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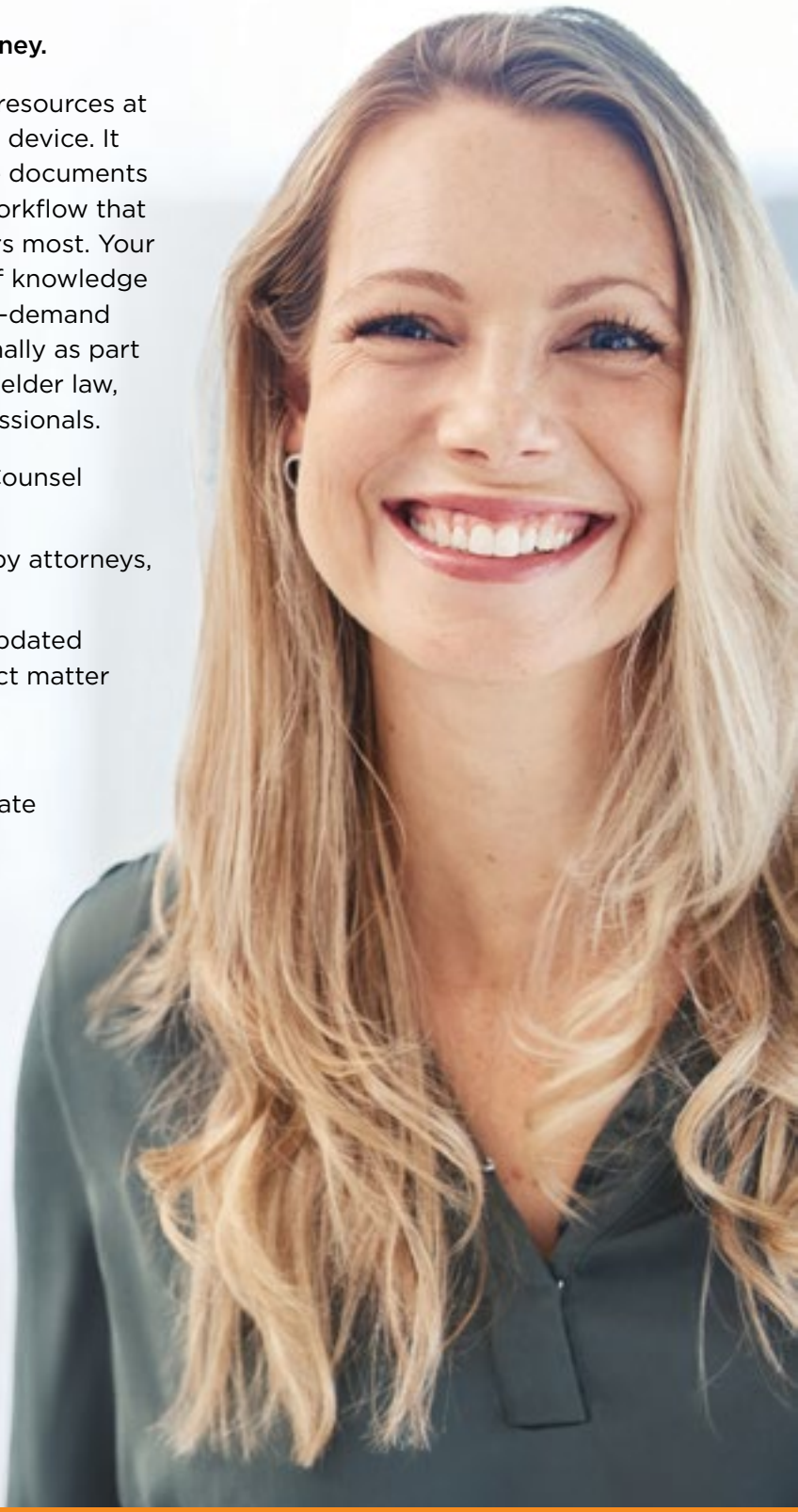

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KATHLEEN SWEET

A Legacy of Service to Our Members and the Law

The New York State Bar Association was founded in 1876 and is the oldest and largest voluntary state bar association in the United States. It is older even than the American Bar Association. We have members in all 50 states and in close to 100 countries. The founding of the New York State Bar Association was inspired in part by the goal to unify attorneys throughout the state and to bring together diverse voices and perspectives for the betterment of the legal profession. Our legacy is embedded in New York's history, and the association has been at the forefront of numerous impactful legal reforms such as the creation of the indigent defense system, which predates the Supreme Court's decision in *Gideon v. Wainwright.*

I am humbled and honored to be the ninth woman to serve as president of this association. Allow me to acknowledge the women who paved the way for me.

- The first woman president of the association, Maryann Saccomando Freedman, served from 1987-88.
- M. Catherine Richardson served from 1996-97.
- Lorraine Power Tharp served from 2002-03.
- Kathryn Grant Madigan served from 2007-08.
- Bernice K. Leber served from 2008-09.
- Claire P. Gutekunst served from 2016-17.
- Sharon Stern Gerstman served from 2017-18.
- Sherry Levin Wallach served from 2022-23.

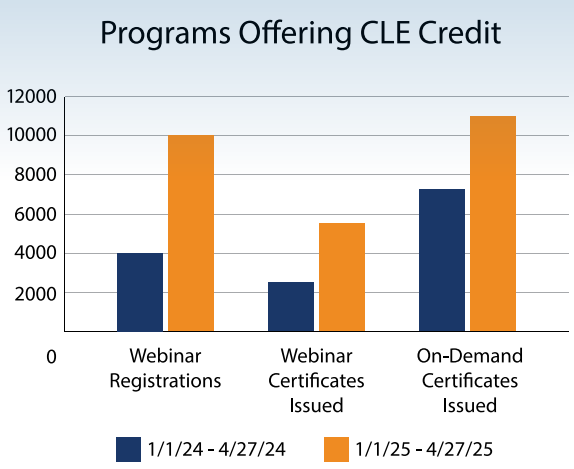
(Due to space constraints, I will not name the 120 men who have preceded me as president!)

As we approach our 150th anniversary, a significant milestone, it is important to reflect on our history. The New York State Bar Association has shaped the development of law, contributed to the history of New York, and has provided education, information, and resources to attorneys and the public in New York, across the country and around the world. The objectives outlined in the association's founding constitution remain: "to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards of integrity, honor, professional skill, and courtesy in the legal profession."

Being a member of the New York State Bar Association means being able to make a difference – whether through advocacy for necessary reforms or speaking about issues important to the profession – because the association has a strong and respected voice with significant influence to make change.

My goal is to build upon this legacy by increasing membership and addressing our members' needs. I am happy to report that engagement with member benefits has increased substantially since our new membership model was rolled out last fall.

Our new all-inclusive model includes complimentary access to almost all continuing legal education programs. The increase in registration and attendance at CLE programs has been dramatic:



- Webinar registrations increased by 6,177 from 2024 to 2025 (61% increase).
- Webinar certificates issued increased by 3,041 (54% increase).
- On-demand certificates for pre-recorded CLE programs issued increased by 3,709 (34% increase).

We continue to track and gather data on member engagement to inform our outreach campaigns to reach the virtual and global audience as well as New York lawyers who are not members.

These statistics prove that the New York State Bar Association is a leader in legal education and programming. The expertise that our faculty members offer in hundreds of programs is recognized to be of the highest quality. In the last six months we've seen the following increases in membership engagement:

- 6,120 new social media followers.
- From Jan. 1 to March 31 our website had over 1 million views.
- Our e-books and downloadable forms have logged 11,545 sessions, which translates to lawyers spending over 637 hours with our content.

We have seen an increase of 20% in section membership. We have held 10 section destination meetings in April and May of this year, and there are 20 more coming later this year including:

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Above all, the New York State Bar Association is a member services organization. We help our members to help their clients. We help our members become better attorneys, and we advocate for the legal profession.

We will continue to defend the profession, the Rule of Law, the independent judiciary, and the right to due process.

I look forward to the coming year of service to the association and to each of you.

KATHLEEN SWEET can be reached at ksweet@nysba.org.

Judicial Scrutiny of Eyewitness Evidence: Lessons From the 2024 Court of Appeals Decisions

By Karen A. Newirth

As a matter of course, court decisions on major issues evolve over time, in piecemeal fashion. The reasons are obvious: cases begin at a lower court and are filed at different times under different circumstances, while decisions are limited to the facts at hand, often leaving questions about broader applicability to be decided by higher courts. This has certainly been the case over the past several decades, during which the New York Court of Appeals has developed a cautious and evolving body of law around the use of eyewitness identification evidence – generally through individual rulings addressing specific procedural or evidentiary issues. During its 2024 term, the court returned to this topic with unusual focus, issuing four decisions – *Vaughan*, *Williams*, *Mosley*, and *Watkins* – that clarify key principles governing expert testimony, in-court identifications, lay video identifications, effective assistance of counsel, and cross-race jury instructions. While none of the rulings marks a seismic shift, together they offer a more cohesive framework for evaluating the reliability of eyewitness evidence – one that reflects lessons from wrongful conviction data, developments in cognitive science, and longstanding constitutional protections.

Eyewitness misidentification has long been recognized as the primary contributing factor to wrongful convictions in the United States, appearing in approximately 70% of DNA exonerations. Even before this reality was confirmed through empirical study and DNA testing, the New York Court of Appeals acknowledged the inherent fallibility of eyewitness memory. Over the decades, the court has crafted a body of case law aimed at reducing the risks associated with eyewitness identifications, culminating in a series of important rulings during the 2024 term.

Expert Eyewitness Testimony Admissible Even Where Corroborating Evidence Exists

The court's 2007 decision in *People v. LeGrand*[1] represented a major turning point in the Court of Appeals' eyewitness jurisprudence in that it permitted expert testimony about eyewitness memory. In *LeGrand*, the court held that where the case turns on a contested identification and there is little or no corroborating evidence linking the defendant to the crime, trial courts must allow expert testimony on factors affecting the reliability of eyewitness identification if it would assist the jury.

LeGrand was understood to create a two-step test for the admission of expert eyewitness testimony and was often interpreted to exclude experts where corroborating evidence appeared to exist. This interpretation raised practical and constitutional concerns.

First, the Supreme Court has made clear that a defendant's right to present a complete defense – rooted in the due process clause and the Sixth Amendment – prohibits trial courts from excluding relevant defense evidence simply because the government's case appears compelling.[2] The right to present a defense includes the ability to challenge the credibility and reliability of prosecution evidence. Allowing expert testimony only where the government's case appears weak – i.e., where there is a little to no corroborating evidence – would appear to violate this mandate.

Second, in many wrongful conviction cases, the very evidence courts later deem corroborative – such as matching clothing, proximity to the scene, or prior acquaintance – is what caused the innocent person to become a suspect in the first place. Once a name or image is introduced to an eyewitness, particularly through suggestive means, eyewitnesses may rely more on these contextual cues than on genuine facial recognition from memory.[3] This phenomenon, known as unconscious transference or pre- or post-procedure feedback, can lead witnesses to misattribute familiarity or other associative details to the person they are asked to identify. Thus, the apparent strength of corroboration may not only fail to protect against misidentification but may actually contribute to it.

Third, at the time a court is considering a defense motion for an expert, the prosecution's evidence has yet to be meaningfully tested – so what appears to be strong corroboration pre-trial may wind up being weak or not credible evidence. Indeed, the known wrongful conviction data (from DNA exonerations) makes this clear. Mistaken eyewitness identification played a contributing role in nearly 70% of the more than 375 DNA-based exonerations in the United States. In many of these cases, courts and juries were persuaded by what appeared to be strong corroboration – even after trial – multiple eyewitnesses misidentifying the same person, matching clothing, or a similarity between the innocent defendant and the suspect. Yet these very elements often proved to be unreliable or misleading, as later DNA testing demonstrated.

In *People v. McCullough,*[4] the court "clarified" that *LeGrand* should not be interpreted as mandating a rigid two-part test focused solely on the strength of corroborating evidence. Instead, the court explained, *LeGrand* enumerated factors for trial courts to consider when determining whether such expert testimony would assist the jury.

In its most recent decision on the admissibility of expert testimony, *People v. Vaughan,*[5] the New York Court of Appeals further "clarified" *LeGrand*, holding that the existence of corroborating evidence does not preclude the admission of eyewitness expert testimony. The court explained that corroborative evidence, while relevant, is not dispositive of whether expert testimony on eyewitness reliability should be admitted. Rather, trial courts must conduct a fact-specific inquiry to determine wheth-

er the proposed expert testimony would assist the jury in evaluating the identification. The court emphasized that trial courts must avoid short-circuiting the analysis by relying solely on the perceived strength of the prosecution's evidence.

Specifically, courts must engage in a case-specific assessment of whether expert testimony would assist the jury in evaluating the identification's reliability – even when circumstantial or contextual corroboration exists. Perhaps most significantly, *Vaughan* reaffirms that trial courts retain discretion over the admissibility and scope of expert testimony but cautions that this discretion must be exercised thoughtfully. Judges may not substitute their own assessment of the strength of the prosecution's case for a reasoned analysis of whether the jury would benefit from expert insight into eyewitness memory. In this way, *Vaughan* guards against the rigid or overly limiting application of *LeGrand*, preserving the trial court's gatekeeping role while protecting the defendant's right to a fair trial.

Although *Vaughn* did not directly address the constitutional issues, its rejection of a categorical rule barring expert testimony in the face of corroboration aligns with the principles set forth in *Crane v. Kentucky*. Judicial gatekeeping must not override the jury's role in assessing reliability and guilt.

Vaughan affirms trial court discretion while clarifying that corroborative evidence alone cannot justify the exclusion of expert testimony on eyewitness reliability. In doing so, it harmonizes New York law with evolving scientific understanding and constitutional principles. The decision strengthens protections against wrongful convictions rooted in mistaken identification and ensures that juries are better equipped to evaluate one of the most fallible forms of evidence in the criminal justice system.

Separate Independent Source Hearings and Out-of-Court Identification

In *People v. Williams,*[6] the Court of Appeals addressed a recurring issue in undercover narcotics operations: whether an in-court identification by an officer may be admitted when an earlier out-of-court identification has been suppressed as the fruit of an unlawful arrest. The decision reinforces the procedural requirement that courts conduct a formal independent source hearing before admitting any such in-court identification.

The case arose from a buy-and-bust operation in which an undercover officer observed a drug sale and described the alleged seller – whom he had not previously encountered – as a Black male wearing black pants, a white sweater, and a black hat. Another officer subsequently arrested the defendant based on this description. At a probable cause hearing, the trial court found the arrest unlawful and suppressed both the out-of-court identification and physical evidence. Nevertheless, the court allowed the undercover officer to identify the defendant in court, concluding *sua sponte* that there was an independent source for the identification based solely on the officer's probable cause hearing testimony.

The Court of Appeals reversed. It held that once an identification has been suppressed as a product of unlawful police conduct, the trial court must hold a separate, formal, independent source hearing – at which the prosecution bears the burden of proving by clear and convincing evidence that the in-court identification derives from observations independent of the tainted identification. The court emphasized that such a hearing is not optional, nor may the trial court rely solely on prior hearing testimony to make this determination.

Importantly, the court rejected the notion that police officers are specially equipped to evaluate the source of their own identifications. It cautioned that "the nature of a police officer's duties, special training, and experience on their own simply have no relevance" to whether an identification is the product of illegal conduct. This language underscores the principle that police credibility or expertise does not exempt law enforcement witnesses from scrutiny under constitutional safeguards.

The court outlined a set of factors that must be considered at an independent source hearing, including:

- The witness's opportunity to observe the defendant at the time of the crime.
- The accuracy and detail of the initial description.
- The degree of certainty expressed at the time of the illegal identification.
- The level of prior familiarity (if any).
- The time elapsed between the observation and the identification.
- The nature and circumstances of the suppressed identification and the risk of taint.

Williams thus reinforces procedural rigor in identification cases, particularly where police-initiated identifications may be tainted by unconstitutional arrests. The decision reaffirms that the reliability of such identifications must be scrutinized through a structured evidentiary process – not assumed based on the witness's professional status or the perceived strength of the prosecution's case.

A New Test for Lay Non-Eyewitness Identifications

In *People v. Mosley,*[7] the Court of Appeals addressed the increasingly common practice of using law enforcement officers – and other lay witnesses – to identify a defendant as the person depicted in surveillance footage, despite not

having witnessed the crime. The court reversed the conviction, finding that the trial court erred in permitting a police officer to offer identification testimony without first establishing that the officer had sufficient familiarity with the defendant to render that opinion helpful to the jury.

The court emphasized that non-eyewitness identification testimony – especially from law enforcement – poses unique risks. First, such testimony may usurp the fact-finding function of the jury. Second, jurors may give undue weight to such testimony, particularly when offered by authoritative figures, even if it is based on brief or limited exposure to the defendant. With respect to law enforcement witnesses, the court specifically noted that "[t]rial testimony by a law enforcement officer may pose additional concerns by drawing attention to a defendant's prior interactions with the police, and efforts to mitigate any prejudice by omitting reference to a law enforcement officer's occupation or providing a cryptic basis for familiarity may constrain the opportunity for vigorous cross-examination."[8]

The case arose from a buy-and-bust operation in which an undercover officer observed a drug sale and described the alleged seller – whom he had not previously encountered – as a Black male wearing black pants, a white sweater, and a black hat.

In *Mosley*, the court found that there had been no showing that the officer witness – who was not an eyewitness to the crime and was merely called to identify the defendant as the person in the surveillance video showing the crime – was familiar enough with the defendant's appearance to offer a reliable opinion, nor was there any indication that the jury needed assistance interpreting the surveillance video. The defendant had not altered his appearance in a way that would have impeded the jury's independent assessment, and the video quality did not warrant lay interpretation.

In distinguishing *Mosley* from its prior decisions in *People v. Russell*[9] and *People v. Sanchez,*[10] the court underscored two critical limitations. In those earlier cases, lay identification testimony was permitted because the witness had prior personal knowledge of the defendant and the defendant had used a disguise during the crime, thus impairing the jury's ability to assess the video unaided. Neither condition was met in *Mosley*.

The court adopted a two-part test governing the admissibility of non-eyewitness identification testimony:

1. **Familiarity:** The proffered witness must have had "sufficient contact" with the defendant to achieve a level of familiarity that renders their identification helpful. If the witness lacks such familiarity, the jury should make its own conclusion without the witness's assistance. Factors to consider include: the witness's general level of familiarity with the defendant's appearance; the span of time and variety of circumstances of the witness's observations of the defendant; the witness's familiarity with the defendant's appearance at the time the video was taken; and any familiarity with the defendant's customary manner of dress or clothing on the day the video was recorded. Finally, courts should consider whether the witness references a specific trait the defendant has and whether that trait is apparent in the video footage.
2. **Necessity:** The trial court must determine whether the jury requires assistance to identify the defendant in the video – such as where the defendant has altered their appearance or where the footage is of low quality or obstructed.

Both elements must be established outside the jury's presence during a voir dire or pretrial hearing, with the proponent bearing the burden of demonstrating that the testimony would be both helpful and necessary. The court urged both parties to create a thorough record to aid the court in its determination and to allow for meaningful appellate review.

Finally, as a best practice, the court urged trial courts to provide cautionary jury instructions, both at the time of the testimony and during the final charge, explaining that lay non-eyewitness identification testimony is "mere opinion testimony that they may choose to accept or reject" and reminding jurors that it is their opinion that controls.

Counsel May Be Ineffective for Failing To Request a Mandatory Cross-Race Jury Instruction

In *People v. Watkins,*[11] the New York Court of Appeals addressed whether defense counsel's failure to request a cross-race jury instruction constituted ineffective assistance of counsel. While the court ultimately rejected the

Watkins serves as a cautionary reminder: In any case involving a cross-racial identification, defense counsel must request an appropriate instruction or risk a post-conviction claim.

defendant's claim, the decision reaffirms the importance of such instructions and highlights their growing role in safeguarding against misidentification.

The defendant, a Black man, was identified by a non-Black eyewitness in a single-witness case. Defense counsel did not request a cross-race identification charge, and none was given. On appeal, the defendant argued that this failure constituted constitutionally deficient performance under *People v. Baldi*[12] and *Strickland v. Washington.*[13]

The court acknowledged that cross-race identifications raise unique risks of misidentification, as extensively documented in psychological research. However, it concluded that at the time of trial – before the court's landmark ruling in *People v. Boone*[14] – there was no clearly established duty to request such a charge. In *Boone*, the court held that upon request, trial courts must provide a jury instruction explaining the potential unreliability of cross-race identifications. Because *Watkins* predated *Boone*, the court found that counsel's performance, while perhaps suboptimal, was not legally deficient under the standards prevailing at the time.

Notably, the court left open the possibility that a failure to request a cross-race instruction after *Boone* could support an ineffective assistance claim. It stressed the significance of the *Boone* rule and signaled that counsel's awareness of cross-race identification risks is now part of the baseline competence expected of criminal defense attorneys.

Watkins serves as a cautionary reminder: In any case involving a cross-racial identification, defense counsel must request an appropriate instruction or risk a post-conviction claim. The decision reinforces the broader principle that effective assistance of counsel includes attention to well-established factors affecting eyewitness reliability – particularly when jury instructions are available to mitigate those risks.

Conclusion

The 2024 term reflects the New York Court of Appeals' continued and evolving concern with the risks eyewitness identifications pose to the integrity of criminal trials. In *Vaughan*, *Williams*, *Mosley*, and *Watkins*, the court addressed the reliability of identifications from multiple angles – clarifying when expert testimony is required, limiting the admissibility of law enforcement identifications absent sufficient procedural safeguards, and reinforcing the constitutional necessity of tailored jury instructions.

Taken together, these decisions underscore the court's recognition that traditional indicia of reliability – such as law enforcement expertise, multiple witnesses, or corroborative detail – may not suffice when viewed against decades of wrongful conviction data and social science. They also emphasize the importance of evidentiary rigor: that identifications must be tested, that expert guidance should be provided when needed, and that juries must be properly instructed on the cognitive limitations that affect eyewitness accuracy.

For practitioners, these rulings reinforce several practical imperatives: Move early to request expert testimony where identification is contested; challenge lay and law enforcement identifications lacking foundational reliability; demand cross-race jury instructions in appropriate cases; and preserve a full record for appellate review. The court's message is clear – protecting the fairness of criminal trials requires close scrutiny of identification evidence at every stage.

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Endnotes

1. 8 N.Y.3d 449 (2007).
2. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).
3. *See, e.g., People v. Abney*, 13 N.Y.3d 251 (2014).
4. 27 N.Y.3d 1158 (2016).
5. 2024 N.Y. Slip Op. 01345 (Feb. 22, 2024).
6. *People v. Williams*, 41 N.Y.3d 551 (2024).
7. 41 N.Y.3d 640 (2024).
8. *Id.* at 647 (cleaned up).
9. 79 N.Y.2d 1024 (1992).
10. 21 N.Y.3d 216 (2013).
11. 42 N.Y.3d 635 (2024).
12. 54 N.Y.2d 137 (1981).
13. 466 U.S. 668 (1984).
14. 30 N.Y.3d 521 (2017).

Attorney Grievances: The Fight for Confidentiality

By Rolando T. Acosta, Dante W. Apuzzo, and Catherine Perez

New York Judiciary Law Section 90(10) mandates that all disciplinary proceedings be closed to the public unless and until public discipline is imposed. This longstanding policy of confidentiality for disciplinary proceedings and documents, rooted in the history of New York's bar, limits the reputational harm to attorneys subjected to unfounded complaints, promotes trust in the legal profession, encourages the participation of witnesses, and prevents the disclosure of privileged and sensitive personal information.

This disciplinary scheme has operated effectively in New York for the past 80 years. Over that time, the four departments of the Appellate Division have maintained oversight of attorney discipline, balancing the competing rights of privacy with the public's right to access. In the hands of the grievance committees, attorney discipline imposed under the Judiciary Law has deterred improper and unethical attorney conduct while protecting the public and preserving the integrity of the judicial system as a whole.

Recently, however, the wisdom underlying Judiciary Law Section 90(10) has been under attack. Detractors have argued that the level of confidentiality in New York disciplinary proceedings is inconsistent with the First Amendment and with the national practice of affording public access to all disciplinary documents and proceedings. Last year, in *Civil Rights Corps. v. Cushman*, a group of academics advanced those very arguments in a federal action against the Appellate Division, Second Department.

Specifically, in *Cushman*, the plaintiffs argued that the First Amendment guarantees public access to certain grievance committee dispositions related to complaints they filed against prosecutors who had obtained convictions that were later reversed for prosecutorial misconduct. The United States District Court for the Southern District of New York (Marrero, J.) agreed with plaintiffs, granting them summary judgment and entering a declaratory judgment creating a qualified public right of access to the grievance committee dispositions related to the complaints and any resulting formal disciplinary proceedings in the Second Department.

The appeal of the judgment in *Cushman* is now pending before the Second Circuit.[1] The Second Department and amicus curiae, the New York State Bar Association, argue in their appellate briefs that the district court erred in concluding that there is a qualified right of access to grievance committee dispositions, which dispositions may include dismissals of unfounded complaints, referrals of attorneys to diversion programs, letters of advisement, and private admonitions. These dispositions result from investigations and not any formal hearing or trial, and their publication would intrude on and impair the disciplinary process.

The *Cushman* case raises two important practical questions. First, does history support a constitutional right to inspect disciplinary investigations? Second, would converting today's closed system into an open file actually serve clients, courts, and the broader public?

The short answer to both questions is no.

The Statutory Balance New York Struck in 1945

Since 1945, Judiciary Law Section 90(10) has reflected a carefully negotiated bargain. All papers "upon any complaint, inquiry, investigation or proceeding" remain private unless and until the Appellate Division finds misconduct and imposes public discipline.[2] The rule is not an anomaly. Grand jury minutes, judicial misconduct investigations, physician licensing complaints, and other sensitive matters follow the same pattern: secrecy while facts are gathered, openness once a formal accusation is ready for adjudication. That model accords with intuitive fairness and accounts for the risk that the accused's reputation could be ruined by allegations that may prove baseless.

What the *Cushman* Plaintiffs Want

The *Cushman* plaintiffs argue that the First Amendment's "experience and logic" test requires public access to three categories: grievance committee letters that dismiss complaints, letters that admonish or divert lawyers without a hearing, and the pleadings that launch formal proceedings. Neither half of the "experience and logic" test is satisfied.

Historically New York has never opened investigative materials. From the creation of the Appellate Division in 1896 through the present, discipline was treated as a quasi-prosecutorial, not an adjudicative, function and proceedings remained confidential until a petition and answer were filed with the court. That tradition is vivid in the legislative record and in early cases such as *People ex rel. Karlin v. Culkin*,[3] in which Judge Cardozo spoke of the attorney discipline inquest as a secret inquiry designed to protect both the bar and the public.

Logic also favors privacy. More than 90% of grievances go nowhere.[4] In the Second Department, of these claims dismissed, more than 40% are dismissed for failure to state a claim, indicating that many complaints lack merit and should not be made public.[5] Publishing such complaints would therefore brand hundreds of innocent lawyers each year without improving consumer safety.

Four Practical Interests Served by Confidentiality

The debate often proceeds in abstractions, but four concrete interests illustrate why keeping the file closed until probable cause is the sounder course.

1. **Protecting reputations and livelihoods.** Unlike criminal defendants, lawyers facing a grievance have no right to a speedy hearing; investigations routinely last 18 to 24 months. In our referral-driven marketplace, a public allegation, even if later disproved, can destroy a solo practice long before charges are dismissed. The Legislature knew this in 1945 and designed Section 90(10) accordingly.
2. **Encouraging candid complaints and cooperation.** Clients who submit grievances often attach privileged retainer papers, health records, or descriptions of family finances. They do so because they trust that the file will not become a news article. Witnesses similarly speak more freely when they know their testimony will not be posted on the internet the next day.
3. **Preserving the integrity of the investigation.** Once a matter is public, lawyers on both sides may try their case in the press; potential witnesses read coverage; strategies are telegraphed. That dynamic is precisely why grand jury secrecy is enforced so zealously, and why courts have upheld confidentiality in physician discipline proceedings.[6] The same dangers attend attorney regulation.
4. **Allowing proportionate, remedial responses.** Many grievances reveal improper bookkeeping, missed deadlines or stress-induced lapses, not dishonesty. Diversion programs, CLE, trust account audits, and mental health counseling let committees correct those problems privately and promptly. If every diversion letter became a headline, lawyers would fight even minor charges through full litigation, draining grievance committee resources and delaying justice for truly aggrieved clients.

Allowing the Legislature To Act

Of course, New York's lawyers must be accountable for improper or unethical conduct, and transparency in matters regarding attorney misconduct is eminently warranted when bad actors are involved. However, as discussed above, not

every disciplinary complaint has merit. In that vein, Judiciary Law Section 90 strikes a delicate balance between the protection of the public and the preservation of the rights of attorneys who have not yet been found guilty of misconduct.

Any changes to the rubric of Judiciary Law Section 90 must be made only after careful consideration by the Legislature. The Legislature could choose to amend the statute to make disciplinary proceedings public at an earlier juncture, such as after a formal petition is filed, when the grievance committee finds probable cause to believe the attorney engaged in professional misconduct warranting the imposition of public discipline. Indeed, it has been argued that when the grievance committee authorizes a formal petition, the system pivots from investigation to adjudication, the respondent can answer in open court, motions may be filed, and a referee or the Appellate Division itself will determine the facts, justifying disclosure after probable cause is found.

However, the determination of when a proceeding should be made public is one for the Legislature, not for the courts, to make.[7] At a minimum, broad public access should never be granted before the conclusion of the grievance committee's investigation and finding of probable cause.

Consequences of the District Court Ruling if Affirmed

Should the Second Circuit affirm, the ripple effects would be wide. The statements of every complainant and witness might appear in the press, discouraging candor. Lawyers would face publication of raw allegations that the grievance committee ultimately rejects. Diversion programs would lose participants.

Social media will intensify these harms. Negative information spreads quickly online and there is little recourse to correct user-generated content disseminated through social media outlets. Unsealed allegations filed against attorneys could be posted and reposted online ad infinitum before attorneys have a chance to respond to and defend against them, causing irreparable reputational damage in the meantime. Further, widespread publicity online of unfounded complaints would add fuel to the fire of the public's eroding trust in the judicial system. Now more than ever, New York must protect due process and public confidence.

Moreover, unsealing disciplinary proceedings and documents would make New York an outlier. At least four states keep disciplinary matters sealed until final discipline; most others keep them sealed until probable cause.[8] None recognizes a public right of access at the screening or investigative phase.

Conclusion

The public's faith in lawyers rests on two pillars: confidence that misconduct will be punished and confidence that the innocent will not be unjustly tarnished. Judiciary Law Section 90(10) gives New York both, by ensuring confidentiality during investigation and transparency once charges are sustained. The *Cushman* plaintiffs would pull one pillar away, damaging the very system they seek to improve. As lawmakers revisit discipline for judges and lawyers alike, the bar should speak plainly: keep grievance committee files confidential. That single guardrail preserves reputations, encourages whistleblowers, and allows proportionate discipline, without compromising the openness that democracy demands.

In short, sunshine is vital, but so is shade. New York's longstanding rule delivers just enough of each.

Justice Rolando T. Acosta, a litigation partner with Pillsbury Winthrop Shaw Pittman, served for a quarter-century as an innovative and community-minded New York trial and appellate judge, presiding over hundreds of bench and jury trials and thousands of appeals in civil and criminal cases. Most notably, he served on the New York State Supreme Court, Appellate Division, First Department for 15 years, including for six years as presiding justice. Prior to his judicial service, Acosta held various posts with the Legal Aid Society, including attorney-in-charge of the largest civil trial office. He also served as first deputy commissioner and as deputy commissioner for law enforcement at the New York City Commission on Human Rights.

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The authors represent the New York State Bar Association in *Civil Rights Corps. v. Cushman* at the United States Court of Appeals for the Second Circuit.

Endnotes

1. *See Civil Rights Corps. v. Cushman*, Case No. 24-2251.

2. Alternatively, the court may unseal disciplinary records when good cause exists. *See* Judiciary Law § 90(10).

3. 248 N.Y. 465 (1928).

4. See the annual reports of NYSBA, Comm. on Pro. Discipline, https://nysba.org/committees/committee-on-professional-discipline.

5. N.Y.S. Commission on Statewide Attorney Discipline, *Enhancing Fairness & Consistency Fostering Efficiency & Transparency* (Sept. 2015) at 53, https://ww2.nycourts.gov/sites/default/files/document/files/2020-10/AttyDiscFINAL9-24-1.pdf.

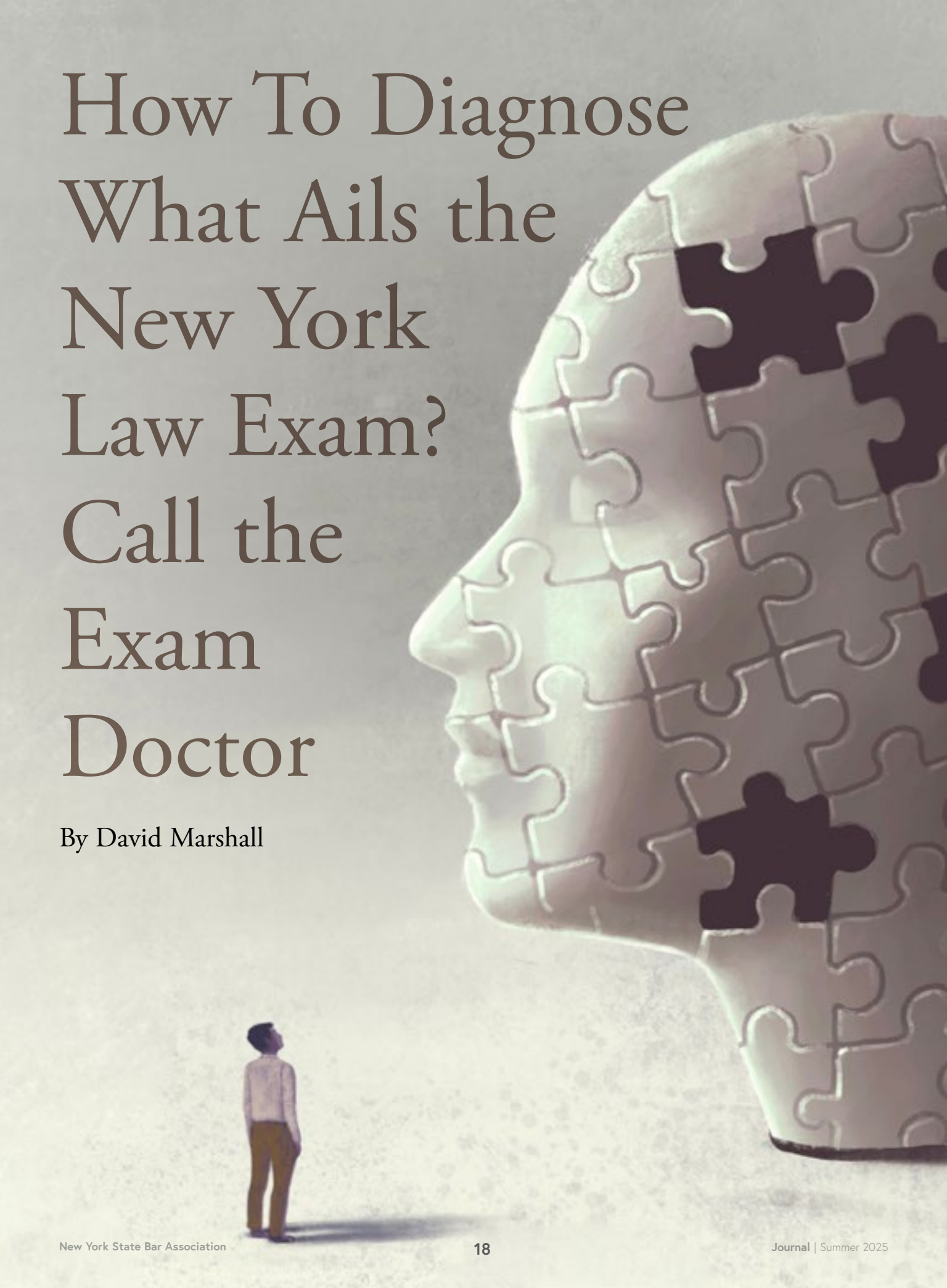
6. *Doe v. Office of Professional Medical Conduct*, 81 N.Y.2d 1050 (1993); *see also In re Doe v. Axelrod*, 123 A.D.2d 21, 30 (1st Dep't,1986*), rev'd* on other grounds 71 N.Y.2d 484 (1988) (recognizing that patient as well as physician has an interest in insuring confidentiality).

7. For example, the recent New York State Assembly Bill A7650, relating to the powers and authority of the State Commission on Judicial Conduct, aims to increase accountability and transparency in the judicial discipline process by ensuring that formal written complaints and hearing records become public. *See* https://www.nysenate.gov/legislation/bills/2025/A7650.

8. *See* N.Y. Jud. Law § 90(10); Ala. R. Disciplinary Pro. R. 30; Del. Laws. R. Disciplinary Pro. 13; Iowa Code Ann. § 34.4; *see* Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 Geo. J. Legal Ethics 1, 21 (2007), https://heinonline.org/HOL/P?h=hein.journals/geojlege20&i=13. 21; Michael S. McGinniss, *Sending the Message: Using Tech. to Support Jud. Reporting of Law. Misconduct to State Disciplinary Agencies*, 2013 J. Pro. Law. 37, 81 (2013), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/jpl_2013_02mcginniss.pdf.

How To Diagnose What Ails the New York Law Exam? Call the Exam Doctor

By David Marshall



In 2016, more than 20 years after the New York bar exam was given a clean bill of health by three independent experts who specialize in stress-testing licensing exams, New York discarded its professionally validated version of the bar exam. It substituted the current New York Law Exam, which has never been subjected to the same intensive professional analysis as its predecessor, nor has it been certified by any expert psychometrician as valid, reliable, and non-discriminatory. Not surprisingly, the NYLE has generated criticism from virtually all quarters. Fortunately, the switch to the NextGen bar exam in July 2028 gives New York sufficient time to retain psychometricians to help it diagnose the problems with the NYLE accurately, identify a cure appropriate to New York's unique conditions and circumstances, and launch law schools and law students on a treatment regimen that will enhance student success – both in passing the bar and in practicing at the bar – after 2028.

The New York Law Exam Isn't Doing Well

Since its inception in 2016 as part of the state's adoption of the Uniform Bar Exam, the NYLE has suffered from a failure to thrive. It has failed as an incentive to law students to study New York law, failed as an inducement to law schools to make teaching New York law a core part of their curriculum, failed as an effective tool for ensuring that new lawyers who appear in our courts are competent to practice New York law, and failed to achieve a reputation among law students, professors, and practitioners as a test that protects the public from lawyer incompetence. The troubling evidence of failure to thrive has been detailed in previous issues of the Bar Journal, which can be accessed at: https://nysba.org/presidents-message-time-for-change-future-attorneys-in-new-york-need-a-rigorous-exam-to-be-better-prepared; https://nysba.org/a-rigorous-new-york-law-exam-nuisance-or-necessity-a-view-from-the-bench/; and https://nysba.org/new-yorks-next-bar-exam-where-should-we-go-from-here/.

How To Construct an Effective Diagnostic Process

In January, the New York Court of Appeals empaneled a committee to "study and report to the Court on various options for a robust New York-specific bar eligibility requirement, including the possibility of an in-person New York law component." The court's committee has held public hearings seeking comments about, among other things, "the advantages and/or disadvantages of alternatives to the current NYLC and NYLE, including eliminating or replacing an examination requirement." The court has announced that this September, the committee will deliver a report "reviewing its findings."[1]

Don't Neglect the Patient's History

This isn't the first time the court has convened a commission that evaluated the New York bar exam for possible unreliability and unfairness. In 1988, the court established the New York State Judicial Commission on Minorities. Chaired by civil rights pioneer Franklin H. Williams, the commission investigated, among other things, the allegation that the New York bar exam was discriminatory, had not been shown to be job-related, and should be abolished. In 1991, the commission issued a report in which it recommended against abolition of the New York bar exam. It explained that the principal argument in favor of retaining an examination of New York law was that "the examination tends to ensure that law schools are not graduating students who lack certain basic skills."[2] The commission went on to dismiss as fatally flawed the proposed alternatives to the New York bar exam, such as automatic admission to the bar upon receipt of a law school diploma, admission upon satisfactory completion of an apprenticeship, or substitution of skills testing for traditional testing via multiple-choice and essay questions.[3] Instead of amputating the exam entirely from the lawyer licensing process to cure the effects of pass rate disparities, as some critics demanded, the commission recommended that data be gathered so that the exam could be "evaluated for cultural and economic bias and for job relatedness."[4]

Gather Relevant Data and Apply Careful, Professional Scrutiny

The year after the commission issued its recommendations, the Court of Appeals retained a team of independent professional psychometricians under the direction of Professor Jason Millman of Cornell University, which included Professor Paul Sackett of the University of Minnesota and Professor William Mehrens of Michigan State University. The court asked the Millman team to gather and analyze data regarding the New York law portion of the two-day bar examination in effect in 1992.[5] It gave the team as its "starting point" the fact that "the Bar Examination was a licensure examination and, as such, its purpose is to protect the public against incompetent lawyers."[6] In 1993, Dr. Millman's team submitted a nearly 300-page report analyzing reams of statistical data, public hearing testimony, and responses to interviews and surveys from New York practitioners, bar exam graders, and bar admission officials. Applying the tools and techniques endorsed by the psychometrics profession in the Standards for Educational and Psychological Testing, the Millman team concluded that "[t]he validity, reliability, lack of bias, and other aspects of the New York State Bar Examination and its implementation surpass acceptable levels."[7]

Don't Experiment With Treatment Fads or Fashions – Call Your Doctor

To New York's great good fortune, one member of the team that prepared the Millman report is an active member of the psychometrics profession and continues to research, write and advise clients regarding professional school admissions and licensing. In April, we asked Dr. Paul Sackett, the Beverly and Richard Fink Distinguished Professor of Psychology and Liberal Arts at the University of Minnesota, to provide an insider's view of the 1993 Millman report and offer some guidance to the court as to issues it should consider when evaluating proposed non-exam alternatives to the current NYLE. Our conversation below has been edited and condensed for clarity, continuity, and length.

David Marshall: Could you start off, Professor Sackett, by telling us what a psychometrician does in connection with the evaluation of a professional licensing exam like the bar exam?

Paul Sackett: It turns out that designing a test involves a wide variety of skills. The knee-jerk notion is, oh, I need a test, I'll go home and make one up tonight and give it tomorrow. Write some questions and we have a test. The field of psychometrics makes clear that we're so far removed from that for any professional test. For a licensure exam, we start by saying, okay, we've got to determine what is the content domain, the body of knowledge and skill that we're going to use to decide you are or aren't above a threshold for minimal competence. You can't measure everything, so we identify the most important knowledge, skills, and abilities. Now we've got the content domain for a test.

Next, we're going to build a test specification. We design a plan that samples from each of those domains to make sure that everything we measure makes sense. We use expert panels to make ratings and linkages between items and the intended content domain. Is this important for practice? Is it essential, is it helpful, or could you do without it?

From there, we move to designing exams, using a set of skills that are very quantitative. We want to make sure that the individual items work as intended. We've got processes for identifying and removing items that are not functioning as we hoped they would. And then we use a batch of analytic tools that work at the level of the overall test score. We examine the relationship between all kinds of measurable characteristics of test takers from the typical demographics of race, gender, and ethnicity to background features such as where you went to school, your law school GPA, and your LSAT score. We examine relationships between all these pieces in order to form an informed decision about whether this test makes sense.

DM: I don't want to put you on the spot with this question, and I hope you'll answer it without worrying about the tender sensibilities of lawyers, but what can psychometricians do that lawyers can't do? For example, you said you would convene a panel of lawyers to say what domains are important to be a competent lawyer. Why can't we leave you psychometricians out entirely and just let that panel of lawyers come up with the questions for the exam, grade the answers, and figure out what the passing score is?

PS: I think it's simply the fact that we have developed systematic processes for doing these things. Unless you are in the habit of thinking about it, there is a lot that can go wrong. I think there's tremendous value in working with someone deeply involved in the test development and evaluation process who is aware of possible pitfalls.

DM: There are two concepts used in the articles that you and others in your profession have written about professional licensing testing: validity and reliability. Can you give us a summary of the meaning and application of each of those concepts?

PS: When you give a test and produce a score in the licensing arena, you're making a claim or drawing an inference that a person above a threshold meets the state's interest in safe and efficient practice of the profession. So, validity means, do we have evidence that would support that inference? Does the test measure what it's supposed to measure?

Reliability involves consistency of measurement. Would you get the same score upon retesting? Imagine I give you a set of six essays and we get a score. Now that six is drawn from some broad domain of what could be given. Let's give candidates six more. How well does the score on one set of six relate to another set of six? That ensures fairness to the individual. So that's reliability and that's essential.

You can't have validity without also having reliability. A key contributor to reliability involves test length: the number of items. Any one item that you give, be it a multiple-choice item, be it an essay, has a lot of what I'll call "noise" in the answer. Just by chance, that one item might be something you happen to have studied and invested in a lot and somebody else hasn't. And if you were given the next item, that might be different. But as we accumulate items, there is a fundamental mathematical principle of psychometrics, namely, that noise or error averages out and the truth emerges. Why don't we just give a three-item bar exam? Because it's going to be unreliable. We examine how many items we need to reach a level that we can say confidently, "Here's your score with a small enough plus or minus range around it."

DM: Is it fair to say that if you want to make an exam harder and more reliable, just make it longer and that will give you a harder, more reliable exam?

PS: More reliable doesn't mean harder. If I could give you all possible test items, I would then know your true absolute true score. We can't get that. We're trying to approximate it with a sample of items. That's the whole mathematical idea of reliability. How close do you come

from a fixed subset of items to a truth that would be known if we gave you, not a sample but the whole population of all possible test items.

DM: Has your profession developed metrics or measurement standards that would allow you to compare the validity and reliability of a pencil and paper test versus the validity and reliability of alternatives such as a supervised period of on-the-job apprenticing or the evaluation by a panel of professors or lawyers of a candidate's portfolio of simulated work product?

PS: There are different issues involved when you're giving a standardized, multiple-choice test, which is objectively scored versus when judgment is involved in scoring, as in an essay answer. For the latter, we have to look at the reliability not only of the examinee's performance, how consistently you are performing from item to item, but also the reliability of the rating or grading. The fundamental idea is that the examinee should be indifferent as to who is assigned to read their essay.

But if the content domain is specified, then issues of reliability and validity can be addressed regardless of the approach taken to assessing a candidate. Overall, validity is an informed judgment of how well a given approach supports the inference we want to draw about whether a candidate merits licensure.

DM: I don't think the issue of reliability is always well understood by people who are very opinionated about the superiority of having people perform or simulate tasks as a way of measuring their competence.

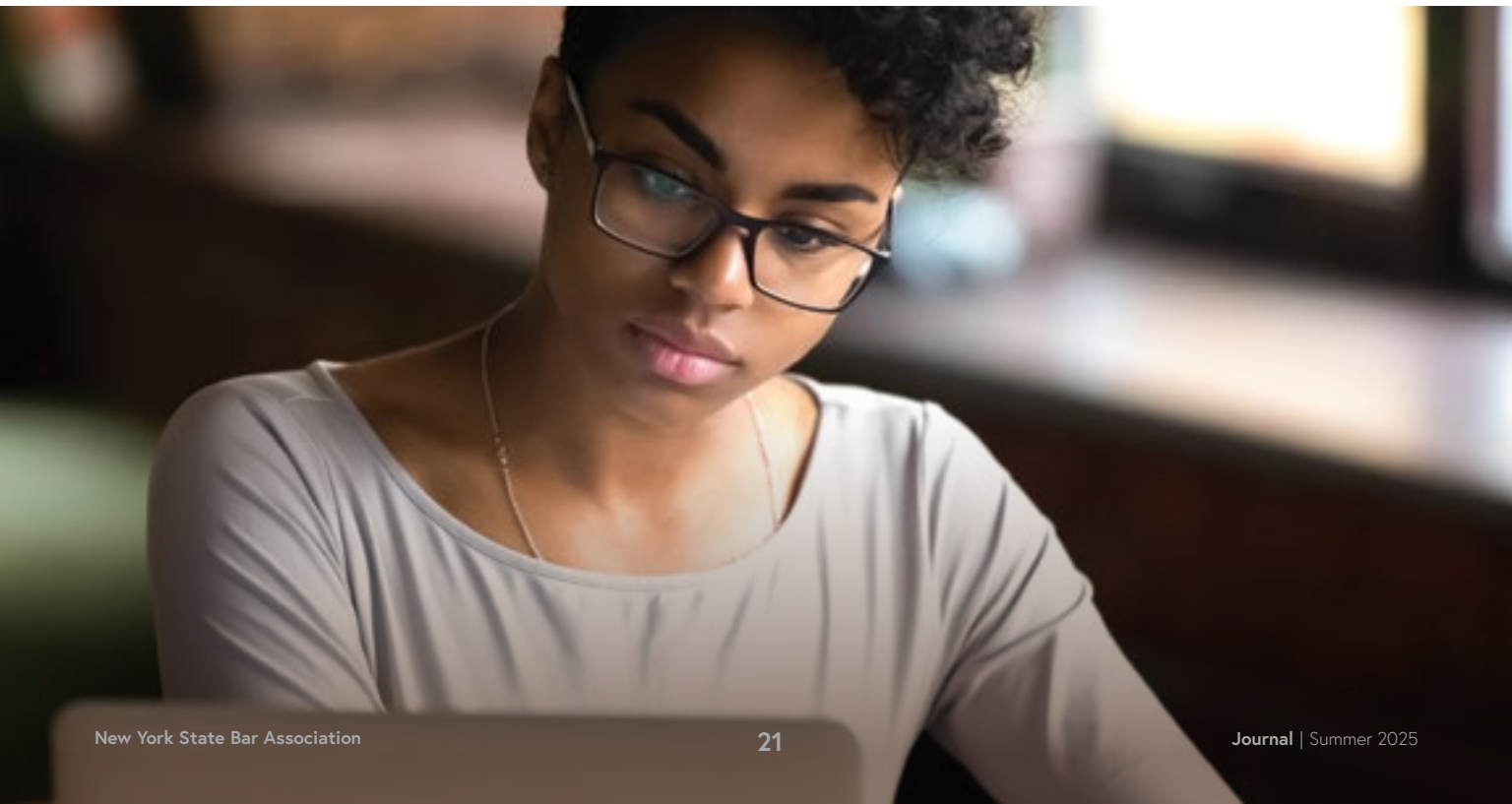
PS: Work sample testing is appealing and I'm all for it when one's got the time and resources to do it. It just becomes really hard to do on a large scale and get a quality measure out of it.

There are all kinds of large-scale assessments where you've got these large numbers of different raters. The biggest is probably writing exams for high school graduation. People write all these essays, and a big company like Educational Testing Service will employ large numbers of essay graders, but there is extensive quality control and elaborate training in place to make sure that ratings are comparable. It's not just, oh, let's get some volunteers and grade some essays.

DM: Has your profession determined that there's a ranking of the methods for conducting professional licensing assessments, in which at the top, the best, is apprenticing, the next is a portfolio of simulated work, next is a GPA score that you achieve at the end of your professional schooling, and, at the bottom, is a pencil and paper test like the bar exam?

PS: I would say no. To me, there are settings where any of those make good sense and there are settings where any of those is questionable. There's no universal. I resonate with the notion of being as realistic as possible. The idea of asking people to do actual lawyering tasks sounds good. Work samples appeal because they are realistic. My general principle is that it takes a lot more testing time to get a given unit of information from a work sample or a simulation than from a multiple-choice test. So, if you're saying, I want to reach a level of reliability where I can say, yep, if you use assessment format A versus format B, you'd get the same score – generally, that takes a lot more time, often more time than people feel they can afford to take. There are settings where I use and love work samples, but you need a lot of time generally to get a reliable measure.

When you involve bringing judges and raters in, you have to make sure that you're taking into account issues



of bias on the part of the evaluators, to what extent are you adding more problems than you're avoiding.

The work that I've seen on work samples in place of bar exams produces some findings that might be counterintuitive. A common belief is that racial and ethnic passing rate differences are due to a flaw in the multiple-choice test. The big California experiment with work samples produced essentially the same group differences on the work sample as on the multiple-choice test. The implicit assumption that it's worth going through all that effort because we're going to see differences disappear wasn't borne out there and often isn't borne out.

Melinda Saran, University at Buffalo School of Law: The multiple-choice test, and the bar exam as a whole, has an issue of speededness. Unlike the medical profession, the legal profession, except in certain cases, is not a speeded profession. So, does that change a psychometrician's view of validity when you're asking someone to do a task very quickly that real practice does not require them to do very quickly?

PS: That's a great question, and if someone waded through our 280-page report from 1993, you'd see we devoted a lot of time to the speededness issue. And we agree with you. There's no evidence the exam should be measuring your performance under time pressure. That means to me it's important to take speededness into account because a fundamental goal of a bar exam is that it should not be substantially speeded.

Virtually all exams have time limits, just for the logistics of how it works. But you try to work it out such that the vast, vast, vast majority of people can give it a solid shot within the time limit that you allot.

DM: I want to drill down a little bit more on that 1993 report you prepared for the court. According to the executive summary, and I quote, "the validity, reliability, lack of bias, and other aspects of the New York State Bar examination and its implementation surpass acceptable levels."

Can we pick that apart a little bit? One of the things that you folks said you were looking at was, did that 1993 exam, which consisted of a full day of essays and multiple-choice questions, measure legal knowledge and legal reasoning ability? Can you talk about what you found with respect to the validity of the New York bar exam in terms of its validity as a test of legal knowledge and as a test of specific skills?

PS: Yeah. We found it very solid as a measure of foundational knowledge and reasoning skills. And that's great because to us that's a foundation for other pieces, doing the specific skills that build on that foundation. An exam can't do everything. Factual investigation and case planning were not included in the 1992 exam. Would it be potentially useful to do so? Absolutely yes. That's this idea of, can you build in some kind of work sample? Our report ends up saying these are worth investigating as mechanisms that might be added to subsequent exams.

DM: You were also asked to address the question of whether the 1992 exam tested memorization more than it tested legal reasoning and knowledge.

PS: As a general principle, I don't buy the notion that per se a multiple-choice item is mere memorization. One can craft good items that really get at useful information. You can get into arcane, trivial memorization or you can build into a multiple-choice question a story, a scenario, and build a judgment into the correct answer. It's something to aspire to.

We looked at the 1992 exam and found that the multiple-choice items sorted into the subset that is more memory oriented and the subset that's more reasoning oriented. One of the interesting things we found, and to me one of the most interesting things in the whole study, is that if I rank order people on the memory items and I rank order them on the reasoning items, the correspondence is close to perfect.

It really gets at one underlying thing that's a fundamental principle that says capable people go to law school. They know what's going to be tested and they set out to do it. The more capable they are, they're going to show it on all the components of the exam. We don't see differential performance by subsets.

Now, somebody might say, well, if you get the same score from each piece or component, let's make our lives easier and get rid of the essays because the essays are time consuming, and we've got to train the graders, and we're going to get the same answer out of the essay piece anyway. That idea doesn't hold. Because the reason you get correspondence is, as I say, these smart people know they're going to have to write legal essays. They know they're going to have to answer multiple choice questions. They invest in all that. If you tell them, no, the exam's only going to be on this part, not that, odds are good that the set of skills that aren't included on the exam drop away, aren't developed.

It's within that context that I like to tell this story. I was heavily involved in the last revision of the medical college admissions test or MCAT which, up until the last time, asked how much science, how much biology, and how much chemistry the test taker knew. With everything we know about the human side of medicine, and behavioral medicine and psychological and sociological aspects of health, we added a new subtest to the MCAT looking at behavioral health issues. And, what happened? All these pre-med students who never took psychology and sociology before now are taking those courses. They're investing. They're building a new body of knowledge. Is the new MCAT any more valid? No, it's just as predictive of subsequent medical school performance as it was before,

but the fact that you're testing new subjects meant that people developed a body of skill that's important in medicine. So, I feel that we really changed how the next generation of doctors are prepared, even if the test itself ends up pretty much in the same place.

DM: I want to turn to the question of disparate impact because that was a large part of what prompted the study that you undertook in 1993. Can you comment on what your findings were with respect to whether the multiple choice and essay questions were valid and reliable, or whether they were actually overly influenced by race or ethnicity or gender or disability?

PS: The general public perception would be that if there's a difference in passing rates on a test, that defines bias, that a biased test is one on which any two groups that you pick don't score on average the same. The psychometrics profession doesn't accept that. We say – and the Supreme Court said the same thing in *Griggs v. Duke Power* – that a finding of a mean difference, a group difference, a difference in passing rates, should trigger scrutiny. It says this is something we should look at and ask what's the cause.

There are two possibilities: bias in the test; or the test is measuring what it's supposed to, but there are differences in preparation or other factors that produced these differences in passing rates. We have a set of techniques, some of which operate at the level of each individual item, that ask, do people with the same overall score, but one is male and one is female, do they have the same probability of getting item one right? Do they have the same probability of getting item two right? We call that differential item functioning. The key thing is not to ask whether there is a difference in the passing rate, in the percentage correct for item one, for men versus women. The key thing is whether men and women with the same overall score have the same chance of getting item one right. That's our technique for looking at bias at the item level.

At the overall score level, we will say there are all kinds of features we can measure about people in terms of the things that they come to the table with. One of the biggest features that affects overall score level, in terms of being highly related to bar exam performance, is law school GPA. How well did you do in law school? The people who did well in law school, on average, do better on the bar exam. It's not perfect. If it were, we wouldn't need to think about a bar exam. Statistically, we'll say that once one controls for differences in school attended, performance, etc., what happens to racial or ethnic differences is that those essentially fade from sizable to small to negligible. This is what led us to the conclusion in 1993 that racial and ethnic disparity is not an inherent flaw in the test used by New York in 1992. The test measures what it's supposed to measure. Disparities are caused by differences in background and preparation.

If you start with the notion that the state has an interest in competent practice of law, we ask the question, do people meet that standard? The reason that we said we don't see bias inherent in the test is that those surface differences disappear when you control for these background factors. I can't say I'm happy about that. I wish we had a world where those background factors were equated for everybody. Everybody has equal opportunity. Everybody got to go to the same law school. But that's just not where we are.

I thank goodness that there are retest opportunities. I can't say I know the legal data as well as, for example, as I know medical data, but you'll see very comparable findings. What you're seeing with bar exams isn't atypical in the context of professional licensure. For all programs requiring post-collegiate study, you'll find gaps in the initial passing rate, but those gaps disappear with retake. Tests are not a permanent bar to the profession for very, very large numbers of people. But I think some people need more preparation to be able to master the content.

DM: Our Court of Appeals has commissioned a working group to study the options available for a bar admission eligibility requirement, whether it's an exam or an alternative non-exam pathway. Right now, applicants to the bar in New York take a multiple-choice, open book, at-home exam to test knowledge of New York law. How would you advise the working group to go about the business of evaluating the options and giving the court guidance as to which bar admission requirement is going to achieve the ultimate goal of ensuring that the bar exam and the bar licensing process protect the public from lawyer incompetence?

PS: We start with a specification of what it is that you're certifying – in this case how do we evaluate if you're competent. We define competence in terms of whatever it is, knowledge, reasoning, in a certain set of domains. A standardized exam is a standardized exam that has been developed to make sure that it adequately samples all of that.

The option of an on-the-job evaluation by your boss may not be adequate if your job duties only deal with a small piece of the set of domains that come into play in assessing competence. So, each option would be evaluated against the standard of whether it matches up with what you claim you're certifying.

For whatever people may think about it, one of the things about a standardized test is that it tries to take strong control away from a variety of biasing factors that are involved when people are making judgments of others. As to this notion that we'll just have your boss on your first job make a rating and that'll determine competence, I can't say I know for sure what will happen, but I've got a guess.

I'm going to use as an example my employer, the University of Minnesota. At every university, professors come up for tenure. After half a dozen years on the job, they get reviewed and the university has to decide, are you allowed to stay or do you have to go? The process always involves getting outside evaluations. So, you write to half a dozen experts in their field and ask them for a letter evaluating this candidate's work. The state of Minnesota is not alone in this, but it's one of the states that has a sunshine law that says that those letters would be made available to the candidate being evaluated. As a result, quite a large number of people who get requests for letters respond saying that they have a policy against writing such a letter in a state where it's going to go to the candidate. Others shrug and say, okay, well, it's something we have to do, but their letters have limited evidentiary value. It's really rare to get a letter containing even a hint that that candidate is less than absolutely perfect. The fact is that no one's going to go on record as saying, I think so-and-so's scholarship is shoddy and the person shouldn't be promoted. They worry about their legal liability for doing that, [to] their reputation. So, I worry about those kinds of features when there are stakes for the evaluator. That issue is, of course, not what's at play in any standardized assessment where the evaluation and evaluators are anonymous and have no vested interest in a candidate.

So, I worry about the issue of motivation. The notion of a competency assessment that says that passing a certain set of courses in law school is sufficient to certify competence is one that I worry about. A given school is competing for students with other schools and may not want a reputation as a place that grades hard and thus keeps people from being licensed. So, I think there's a series of impediments that have to be evaluated when we're relying on judgmental evaluations by people potentially with vested interests in an individual student's success.

DM: I'm going to put you on the spot one more time. I know you're very busy, but if the New York Court of Appeals said, "Can we retain you to give us 10 hours to develop a strategic plan for how we should be going about our work," would you be able to do that, building on what you did for the court in 1993?

PS: Can I find a few hours? Yes. Could I come in and redo the 1993 report? No, I would not have the time or availability to do anything of that sort. If I can be of value in a meeting with some group, I can find a few hours for that.

David Marshall co-chairs the Committee on Legal Education and Admission to the Bar. He is an adjunct professor and co-director of the Center for Labor and Employment Law at St. John's University School of Law. He began his career at the National Labor Relations Board in Washington, D.C., before entering private practice in New York City, where he practiced labor and employment law for nearly four decades.

Endnotes

1. Notice to the Bar from Heather Davis, Chief Counsel and Legal Counsel to the State of New York Court of Appeals, Public Hearings: New York State Bar Examination (updated May 2, 2025), https://www.nycourts.gov/ctapps/news/nottobar/nottobar050225.pdf.
2. *Report of the New York State Judicial Commission on Minorities*, 19 Fordham Urb. L.J. 181, 266 (1992),https://ir.lawnet.fordham.edu/ulj/vol19/iss2/3.
3. *Id.*
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5. Jason Millman, William Mehrens & Paul Sackett, An Evaluation of the New York State Bar Examination, ES-1 (1993) (unpublished report) (on file in the SUNY/Buffalo Law Library: KFN 5CD76 M55 1993) ("Millman Report").
6. Millman Report, p. 1-2.
7. Millman Report, p. ES-1.

My Testimony on the New York State Bar Exam

By Domenick Napoletano

Domenick Napoletano, who was then president of the New York State Bar Association, testified on May 13 in front of the advisory committee that is making recommendations to the Court of Appeals on how the state should test law school graduates on their knowledge of New York law. The NextGen exam is replacing the Uniform Bar Exam in New York in July 2028, and the court is deciding whether the New York Law Exam, a two-hour open-book multiple choice test that is required for admission to the bar in New York, should be discontinued or replaced.

I'm Domenick Napoletano, president of the New York State Bar Association. With me today is NYSBA General Counsel David P. Miranda. We thank the members of the Advisory Committee and Chief Judge Rowan Wilson for this invitation to share NYSBA's views regarding proposed changes to the manner in which those seeking the honor and privilege of practicing law in the great state of New York are examined and tested. We applaud Chief Judge Wilson for his leadership in forming this Advisory Committee to examine whether our current and future form of testing for New York state bar admission is sufficient to test the skills and ability of law school graduates to be ready to practice law in New York.

As you know, the New York State Bar Association opposes the use of the current Uniform Bar Examination without a substantial and rigorous New York state examination. We support the premise that the UBE is inadequate for New York state and can be improved. The 50-question online, multiple-choice, open-book New York Law Examination that accompanies the current UBE is neither substantial nor rigorous and is recognized as inadequate. Newly admitted attorneys in New York need to be ready to practice law, and in order to get there our old testing models need to be challenged and improved. However, the membership of NYSBA, the practicing attorneys of New York State, have very strong concerns that the NextGen exam for New York state, as it is currently configured, without a substantial and rigorous New York exam, will not lead us in the right direction, but rather is a step backward.

A license to practice law in New York is the gold standard for lawyers across our nation and around the world. That must not change, or be tinkered with, without long and careful deliberation. More often than not, the laws of New York do not follow the uniform laws that either the UBE or new NextGen exam tests; rather, New York laws are special, unique and sometimes frustrating, but the ability to understand and navigate the nuances and pitfalls of New York law is crucial to the ability to be able to practice competently in New York. New York, with its progressive laws, courts, and judges is a recognized leader in the legal community throughout our nation and the world. Practicing here is special and unique, and very different from practicing in Iowa or Nebraska. Our bar examination should be, must be, properly reflective of our uniqueness, our diversity, and our influence throughout the world.

Practicing in New York is different from any place else in the world. New York state is the opposite of uniform. What makes New York different is also what makes us so sought after. Attorneys in other states and other countries first want to practice in their home jurisdiction, but for many, a license to practice law in New York is their second most valuable asset. Every year New York state admits thousands of new attorneys from most every state and dozens of countries. We have seen since the use of the UBE that law schools are no longer attracting students to New York-centric courses like civil practice, because it's not necessary to pass the New York bar exam.

When we're told that the NextGen is better because it will increase the portability of a New York license, we're concerned because there is no outcry from our members about barriers to entry in other states, no outcry from practicing New York attorneys, no outcry from our clients or the public, and no outcry from our courts that they wish more out of-state attorneys could practice here. Attorneys in other states are flooding the New York legal community without an understanding of New York law and dilute the significance of a license to practice in New York. Law firms and employers in New York want attorneys steeped in the complicated nuances of New York practice; clients in New York, whether rich or poor, need their attorneys to be fully versed in New York law. Our bar examination is the gatekeeper to protect the public we are privileged to serve. The proposed configuration of the NextGen will be a step backward if it does not include a substantial and rigorous examination of New York law.

It is important to keep in mind that the purpose of the bar examination is to determine whether the law school graduate has mastered the legal skills and general knowledge that a practicing attorney should have. This means a firm grasp of black letter law and a solid grounding in basic analytical, reading, and writing skills. Writing a well-constructed legal essay is a learned skill that requires mastery of the law and the nature of logical argument.

A licensing process that fails to assess the candidate's ability to write, analyze, and reason logically about the law of the licensing state is inadequate to achieve its objective. This is what a licensing exam for the practice of law must be designed to do. When a candidate has mastered the basic skills of legal analysis and an understanding of the law, then the bar exam is not a barrier to the profession but a threshold requirement for entering the profession to be met like any other.

When Court of Appeals Chief Judge Jonathan Lippman announced in 2015 that the state would adopt the two-day Uniform Bar Exam, he also declared that the "New York Day" of the bar exam would include a separate test of New York law that he promised would be "thorough" and "rigorous," and would provide "comprehensive testing of knowledge of New York law," and preserve New York's reputation among state bars as the "gold standard" for bar admission.

The court's Advisory Committee on the Uniform Bar Exam, which had spearheaded a statewide effort to gather comments from members of the bar, bench, and legal academy about the court's plan to revise the bar exam, reported that a "recurring theme at nearly every public hearing" was concern about the potential negative effects on both the teaching and study of New York law once the bar exam no longer included the New York Day essay questions. Commenters argued that in the absence of such essay questions, the exam would not test examinees' ability to spot and analyze the state law issues they might encounter when asked to solve the problems of their New York clients, nor would it assess whether they could clearly and accurately describe in writing the solutions to those problems.

The "recurring" concerns about new attorney competence in New York law have proven to be well-founded, and the promise of a "gold standard" for admission to the New York bar has not been kept. This court has the opportunity now to commission a careful study of the New York Law Examination with a view toward correcting what hindsight shows are the unintended negative consequences of the state's eight-year experiment with the Uniform Bar Examination/ New York Law Examination protocol.

In my Feb. 27 letter to Chief Judge Wilson commending him for the formation of this Advisory Committee, we called upon him and you to engage a psychometrician to advise this committee on the type of New York examination to recommend. When the New York Bar examination was studied by this court in 1992, this court engaged three independent, professional psychometricians under the chairmanship of Cornell University Professor Jason Millman to evaluate the validity, reliability and disparate impact of the New York law component of the two-day bar exam given at that time, as well as to assess procedures for accommodating test takers with disabilities, ensuring security of exam answers, grading exams, setting cut scores, and handling appeals of failing scores. The Millman Report, which was issued in May 1993 and covers several hundred pages, indicates that the Millman team used panels of practicing lawyers to gather data about exam question validity and question sensitivity, interviewed Board of Law Examiners personnel extensively about their procedures for granting accommodations, retaining and training graders, and scoring the exam, and analyzed substantial amounts of data from their files. In the executive summary of the report, the Millman team concluded that the "validity, reliability, lack of bias, and other aspects of the New York State Bar Examination and its implementation surpasses acceptable levels." Notably, that high grade was awarded to the full-day-of-New-York-law exam that then Chief Judge Lippman replaced with the UBE along with the much-criticized, two-hour, online, open-book NYLE. That decision was made in 2015, without undertaking the extensive professional psychometric study conducted by this court in 1993. This Advisory Committee has the opportunity to correct that glaring omission by retaining appropriate professional psychometricians to design and conduct an evaluation of bar admission "options." Please tell me – has the Advisory Committee recommended the retention of a psychometrician to advise on the proper method of examination? If so, who have they recommended? If not, why not?

We agree that New York state should embark upon creating an exam that is greater than the current model, a bar exam that truly tests the ability to practice law in New York and keeps the New York license as the gold standard for lawyers. We submit that implementing the NextGen exam without a substantial and rigorous examination of New York law does not lead us in the right direction. We ask the chief judge and the Advisory Committee not to be unnecessarily hasty in its decision. To date we have seen scant proof regarding the potential disparate impact of this new exam. It is not sufficient to say let's try it for a few years and see what happens. Without further study we may well be disenfranchising important groups of people from the privilege of practicing law in New York – and it is a privilege, and responsibility, that New York and not some other entity should control.

New York state must be diligent in providing an examination that fully tests knowledge of New York law and the skills necessary to practice in New York. The current exam does not get us where we need to be, and the proposed NextGen does not get us there either. We are confident that with the leadership of Chief Judge Wilson, and the dedication of this Advisory Committee, working together with the organized bar and the great law schools of this state, we will do better. The New York State Bar Association stands ready to work with you to ensure that New York state and its bar examination remains the gold standard for practicing law. On behalf of NYSBA, I thank Chief Judge Wilson and this esteemed Advisory Committee for starting us on the path to a bar exam that truly and comprehensively tests the ability to practice law in New York.

Endnotes

Links to all the below can be found at: https://nysba.org/governmentrelations.

1. Letter from Domenick Napoletano, President, and Kathleen Sweet, President-Elect, NYSBA, to Sherry Levin Wallach and Hon. Edward D. Carni, Co-Chairs, Advisory Committee on the New York State Bar Examination (Feb. 27, 2025), https://nysba.org/wp-content/uploads/2025/04/NYSBA-Feb-27.pdf.

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3. David R. Marshall and Suzanne Darrow-Kleinhaus, *New York's Nex Bar Exam: Where Should We Go From Here?*, N.Y. St. B.J., vol. 96, no .4 (Fall 2024), https://nysba.org/new-yorks-next-bar-exam-where-should-we-go-from-here.

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8. Alan D. Scheinkman and Michael Miller, *New York Needs a New Bar Exam*, N.Y. St. B.J., vol. 93, no .5 (September/October 2021), https://nysba.org/wp-content/uploads/2025/04/Attachment-7.pdf.

Monumental Ruling Still Leaves Questions About Student-Athlete Compensation

By Kyle Ritchie

The landscape of college athletics continues to change at an unprecedented rate. Name, image and likeness has opened the flow of compensation to student-athletes at all levels. Up until recently, payments for NIL have only been allowed through entities not associated with a university. However, a new era emerged on June 6 when Judge Claudia Wilken of the Northern District of California granted final approval of a long-anticipated settlement in *House v. NCAA* that will allow colleges to directly pay their student-athletes for use of their name, image and likeness as of July 1. Student-athletes will still be allowed to sign NIL deals on their own with outside organizations. These NIL deals will be processed through a clearinghouse managed by the accounting firm Deloitte who will ensure that payments made by outside organizations in excess of $600 are not above fair market value.

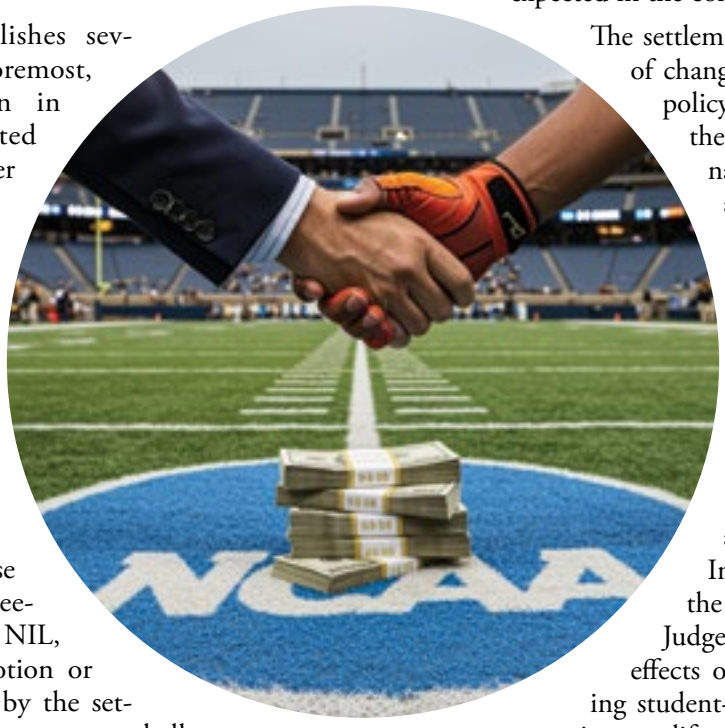
Another case at the center of the evolution is *Johnson v. NCAA,* which was filed in the U.S. District Court for the Eastern District of Pennsylvania. This case seeks to address the fundamental issue: Are student-athletes employees of their institutions?

Direct Payments *(House v. NCAA)*

The *House* case was filed in 2021 and garnered national attention due to the significant amount of potential damages and transitional impact on college sports. In May 2024, the parties submitted a preliminary settle-

ment agreement to the court for approval. Judge Wilken returned the preliminary settlement to the parties and requested revisions be made. The amended preliminary settlement was submitted on Sept. 26, 2024 and was preliminarily approved by Judge Wilken on Oct. 27, 2024.[1] Interested parties had until Jan. 31 to file objections with the court for consideration prior to the final approval hearing, which was held on April 7. At the hearing, and subsequently in writing, Judge Wilken indicated support for the settlement, subject to suggested revisions regarding roster limits that placed caps on the number of players that each team can field.

Testimony at the hearing from student-athletes who were in danger of losing their roster spots due to the cap convinced Wilken to push schools to grandfather in current students and incoming freshmen.[2]



The settlement accomplishes several things. First and foremost, it awards $2.78 billion in back pay to be distributed to class members (former student-athletes). Second, the settlement sets forth a 10-year model for NCAA Division I institutions to utilize future revenues to compensate student-athletes directly for their name, image and likeness. Each institution will have the right to enter into an exclusive or non-exclusive license and/or endorsement agreement for a student-athlete's NIL, institutional brand promotion or other rights as permitted by the settlement. The license or agreement shall authorize payments to student-athletes for the right to use a student-athlete's NIL for a broadcast of collegiate athletics games or events. If an institution opts in to the settlement, they will be able to spend up to a maximum 22% of the average shared revenue on its student-athletes through direct payments and additional scholarships. Average shared revenue is based on the named defendants' and the University of Notre Dame's most recent NCAA membership financial reporting system that shows their athletic media, ticket and sponsorship revenue. Notre Dame is not a member of any conference, but it is included in the calculations because of its capacity to generate revenue on par with the Power 5 conference schools (Big Ten, Southeastern Conference, Big 12, Atlantic Coast Conference and Pac-12). For the 2025-26 academic year, that equates to approximately $20.5 million per institution. Payments over this capped amount are not permitted and penalties will be enforced by a to-be-determined entity. The cap amount escalates each year for 10 years. Institutions are not required to spend up to the 22% number – each institution retains the right to determine its own payment amounts, so long as they stay below the applicable cap.[3]

Other Issues Raised by the Settlement

Eight female student-athletes filed an appeal to the settlement on June 11, arguing that women would not receive their fair share of $2.78 billion in back pay. They have standing to appeal because they previously filed objections to the proposed settlement.[4] Additional appeals are expected in the coming days.

The settlement also sets out a number of changes to longstanding NCAA policy. The most prominent of these changes were the elimination of scholarship limits and the aforementioned institution of roster limits.[5] Under current NCAA policy, each sport is limited in the number of scholarships it can provide for its student-athletes (for example, NCAA's Football Bowl Subdivision colleges are allowed 85 scholarships).[6] In the days leading up to the settlement being approved, Judge Wilken focused on the effects of the roster caps on existing student-athletes and requested the parties modify the settlement agreement to protect the student-athletes in question. What resulted is an individual designation that a school can make for existing student-athletes who, as determined in good faith by the institution, would have been cut due to the roster limits. Incoming freshmen who were recruited prior to April 7, 2024 will also receive the designation. The designation allows the student-athlete to not count against the roster limits for the duration of their eligibility. To consider the effect of this modification to the settlement, consider that most Football Bowl Subdivision teams carry 125-140 student-athletes on their roster. With roster limits in place, there will be fewer opportunities available to student-athletes to participate at a given school (football will have a roster cap of 105 student-athletes). This change will modify longstanding NCAA financial aid legislation[7] and will eventually have a profound effect on the total number of student-athlete

opportunities at a university. Many Power 5 institutions are estimating a reduction in total student-athletes between 80-150 as a result of the roster limits.[8] The settlement allows for individual student-athletes to be protected and to ensure a smoother transition for the institutions that opt in to the settlement.

For NCAA Division I institutions that decide not to opt in to the settlement, the current NCAA rules regarding scholarships will continue.[9] Student-athletes at those institutions may still enter into NIL deals, just not directly with their institution. For example, a student-athlete can promote a business in exchange for a fee or may sign autographs and get paid for the service, which is standard NIL activity.

With the approval of the settlement, revised NCAA legislation has been put in place that modifies existing rules to be in line with the settlement, while still allowing for institutions that opt out to continue with the old rules still in place. Many unknowns still exist. Who will enforce existing NCAA legislation? Will it be the NCAA or the College Sports Commission (formed under the settlement)? What are the potential long-term effects of not opting in? If a school does not opt in this year, but chooses to next year, will it be allowed to designate student-athletes to be exempt from roster cap calculation? Without any clear guidance on the matter, institutions must weigh the pros and the cons of whether to opt in and to remain nimble while navigating the changing landscape. If they decide not to opt in, instead of paying student-athletes directly, schools may risk falling behind their competition.

The settlement is also (intentionally) silent on the application of Title IX to payments from an institution to the student-athlete. Do the amounts paid directly to men and women student-athletes need to be consistent with Title IX proportionality standards, or can they be appropriated according to some other metric? Title IX states that institutions "must provide reasonable opportunities for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics."[10] This standard has applied to athletic scholarships, access to facilities, equipment, coaches, etc. over the years. What is less clear is whether NIL payments fall into this same category, or because an individual's NIL market value varies based on both the sport and the revenue generated from it, that market share should be utilized to determine compliance with Title IX. Institutions have indicated they intend to distribute payments based upon market value. This analysis is similar to coaches' salaries paid by an institution. Title IX requires the school to provide equal training and coaching opportunities to its men's and women's teams.[11] The cost associated with equal coaching is not part of the analysis; rather, the market dictates the amount to be paid to a coach. Adding to this analysis, the Department of Education recently issued a fact sheet determining NIL payments be treated

Many unknowns still exist. Who will enforce existing NCAA legislation? Will it be the NCAA or the College Sports Commission (formed under the settlement)? What are the potential long-term effects of not opting in?

similar to scholarships.[12] The fact sheet, however, was not precedential or binding and was issued just before the Trump administration took office. On Feb. 12, this guidance was rescinded by the Department of Education. Without any clear guidance, institutions are working with their Title IX attorneys to determine the best way to navigate the settlement.

Employment Status *(Johnson v. NCAA)*

Ultimately, what these cases try to grapple with is the question of whether student-athletes are students who play sports or professionals who attend school.

The plaintiffs in *Johnson v. NCAA* contend that they should be treated as employees, entitled to minimum wage and benefits protections under the Fair Labor Standards Act.[13]

The plaintiffs make no distinction among scholarship and non-scholarship student-athletes, meaning both would be treated the same. They assert that monetary compensation from an institution, in the form of a scholarship to a student-athlete in exchange for their services is not required for them to be deemed an employee. To date, no institution has treated student-athletes as employees.

Johnson is the latest effort to define student-athletes as employees and differentiates itself from previous efforts in that a decision in the plaintiffs' favor could have applicability to both public and private institutions. Previous efforts focused predominantly on student-athletes having the right to unionize and collectively bargain with their private institution by pursuing remedies through the National Labor Relations Board.[14]

Johnson remains in its early stages but has already produced interesting results. In denying the defendant's motion to dismiss, the district court applied the multi-factor test established by *Glatt v. Fox Searchlight Pictures, Inc.* to determine whether student-athletes "could" be employees under the Fair Labor Standards Act.[15] The defendants appealed, and the case was certified to the Third Circuit for an interlocutory appeal. The Third Circuit determined that (1) student-athletes "could" be employees under the act; (2) the *Glatt* test was inappro-

priate; and (3) an alternative test should be used to determine employee/employer status in college athletics.[16]

Generally, determination of whether an individual is an employee centers on behavioral control, financial control and relationship details of the arrangement.[17] Proponents for student-athletes being considered employees argue that the degree of control institutions exert over student-athletes and their schedules for training, competition and schoolwork establishes student-athletes as employees. However, the determination that student-athletes can be considered employees of an institution would have far-reaching consequences and lead to several operational and legal questions for institutions. For example:

- The cost to an institution for a student-athlete would grow significantly due to the required benefits under applicable law (e.g., health insurance). Will institutions seek additional funding or seek to cut expenses by eliminating certain sports?
- What laws or policies would govern relationships between student-athletes?
- Would student-athletes enter into a collective bargaining agreement with the institution?
- Can underperforming student-athletes be fired by the institution?
- Can an employer impose certain academic requirements (e.g., 12 hours of study per semester, GPA requirements, etc.) upon an employee?

For institutions that utilize athletics as an enrollment driver, what is the long-term effect of employee status? At this point we only have speculation; however, the added expenses that go along with deeming student-athletes employees is likely to create significant institutional discussions and decisions going forward, especially for schools with net revenues below those of the "Power 5" conference institutions.[18] The effect of the added costs could lead to the elimination of certain non-revenue sports or, in some cases, the elimination of an institution's athletic department.

Conclusion

The past four years have provided landmark changes to collegiate athletics. The creation of NIL and NIL collectives and direct challenges to the NCAA's authority to govern its member institutions have led many to use the phrase "the Wild Wild West" when describing the landscape.

NCAA President Charlie Baker said that while the *House* settlement offers a pathway for stability in college sports, he is looking to the federal government to help lock in some of the momentous changes including federal oversight and a limited form of antitrust protection that would prevent, among other things, lawsuits challenging the spending cap put forth in the settlement.[19]

Baker also said he would like to see a preemption of state laws that set different rules for paying student-athletes.

Southeastern Conference Commissioner Greg Sankey added that it is not good to have a league spanning 12 states operating under 12 different sets of laws guiding player payments and other elements of college sports.[20]

One way or another, we know that more changes to the landscape of collegiate athletics are on the horizon.

Kyle Ritchie is senior counsel at Bond, Schoeneck and King and is part of their Collegiate Sports Practice Group. He has significant experience in name, image and likeness matters and assisting institutions through the evolving landscape of college athletics.

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The HALT Act and Solitary Confinement in New York State

By Norman P. Effman and Leah Rene Nowotarski

On Feb. 17, New York State corrections officers went on an unauthorized strike and demanded safer working conditions. One of their complaints was that the rules around solitary confinement, which went into effect in 2022, created dangerous conditions and prevented them from being able to adequately do their jobs.

This article will examine the passage of the HALT Act, its implementation, and the corrections officers' claims that it has made their jobs more difficult.

As of May 1, 503 prisoners were being held in segregated confinement in New York State prisons out of an estimated average of 18,403 inmates.[1] The Department of Corrections and Community Supervision also reported 1,974 incarcerated individuals housed in residential rehabilitation units.

Solitary confinement has been used in the United States since 1787. It has been controversial at least as far back as the early 1800s, when the regular use of the disciplinary tactic in a Philadelphia prison was brought under scrutiny because inmates were committing suicide and suffering acute mental trauma.[2] In 1890, in a U.S. Supreme Court case in which James Medley, a man awaiting the death penalty for murdering his wife, went to court after being held in solitary confinement for 45 days prior to his execution. Medley claimed that solitary confinement was cruel and unusual punishment. According to the court, "a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." [3]

Yet, less than 100 years later, solitary confinement had become an increasingly popular strategy in U.S. prisons. In the 1980s, corrections officials began to lock down entire prisons, with inmates kept in their cells 23 hours a day with no access to educational programming or work assignments. The first prison built for this purpose, called a "SuperMax," was erected in 1989 in California. By 2005, 40 states were housing 25,000 inmates in these facilities.[4]

Historically, New York prisons have used segregation and solitary housing units as a routine form of disciplinary intervention for misconduct by incarcerated individuals. Prior to the enactment of the Humane Alternatives to Long-Term Solitary Confinement Act in 2022, individuals incarcerated in New York state facilities who were accused of violating the inmate rules and regulations could be subject to segregated confinement in cells for up to 23 hours a day over any number of consecutive days, months, or years. Individuals were allowed to leave their cells only to shower or for one hour of recreation. They were kept completely separate from the general prison population at all times.[5]

NYSBA Report on Solitary Confinement

In 2013, the New York State Bar Association's House of Delegates approved a report by the Committee on Civil Rights on solitary confinement. It recommended changes to the use of solitary confinement in New York State, calling for "clear and objective standards to ensure that prisoners are separated from the general population only in a very limited and very legitimate circumstances and only for the briefest period and under the least restrictive conditions practicable."[6] It also called upon the state Legislature to hold hearings on the issue. In 2019, NYSBA also issued a memorandum in support of legislation restricting the use of solitary confinement.

In 2021, the Humane Alternatives to Long-Term Solitary Confinement Act was introduced to the New York State Legislature by state Senator Julia Salazar and Assemblymember Jeffrion Aubrey. Gov. Andrew Cuomo signed the HALT Act into law on March 31, 2021. It restricts the use of solitary confinement in prisons and jails, mandates alternative rehabilitative measures, and limits the duration of segregated confinement.

The HALT Act was inspired in part by the United Nations "Nelson Mandela rules." Those rules set forth the standard for modern prison administration and followed the basic primary principle:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from torture and other cruel, inhumane, or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers, and visitors shall be insured at all times.[7]

It also referenced the U.N. Special Rapporteur on Torture, which concluded that "solitary confinement of more than fifteen consecutive days can amount to torture."[8]

Key Provisions of the HALT Act

The HALT Act amended New York Corrections Law by defining "segregated confinement" to mean confinement of an inmate in any form of cell confinement for more than 17 hours a day other than in a facility-wide emergency or for the purpose of providing medical or mental health treatment.[9]

The bill also defines "residential rehabilitative units" as separate housing units used for therapy, treatment, and rehabilitative programming of incarcerated people who have been determined to require more than 15 days of segregated confinement pursuant to department proceedings. Moreover, the units are designated as "therapeutic and trauma-informed and aim to address individual treatment and rehabilitation needs and underlying causes of problematic behaviors."[10]

The act ensures that during mental health assessments, an individual found to have a serious mental illness may not be placed in segregated confinement or a residential rehabilitative unit, except for keeplock periods prior to disciplinary hearings. Even when placed in keeplock awaiting a hearing, they must be given seven hours per day out-of-cell time or be transferred to a residential rehabilitative unit or a mental health treatment unit no longer than 48 hours after being kept locked up.

Correction Law Section 137(6) further limits the use of segregated confinement when it comes to special population individuals, which includes those 21 years or younger, 55 years or older, individuals with disabilities, pregnant individuals or those within the first eight weeks of postpartum recovery, and mothers caring for newborns in prison. While in a residential rehabilitative unit, an incarcerated person must have access to programs and work assignments comparable to core programs and work assignments in the general population. They also must have access to additional out-of-cell, trauma-informed therapeutic programming and help preparing for discharge from the unit and to the community.

To use solitary confinement beyond the limits of the HALT Act, first there must be an evidentiary hearing. Second, the hearing officer must prepare a written decision. Third, the decision must conclude that there is an unreasonable risk to the security of the facility. A period of incarceration can be extended by finding that the violation caused or attempted to cause serious physical injury or death to another person or making an imminent threat or such physical injury or death, or if the person has a history of causing such physical injury or death and there is a strong likelihood that the person will carry out such a threat. Such determinations must also involve the commissioner of mental health or a designee.

Where that individual is found to possess a significant and unreasonable risk to the safety and security of others, then the department can restrict participation in programming and out-of-cell activities, as necessary. The department must then provide at least four hours of out-of-cell time daily, which includes at least two hours of therapeutic programming and two hours of recreation. If an incarcerated individual poses an imminent threat, engages in sexual violence, commits acts of extortion, incites or attempts to cause a riot, obtains deathly or dangerous weapons or contraband, or attempts to escape from the facility, correctional staff may place that person in segregated confinement beyond the limits of the HALT Act.[11]

Continued placement in residential units is reviewed on a regular basis, and individuals who have not been discharged within one year of their initial admission have a right to be discharged from the unit unless they have committed one of the serious acts listed within the prior

Where that individual is found to possess a significant and unreasonable risk to the safety and security of others, then the department can restrict participation in programming and out-of-cell activities, as necessary.

180 days and possess a significant and unreasonable risk to the safety or security of incarcerated persons or staff. The statute provides for immediate and automatic independent review by the commissioner and the commissioner of mental health or their designees for such continued segregation. The HALT Act requires a meaningful periodic review of the status of each incarcerated person in a residential rehabilitative unit at least every 60 days to assess the individual's progress and to determine if the person should be discharged from the unit.

The HALT Act provides that employees assigned to the solitary housing units and residential rehabilitative units undergo a minimum of 37 hours and 30 minutes of training prior to any assignments. The training includes the purpose and goals of the non-punitive therapeutic environment, the basics of restorative justice, and dispute resolution methods. Justice centers are also required to review the department's compliance with the provisions of Correction Law Sections 137-2 and 138.

Inspector General's Report

The HALT Act has succeeded in its primary aim in reducing the use of and the length of time inmates serve in solitary confinement in order to safeguard health and promote rehabilitation.[12] However, there is still work to be done in order to fully comply with the act.

On Aug. 5, 2024, the Office of the Inspector General released its report reviewing the HALT Act and compliance by the Department of Corrections and Community Supervision. The report acknowledged that, following HALT's enactment, numerous complaints were made regarding the implementation of the law and that the department was failing to issue required written justifications for the use of

confinement exceeding the mandatory limits. There were also incidents when restraints were used improperly.

The inspector general found that antiquated recordkeeping systems posed significant impediments to accurately monitoring and reporting on critical metrics such as the use and duration of segregated confinement. She noted that there were inconsistencies and incomplete records from some facilities and recommended that recordkeeping systems be modernized to improve transparency and reporting accuracy. The report also criticized the agency for not investing in technology but noted that Commissioner Daniel F. Martuscello III was making improvements. Significantly, the report also found that the department lacked HALT-mandated justification for holding some people in segregated confinement. As noted above, the prisons are required to document in writing the justification for a determination exceeding HALT requirements and segregation. The inspector general found that many of these decisions lacked sufficient written justification for such confinement.[13]

On the positive front, the report found that in June of 2023, the commissioner acted to aid staff in complying with HALT by creating new forms called Confinement Justification Forms. Following the use of these forms, however, the inspector general still found that in their review of 100 incidents, 1 in 5 lacked sufficient written justification for extended segregation.[14]

The Corrections Officers Strike

The series of events that led up to the wildcat strike by corrections officers started in December 2024, when an inmate, Robert Brooks, died following a fatal beating by corrections officers at Marcy Correctional Facility. Following his death, Gov. Kathy Hochul ordered the firing of 13 officers and one nurse involved in the incident. A grand jury in Onondaga County subsequently indicted nine defendants for the murder of Brooks. Six officers were charged with second-degree murder and first-degree manslaughter. One officer has since pled guilty to manslaughter in a plea deal.[15]

Robert Brooks certainly was not the first incarcerated individual who died at a correctional facility. In the Brooks case, however, his death was captured unknowingly by body cameras worn by some of the corrections officers. The brutal beating captured on video could not be ignored, and it outraged not only the governor and the commissioner of the Department of Corrections and Community Supervision, but also brought public scrutiny on corrections officers and the culture that would permit such brutality.

As the horrific story of the death of Robert Brooks made headlines throughout New York State, corrections officers left their jobs and set up picket lines in an unsanctioned strike. The Taylor Law prohibits New York State public employees from striking. For certain unions, primarily involving law enforcement, the law provides for binding arbitration and imposes penalties against the union for violation of the law. The New York State Corrections Officers and Police Benevolent Association did not authorize the strike and therefore was not subject to penalties of the Taylor Law. The union did, however, engage in bargaining sessions with the New York State Department of Corrections and Community Supervision during this time.

The strikers complained of severe staff shortages, dangerous working conditions, forced overtime, and the limitations posed by the HALT Act, which they argued made their jobs more difficult.

In February, state Senators Dan Stec and James Tedisco proposed an amendment to repeal the HALT Act, arguing that the act made for dangerous conditions for corrections officers. Senator Tedisco cited an 85% increase in assaults on corrections officers between 2019 and 2024.[16] The proposed amendment was voted down.[17]

On Feb. 21, CNY Central reported that "while corrections officers at the protest outside Cayuga Correctional denied any link, an advocate with the Center for Community Alternatives said that there is no coincidence that these strikes are taking place the week that indictments were unsealed in Robert Brooks' death." That same report noted that the Department of Correctional and Community Services would be suspending "elements" of the HALT Act until prisons could be operated safely again.[18]

The Kingston Daily Freeman also reported that New York officials had declared a prison-wide state of emergency and temporarily suspended parts of the HALT Act. Officials said "provisions of the HALT Legislation permit temporary suspension of specific elements of HALT under 'exceptional circumstances' . . . where these circumstances create a significant and unreasonable risk to the safety and security of other incarcerated persons, staff or the facility."[19]

A retired corrections officer said in response to the memorandum, "They know that they've been lied to before [and] they'll be lied to again," and that there are "[t]oo many stipulations because the HALT Act is suspended temporarily. That means that 12:01, when people come back to work, it's back in action and [our issues get] washed off the table like nothing even happened."[20]

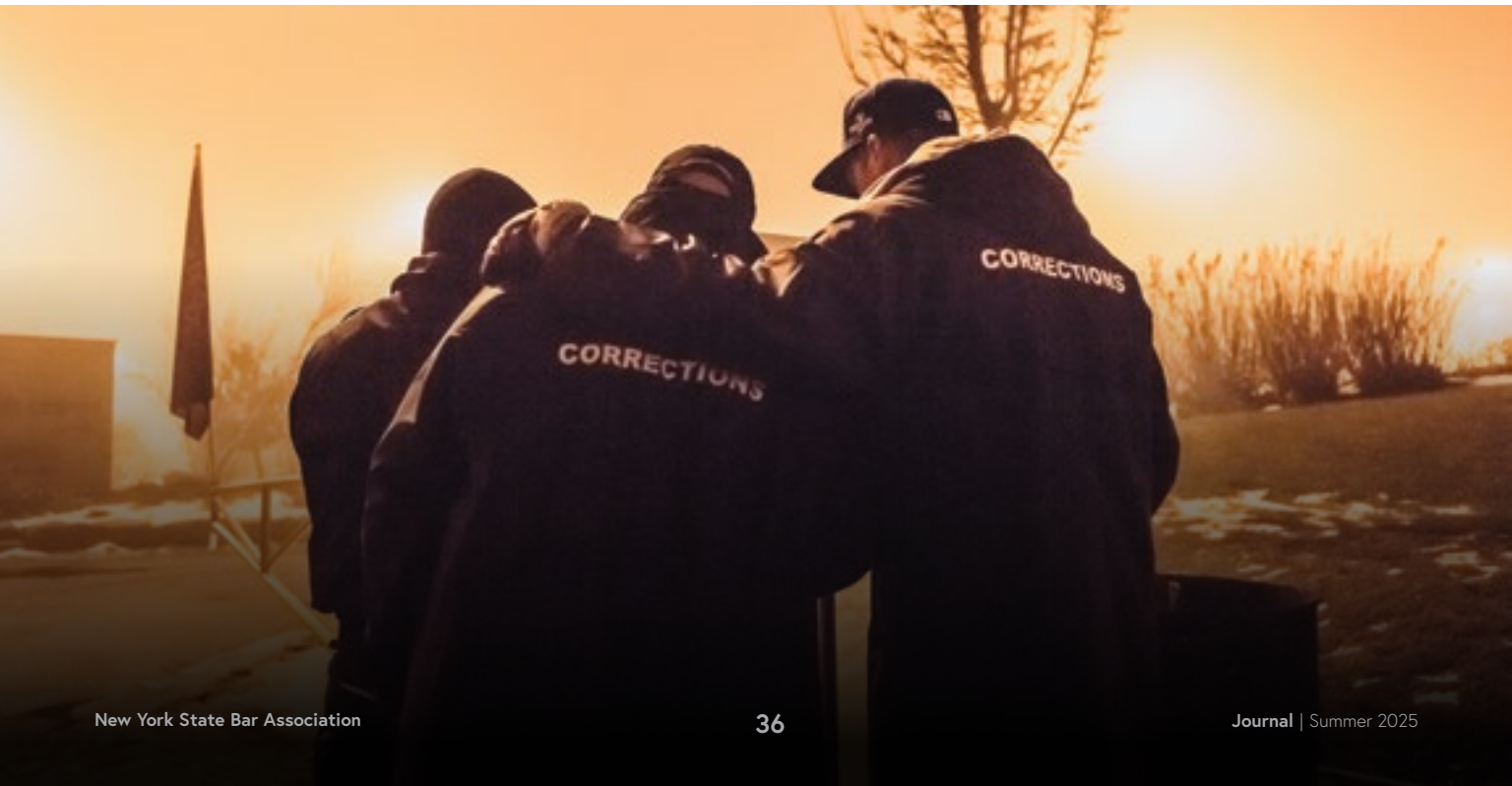
Advocates with the HALT Solitary Campaign, a project of the New York Campaign for Alternatives to Isolated Confinement, argued:

> People will die – by suicide, by overdose, and in the hands of emboldened guards who know they can get away with anything simply by disappearing their abuse victims in solitary confinement. Moreover, this action will make prisons less safe, because solitary confinement only worsens behavioral challenges.[21]

On Feb. 28, various media sources reported that a mediator had released a consent award agreed on by state and union leaders in which certain elements of the HALT Act would continue to be suspended for at least another 90 days.

The consent award used language in the agreement to continue suspending "programming elements" of the HALT Act for another 90 days "owing to the ongoing emergency" and existing staff shortages. The agreement further noted that following 30 days, the department would commence an evaluation of the operations, safety, and security at prisons to determine whether it would be safe to reinstate the suspended provisions based on staffing levels.

Senator Salazar said that she is "disappointed and concerned with certain elements of the consent agreement, particularly because the language around the HALT Act creates the fear that New York would take a step backward regarding the harmful use of long-term segregated confinement." The senator also cited the 2024 inspector general's report, which stated that the department had not even implemented the HALT Act properly, and further, "[w]hile the lack of full compliance with the HALT Law was unacceptable even before corrections officers unauthor-



ized work stoppage, the newly announced consent agreement exacerbates concerns about HALT implementation."[22]

Commissioner Martuscello announced the end of the strike on March 10. The department announced that the commissioner would "exercise his statutory discretion under the HALT Act and continue the temporary suspension of only the programming elements of the HALT Act for ninety days," starting March 8.[23]

The Future of the HALT Act

The HALT Act is the law in New York state. Corrections officers clearly believe that the limits on the use of solitary confinement have made their jobs more difficult and created safety issues for themselves and other incarcerated individuals. Advocates for the law maintain, as noted in the inspector general's report of August 2024, that the procedures contained in the HALT Act that provide for longer periods of segregation are not well understood by frontline corrections officers. Moreover, as reported in the inspector general's report, compliance with procedures for implementing longer terms of segregation are not being followed.

Corrections officers have a difficult and sometimes dangerous job. Staffing problems at New York's correctional institutions require extraordinary recruiting and retention incentives. The implementation of the HALT Act has been severely curtailed by the state's failure to provide prison officials with the necessary technology and training to implement it.

Rather than debating the HALT Act's outcomes, it is important to continue to advocate for the reduced use of solitary confinement while providing more thorough training and education for those who are responsible for administering it.

Norman P. Effman has been with the Wyoming County Public Defender's Office since 1990. He is the executive director of the Wyoming County-Attica Legal Aid Bureau and has practiced criminal law in the private and public sector for 55 years. He is on NYSBA's Executive Committee and and is a member of the Executive Committee of the Criminal Justice Section. He is a past recipient of NYSBA's Criminal Justice Section Award for Outstanding Contribution to Defense Service and the section's Award for Outstanding Contribution to Correctional Service.

Leah Rene Nowotarski is the public defender of Wyoming County and a staff attorney at Attica Legal Aid. She specializes in representing clients in post-conviction matters. She has served as chair of the Criminal Justice Section and the Committee on Mandated Representation, as a member of the section's Executive Committee and various subcommittees, member-at-large to the Executive Committee, member of the House of Delegates, and fellow of the New York Bar Foundation.

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New NYSBA President To Focus on Membership

By Rebecca Melnitsky

As the president, Kathleen Sweet knows the most important resource of the New York State Bar Association is its members.

"Unless we maintain and grow membership, the rest of it doesn't matter," Sweet said. "We can't defend the rule of law, we can't support access to justice, we can't defend the impartiality of the judiciary if we don't have the strength of our membership."

With the new membership model, Sweet wants to reach members of the legal profession who may not be aware of the benefits and resources available.

"Now that continuing legal education courses, electronic forms and e-books are included, we can market that as huge value to the leaders of large agencies and organizations that employ lawyers."

"I think it would be a great opportunity for them to be a part of our community – whether it's in the sections or in the association at large – to further develop and share their knowledge, skills and connections in the profession."

She emphasized that building more bridges with the law schools can also help turn future lawyers into future members. "I certainly think it would be good to have ombudsmen for the association embedded in the law schools through the faculty and the deans."

Honoring the New York State Bar Association's Past and Future

Sweet served as president of the Bar Association of Erie County from 2012 to 2013, which led her to becoming a member of the New York State Bar Association's House of Delegates. Since then, she has taken on leadership roles in the association, including co-chairing the Committee on Access to Justice for the past year.

"Serving in the House of Delegates, I developed deep admiration and respect for the leaders of our association, and I am in awe of the wide range of good work the association does," Sweet wrote in her candidate statement.

Sweet said that among her most impactful work at the New York State Bar Association was serving on past President Richard Lewis' Task Force on Medical Aid in Dying, which advocated for legislation that would allow terminally ill New Yorkers to choose to end their lives with dignity. The New York State Bar Association endorsed the task force's recommendation to support the legislation in January 2024.

Another high point for Sweet was serving on past President Lewis' Task Force on Advancing Diversity, which addressed the impact of the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina.*

As she will be president during the New York State Bar Association's 150th anniversary in 2026, she looks forward to celebrating the association's past presidents and their accomplishments.

Sweet was also president of the Bar Association of Erie County during its celebration of its 125th anniversary. "So, my timing has been excellent," she joked.

Support From Colleagues and Family

A lifelong resident of Western New York, Sweet has been at the Buffalo-based firm of Gibson, McAskill and Crosby – where she is a partner – for 27 years.

"My law firm colleagues have been wonderfully supportive of me. It is no small gift from the firm – they're sacrificing not only the value of my time and billable hours, but I'm physically not there as much," she said.

Her practice includes the defense of medical malpractice actions and legal malpractice actions. She also represents physicians and other health care professionals subject to discipline at the institutional level and those facing state and federal investigations and actions. She is a certified mediator for the United States District Court for the Western District of New York.

Sweet lives in Orchard Park with her husband, Brian Fredericks, a recently retired civil engineer. Her daughter Caroline recently graduated from Northeastern University School of Law and plans to work for a law firm in Boston. Her son Michael has a master's degree from the University of Virginia and works for a defense contractor at the Pentagon.

Sweet earned her juris doctorate from the Villanova University Charles Widger School of Law and completed her undergraduate studies at Boston College. In 2004 she was inducted into the Boston College Varsity Club Hall of Fame and she recently learned that she will be inducted into the Greater Buffalo Sports Hall of Fame, Class of 2025.

When asked how her experience as an athlete impacted her legal career, Sweet said, "Every game, every possession is an opportunity. It is often the same with litigation and especially trial work. You have to respond and react to changing circumstances and be resilient."

After graduating law school, Sweet spent two years as a law clerk at the New York State Supreme Court Appellate Division, Fourth Judicial Department. "I feel like I grew up as a lawyer a lot during those two years at the Appellate Division. I had exposure to a lot of different areas of law. I made good friends there and learned so much from the judges."

Examining the Medical Indemnity Fund

During her presidency, Sweet would like to establish a task force to research and recommend how best to protect and sustain New York's Medical Indemnity Fund, a fund for children who have experienced neurologic deficits in the context of alleged medical malpractice. "I'm hopeful to find a group of lawyers who will study it and provide data and recommendations to support continuing and protecting the viability of the fund," Sweet said.

Looking toward the next 12 months, the association's 128th president said, "I want to focus primarily on growing membership and making sure the association is a professional home where people can become better lawyers. That is the core mission."

Ten Things You Don't Know About Kathleen Sweet

By Jennifer Andrus

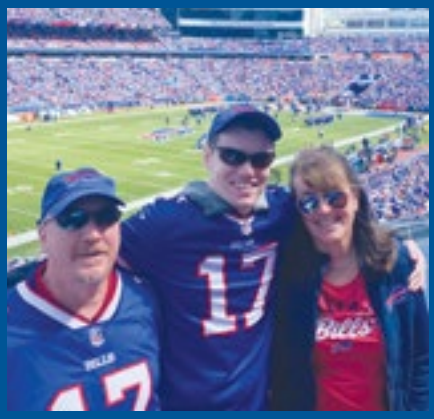
1 Kathleen grew up in Clarence, New York, the middle child of three daughters of David and Jane Sweet.

2 The Sweets are multi-generation, diehard Buffalo Bills fans. Kathleen's mom took her to games in any weather: rain, sleet or snow.

3 She is a member of the Boston College Varsity Club Hall of Fame.

4 Kathleen inherited her love of the Red Sox and the Celtics from her grandfather, Stanton Sweet. She looks forward to the NYSBA game at Yankee Stadium on Aug. 22.

5 Musical favorites include Whitney Houston, Adele, Pink and the Goo Goo Dolls.



6 Kathleen met her husband Brian Fredericks at a happy hour arranged by mutual friends who thought they should meet.

7 The craziest thing she ever did was go parasailing in Florida.

8 Kathleen's two grown children are: Caroline, who just graduated from law school and is a NYSBA member, and Michael, who is an analyst for a defense contractor at the Pentagon.

9 Kathleen's most prized possessions are her dogs and her family photo albums.

10 Kathleen and Brian enjoy the theater. Her favorite musical has always been Wicked.

President-Elect Taa Grays: Advancing the Mission of the Association

By Jennifer Andrus

"The New York State Bar Association is the place where lawyers come together to teach each other and help people understand the practice of law," said Taa Grays, incoming president-elect of the association. "For me, there have been many people in the association over the years who have given me opportunities to learn new areas of the law and sharpen my skills."

For more than 20 years, Grays has worked on behalf of the New York State Bar Association on issues from police reform to strategic planning and corporate governance. She also sharpened her leadership skills during her years as a delegate, committee member, section leader and the association's secretary. Those leadership roles have given her a rich background of experience that she will draw upon in her new role as president-elect, especially as she chairs the House of Delegates and co-chairs the President's Committee on Access to Justice.

A Personal Commitment to Service

Encouragement to serve was ingrained in Grays from an early age.

"My parents really shaped my commitment to service," said Grays. "They were public school teachers. Their influence around helping others, bringing people from behind along with you, instilled in me a commitment to service."

She shared her parents' passion for teaching, but they encouraged her to pursue a law degree rather than one in teaching. "My parents grew up at time when African Americans were denied access to justice. Going to law school was a way to be an advocate for those who could not advocate for themselves." That led her to Georgetown Law School.

Armed with a desire to help others, she started her legal career at the Bronx District Attorney's Office. While learning how to be a trial attorney, she also saw how the role of the district attorney can be integral to advancing access to justice.

"We are all looking to achieve justice and the district attorney's office has to make sure the police follow the rules to protect people's rights," she observed. "I learned that access to a fair system is important for both sides."

Supporting the Association's Commitment to Access to Justice

Her early personal and professional experiences along with her decades of commitment to the association will serve her well in the coming year as the chair of the Committee on Access to Justice.

Advancing justice is an integral part of the association's mission. The mission statement reads: "The New York State Bar Association will continue to be the leading voice for the legal profession by advancing the professional success of our members, equal access to justice, and the rule of law."

The Committee on Access to Justice advances this mission by considering and implementing methods for enhancing access for the indigent to the civil legal system. Grays feels that access to justice extends beyond race to encompass socioeconomic and geographic factors and should ensure the availability of lawyers in rural counties as well as in densely populated urban areas.

Grays has already worked on these issues. Shortly after the death of George Floyd in 2020, she was appointed co-chair of the Task Force on Racial Injustice and Police

Reform with Co-Chair T. Andrew Brown. Following the task force's work, Brown, then president of the association, appointed her to co-chair the Task Force on Racism, Social Equity, and the Law.

Supporter-in-Chief

The role of president-elect is also one of team builder and emissary for the president. Grays is focused on advancing the work of the association and supporting President Kathleen Sweet's agenda.

"As part of her team, I am here to assist her in her success," she said. "My role is to make sure her initiatives are successful, including supporting her efforts with our new all-inclusive membership model."

Grays also looks forward to connecting with the volunteer leaders as chair of the House of Delegates as well as members at association-wide events and those held by the sections, which are divided by practice areas and demographics. Grays is a member of the Business Law, Women in Law and Corporate Counsel sections, and was the chair of the Business Law Section Diversity & Membership Committee.

"By working on the strategic plan for the association," she said, "it highlighted for me the valuable role of the sections. I look forward to attending many section events and connecting with members in the coming year."

Thomas J. Maroney, Secretary

Thomas J. Maroney is the secretary of the New York State Bar Association. He previously served on the NYSBA Executive Committee and in the NYSBA House of Delegates as an elected member-at-large. He is chair of the NYSBA Committee on Association Insurance Programs and a member of the Gala Sales Committee. He also serves on the NYSBA Committee to Review Judicial Nominations.

Maroney served as a member of the Task Force on Medical Aid in Dying, Working Group on Facial Recognition Technology and Access to Legal Representation, and the Emergency Task Force on Solo and Small Firm Practitioners. He also served as the NYSBA Membership Committee chair.

Maroney was a contributing author of NYSBA's "Post Trial Practice and Procedures." He has lectured on civil trial practice, negotiating strategies and alternative dispute resolution. He served as chair of the NYSBA Torts, Insurance and Compensation Law Section.

He is the president of the New York City Trial Lawyers Alliance, which is dedicated to promoting professionalism and collegiality in civil trial advocacy.

Maroney is a past president of the Defense Association of New York and the Emerald Association of Long Island. He served on the board of directors of the Defense Research Institute. He serves on the boards of the New York Claim Association and the St. John's University School of Law Alumni Association.

He is a member of the New York County Lawyers, Bronx Bar and Nassau County Bar associations. A graduate of Siena College and St. John's University School of Law, he has dedicated his practice to high exposure, catastrophic and complex civil defense litigation. He has been a member of the First Department Character and Fitness Committee since 1998.

Maroney is the recipient of the DRI Outstanding State Representative Award, DRI Exceptional Performance Award, New York State Bar Association Section Diversity Challenge Champion Award as chair of the TICL Section, the New York City Brehon Law Society Outstanding Attorney Award, the NYSBA TICL Section Leach Memorial Award and the Institute of Jewish Humanities Defense Lawyer of the Year Award.

The Defense Association of New York presented the James S. Conway Award to Maroney in recognition of his lifetime dedication to the ideals of diversity, equality, professionalism, and dignity for all who seek justice through our courts.

Susan L. Harper, Treasurer

Susan L. Harper began her term as treasurer of the New York State Bar Association on June 1, 2023.

Harper is the founding chair of the association's Women in Law Section and served as chair of the Committee on Women in the Law, where she successfully spearheaded initiatives and legislation to advance issues pertaining to women in the legal profession and advocated for the fair and equitable treatment of all women under the law.

Harper serves on the association's Executive Committee, Finance Committee, Investment Committee, and Audit Committee, and is the Executive Committee liaison to the Women in Law Section, the Committee on Attorney Well-Being, and the Lawyer Assistance Committee. She served as chair of the association's Attorney-Client Relations Working Group on the Task Force on the Post-Pandemic Future of the Profession and was a member of NYSBA's Strategic Planning Committee, the Task Force on Free Expression in the Digital Age, the Working Group on Judiciary Law Section 470, and chair of the Women in Law Section's Centennial Suffrage Commemoration initiative.

Harper is a member of NYSBA's Corporate Counsel, Elder Law and Special Needs (and its legislative subcommittee), Commercial and Federal Litigation, and Business Law sections. Prior to becoming an officer, she presented to the House of Delegates on six occasions to advance paid leave, the Equal Rights Amendment, and the creation of the Women in Law Section.

Harper has been admitted to the New York and New Jersey bars. She focuses her practice on business advisory, financial services, senior fraud and financial exploitation prevention, legislation, policy development, and not for profit law. She also works with organizations and individuals to advance and amplify issues, ideas, causes, and services through advocacy, strategy, and communications.

She has represented major broker-dealers, insurance companies and clearing firms and their employees on matters before the Financial Industry Regulatory Authority, the Securities and Exchange Commission and state and federal courts in connection with customer, industry, and employment disputes. She recently served as a managing director of a nationally recognized financial services expert witness and consulting firm.

Harper is a member of the New York County Lawyers Association board of directors and its nominating committee, co-chairs the Securities and Exchanges Committee, and is past chair of the Women's Rights Committee.

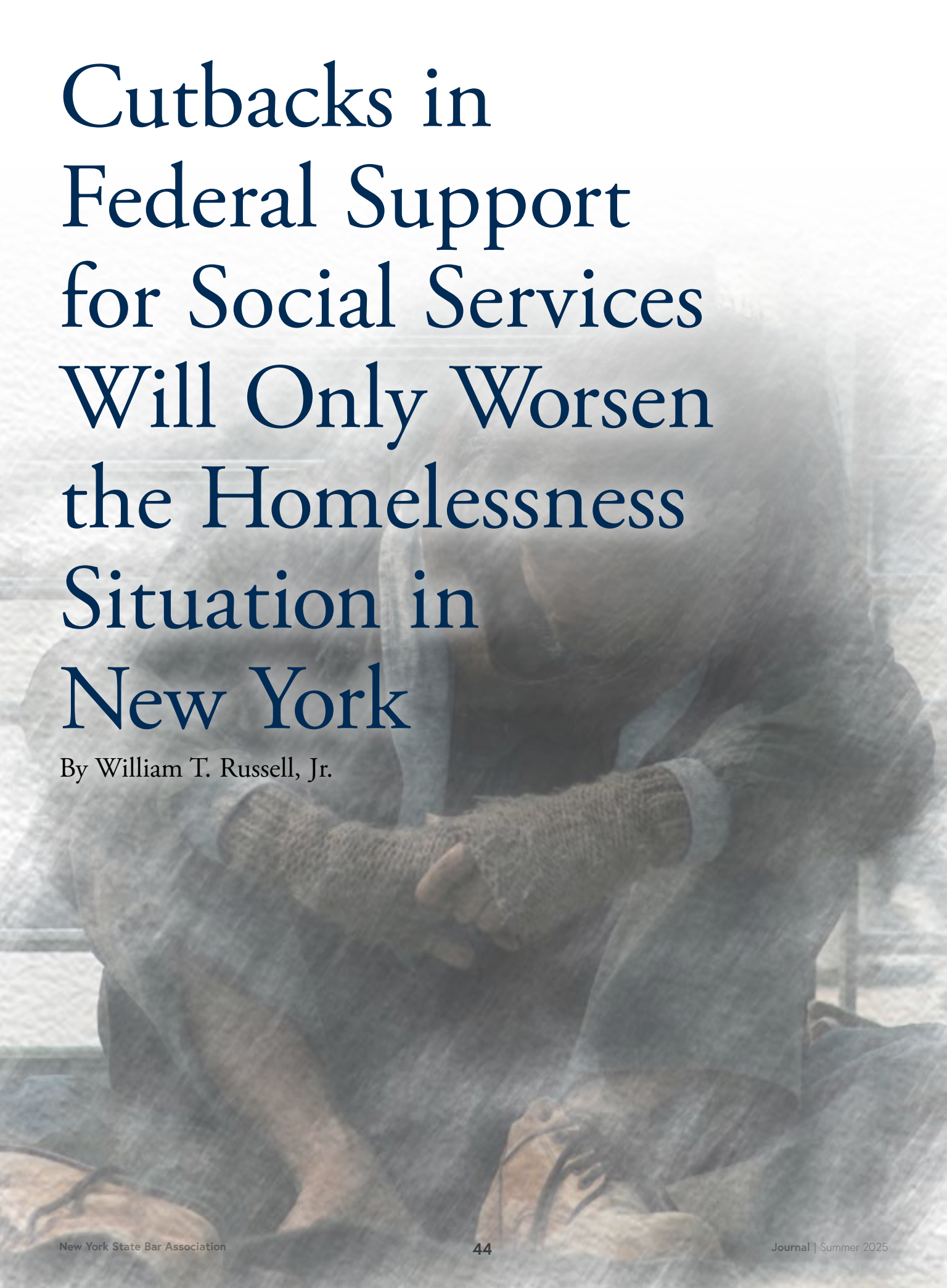
She served as president and chair of the board and Executive Committee of the Financial Women's Association of New York and the association's New York Educational Fund. She also served as its board restructuring chair and general counsel for several years and was the organization's liaison to the United States military for over a decade.

Harper earned her law degree from New York Law School and her bachelor's degree in business management from Simmons College in Boston.

She is a recipient of Hofstra University's Maurice A. Deane School of Law's Outstanding Women in Law award and has been honored as a Public Sector Woman of the Year by the Financial Women's Association of New York.

Cutbacks in Federal Support for Social Services Will Only Worsen the Homelessness Situation in New York

By William T. Russell, Jr.



In January, the New York State Bar Association's House of Delegates and its Executive Committee approved the Report and Recommendations of the New York State Bar Association's Task Force on Homelessness and the Law.[1] While the report described in detail the scope of this tragic situation and offered multiple policy recommendations that could result in significant improvements, the current and expected future cutbacks in federal government support for homelessness initiatives and related programs will significantly impede any efforts at improvement and will only make a bad situation worse.

In its report and recommendations, the task force described at length the homelessness situation in New York and the rest of the nation, identified the various causes of homelessness and housing insecurity, described the existing programs and resources available to address the needs of individuals experiencing homelessness and housing insecure individuals and provided a series of policy recommendations to improve this situation that has such a devastating effect on the lives of so many members of our community.

As noted in the task force report, homelessness is a significant issue in the United States that impacts hundreds of thousands of Americans. In 2023, New York State had approximately 15% of the nation's homeless population. The U.S. Department of Housing and Urban Development, which has been tasked with administering homelessness services on a national level, estimated there were at least 653,104 individuals experiencing homelessness nationwide and at least 103,200 in New York as of December 2023.[2] By December 2024, those numbers had grown to 771,480 nationwide and 158,019 in New York.[3] These estimates are generally recognized as greatly undercounting the number of individuals experiencing homelessness and do not include, for example, individuals who are living in their cars or "couch surfing."

One of the key takeaways from the task force report is that resources matter. Experience demonstrates that the investment of resources in addressing homelessness can make a meaningful difference, and the report provides examples of several programs, initiatives and other resources that have a positive impact on the homelessness situation and on the lives of those whom it affects.

An excellent example of this is the significant progress that has been made since 2009 in reducing the number of military veterans experiencing homelessness and housing insecurity. This is a direct result of the increase in the amount of resources devoted to the support of this population. Veterans have made unique sacrifices to defend the American people and our freedoms, but military service members who have left active duty face many challenges returning to civilian life, including access to housing. Only 5% of Americans are veterans, but 11% of unhoused adults are veterans, and that is likely underrepresentative of the true magnitude of the problem.[4]

While these figures are sobering, they represent a dramatic improvement over earlier periods in which fewer resources were available to meet the needs of our nation's veterans. In recent years, the U.S. Department of Veteran Affairs has made progress in reducing the number of our nation's veterans experiencing homelessness through federal funding of numerous programs and initiatives including, among others, the HUD-Veterans Affairs Supportive Housing program, Supportive Services for Veteran Families and the Grant and Per Diem Program. The impact has been particularly profound in New York state. The program is a collaborative program between the Department of Housing and Urban Development and the VA to provide both housing vouchers and VA supportive services (health care, mental health treatment and substance abuse counseling) to help homeless veterans and their families find and maintain permanent housing. The VA also assists very low income veterans who are facing imminent loss of their home through the Supportive Services for Veteran Families program. This program provides supportive services grants to private nonprofit organizations and consumer cooperatives that assist very low-income veteran families residing in or transitioning to permanent housing. The organizations receiving grants provide a range of supportive services to eligible veteran families that are designed to promote housing stability. Finally, the Grant and Per Diem Program is offered annually (as funding permits) by the VA to fund community agencies providing services to veterans experiencing homelessness. This program awards grants to community-based organizations to provide transitional housing with wraparound supportive services to assist vulnerable veterans move into permanent housing. The grants are designed to meet veterans at various stages as they move to stable housing.

These efforts have had a dramatic effect: between 2009 and 2019 "veteran homelessness in the United States fell by nearly half – a decline of about 36,000 people who were without housing on any given night."[5] This decline was the result of policy initiatives like those described above that prioritized increasing veteran housing and providing the necessary wraparound services (e.g., mental health counseling and case management) that assisted this population in obtaining and remaining in housing. The significant decrease in the number of veterans experiencing homelessness during the tenure of these programs is persuasive evidence of the positive effect that well-funded, targeted programs can have.

Another example of the successful devotion of resources to address homelessness issues occurred last year in Westchester County when government officials wanted to remove a homeless encampment under a New York State Thruway overpass in Port Chester. Efforts to forcibly remove individuals experiencing homelessness who are sleeping on public property are likely to increase after last year's United States Supreme Court decision in *City*

of Grant's Pass v. Johnson.[6] In that decision, a 6-3 majority ruled that a municipality's enforcement of an ordinance banning camping on public property against individuals experiencing homelessness does not violate those individuals' constitutional rights.

Rather than arrive unannounced and simply evict all the inhabitants, which typically just results in further disruption of the inhabitants' lives and their relocation to another public space, the New York State Thruway Authority, with support from the New York State Police, took a different approach. They offered a substantial window of time in which to relocate the occupants and their possessions. A key stakeholder meeting was set up that included the county's Department of Community Mental Health and Social Services, the Thruway Authority, state and local police and Search for Change, a nonprofit organization in the Hudson Valley that provides intensive outreach, engagement and care coordination services to individuals experiencing street homelessness and those in temporary shelter settings.

From February through May 2024, agency staff and the nonprofit team planned and worked with the encampment residents to connect them to housing and services. After nearly four months of these groups working together, encampment removal went forward. The remaining occupants were given a date certain for the closure and information on where their remaining possessions would be taken and how to retrieve them. The nonprofit team was present and worked with the occupants to track and retrieve whatever possessions remained that they wanted to store and keep. The fences and the site were posted – not just with "No Trespassing" signs but also signs that told people how to contact the team for assistance if they were homeless and looking to return or seeking help. This successful approach to a homeless encampment can and should be replicated elsewhere, but it requires investment of resources from a variety of stakeholders.

These are just two examples of success in reducing the number of individuals experiencing homelessness and addressing the needs of those individuals and of individuals facing housing insecurity. There are many other examples described in the task force report. Unfortunately, many – if not most – of the programs and initiatives that enjoy success in addressing homelessness receive necessary support in the form of direct or indirect federal funding. While the full extent of upcoming federal budget cuts is uncertain, it is clear that there will be significant cuts to a variety of governmental agencies and programs that provide crucial support.

For example, HUD's Office of Community Planning and Development, which funds housing and other support for individuals experiencing homelessness, is expected to lose 84% of its staff as a result of budget cuts, and the rest of HUD is facing projected staff cuts of 50% as a result of the Department of Government Efficiency initiative.[7] This puts at risk approximately $3.6 billion in pending federal grants to shelters and other homelessness providers including faith-based charities, organizations providing housing for survivors of intimate partner abuse and programs serving veterans in need of housing assistance.[8]

In addition, more than 80,000 jobs, representing more than 17% of the staff – one quarter of whom are veterans themselves – are expected to be cut from the VA that, as noted above, has made significant progress in reducing the number of veterans experiencing homelessness.[9]

In New York State alone, federal budget cuts are expected to result in hundreds of millions of dollars in losses to crucial programs, including more than $300 million in Department of Health funding for a variety organizations across the state, $40 million in funding for the Office of Addiction Services and Supports that backs programs including transitional housing and $27 million in funding for the Office of Mental Health that includes programs designed to allow individuals in need of care to remain in their homes.[10]

According to Deborah L. Worden, the executive director of Action Toward Independence, a nonprofit that provides services to individuals with disabilities in Orange and Sullivan counties, "the cuts to federal funding and restrictions being placed on federal funding threaten the ability of community-based organizations like ours to continue to serve the most vulnerable and historically underserved populations."

The New York State Bar Association's task force report contains encouraging examples of programs that work. They not only help address the needs of individuals experiencing homelessness; they also help prevent individuals from losing their homes in the first place and accordingly reduce the societal costs associated with high rates of homelessness. When the task force issued its report earlier this year, the hope was that the policies and programs it recommended could help reverse the upward trend in homelessness. Given the important role of federal support – including serving as the ultimate source of funding for many state programs – the significant cutbacks in federal funding that are underway will make this arduous task even more difficult. But hopefully New York State will find the money to preserve as many of these crucial programs as possible until the federal administration sees fit to provide adequate support for the most vulnerable members of our society.

William T. Russell, Jr. is a partner at Simpson Thacher & Bartlett in the firm's litigation department and is head of the firm's bankruptcy and restructuring litigation practice group. He represents financial institutions, private equity sponsors, corporations and other businesses in a wide variety of commercial disputes. He is chair of the New York State Bar Association's Task Force on Homelessness and the Law, a member of the New York City Bar Association's Board of Directors, and a member of the American Law Institute. He has chaired Legal Services NYC's Board of Directors and served on the Executive Committee of the New York State Bar Association.

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Craig Maclean Johnson
Robert William Johnson
Kevin Charles Jones
E. Danielle Jose-Decker
Michele Kahn
James I Kaplan
Scott M. Karson
Jerrold G. Katz
Satwant Kaur
Deborah Hollis Kaye
George A. Keenan
Jake Johnson Keester
Francis T. Kelly
William M. Kelly
Matthew J. Kelly
M. Bernadette Kenny
Dennis Kenny
Russell William Kessler
Daniel John Kheel
Vincent Kim
Alec Chase Kirschenbaum
James Milrod Koblenzer
Scott A. Korenbaum

Andreas Koutsoudakis
Theresa Dawn Truitt Kraft
Stephen J. Krass
Ronald Kreismann
Laurel R. Kretzing
Erik Kristensen
Tracey Murray Kupferberg
Marissa Rose Labelle
Joseph G. LaCapra
Robinson B. Lacy
Lambros Y. Lambrou
Kevin A. Landau
William Mark Lanier
Madeleine Danielle Laser
Jaime Lathrop
Glenn Lau-Kee
Richard Lavorata
Bernice K. Leber
Charlotte Cho-lan Lee
Frank Lee
Inkyung Lee
Matthew J. Leeds
David Leve
Howard A. Levine
Peter H. Levy
Evan Li
Susan B. Lindenauer
Troland S. Link
Caren L. Loguercio
Mark A. Longo
Michael Lotto
Jennifer Lupo
Alexia Jena Maas
Frank Maas
Ian William MacLean
Joan Anne Madden
Gustavo Adolfo Madero
Kathryn Grant Madigan
Theresa Noel Maguire
Jacqueline R Mancini
Kenneth A. Manning
Dominique Manzolillo
Jonathan S. Margolis
Michael A. Marinaccio
Michael A. Markowitz
Evan Maron
Thomas J. Maroney
Alexander Isaiah Martin
Frederick S. Marty
Dudley Maseko
Yasmeen Mashriqi
John Fouad Matouk
Christopher S. Mattingly
Allan E. Mayefsky
Edward Mazzu
David J. McCabe
John T. McCann
Maureen W. McCarthy
Terrence Eugene McCartney
Dennis R. McCoy
David E. McCraw
Ann Marie McGrath
Bruce J. McKeegan
Michael J. McNamara
Sarah Diane McShea
Norma G. Meacham
Tyler Roberts Meade
Christopher Blake Meagher
Henry T. Meyer
David W. Meyers
Derrick S. Milam
Claire C. Miller
Steven E. Millon
Melissa M Mirabelli
Neville Mitchell
Joseph P. Moan
Michael M. Mohun
David Molot
Charles A. Montorio-Archer
Hazen Moore
Maitreyee Mopalwar
Oscar Luis Moret
Peter J. Moschetti
Jonathan S. Moses
Marc Lee Mukasey
James F. Munsell
Sophia Murashkovsky
James P. Murphy
Ann Marie Murzin
Yakov Mushiyev
Domenick Napoletano
Eduard P. Eduard Nedelcu
Richard P. Neimark
Stephen William Nesspor
Jacqueline N. Newman
Maura Nicolosi
Annapurna Nimmacheti
Vivekananda Nittala
John M. Nonna
Jane Phillips Novick
Anthony Armando Nozzolillo
Amanda H. Nussbaum
Carolyn G. Nussbaum
Uloaku Nkechi Nwachukwu
Donald W. O'Brien
John F. O'Donnell
Maria Del Pilar Ocasio-Douglas
Hideo Okamoto
Robert J. Olejar
Gregory E. Ostling
Ann-Elizabeth Ostrager
Tomoyuki Otsuki
Anthony Robert Palermo
Mark Henry Palermo
Vito Palmieri
John A. Pappalardo
Jessica D. Parker
David A. Parsons
Melissa Munoz Patterson
Jennifer Leigh Pelton
Michael F. Perlis
John J. Petosa
John J. Phelan
Vincent F. Pitta
Tara Anne Pleat
Alfred J. Polizzotto
Kevin A. Pollock
Natalia Porsche
Daria L. Pratcher
Paul Marnell Price
Griffith B. Price
Marcella Gabriella Rabinovich
Courtney S. Radick
Darshan Ramdhani
Raymond A. Raskin
William Victor Ratkus
Edward L. Redmond
Richard Reich
Thomas Reichard
Elizabeth L. Reilly
Samuel Rein
Jacquelynn Nicolle Remery-Pearson
M. Catherine Richardson
Edwina G. Richardson
Aimee L. Richter
Michelle F. Rider
George E. Riedel
Jan H. Riley
Sandra D. Rivera
Kathy Robb
Marc W. Roberts
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Manuel A. Romero
Patricia A. Rooney
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David B. Rosenbaum
David Rosenberg
Stuart L. Rosow
Romeo Gallo Roxas
Marguerite E. Royer
Katherine Marie Ruiz Boada
Kendall Ruiz Jiménez
William Richard Allen Rush
William T. Russell
Mirtha Camille Sabio
Brad R. Sacks
Jesse A. Safer
Roland Sabeh Salloum
Christina M. Santiago
Tzvi Saperstein
Jorge L. Sarmiento
Scott Justin Saturn
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Michael L. Schler
Kenneth L. Schmelkin
Robert T. Schofield
Max F. Schutzman
A. Joseph Scott
Kathleen A. Scott
Karen Scowcroft
Adam Seiden
Barry Aaron Semel-Weinstein
Gregory V. Serio
Steven B. Shapiro
Lauren E. Sharkey
Jeffrey J. Sherrin
Patricia J. Shevy
Lisa Lynn Shrewsberry
Michael S. Shuster
Sajeev K Sidher
Giovanni P. Silvagni
Mary Dietz Silver
Perry D. Silver
Adam W. Silverman
Lorraine R. Silverman
Rebecca J. Simmons
David C. Singer
Stuart Siris
Zachary Robert Sizemore
Deborah A. Slezak
Pamela M. Sloan
Todd Hunter Sloan
Craig Z. Small
Richard Lewis Smith
Jarrod William Smith
Mary Walsh Snyder
Enet Clover Somers-Dehaney
Howard V. Sontag
Evan J. Spelfogel
Richard Cary Spivack
James L. Stengel
Julie Maya Stoil Fernandez
Anne F. Stone
Joel B. Strauss
Sanford Strenger
Aditya B. Surti
Kathleen Marie Sweet
Robert N. Swidler
Douglas Tabachnik
David J. Taffany
Joseph R. Talarico
Martin H. Tankleff
Michael G. Tannenbaum
Patricia Anne Taylor
Kim Annalisa Taylor
Steven C. Teague
Arthur N. Terranova
Janet M. Thayer
Daniel McLawrence Thompson
Jeffrey N. Todd
Michael A. Tognino
Toni Jaakkima Toikka
Lisa-Sheri Torrence
Geraldine N. Tortorella
Mitchell Andrew Toups
James Patrick Tracy
Jonah Triebwasser
Dana L. Trier
Juan Trillo
Thomas Tripodianos
Bill Tsevis
John N. Tsigakos
John M. Tucciarone
Adam Solomon Uris
Eric Vallone
Julian Ricardo Vasquez
Thomas O. Verhoeven
John Vito Vincenti
Paul Joseph Vincenti
Gerard Virga
Leandros Vrionedes
Shawn Xiao Wang
Chuqiao Wang
Adrian Henry Franklin Ward
Leonard M. Wasserman
Hajime Watanabe
Stephen H. Weinstein
Steven J. Weiss
Warren Welch
Sharon L. Wick
Bryan J. Wick
Michelle H. Wildgrube
Thomas D. Williams
James W. Winslow
Tracy Cheuk Chi Wong
Margaret Wong
Philip B. Wright
Gerard Michael Wrynn
Oliver C. Young
Stephen P. Younger
Leonard D. Zaccagnino
Mark C. Zauderer
Peter Zlotnick
Gary A. Zucker

Can Ethical Screens Resolve Conflicts of Interest?

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.**

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To the Forum:

I am a senior associate at Jones & Smith, a 30-lawyer firm on Long Island. One of the two founding partners, Tom Smith, came to me yesterday with astonishing news: he had just told his co-founder, Elbert Jones, that he (Tom) was leaving to go to a rival firm, Young & Zachary. He told me he had asked Elbert for permission to speak to me about coming with him, and Elbert – with whom I rarely work – had agreed. Tom has offered me a partnership at Y&Z, and I'm excited about the possibility. Tom is also hoping another J&S associate, Alan Able, will come with us.

There are, however, two major problems. First, Tom, Alan and I have for years been representing MegaManu, Inc., a large, closely held manufacturing company, in an antitrust dispute with its rival Cartels-R-Us, Inc. Cartels-R-Us is represented in that action by Y&Z. Over the years, I have had limited involvement in the case: I have taken a couple of depositions of mid-level witnesses and been at occasional meetings with client representatives discussing case strategy. Tom is the main interface with the client and has principal responsibility for the case; when a major tactical decision has to be made in the case, or a principal needs to be deposed, Tom handles that. Alan's involvement in the case has mainly been limited to conducting legal research.

Second, Alan comes from a wealthy family, and he is the beneficiary of a family trust that owns 33% of MegaManu's stock. The value of that stock would be adversely affected if MegaManu loses the lawsuit.

I have expressed concern about all this creating a conflict if we move to Y&Z. Tom has spoken to Y&Z about it and they say there is no problem – all we have to do is create an ethical screen. I heard that a recent change in the ethics rules might impact our response, but I don't know what that change is and how it could help us.

May all three of us move to Y&Z? Will an ethical screen work to avoid a disqualification motion in the MegaManu/Cartels-R-Us case?

Sincerely,
W. E. Moving

Dear W. E. Moving:

New York has long maintained a strict approach concerning the imputation of conflicts of interest under the governing ethics rule, New York Rule of Professional Conduct 1.10, and relevant case law. Traditionally, New York has disqualified entire law firms based on the conflict of one lawyer, without allowing firms to use ethical screening to solve the problem. Ethical screening is the method by which a lawyer is isolated – or "screened" – from the rest of the firm so that they cannot pass information they may have about conflicted representations to other lawyers.[1] The screen must not only be effective, it must be timely – imposed as soon as reasonably possible after the conflict is discovered.[2]

But the rules we live by are subject to change. Over the past two decades, evolving national standards, the practical realities of lawyer mobility, and critiques of the harshness of the automatic imputation rule culminated in New York's amendments to Rule 1.10 last January. These amendments represent a significant shift, particularly in permitting screening to cure conflict problems for certain lateral moves and narrowing the automatic imputation of personal interest conflicts.

New York's Traditional Approach to Imputation and Disqualification

Since the enactment of the New York Rules of Professional Conduct in 2009, and indeed for decades before that under New York's Code of Professional Responsibility,[3] New York's ethical rules provided for strict imputation of conflicts. Until the recent amendments, Rule 1.10(a) read:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when *any one of them practicing alone* would be prohibited from doing so by Rule 1.7 [client-to-client and personal interest conflicts], 1.8 [specific types of conflicts] or 1.9 [former client conflicts], except as otherwise provided herein.

Put bluntly, this means that if one lawyer had a conflict, every lawyer in the firm was deemed to have the same conflict – no matter how large the firm and whether the lawyer with the conflict was located in the same office as the other firm lawyers working on the matter causing the conflict. While Rule 1.10 did, to be sure, have exceptions, they were limited – for example, if the lawyer's leaving means no one left in the former firm has any material confidential information about the matter,[4] if the lateral lawyer's new firm has no one left with material confidential information about the now-adverse client's matters,[5] or if the conflicts are waivable and properly waived.[6] This strict imputation rule created real problems for lawyers moving laterally, as the possession of material confidential information about a case by a lawyer contemplating a move to the adverse firm – no matter how junior the lawyer or limited their role in the case – would be enough to stop the move.

Consistent with this strict language, New York courts historically adopted a rigid stance on the imputation of conflicts of interest, based heavily on concerns of loyalty, confidentiality, and public trust in the integrity of the judicial process. Early federal and state court decisions established the trajectory that eventually led to the necessity for reform.

In *Cinema 5 Ltd. v. Cinerama, Inc.*, the Second Circuit early on endorsed strict disqualification principles. The court emphasized that even the appearance of impropriety could warrant disqualification. ("'[A]n attorney must avoid not only the fact, but even the appearance, of representing conflicting interests[.]'").[7] In *Cinema 5*, where an attorney was a partner at two firms who represented both parties in the litigation, the court held that "because of the peculiarly close relationship existing among legal partners, if [the attorney] is disqualified, his partners at [his law firm] are disqualified as well."[8]

Similarly, in *Cheng v. GAF Corp.*, the Second Circuit demonstrated a rigorous attitude, disqualifying a law firm based on the movement of a lawyer who had exposure to confidential information, even if the information's relevance to the new matter was not particularly clear.[9] In *Cheng*, the attorney in question worked as a legal services attorney who represented the plaintiff (Cheng) in an employment action against the defendant (GAF).[10] However, the attorney, as conceded by the plaintiff, did not represent the plaintiff in any litigation.[11] While the action was still pending, defense counsel hired the plaintiff's attorney to work in their firm.[12] Defense counsel opposed disqualification by arguing that it had effectively screened the attorney from the ongoing Cheng case.[13] The court, however, questioned the feasibility of a screen as the defense counsel had "a relatively small firm."[14] The court further echoed the *Cinema 5* decision's concern about avoiding the appearance of impropriety.[15]

State court decisions parallel these developments. For example, in *Cardinale v. Golinello*,[16] the New York Court of Appeals, after disqualifying a small firm lawyer from an action, likewise disqualified all attorneys in that firm from such representation. However, the court eventually loosened its grip, at least a little bit. In *Solow v. Grace & Co.*, the court acknowledged that while a presumption of shared confidences arose when a lawyer moved between firms, it could theoretically be rebutted. ("In this situation, the court must presume that the rights of the former client are jeopardized by [the law firm's] subsequent representation of plaintiffs, but [the law firm] should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client.").[17]

However, the court made clear that overcoming the presumption was a difficult task, stating "[i]f the firm can demonstrate prima facie that there is no reasonable possibility that any of its other attorneys acquired confidential information concerning the client, a hearing should be held after which the court may determine that disqualification be unnecessary."[18] In other words, the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation. The court's framework still tilted heavily toward disqualification, absent compelling proof of an effective screen.

This conservative approach was reaffirmed in *Kassis v. Teachers' Ins. and Annuity Association*. There, the Court of Appeals held that an ethical screen was insufficient to rebut the presumption of shared confidences where a lawyer, although an associate, had significant involvement in a matter at the former firm, having handled depositions and discovery conferences.[19] Importantly, the court rejected the sufficiency and practicability of precautionary measures under the screen because of the attorney's "extensive participation in the Kassis litigation," and finding that "defendants' burden in rebutting the presumption that [the attorney] acquired material confidences is especially heavy."[20]

Hempstead Video: The Approach Begins To Change

Over time, signs of a shift began to emerge in the Second Circuit. Six years after *Kassis,* in *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, the Second Circuit confronted a situation where an "of counsel" lawyer to a firm had previously represented a party that had since become adverse to the firm's client.[21] Rather than imposing automatic disqualification, the court permitted continued representation provided that effective screening measures were in place.[22] ("We see no reason why, in appropriate cases and on convincing facts, isolation – whether it results from the intentional construction of [an ethical screen] or from *de facto* separation that effectively protects against any sharing of confidential information – cannot adequately protect against taint."). Although *Hempstead Video* involved an "of counsel" relationship – structurally more attenuated than that of a partner or associate – it signaled a growing recognition that strict imputation rules might not always be appropriate, particularly where modern law firm structures and ethical screens could realistically protect client confidences.

Recognizing that it was time for a change, the American Bar Association came to that conclusion at approximately the same time, and in 2006 amended Model Rule of Professional Conduct 1.10 extensively to allow for screening on *all* lateral moves, as long as certain conditions were met. These conditions included written notice to the former client of the screening procedures, an initial certification that correct screening procedures are being followed, and later certifications to the same effect at "regular intervals" during the life of the matter.[23]

Following *Hempstead Video,* federal district courts in New York were much more willing to allow nonconsensual screens in the context of lateral moves, particularly if the lawyer moving was an associate or had a minimal role in the case causing the conflict.[24] But these decisions were not always uniform.[25] Moreover, state courts remained much more likely to follow the plain language of Rule 1.10(a) and the rule of *Kassis,* continuing to disqualify lateral lawyers who had played a minimal role in the case at their former firms.[26] The short of it is that whether a New York court would allow a nonconsensual screen in a given case became more and more difficult to predict, making even a junior associate's lateral move increasingly risky.

In 2018, responding to growing dissatisfaction with this state of affairs, the New York State Bar Association,

through its Committee on Standards of Attorney Conduct, proposed amendments to Rule 1.10. Composed of practicing attorneys, academics, and judges, the committee was specifically tasked with evaluating and recommending improvements to New York's ethical framework. Recognizing that New York's rules had fallen out of step with the ABA Model Rules and the realities of modern law practice, the committee advocated for a more pragmatic approach. Its proposals sought to permit the use of nonconsensual screens in appropriate circumstances so as to reduce the risk that a lateral move would result in disqualification. After a seven-year process, a new version of Rule 1.10 was promulgated in January, ushering in a more flexible, case-sensitive approach to imputation and disqualification.

The 2025 Amendments to New York Rule 1.10

The 2025 amendments to Rule 1.10 of the New York Rules of Professional Conduct mark a pivotal shift in the state's approach to imputed conflicts. The amendments introduced three key reforms: (1) limiting the imputation of personal interest conflicts; (2) narrowing disqualification based solely on file retention; and (3) allowing screening of lateral hires in most situations.

First, Rule 1.10(a) was revised to limit the automatic imputation of personal interest conflicts under Rule 1.7(a)(2). Under the prior rule, a lawyer's personal conflict – such as a financial interest in the outcome of a matter – was imputed to the entire firm, even where no other lawyers were affected. The amended version creates a carve-out: if the conflict is based solely on a lawyer's personal interest, and a reasonable lawyer would conclude that no significant risk exists of materially limiting the other firm lawyers' representation, then the conflict is not imputed. This change reflects a recognition that personal conflicts – particularly those involving family or financial ties – do not necessarily impair the judgment or independence of uninvolved colleagues.

Second, the amendments clarified Rule 1.10(b) to address situations where lawyers with knowledge of a matter have departed the firm and taken the client with them. Previously, the firm's mere possession of files related to the former client could trigger disqualification. The revised rule shifts the focus to actual knowledge: disqualification may occur only if a lawyer remaining at the firm has actual knowledge of, or has accessed, the former client's confidential information. This clarification reduces the risk of strategic disqualification motions and aligns New York more closely with jurisdictions that emphasize the functional realities of law firm information management.

Third, and most significantly, Rule 1.10(c) now expressly permits the use of ethical screening to prevent the imputation of conflicts arising from lateral hires. The prior version of the rule essentially refused to recognize screening outside narrow exceptions. The amended rule allows for screening, except in litigation or adjudicative matters where the lateral lawyer either (1) substantially participated in managing the case, or (2) had substantial

decision-making authority on a continuous basis. In those situations, the risk of taint is deemed too great for a screen to suffice. This compromise approach retains safeguards for highly sensitive transitions while offering a pathway for many routine lateral moves.

These amendments also bring New York closer to Model Rule 1.10(a)(2), which has long permitted screening to avoid firm-wide imputation. However, New York's rule remains more conservative, still prohibiting the use of screens for lateral lawyers who held material leadership roles in the relevant matter. Whether courts will strictly enforce these limitations or follow the Second Circuit's more flexible approach in cases like *Hempstead Video* remains to be seen.

Together, the 2025 changes to Rule 1.10 reflect a deliberate effort to balance client protection with lawyer mobility and firm autonomy. They preserve core ethical values while offering pragmatic solutions to modern conflicts scenarios.

Still, the amended rule retains important safeguards, particularly in litigation contexts where the risk of taint and unfair advantage is greatest.

Application of the Amended Rule to Your Question

Applying the 2025 amendments to the question that you have addressed to the forum reveals the kinds of nuanced, fact-sensitive analysis the revised Rule 1.10 now invites. The key questions are whether the move of the three lawyers – Tom, W.E. Moving (the author of the inquiry above), and Alan – to Young & Zachary, which represents the adversary in the same litigation, would create an imputed conflict, and whether that conflict could be cured through screening.

Our most immediate concern arises from Tom's role. He is not someone who had a minor role in the litigation. He is the primary relationship partner with MegaManu and has handled all major strategy decisions in the litigation. If Tom were to move to Y&Z, Rule 1.10(c) would likely prohibit screening as a solution because he "substantially participated "in the management and direction of the case" and had "substantial decision-making responsibility" on a continuous basis. Consequently, his move would likely result in an imputed conflict to Y&Z, requiring disqualification if the firm continued to represent Cartels-R-Us in the matter, regardless of the timeliness or efficacy of any screen.

The analysis is more complicated with respect to Moving and Alan. Moving had relatively limited involvement – taking a couple of depositions and attending occasional meetings – but did not manage the case or handle principal witnesses. Alan's role was more limited still, consisting mainly of legal research. On these facts, neither Moving nor Alan appears to have had substantial day-to-day control or leadership responsibilities over the matter. Under the revised Rule 1.10(c), both would be able to move to Y&Z, provided proper screening procedures are implemented to prevent access to information or contact with the lawyers handling the litigation at Y&Z.

However, Alan's situation introduces a second issue – he has a personal interest conflict. He is the beneficiary of a family trust that owns 33% of MegaManu's stock. Under Rule 1.7(a)(2), a lawyer may not represent a client if there is a significant risk that the representation will be materially limited by the lawyer's own financial interests. The amendment to Rule 1.10(a) provides that such personal conflicts are not automatically imputed to others at the firm unless a reasonable lawyer would conclude that the personal interest poses a significant risk to other lawyers' independent judgment. In this case, Alan's financial interest in the outcome of the litigation likely disqualifies him personally but would not be imputed to other Y&Z lawyers – especially if Alan is screened from the matter.

In sum, Tom's move would almost certainly create a conflict for Y&Z that could not be cured by screening. Moving, on the other hand, could potentially move to Y&Z if they are properly screened and do not carry material confidential information or decision-making authority. Alan would need to be removed from the case because of his personal interest, without that being imputed to the rest of the firm. Still, the presence of Tom – whose role triggers the exception to screening – would likely render Y&Z subject to disqualification altogether. The amended rule provides a pathway in limited circumstances, but not where lead litigation counsel changes sides.

Conclusion

The 2025 amendments to Rule 1.10 represent a thoughtful evolution in New York's approach to imputed conflicts. After decades of rigid presumptions and blanket disqualifications, the state has moved toward a more nuanced regime that balances client protection with

the realities of a modern, mobile legal profession. By narrowing the scope of imputation for personal interest conflicts, clarifying the limits of disqualification based on file retention, and – most significantly – authorizing screening in many lateral movement scenarios, the revised rule aligns New York more closely with national standards while preserving vital ethical boundaries.

Still, the amended rule retains important safeguards, particularly in litigation contexts where the risk of taint and unfair advantage is greatest. As the question here illustrates, even under the new framework, lawyers with significant responsibility for a matter – like Tom – cannot avoid imputation through screening. The revised Rule 1.10 gives lawyers more flexibility when they change firms, but not at the expense of core principles of loyalty and confidentiality that govern our profession.

Sincerely,
The Forum by
Ronald Minkoff minkoff@fkks.com
Khasim Lockhart KLockhart@fkks.com
Vincent J. Syracuse Syracuse@thsh.com

QUESTION FOR THE NEXT FORUM

To the Forum:

I am a longtime New York civil personal injury attorney. I thought that I had seen it all. Yet last year, while serving as a plaintiff's trial attorney in a civil battery case, I had to call for testimony a friendly and key eyewitness, a grandmother, who had clearly seen the battery from her front porch. She had never testified in court; I met with her two days before trial. Picture the scene: trial is progressing; her time to testify arrives; I see her grandson in the courtroom at the appointed time and so I know that she is outside waiting for me to call her to the stand. The judge says curtly: "next witness." I ask the judge for a few seconds so that I can send my paralegal to the hallway to get her. He says yes; the paralegal goes. Thirty seconds later, the paralegal opens the door and holds it for her – in she comes, in a wheelchair, struggling to move. This was a surprise to me – she had been perfectly ambulatory the two days before during prep. As I approach the witness, I whisper, "What happened?" She looks up at me, smirks, and says, "My grandson thought I would seem more credible in a wheelchair." I freeze. The judge looks at me impatiently, the jury staring at the witness. What to do? Too late; she is wheeling herself toward the witness stand. Do I address the subject with her in open court, or let it lie? Should I ask her about her wheelchair, more than likely eliciting a lie from her? Impeach her and discredit my own witness and quite possibly sink my client's case? But her substantive testimony would be true and honest! What action did I owe to my client? To the court? To opposing counsel? "Get started, counselor," the judge instructs. I decide to completely ignore her wheelchair and simply elicit from her exactly the testimony that I had prepped with her.

This went perfectly well, and to my knowledge she never lied. Upon her cross-examination, miraculously, the opposing counsel too made no mention of her wheelchair. We won the trial and to this day I have no reason to believe that her feigned disability made any difference in the outcome. But this was a very negative experience. And it has haunted me for a year. There was a multitude of ways in which it could have gone worse than it did. Did I do the right thing? What should a lawyer in my position have done?

Sincerely,
Marcus DeLafayette

Endnotes

1. *See* Rule 1.0(t) (defining "screening").
2. *Id.*
3. *See* DR 5-105.
4. *See* Rule 1.10(b).
5. *See* Rule 1.10(c).
6. *See* Rule 1.10(d).
7. *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386–87 (2d Cir. 1976).
8. *Id.* at 1387.
9. *Cheng v. GAF Corp.*, 631 F.2d 1052, 1059 (2d Cir. 1983).
10. *Id.* at 1054.
11. *Id.*
12. *Id.*
13. *Id.* at 1057.
14. *Id.* at 1057-58. Many of these early cases referred to ethical screens as "Chinese Walls." Since that term is now discredited, we use the term "ethical screen" throughout.
15. *Id.* at 1058-59.
16. 43 N.Y.2d 288 (1977).
17. 83 N.Y.2d 303, 313 (1994).
18. *Id.*
19. *Kassis v. Teachers' Ins. and Annuity Ass'n*, 93 N.Y.2d 611 (1999).
20. *Id.* at 618-19.
21. *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005).
22. *Id.* at 138.
23. MR 1.10(a)(2)(i)-(iii).
24. *See, e.g., In re Air Cargo Shipping Services Antitrust Litig.* No. 06-Md-1775, 2016 WL 727171 at *6 (E.D.N.Y. Feb. 23, 2016) (("[B]ecause [the lateral attorney] does not recall obtaining any confidences relating to any of the defendants now in the case, there is no risk that even inadvertent disclosures may occur."); *Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 393 (S.D.N.Y. 2010) (denying motion to disqualify because "there [was] no substantial relationship between the [prior] litigation and the current case.").
25. *See Gen. Sec., Inc. v. Com. Fire & Sec., Inc.*, No. CV 171194 (DR)(HAYS), 2017 WL 4119622, at *4 (E.D.N.Y. Sept. 15, 2017) (("However, in situations where an attorney shares only limited connections with a firm, such as attorneys often referred to as 'of counsel,' a court may find that the attorney and the firm are not 'associated' for purposes of conflict imputation . . . Courts deciding whether to impute an 'of counsel' attorney's conflict to an entire firm look to 'the substance of the relationship' between the attorney and the firm.").
26. *See e.g., Rodeo Family Enterprises, LLC v. Matte*, No. 600378/2010, 2011 WL 1879056, at *4 (Sup. Ct. Nassau Cnty, May 6, 2011) (following *Kassis* and disqualifying lawyers who performed 3.8 hours of billed work on matter); *Gentile v. Gentile*, 64 N.Y.S.3d 482, 486 (Sup. Ct. Rockland Cnty, 2017) (following *Kassis* and disqualifying attorney despite attorney having no recollection of attending any meetings regarding the defendant's case).

Liberation Day

By David Paul Horowitz and Katryna L. Kristoferson

Most of you recall that President Trump declared April 2 "Liberation Day." Tremendous amounts of ink have been spilled predicting the impact changes to tariff rules will have on our day-to-day lives. With Memorial Day just passed, it is unclear to us what the impact will be, though David just ordered 30 toys for each child on his Christmas list in case prices go up.

For New York State court litigators such as ourselves, we will celebrate a different Liberation Day: July 7, 2025. On that date, Uniform Rule 202.8-g will be repealed, greatly enhancing our lives as litigators. Why and how? Read on.

Oh, and also noteworthy – Uniform Rule 202.8-b is amended effective that same date to make clear that the word count limits in moving, opposing, and reply papers "shall not apply to evidentiary materials such as affidavits, affirmations or reports from lay or expert witnesses."

Uniform Rule 202.8-g

Enacted on Dec. 29, 2020, effective Feb. 1, 2021 and amended on Aug. 31, 2022,[1] Uniform Rule 202.8-g currently provides:

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party may be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party. The court may allow any such admission to be amended or withdrawn on such terms as may be just.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

(e) In the event that the proponent of a motion for summary judgment fails to provide a statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may deny the motion without prejudice to renewal upon compliance, or may take such other action as may be just and appropriate. In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or may take such other action as may be just and appropriate.

Rule 19-a. Motions for Summary Judgment; Statements of Material Facts

A statewide rule regarding statements of material fact originated in the Commercial Division in 2006 and was subsequently adopted in all Supreme Court parts in 2020.[2] The current iteration of the rule in the Commercial Division, amended April 27, 2022 (effective May 2, 2022)[3] and which is not repealed, provides:

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered statement responding to each numbered paragraph in the statement of the moving party. In

the response to the material statement of facts, the respondent shall recite the movant's paragraphs and then provide a response to that paragraph, so the court has all the materials in one document. The movant shall, upon request, promptly provide the respondent with a copy of the material statement of facts in the same word processing software application in which the statement was prepared. The respondent may also include additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

While the goal behind statements of material facts, to narrow the issues before the court on summary judgment, was salutary, the impact on our practice was to add yet another time-consuming component to moving for and opposing summary judgment motions. Since summary judgment motions are a significant aspect of our practice, the marginal benefit from clarifying and narrowing issues, both for court and counsel, was not worth the effort. At least in our experience.

This is particularly so when, in practice, statements of material facts devolved into yet another tool for argument, misstatement of facts, and long-winded statements that were anything but "short" and "concise," and often contain statements as to which there was a genuine question as to a material fact.

Creating confusion was the fact that judges could opt out of the requirement, as in *Paley v. Curious Holdings LLC*, and courts could ignore non-compliance, as in *Argueta v. Hall and Wright, LLC,.*[4] Interestingly enough, the underlying motions in *Paley* and *Argueta* were both filed in September 2021,[5] prior to the amendment that permitted the court discretion to require a statement of material facts, and subparagraph (e) which explicitly permitted the court to overlook the failure to provide a statement and to direct compliance with the rule.

With the repeal of 202.8-g, everything old is new again.

Uniform Rule 202.8-b

By now the rules on word counts in summary judgment motions, which also took effect Feb. 1, 2021, are familiar

to practitioners. While our anecdotal survey finds the bench almost universally supportive of the limitations, the bar is divided, and likely more opposed than in favor. Some of this no doubt arises from lawyers' reflexive "don't tell us what to do" response when instructed on how to litigate our cases, while much more likely stems from the realization that writing that is short, concise, and therefore more effective, is far more time-intensive than writing that is verbose, meandering, and vapid.

In the four-plus years the rule has been in effect courtwide, we have, begrudgingly, come to appreciate the rule and we acknowledge that our writing is better for it. And, in moving or answering papers, 7,000 words each for the

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attorney's affirmation and the memorandum of law is not stingy (and remember replies are limited to 4,200 words).

However, we have spent countless hours and burned the midnight oil trying to limit an expert affirmation in a complex, multi-party case to those same limits, occasionally sacrificing substantive material that would have made the affirmation stronger.

But wait, you say, the rule provides "unless otherwise permitted by the court," meaning that an application may be made to the court to file papers in excess of the word counts. True. Two problems. First, and most critically, the recognition that the word count is insufficient generally comes late in the day, literally (damn you, NYSCEF 11:59 p.m. filings), when seeking leave of court is not practicable. Second, the very nature of the application may be summarized "judge, permission to make more work for you (respectfully)." Good luck with that.

So, recognizing that an attorney's argument and marshalling of proof and law can be subject to an (admittedly, generally generous word count), critical witness testimony should not be so limited. Hence, the carve-out that "[t]hese word limitations shall not apply to evidentiary materials such as affidavits, affirmations or reports from lay or expert witnesses."

Conclusion

These two rule changes come just in time for summer, and we look forward to more time at the beach now that we no longer have to prepare statements of material fact and no longer have to spend time editing key witness affirmations, often with a chainsaw rather than a scalpel, to satisfy word count rules. We only wish the effective date had been designated as July 4, a different, and far more famous, Liberation Day. Have a wonderful summer and, with all this extra free time, use a bit of it to periodically check for Court Rule Amendments.[6]

David Paul Horowitz, of the Law Offices of David Paul Horowitz, has represented parties in personal injury, professional negligence, and commercial litigation for over 30 years. He also acts as a private arbitrator and mediator and a discovery referee overseeing pre-trial proceedings and has been a member of the Eastern District of New York's mediation panel since its inception. He drafts legal ethics opinions, represents judges in proceedings before the New York State Commission on Judicial Conduct and attorneys in disciplinary matters, and serves as a private law practice mentor. He teaches classes in New York practice, professional responsibility, and electronic evidence and discovery at Columbia Law School.

Katryna L. Kristoferson is a partner at the Law Offices of David Paul Horowitz and has litigation experience across many practice areas. She has lectured at CPLR update, motion practice, and implicit bias CLEs, and teaches a course on bias and the law at the Elizabeth Haub School of Law at Pace University.

Endnotes

1. The June 13, 2022 amendment (effective July 1, 2022), amended the existing rule as to subparagraphs (a) and (c) and added subparagraph (e).

2. Under Administrative Order 270-20, the chief administrative judge adopted a number of rules from the Commercial Division, explaining, "the Commercial Division of New York State Supreme Court is an efficient, sophisticated, up-to-date court, dealing with challenging commercial cases, and has had as its primary goal the cost-effective, predictable and fair adjudication of complex commercial cases," and "since its inception the Commercial Division has implemented rules, procedures and forms especially designed to address the unique problems of commercial practice . . . the Commercial Division has functioned as an incubator, becoming a recognized leader in court system innovation and demonstrating an unparalleled creativity and flexibility in the development of rules and practices. . . . "

3. The April 27, 2022 amendment amended the existing rule as to subparagraph (b), to require a party responding to a material statement to interlineate their responses.

4. *Paley v. Curious Holdings, LLC*, 233 A.D. 3d 590 (1st Dep't 2024) ("The court did not err in granting plaintiff's motion despite the failure to comply with Uniform Rules for the Trial Courts (22 N.Y.C.R.R.) § 202.8-g. The court's individual rules made compliance optional"). *Argueta v. Hall and Wright LLC*, 230 A.D. 3d 1200 (2d Dep't 2024) ("As an initial matter, even though the plaintiff failed to submit a paragraph-by-paragraph response to H & W's statement of material facts, the Supreme Court was not required to deem the assertions therein admitted by the plaintiff.").

5. Based on the respective NYCEF dockets, in *Paley* the original motion was filed Sept. 15, 2021, and in *Argueta* the original motion was filed Sept. 13, 2021.

6. The Supreme Court Rule Amendments can be found at https://ww2.nycourts.gov/rules/amendments.shtml.

A Closer Look at Protecting Your Family and Finances

Some Practical Information About Life and Disability Insurance

By Mike Mooney

Life Insurance – The "New" Must-Have

Following three years of record sales, first quarter 2025 annuity sales started strong, marking the sixth consecutive quarter of $100+ billion in sales.[1]

It's easy to understand why. During times of uncertainty, people look to a sure thing. Life insurance – often thought of as the "gold standard" for financial preparedness – provides that needed measure of security. And yet some people still resist making it a priority, many because they mistakenly assume they can't afford coverage. **Many overestimate the cost of life insurance by three times or more**[2] and at the same time **40% of Americans believe they are underinsured**.[3]

Now is an ideal time to assess your family's financial security:

- Do you have people who depend on you? Having life insurance will help ensure they'll have financial security in place, should something happen to you.
- If you already have life insurance, how long has it been since you've updated your coverage?
- Have you experienced any life events – from a change in job or promotion to the birth of a child or new house purchase – that require a bump in coverage?

Long-Term Disability Insurance – A Smart Move Right Now

"You can't return to work for several months." No one wants to hear a statement like that from their doctor. But the reality is, long-term disability is more common than people think.

Did you know:

- Approximately 90% of long-term disability claims are caused by illness, not injury or accidents.[4]
- The average group long-term disability claim lasts 34.6 months (2.6 years).[5]

In the current economy, many are stretched financially just paying their regular expenses. What if an illness prevented you from working for an extended period? Could you replace your salary? For how long?

Long-term disability insurance for NYSBA members is designed to help protect your income while you undergo an extended recovery.

Tip: It takes just a few minutes to calculate your insurance needs.

For more information on life and disability insurance options for New York State Bar Association members, 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.

Endnotes

1. https://www.limra.com/en/newsroom/news-releases/2025/limra-u.s.-individual-life-insurance-premium-exceeds-$16-billion-in-2024-setting-new-sales-record.
2. https://lifehappens.org/research/life-insurance-is-on-peoples-minds.
3. https://www.limra.com/en/newsroom/news-releases/2023/new-study-shows-interest-in-life-insurance-at-all-time-high-in-2023.
4. https://disabilitycanhappen.org/public_html/wp-content/themes/cdadev/images/disability_stats.pdf.
5. https://www.limra.com/en/newsroom/industry-trends/2023/disability-insurance-awareness-month-2023.
6. https://www.limra.com/en/newsroom/news-releases/2025/limra-u.s.-individual-life-insurance-premium-exceeds-$16-billion-in-2024-setting-new-sales-record.

A disability lasting 2.6 years translates to 135 weekly paychecks missed

61% of households would feel the financial impact of a wage earner becoming disabled in six months or less.[6]

New York State Bar Association Honors Champion of Diversity, Equity and Inclusion

By Jennifer Andrus

Sharon Brown, diversity partner at Barclay Damon, received the New York State Bar Association's Attorney Professionalism Award during the Law Day ceremony at the Bar Center. The award recognizes her commitment to integrity, fairness and the highest ethical standards.

Brown balances her demanding practice in public finance with advancing diversity, equity, and inclusion within the firm. Brown revamped her firm's summer associate program to include leadership development workshops, all while attracting the nation's best law students.

"As a result of her work, 67% of the 2024 summer associate class was diverse and 73% of the class was female," wrote Barclay Damon Managing Partner Cornelia Cahill. "Sharon embodies the culture of mentorship at Barclay Damon."

Brown has guided firm leadership and shaped recruitment policies that reflect the firm's core values. Many summer associates returned to accept positions with the firm, further diversifying its ranks. Brown also works with the firm's marketing team to ensure its website and social media convey its commitment to DEI principles.

Brown travels around the U.S. speaking about the value of diversity in the legal profession at law schools and professional associations. "Sharon brings her boundless energy, kindness, collegiality and professionalism to her roles at her firm and her outside activities," Cahill added.

One of those community endeavors includes the Nazareth Regional High School in Brooklyn. As the chair of the board of trustees, Brown steered the school through turbulent financial times and helped to rebuild a bright future for the academic community.

Harvey Besunder (left) and Sharon Brown (right), recipients of NYSBA's Attorney Professionalism Award, with Committee on Attorney Professionalism Chair Jean-Claude Mazzola.

"Under her stewardship, she saw a school with a dwindling enrollment of 245 students transform into a flourishing school of 375 men and women representing approximately 88% African American or Caribbean-American families and 12% Hispanic families," wrote Nazareth Principal Robert DiRe.

The principal went on to describe the successful fiscal and program changes initiated by Brown during her time as chair.

Many of the nomination letters from colleagues detail her commitment to outreach. "Her mentorship was invaluable," wrote Sarathi Ray of Bank of America. "Her expansive knowledge as a tax attorney and her ethical and professional conduct made her an ideal role model for me and other young attorneys."

"Her willingness to share knowledge and mentor aspiring attorneys speaks volumes about her character and dedication to the legal profession," wrote Justice Maurice Muir of the New York State Supreme Court. "She navigates challenges with integrity and transparency, garnering the trust and respect of clients and peers alike."

The Attorney Professionalism Award is presented by the New York State Bar Association's Committee on Attorney Professionalism each year on Law Day.

'Dean of Suffolk Law' Honored With Attorney Professionalism Award

By Jennifer Andrus

Harvey Besunder joined the bar in December 1967, the same month the Green Bay Packers battled the Dallas Cowboys in the NFL Championship later knowns as the "Ice Bowl." "The Graduate" and "Guess Who's Coming to Dinner?" were tops at the box office and Otis Redding recorded his hit song, "Sitting on the Dock of the Bay."

At 81, Besunder continues to work full time, trying cases, volunteering on committees, teaching and mentoring young lawyers. The Long Island native followed his father into the legal profession and his wife and children were inspired by him to do the same. His daughter, Alison Arden Besunder, wrote: "Being a lawyer is not just what my father does; it is woven like gossamer into the very fabric of his being."

Colleagues, bar and community leaders, and even a few of his courtroom adversaries wrote dozens of recommendation letters on his behalf. Words like honesty, integrity, civility, respect and honor abound. Page after page, fellow professionals wrote of Besunder's zealous advocacy for his clients and his civility and respect for all members of the court.

In his nomination letter, former courtroom adversary David Rosenberg wrote of an early mentoring experience in which Besunder "always treated me with respect and made me feel like an equal. Harvey's word was his bond."

Kera Reed, president of the Suffolk County Women's Bar Association, calls him a trusted adviser whose early guidance in her career proved invaluable. "He leads by example, creating an environment that fosters respect, collaboration and a commitment to the ideals that underpin the legal system."

Besunder guided friends and colleagues through complex ethical dilemmas. Many detailed his empathy and compassion to those in the most difficult circumstances. The Town of Islip assessor, Anne Danzinger, wrote that Besunder was instrumental in strengthening her strong ethical compass, which helped instill more accountability in her public office. She added that Besunder's mentorship has had a profound impact on her personally and professionally.

Mentoring the next generation of lawyers is a labor of love for Besunder. If you have passed the bar in Suffolk County in the last 20 years, you likely sat with him as part of the character and fitness interview. His impact can be seen in young lawyers who first met him at a high school mock trial competition or as a summer associate in law school.

Elena Langan, dean of Touro Law School, wrote that Besunder's "constant demonstration of professional excellence, mentorship and commitment to developing the next generation of legal professionals makes him an exemplary candidate for the Attorney Professionalism Award."

More than one peer called Besunder a mensch, a word of Yiddish origin that roughly translates into a good person. "All of us who practice alongside him aspire to be like him," added Mark Cohen. A. Thomas Levin, past president of the New York State Bar Association, wrote, "Harvey is the epitome of what an attorney professional should be. The world would be a better place if we could clone him!"

The Attorney Professionalism Award is presented by the New York State Bar Association's Committee on Attorney Professionalism each year on Law Day.

Nationally Recognized Legal Ethicist Selected for the Sanford D. Levy Award

By David Alexander

University of Connecticut School of Law Professor Leslie Levin was honored with the New York State Bar Association's Sanford D. Levy Professional Ethics Award for her lifetime of work in legal ethics, media law and evidence.

"Leslie Levin has long been a trusted expert on one of the most critical subjects of our profession. She is among the nation's top authorities on legal ethics in addition to being an outstanding role model, author and educator. She is an inspiration to her students and colleagues," said Domenick Napoletano, immediate past president of the New York State Bar Association.

Levin also taught at New York University School of Law and at the Uni-

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versity of Haifa as a Fulbright specialist and was a visiting research fellow at the University of Queensland.

"Leslie is highly regarded as a distinguished ethics scholar and educator in the fields of professional responsibility and lawyer regulation. Her considerable contributions to these areas have had a significant impact, and it is a privilege to honor her achievements with the Sanford D. Levy Award," said Brenda Dorsett of Liberty Mutual Insurance Company, the chair of the Committee on Professional Ethics.

Levin served as the first director of the UConn School of Law Lawyering Process Program and as the first faculty pro bono coordinator. In addition, she co-authored a report and recommendations about access to justice for self-represented litigants at the request of the Connecticut Judicial Branch Access to Justice Commission.

The award is named for Sanford D. Levy, a former member of the New York State Bar Association Committee on Professional Ethics. It has been presented since 1982 to an individual or institution that has contributed the most to the understanding and advancement of the field of professional ethics.

Leslie Levin

New York State Bar Association Honors Legal Aid Advocate With Prestigious Civil Rights Award

By Rebecca Melnitsky

The New York State Bar Association honored civil legal services advocate Lillian M. Moy with its W. Haywood Burns Award in recognition of her decades of providing free legal representation to low-income people.

"Lillian Moy has made sure the most vulnerable in our communities have access to legal representation through her years of leadership," said Domenick Napoletano, immediate past president of the New York State Bar Association. "In her career, she has been a steadfast advocate for equal access to justice – a goal we should all aspire to. We are thankful for all that she has done to advance this worthy cause, and we are blessed to recognize her with this high honor."

The award is named in honor of the legendary W. Haywood Burns, a civil rights advocate and legal luminary who worked with Rev. Martin Luther King Jr. and rose to prominence as New York state's first African American law school dean.

Moy grew up in Queens, the daughter of a Chinese immigrant father. She graduated from Hunter College in 1974 and the Boston University School of Law in 1981.

Moy served as executive director of the Legal Aid Society of Northeastern New York for 27 years, from 1995 to 2022. In that time, she expanded its coverage area from six counties to 16 and increased its number of volunteers, its financial support, and range of services. She launched new projects that helped children with special needs, rural domestic violence victims, and people with limited English proficiency.

Moy has served many other organizations promoting civil legal aid including taking part in initiatives with the American Bar Association and the National Legal Aid & Defender Association.

Lillian M. Moy

After retiring, Moy has continued to be active in movements for justice and equality. She co-chaired the New York State Bar Association's Task Force on Racism, Social Equity and the Law and served on the Task Force on Combating Antisemitism and Anti-Asian Hate.

Harlem Native Honored With Ginsburg Scholarship for Helping Black Women Access Law School

By Jennifer Andrus

The New York State Bar Association honored Harlem native Talia Scott with its prestigious Ruth Bader Ginsburg Memorial Scholarship for her work in creating a fund to help black women get accepted to law school. Scott inspired April's packed House of Delegates meeting in Albany with a stirring acceptance speech that brought members to their feet. She chronicled her path to success and how she is creating opportunities for others that she did not have.

"My life has been defined by defying expectations. Entering the legal profession was more than a career choice. It was a bold declaration of possibility," she said. "I didn't grow up surrounded by lawyers. So, I made a choice not just to become what I didn't see, but to create a pathway, so others wouldn't have to look as hard to find themselves in the legal profession."

Scott founded the non-profit Legally BLK Fund, which helps black women pay for law school application fees, LSAT preparation classes and travel expenses tied to applying for law school. The fund has given out more than $60,000 in aid to applicants and is expanding to include mentorship and professional development.

"Talia Scott is a one-woman pipeline, helping dozens of young women succeed in law school," said New York State Bar Association Immediate Past President Domenick Napoletano. "In just five years, Talia's Legally BLK Fund has helped more than 50 women. Talia is carrying on Justice Ginsburg's legacy of gender equity by making dreams come true for women entering the legal profession."

(L-R): Immediate Past President Domenick Napoletano and Ruth Bader Ginsburg Memorial Scholarship recipient Talia Scott.

"Every day, I get to help cultivate a community of black women who will become our future public defenders, judges, professors, general counsel, firm partners," Scott continued. "Women who will shape doctrine, policy, and culture. Women who will just not practice the law but redefine whose lives and futures it protects."

Scott is the daughter of an immigrant parent raised in Harlem. While attending Haverford College on a full scholarship, she continued to work to support her family. Working as a paralegal after her college graduation, she helped her once-undocumented mother navigate the path to citizenship. Scott spoke of the strength in diversity within the legal profession and she looked at the challenges ahead.

"Diversity has never been the opposite of merit. It's a reflection of it, expanding who gets a shot doesn't dilute excellence, it reveals it," she said. "Progress in this profession, for people like me, has never been inevitable. It requires intention, persistence, and vision. Justice Ginsburg understood that change is generational. She opened the door, and now it's on us to keep it open, to widen it, and to walk others through it. A more inclusive profession isn't a radical idea, it's a necessary one. Justice Ginsburg knew that."

Following her graduation from NYU School of Law this year, Scott plans to work in business law while still leading the Legally BLK Fund.

The $5,000 scholarship is presented by NYSBA's Women in Law Section, the Committee on Annual Awards and the Committee on Civil Rights. Created in 2020 after the death of Justice Ginsburg, the scholarship is designed to honor Justice Ginsburg's principles including elevating the standard of integrity in the legal profession, fostering a spirit of collegiality and promoting the public good.

The New York State Bar Association Applauds Passage of Medical Aid in Dying, Encourages Gov. Hochul To Sign Bill Into Law

By Lena Faustel

The New York State Bar Association applauds the state Legislature for passing S138/A136, a bill that allows terminally ill, mentally capable adults with a prognosis of six months or less to live to request from their doctor a prescription for medication they can take to die peacefully in their sleep. If signed by the governor, New York State will join 11 other U.S. jurisdictions in legalizing this deeply personal end-of-life option. This legislation was included in the New York State Bar Association's legislative priorities for the 2025 session.

NYSBA's governing body, the House of Delegates, adopted a 2024 report by the Task Force on Medical Aid in Dying, chaired by Mary Beth Morrissey. The report outlines many of the safeguards included in the legislation, offers a thorough study of the effects in other jurisdictions, and includes testimony from numerous experts with varying perspectives.

Kathleen Sweet, president of the New York State Bar Association, issued the following statement in response to the passage of the legislation:

"Medical Aid in Dying offers both dignity and compassion to those experiencing a terminal illness. It ensures that New Yorkers have a full array of end-of-life options and provides them with the autonomy to make their own choices to avoid needless suffering. We commend the Legislature for passing this important bill and will continue to offer our support and advocacy in encouraging the governor to sign it into law."

Morrissey, Sweet, and Immediate Past President Domenick Napoletano were instrumental in NYSBA's advocacy efforts. Sweet thanks the bill's sponsors, state Senator Brad Hoylman-Sigal and Assemblymember Amy Paulin, for their support and urges the governor to swiftly sign this important legislation into law.

Finances

NYSBA Finances

The New York State Bar Association is committed to being accountable to its members and the public for its finances.

The association works hard to ensure that member dollars are used to create professional, public service, and educational activities and benefits in the diverse and changing legal profession. Copies of the complete audited financial statements for the years 2024 and 2023 are available to members and may be obtained by contacting Amira Rizvanovic, chief of finance, at arizvanovic@nysba.org.

ANNUAL REPORT	2024
Revenue and Support:	
Dues	$8,593,000
Annual Meeting	$923,000
Investment Income, Net	$2,215,000
Other	$442,000
Books and Publications	$323,000
Administrative Fees and Royalties	$2,317,000
Sections	$3,296,000
Continuing Legal Education	$2,576,000
Assets:	
Cash	$8,090,000
Investments	$55,484,000
Property and Equipment	$9,636,000
Other Assets	$3,235,000
	$76,445,000

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