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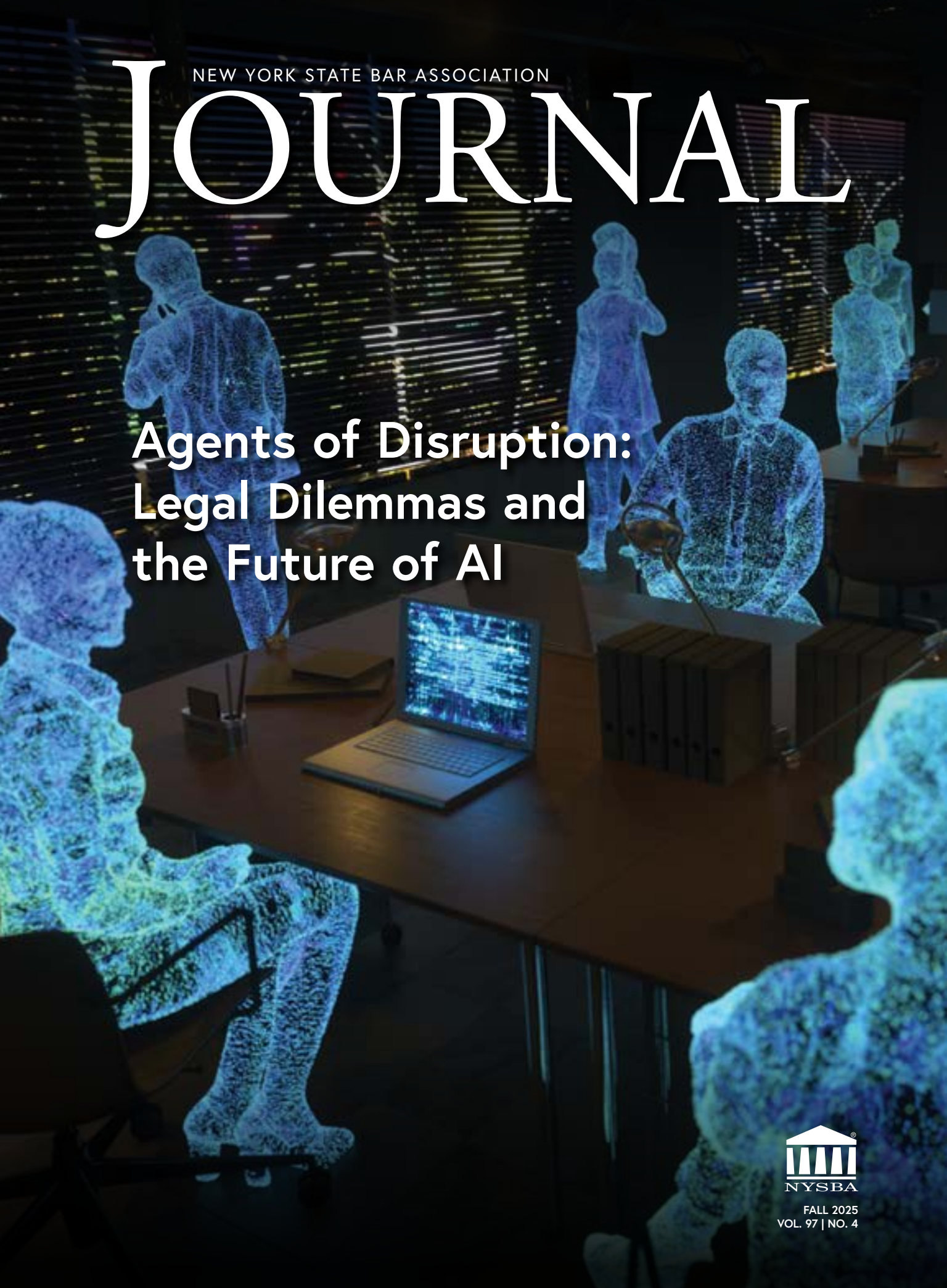

Agents of Disruption: Legal Dilemmas and the Future of AI

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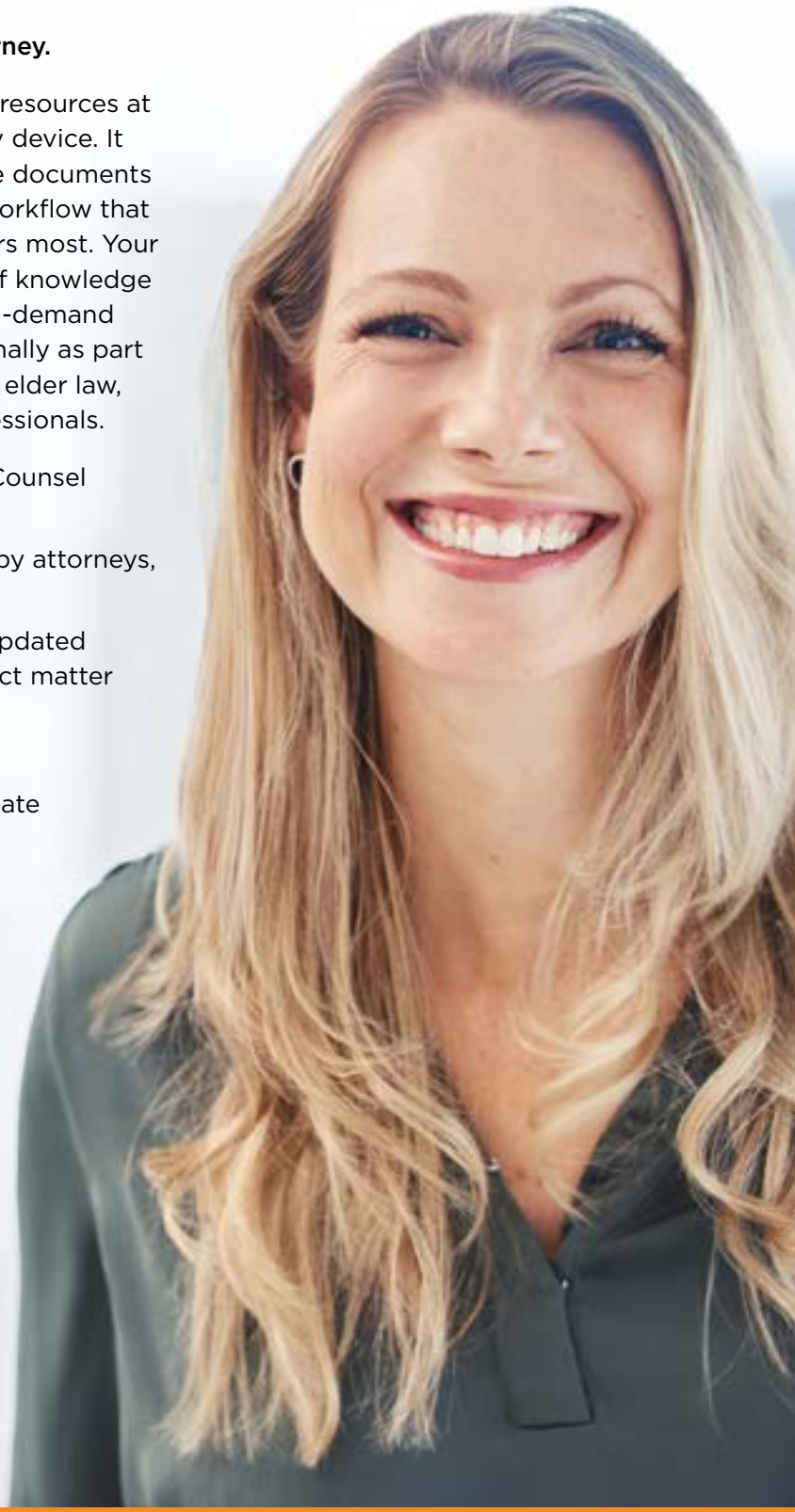

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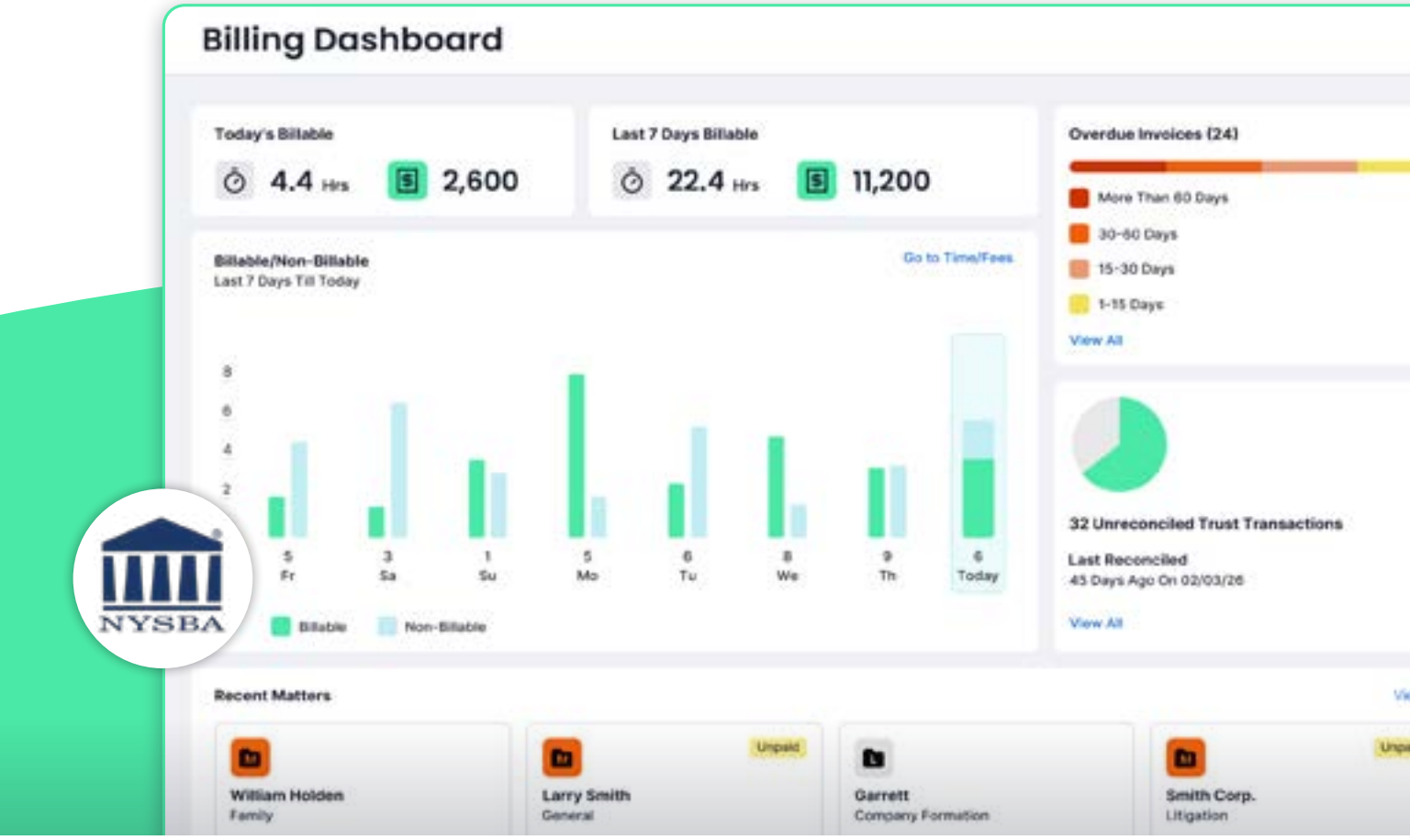

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Dear Colleagues:

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It was in 1876 that a determined group of lawyers came together with a clear vision: "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."

For 150 years, this guiding principle has served as the bedrock of our association.

As we reflect on this remarkable milestone we can look back upon a legacy of leadership and progress for the legal profession and for all New Yorkers.

We have championed essential reforms to improve the administration of justice and to uphold the rule of law.

We have led efforts to expand access to justice for the most vulnerable among us.

We have adapted to the evolving needs of our profession, always striving to stay current in service to our clients, the justice system, our fellow lawyers and the public good.

Before commercial air travel, the founding of the interstate highway system, the common use of electricity in homes and businesses, and even before the invention of the automobile, there was the New York State Bar Association. And as we celebrate and commemorate our history and reflect on our accomplishments, our anniversary is an opportunity to refocus on fulfilling our mission.

We live in extraordinary times, where the rule of law and constitutional norms long taken for granted are under siege. Political rhetoric has led to violence.

As lawyers we have a special responsibility and duty to lead, to pursue and amplify the truth, and to resist the coarsening of debate.

As we look forward to this landmark year at the Bar Association, we invite you to join us in honoring our members, celebrating our accomplishments, and participating in a series of special events.

The Annual Meeting in New York City from January 13th to 16th will include the Presidential Summit, where a panel will discuss the state of the Constitution and its drafters' design of robust checks and balances among the three co-equal branches of government. Pulitzer Prize winning Stanford historian Jack Rakove and Yale Rule of Law Clinic Director Sonia Mittal will lead this important conversation.

A special 150th Presidential Gala will be held at the Plaza Hotel in New York City on Thursday, January 15th, 2026; we will be honoring the association's past presidents and awarding our most prestigious recognition, the association's Gold Medal.

Since 1876 we have been building, growing, and adapting to changes in the profession and in the world that impact our members, and this past year is no exception. We implemented dramatic and transformational changes over the last year, now providing an all-inclusive membership model. Continuing legal education programs, useful forms across numerous practice areas, publications, including e-books and other resources, are now included with member dues.

Members enjoy complimentary membership in two of our sections, a wholesale change that has enhanced member engagement with the sections. Twenty-seven sections have seen double digit percentage increases in their membership since 2024. Eleven sections have added more than 500 members to their ranks. CLE program registrations have increased 120% and on demand programming has increased 45%. The association is on pace to issue more than twice as many CLE certificates in 2025 as it did in 2024. In sum, it is working! And it did not just happen; the credit rightly goes to the inspirational leadership of our Membership Committee and the talent of our amazing staff, led by Executive Director Pamela McDevitt.

Our sesquicentennial anniversary is your story too. Your dedication, advocacy, and service embody the values that have sustained our association. I hope that you will come celebrate with us, reflect on the incredible history we share, and join us as we write our next chapter together.

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Agents of Disruption: Legal Dilemmas and the Future of AI

By Nicoletta V. Kolpakov

AI Agents and the Rise of Virtual Task Makers

Artificial intelligence has evolved rapidly, progressing from simple automation tools to sophisticated systems capable of independent decision-making. At its core, AI refers to computer programs that mimic human intelligence by learning from data, recognizing patterns and performing tasks with minimal human intervention. A prominent subset of AI, generative AI, creates new content – text, images and code – using large language models trained on vast datasets.[1]

But 2025 marks a turning point. AI is no longer confined to passive content generation. The rise of autonomous AI agents, digital entities capable of executing tasks, making decisions, and adapting to real-time conditions, signals a new frontier. Unlike traditional AI models that generate knowledge-based outputs – such as answering questions or summarizing documents – these agents can be assigned goals, navigate dynamic environments with human interaction, and act independently to achieve outcomes, much like human employees operating with delegated authority. In finance, AI agents flag fraud in real time by continuously monitoring transactions and identifying and learning suspicious patterns and risks. In customer service, AI-powered virtual assistants handle inquiries, troubleshoot technical issues and even complete transactions, aiming to reduce wait times for consumers needing assistance. Companies like NVIDIA are at the forefront of this transformation, enabling AI agents to reason and automate complex workflows, from regulatory compliance to scientific discovery.

Yet the regulatory landscape remains fractured. Federal rollback efforts clash with agency enforcement and rising state activism, especially around data privacy. States are passing laws to protect biometric and location data, while the Federal Trade Commission has cracked down on opaque data practices. AI systems, heavily reliant on such data, are caught in the middle – forcing businesses to navigate a complex web of overlapping obligations. These dual-track developments – agency enforcement under existing laws on one hand and executive-driven deregulation powered by AI on the other – create a fragmented and potentially conflicting regulatory landscape for businesses. To navigate this volatile landscape, legal professionals must act swiftly. As AI becomes more autonomous, traditional doctrines like agency law must be revisited to determine liability for AI-driven actions. Clear contractual clauses addressing future regulatory shifts, data governance obligations and algorithmic accountability will be essential. Ultimately, the success of innovation hinges not just on deregulation or development, but on legal frameworks that balance speed with safeguards and power with responsibility.

Liability in AI Tools and the Principal-Agent Relationship

A key issue in AI liability is whether AI systems should be treated as legal agents under traditional agency law. Agency relationships typically involve three elements: (1) a principal, (2) an agent and (3) a third party affected by the agent's actions.[2] Under the common law, an agent acts on behalf of a principal and is subject to the principal's control.[3]

Agency law governs the relationship between a principal (who grants authority) and an agent (who acts on their behalf). Despite the autonomous nature of AI agents, the user – the principal – remains ultimately responsible for the agent's actions. In the context of intellectual property, for instance, if an AI agent generates content that infringes on another party's copyright, the principal (user) may be held liable. The question of who owns the intellectual property rights to the content created by AI agents further complicates matters, especially when the AI tool has been trained using a vast array of data that may contain copyrighted material.

Unlike human actors, AI lacks subjective intent, political liberties or autonomy in the legal sense. However, courts and regulators are increasingly faced with cases where AI-generated content causes harm or misinformation. The legal frameworks governing agency relationships, vicarious liability and product liability provide useful lenses for examining these issues. Traditionally, agency law requires that an agent acts on behalf of a principal, with the principal assuming liability for the agent's actions. The Restatement (Third) of Agency explicitly states that computer programs cannot be considered agents:

> [A] computer program is not capable of acting as a principal or an agent as defined by the common law. At present, computer programs are instrumentalities of the persons who use them. If a program malfunctions, even in ways unanticipated by its designer or user, the legal consequences for the person who uses it are no different than the consequences stemming from the malfunction of any other type of instrumentality.[4]

However, as AI grows more autonomous, agency law may require reexamination. While AI may not be an agent in the legal sense, courts may still attribute liability to its deployers.[5] In tort law, the application of *respondeat superior* – holding an employer vicariously liable for an employee's actions within the scope of employment – offers a potential model for AI-related harms.[6] Applying this principle to AI would place responsibility on the human or corporate entity deploying the system, ensuring accountability without requiring courts to recognize AI as an independent agent.[7] Alternatively, regulatory frameworks could impose direct liability on AI developers or operators based on risk assessments, akin to

the approach taken with autonomous vehicles.[8] Such frameworks would strike a balance between fostering innovation and safeguarding consumer protection and public safety.

Bias: Outputs Are Only as Good as Inputs

Before addressing AI "intent" or liability, we must recognize a core truth: outputs reflect inputs. The saying "garbage in, garbage out" applies acutely to generative AI. When trained on biased or incomplete data, models amplify those flaws. In legal and financial contexts, this creates a dangerous feedback loop – opaque systems producing seemingly natural but deeply biased results. As the founder of Oxford's AI program noted, "bias is a feature, not a bug."[9] AI replicates the prejudices in its training data, which is troubling given its reliance on sources like Wikipedia, books, and academic papers – each carrying cultural, racial and gender bias.

This becomes especially consequential in employment, where biased algorithms can reproduce historic patterns of exclusion under the guise of objectivity. A University of Washington study showed AI resume-screening tools favored white-associated names in 85.1% of cases and female-associated names in only 11.1%.[10] Black male candidates were disadvantaged compared to white male counterparts in every single case.[11] These tools create dangerous feedback loops, with no clear limits to how biased trained AI systems can be.[12] Litigation has followed. In 2023, five plaintiffs sued Workday, alleging its AI tool unfairly rejected over 100 applications due to race, age and disability.[13] In New York City, Local Law 144 took effect in 2023 requiring companies to conduct and publish bias audits before deploying automated hiring tools.[14] Other jurisdictions are following this model, with more protections against AI bias taking effect in early 2026, using "reasonable care" to protect consumers from "algorithmic discrimination."[15] These laws aim to tackle algorithmic bias head-on by recognizing that if AI is trained on discriminatory datasets, it will likely produce discriminatory results. Understanding how bias infiltrates AI is essential to assessing liability, fairness and harm, especially in high-stakes areas like hiring, sentencing, credit scoring, or immigration. If generative AI acts as a decision maker, we must first examine the fairness and transparency of the data powering its "judgments."

Subjective Liability and AI Intent

AI does not engage in self-censorship out of legal concern, nor does it possess intent when generating outputs, as a human would. Consequently, the traditional rationale for subjective intent standards does not extend to AI-generated content, necessitating alternative liability frameworks. Most people prompting large language models recognize the risk that it may produce defamatory material through hallucination, though some argue that disclaimers around the use of AI agents are not used nearly enough.[16] Subjective intent standards serve to prevent liability from unduly suppressing legitimate speech and uphold the fundamental principle of *mens rea* in criminal law. Broader concern remains on preserving individual autonomy and participation in public discourse. In *Counterman v. Colorado*, the Supreme Court reinforced this principle by holding that criminal liability for online threats requires proof that the defendant subjectively understood the harm their statements could cause.[17] This distinction between human intent and AI-generated content highlights the need for tailored legal frameworks that balance accountability with the realities of AI's non-intentional nature.

However, these considerations do not readily extend to artificial intelligence. Unlike human speakers, AI programs lack subjective awareness, autonomy or political liberty. AI does not engage in speech as an act of self-expression, nor can it be censored in the way a human speaker might be. As such, the rationale for applying a subjective standard to AI-generated statements is unpersuasive, and strict liability or alternative frameworks for assessing AI's role in harm may be more appropriate.

Advancements in AI challenge the assumption that it is merely an instrument. If AI begins performing roles once held by humans, courts might reconsider agency doctrine or craft new liability rules. Rather than granting AI legal personhood, a better path may be refining agency principles: If an AI program acts within a deployer's parameters and causes harm, the deployer could be liable under a modified respondeat superior framework, even without a traditional employment relationship. Moreover, the expanding use of AI across high-risk domains may prompt a shift from reactive liability doctrines toward proactive regulation. Lawmakers could impose preemptive duties on developers through risk-based compliance regimes, modeled on autonomous vehicle regulations that focus on design, data transparency and testing.

Developer and User Liability: Who Is Responsible?

As artificial intelligence evolves, so do the legal challenges surrounding its outputs, with one of the most pressing concerns being copyright infringement, especially when AI-generated content closely resembles existing copyrighted works. The challenge of matching AI-generated content to copyrighted works is not new. Platforms like YouTube already use automated detection to identify copyrighted material. AI developers inherently have access to training data, enabling comparisons between outputs and copyrighted content. However, as AI advances in text, audio and visual generation, identifying unauthorized derivative works becomes more complex.

A safe harbor framework could incentivize companies to develop effective filtering technologies. The objective is not perfect enforcement but reasonable safeguards to minimize unauthorized reproduction. Filters should also address copyright-violating prompts, especially as large language models process longer user inputs. Since AI systems already filter harmful content, a safe harbor model could extend similar obligations to copyright compliance, requiring developers to update filters and respond to takedown requests, akin to the Digital Millennium Copyright Act.

Infringement Risk and Fair Use

A landmark case highlights the growing clash between technological innovation and intellectual property rights. On Aug. 14, Getty Images filed suit in the Northern District of California accusing Stability AI of mass copyright and trademark infringement for allegedly using millions of Getty photographs to train its image generator without permission or payment. The dispute underscores the unresolved question of who bears responsibility when AI outputs infringe protected works.[18]

A central issue is whether AI-generated content is sufficiently transformative to qualify as fair use.[19] Courts assess fair use by asking whether a work adds new meaning or expression, but this becomes murky with AI, which lacks intent or creative discretion.

While intent to infringe is not required for copyright liability, it matters when assessing for damages. Under U.S. copyright law, willful infringement, a knowing and deliberate violation, can trigger statutory damages of up to $150,000 per work.[20] Moreover, parties that induce infringement may be held liable under the doctrine of contributory infringement.[21] Since large language models lack intent, liability will likely hinge on whether developers or users exercised reasonable care, a standard courts have long used in assessing secondary liability for technology providers. This principle surfaced in a recent ruling where ROSS was found to have infringed Thomson Reuters's copyrights by using protected content to train a competing legal AI tool.[22] The court rejected fair use, saying that the tool was not protected under fair use (under the U.S. Copyright Act), reinforcing that existing copyright law can apply to AI cases.[23] As AI-generated content becomes more common, courts are showing a willingness to enforce intellectual property rights when unauthorized use occurs. However, as AI tools grow more autonomous, prolific and opaque, the limits of legal doctrines are exposed. AI systems lack intent, yet liability must be assigned, typically to developers or deployers. With massive datasets and countless outputs, pinpointing infringement or assessing fair use becomes unmanageable. The sheer volume, ambiguous authorship and complex development chains complicate enforcement. One unresolved issue is AI's use of copyrighted material for training purposes, a non-expressive use that occupies a legal gray zone. These challenges suggest existing frameworks, while functional, may be increasingly inadequate and in need of reform.

Developer Liability

Attempts to limit developer liability in AI copyright cases often frame the technology as neutral and shift blame to users or downstream deployers, but this overlooks developers' central role. By designing models and curating training data, developers make choices with clear legal and ethical implications. In the *Stability AI* case, artists alleged their copyrighted works were

used without permission to train generative models, illustrating how developers' choices can lead directly to infringement.[24]

Claims of technological neutrality ignore that developers define how AI operates. Dodging responsibility undermines safeguards like dataset transparency, auditability and licensing compliance. Limiting liability weakens accountability and pushes legal risk to those with the least control over AI's construction.

User Liability

Even though the AI agent executes tasks autonomously, users remain liable for their agents' actions. Under agency principles, users act as principals directing AI systems and can be held liable if its AI tool generates infringing content. This is particularly relevant in industries where intellectual property rights are paramount, such as publishing, entertainment and technology. A user who knowingly prompts AI to generate infringing work could be held responsible, even if the AI performed the action. Liability may arise from failing to properly vet the AI agent's outputs or overlooking the content's source.

Transparency and Disclosure

To mitigate intellectual property infringement risks, AI developers should build transparency and disclosure into their systems. Users should know how content is generated and whether training data may include copyrighted materials. Clear licensing terms and attribution guidelines can ensure that the AI agent's outputs do not inadvertently infringe on intellectual property rights. As AI use expands, such disclosures will be essential to protect both users and developers from legal liability.

Corporate Data: Data Privacy Concerns and Compliance Challenges

As AI agents become embedded in business operations, they routinely process vast amounts of sensitive personal and corporate data, raising serious data privacy and security concerns. AI's autonomous processing capabilities increase the risk of unauthorized access or unintentional breaches, potentially triggering legal liability.

The case *J. Doe 1 v. GitHub, Inc*. illustrates the intersection of AI and data use without consent.[25] While the case focuses on copyright issues under the Digital Millennium Copyright Act, its broader implications for data privacy are clear. AI systems must comply with strict regulations like the General Data Protection Regulation and the California Consumer Privacy Act. Requirements such as data minimization and the right to erasure are especially relevant, with violations under the General Data Protection Regulation carrying penalties of up to €20 million or 4% of global annual revenue.[26]

As AI systems handle more personal data, privacy compliance must be a top priority. Legal counsel should guide businesses in aligning their AI operations with applicable laws, conducting regular audits, enforcing robust data security measures and ensuring transparent user consent mechanisms. This is especially critical in sectors like health care and finance, where privacy risks are heightened.

Moreover, when AI tools are trained on sensitive or proprietary customer data, new legal risks emerge, including breach liability and unauthorized downstream use. Lawyers should help clients negotiate clear terms on data sharing, retention and ownership to reduce exposure and preserve compliance. For companies deploying AI agents, transparency and user consent are paramount. Users must be informed about how their data is collected, processed and utilized, with clear, understandable disclosures regarding their rights. This includes the ability to access, correct and delete personal data. It's essential that users can opt in or out and modify their preferences to maintain control over their data. Failure to meet transparency standards and obtain proper consent can expose companies to legal risks, regulatory scrutiny and reputational damage.[27]

Takeaways for Lawyers

Navigating Data Ownership and Liability

Lawyers must proactively counsel clients on intellectual property risks tied to AI-generated content, particularly around ownership and licensing of training data. For businesses, advanced safety systems are available, like Anthropic's ASL-3, an AI containment framework featuring real-time monitoring, access controls, and rapid response protocols; businesses must also weigh the regulatory and contractual consequences of integrating such tools.[28] These systems promise greater security and accountability but also raise new questions about liability and data rights.

Where a customer's data plays a key role in model training or fine-tuning, negotiations should clarify whether that customer is merely a user or a co-creator entitled to share in the outputs. As the government leans into AI development, legal practitioners must ensure that contracts reflect evolving norms around transparency, authorship and the allocation of both intellectual property and privacy rights – especially when client data fuels competitive or sensitive outputs.

Preparing for Future Regulatory Challenges: A Brave New Legal Landscape

As AI technologies rapidly evolve and permeate key societal sectors, legal professionals and businesses must brace for an increasingly paradoxical regulatory environment, one marked by fragmented governance and technocentric policymaking. In 2025, states are accelerating AI legislation across domains such as employment, education, criminal justice and housing. Many of these efforts

are grounded in civil rights and fairness, promoting algorithmic transparency, preventing algorithmic discrimination and enforcing stricter rules around data usage and accountability.[29] California's new AI regulations, effective this year, mandate third-party audits for high-impact algorithms and impose strict standards for data usage and consumer consent. Such laws reflect a growing concern with algorithmic bias and signal a shift toward protective governance at the subnational level.

In stark contrast, the Trump administration is charting a different course.[30] While comprehensive federal legislation remains absent, the administration is leveraging AI through the Department of Government Efficiency, which has employed its DOGE AI Deregulation Decision Tool to identify and repeal federal rules en masse.[31] Deployed at agencies like the Department of Housing and Urban Development and the Consumer Financial Protection Bureau, the tool has flagged entire regulatory sections for elimination, often bypassing traditional notice-and-comment procedures. Internal targets suggest a 50% reduction in federal rules by early 2026. AI is no longer just regulated, it is the engine of regulatory rollback.

Executive orders further reflect this shift. One prohibits the procurement of AI tools with alleged "partisan bias," while another accelerates AI infrastructure and export control reforms. Yet, conspicuously absent are protections in areas like copyright, consumer rights, and civil liberties. President Trump has argued that enforcing AI-related copyright standards would hinder innovation, relegating such disputes to judicial resolution.

Compounding this tension is a pending federal moratorium, passed by the House and pending Senate approval, that would bar states from enacting new AI regulations for a decade. If enacted, the moratorium could preempt state laws on emerging technologies like autonomous vehicles and AI-generated political advertising. This legal uncertainty forces businesses to prepare for both sweeping federal deregulation and a patchwork of potentially frozen or invalidated state laws. Legal advisers must build flexible compliance frameworks that can accommodate both extremes as we move forward into a new world defined and shaped by artificial intelligence.

Nicoletta V. Kolpakov has nearly a decade of experience working on legislative and strategic consulting through her involvement with national think tanks and congressional campaigns, and more recently in blockchain, artificial intelligence and decentralized finance projects. She graduated in May with a J.D. from New York Law School.

Endnotes

1. A large language model (LLM) is a type of artificial intelligence trained on vast datasets to generate human-like text based on probabilistic predictions. It specializes in language processing and can be fine-tuned for specific applications, such as legal analysis or customer support. Generative AI (GenAI) is a broader category of AI systems that create original content, including text, images, audio and video. While all LLMs are GenAI, not all GenAI systems are LLMs, as some focus on visual or multimodal content generation.

2. Restatement (Second) of Agency § 1 (1958); *see* Restatement (Third) of Agency § 1.01 (2006).

3. *Agency*, Wex Legal Dictionary, Oct. 2024, https://www.law.cornell.edu/wex/agency.

4. Restatement (Third) of Agency § 1.04 Cmt. E (Am. Law Inst. 2006).

5. *Moffatt v. Air Canada*, 2024 BCCRT 149, where the airline was held liable for incorrect information provided by its chatbot about bereavement fares.

6. *Id.*

7. When an AI system causes harm in the course of its designated functions, its operator could be vicariously liable, similar to how an employer is responsible for an employee's actions.

8. Miriam Buiten, Alexandre de Streel, Martin Peitz, *The Law and Economics of AI Liability*, Computer Law & Security Review (2023), vol. 48, doi: 10.1016/j.clsr.2023.105794.

9. Ramaa Sharma, '*It's a Feature, Not a Bug*' – *How Journalists Can Spot and Mitigate AI Bias,* Reuters Institute for the Study of Journalism (Aug. 1, 2025), reutersinstitute.politics.ox.ac.uk/news/its-feature-not-bug-how-journalists-can-spot-and-mitigate-ai-bias.

10. Kyra Wilson & Aylin Caliskan, *Gender, Race, and Intersectional Bias in Resume Screening via Language Model Retrieval*, Proceedings of the 2024 AAAI/ACM Conference on AI, Ethics, and Society (July 29, 2024), 10.48550/arXiv.2407.20371.

11. *Id.*

12. *Id.*

13. *Mobley v. Workday, Inc.*, N.D. Cal. Case No. 23-cv-00770-RFL (May 2025).

14. Automated Employment Decision Tools (AEDT), Local Law 144 of 2021, effective July 2023.

15. Colorado's Artificial Intelligence Act, SB 24-205, set to take effect in February 2026, requires developers of high-risk AI systems to exercise "reasonable care" to protect consumers from known or reasonably foreseeable risks of algorithmic discrimination. Unlike Colorado's AI Act, Texas's Responsible AI Governance Act, HB 149, effective Jan. 1, 2026, includes explicit prohibitions on certain AI uses, mandates disclosure requirements for health care providers and government agencies, and amends the state's biometric and data privacy laws.

16. AI hallucination refers to instances where an AI model generates false or misleading information that seems credible but is not based on real data. This happens because AI predicts responses based on patterns rather than verifying facts. For example, an AI might fabricate a court case or a source that doesn't exist. These errors stem from incomplete training data, lack of real-world grounding or the AI's tendency to generate statistically likely – but not necessarily accurate – answers. *See What Are AI Hallucinations?,* Google Cloud, https://cloud.google.com/discover/what-are-ai-hallucinations, last accessed Mar, 3, 2025.

17. 600 U.S. 66 (2023).

18. *Getty Images Inc. v. Stability AI Inc.*, No. 1:23-cv-00135 (D. Del. Feb. 3, 2023). Getty alleges Stability AI copied over 12 million images, captions, and metadata from Getty and its licensees, while stripping or altering copyright management information and misusing Getty's trademarks. The company voluntarily dismissed a related 2023 Delaware case without prejudice before filing this broader complaint.

19. Katherine Lee, A. Feder Cooper, and James Grimmelmann, *Talkin' 'Bout AI Generation: Copyright and the Generative-AI Supply Chain*, CSLAW '24: Proceedings of the 2024 Symposium on Computer Science and Law (March 12, 2024), doi:10.1145/3614407.3643696.

20. 17 U.S.C. § 504(c).

21. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

22. AI's first real copyright judgment was filed in February, where the court held that ROSS's copying of Thomson Reuters's content to build a competing AI-based legal platform is not fair use under the U.S. Copyright Act. *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*, No. 1:20-cv-00613 (D. Del. Feb. 11, 2025).

23. *Id.*

24. *Andersen v. Stability AI Ltd.*, 700 F. Supp. 3d 853.

25. 22-cv-06823-JST (N.D. Cal. Jan. 3, 2024).

26. General Data Protection Regulation (EU) 2016/679, Art. 83 (penalties up to €20 million or 4% of global annual turnover); California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.155.

27. California Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798.100–1798.199; General Data Protection Regulation (EU) 2016/679, Arts. 12–22.

28. *Activating AI Safety Level 3 Protections,* Anthropic (May 22, 2025), anthropic.com/news/activating-asl3-protections.

29. Maryland's Online Data Privacy Act, SB-0541 and HB-0567, set to take effect in October 2025, establishes stringent requirements for data minimization and consumer consent.

30. *America's AI Action Plan*, White House (July 2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.

31. Mohar Chatterjee, *Trump AI Action Plan Slashes Regulation, Speeds Data Center Construction*, PoliticoPro (July 23, 2025), subscriber.politicopro.com/article/2025/07/trump-ai-action-plan-slashes-regulation-speeds-data-center-construction-00469724?site=pro&prod=alert&prodname=alertmail&linktype=article&source=email.

The Modern East-West Divide: AI and Publicity Rights in New York and California

By Neville L. Johnson, Douglas L. Johnson and Hunter S. Litterio

In the spring of 2024, the biggest story in entertainment was the rap battle between Aubrey Graham (better known as Drake) and Kendrick Lamar, which sent shockwaves through the industry. Though the bad blood between the artists and the songs ultimately caught people's eyes, Drake's use of a digital replica of the deceased rapper Tupac Shakur (also known as 2Pac) in the song "Taylor Made Freestyle" represented the way artificial intelligence and other modern technologies may strain the historical approach to music law and the right of publicity in the near future. California and New York, representing the two biggest entertainment markets in the United States, have approached the problem differently, potentially heralding a deep divide in state law that could shatter any hopes of consistency in applying the right of publicity moving forward.

California's Approach

In September, the California Legislature passed AB 1836, a dramatic expansion in post-mortem publicity rights, making two primary changes to the law. The most significant change provides for a cause of action under the statute for appropriating a deceased personality's name, image or likeness via a "digital replica."[1]

This primarily derives from a line of cases interpreting what constitutes a protectable "likeness" under Section 3344.[2] The first case, *Midler v. Motor Co.*, held that the term likeness only refers to visual imitation and not to vocal imitation.[3] Since the defendant had not used Bette Midler's voice, and only a person who sounded like her, Midler was unable to recover under Section 3344.[4] *White v. Samsung* further limited the statutory definition of "likeness" by finding that some level of resemblance was required in order to recover under Section 3344.[5] It should be noted, however, that the plaintiffs in these lines of cases were able to recover under the common law, which allowed recovery for both visual and vocal imitations that were sufficiently identifiable. However, without the fee-shifting provision and the statutory minimum, prospective plaintiffs with less fame than Bette Midler, Vanna White and Tom Waits were left with little remedy for infringements by imitation.

Section 3344.1(a)(1)(A)(i) patches holes in the law to protect deceased celebrities' publicity rights, particularly as it pertains to vocal likenesses. The section provides that anyone using a digital replica of a deceased personality's voice or likeness is liable, subject to the exceptions provided in Section 3344.1(a)(1)(A)(ii). While it is arguable that appropriation via AI would be covered as a visual likeness if sufficiently realistic, Section 3344.1(a)(1)(A)(i) preemptively answers any question on this issue.

The second change provides far higher minimum damages when using a digital replica of a deceased celebrity. Instead of the $750 minimum provided for uses of a deceased celebrity's actual image or likeness, a person that uses a digital replica without consent can find themselves on the hook for, at minimum, $10,000 per use.[6]

There are, however, a few exceptions to this right. First, the use must be a "digital replica" used in an "expressive audiovisual work or sound recording."[7] Further, the section does not apply to uses in connection with public commentary,[8] common fair use categories,[9] documentary or biographical works,[10] advertising for any of these categories[11] or fleeting or incidental uses.[12]

Interpreting exactly how this section will apply can be tricky. The general protection afforded to deceased celebrities applies to use "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services." However, this section of the law only requires the use to be in an "expressive audiovisual work or sound recording," subject to the above restrictions.

The change may appear slight, but it could have a dramatic impact on the types of arguments that will emerge. This is where we return to the spring of 2024. After the release of "Like That," the "Metro Boomin" and "Future" song that started the battle due to Lamar's feature verse, Drake released two songs in response. The second, "Taylor Made Freestyle," featured an AI-generated replica of the late West Coast icon, Tupac Shakur, to stoke a response. As Lamar is arguably the most important hip-hop artist from the West Coast since Shakur himself, it was clear from the start that Drake did not have consent from Shakur's estate.[13] Numerous legal questions emerged at the time and retrospectively in the wake of this use.

For starters, the use would not have technically qualified as a statutory appropriation of the right of publicity under Section 3344.1, as the statute requires more than just mimicking or replication to apply. Section 3344.1(a)(1)(A) requires that an appropriation of a personality's voice be used for "products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent." Whether ethical or not, it is clear that Drake's use was not related to the marketing or sale of a product.[14] The requirement of commercial use would thus likely operate to squash a claim against Drake's use had it come under Section 3344.1(a)(1)(A).

Section 3344.1(a)(2)(A), on the other hand, does not require a commercial element to the use. It only requires that an appropriation of a personality's voice or likeness via a digital replica be used "in an expressive audiovisual work or sound recording without prior consent."[15] If it had been passed at the time of the use, the question would have centered on whether the use fits into any exception. As the statute is structured in such a way that carves out exceptions to prohibited use, there is a burden of proof question, which brings with it a question about the necessary elements of a pleading.

It is possible that a court would require the plaintiff only to prove that the digital replica was used in an expressive audiovisual work or sound recording and then shift the burden to the defendant to prove that the use fell under one of the exceptions. Such an interpretation would generally accord with that of fair use in copyright, which is regarded as an affirmative defense.[16]

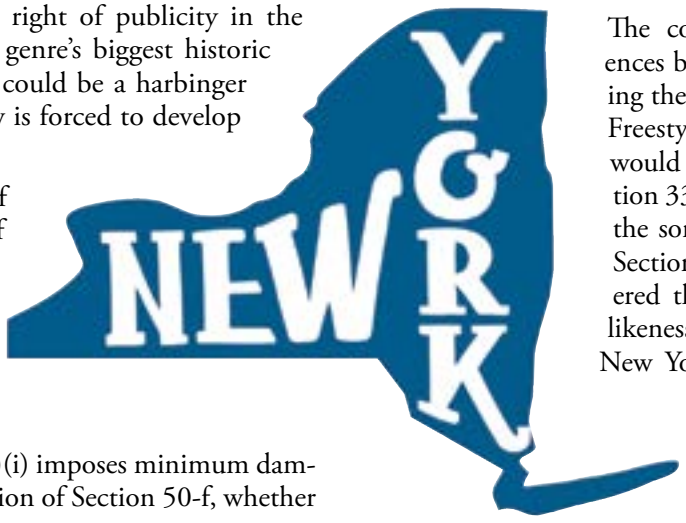
If a court chooses a different route and requires the plaintiff to make a prima facie showing that the use does not fit within an exemption, then both the burden of proof and required pleadings will be different. From a procedural standpoint, a plaintiff would be required to plead that a use does not fall under one of the exceptions, rather than forcing a defendant to raise it as an affirmative defense. This may not have a dramatic impact, as California generally applies a liberal standard when considering amendments to the pleadings.

However, substantively, it could put great strain on a plaintiff. Proving a negative is far more difficult than proving a positive, so putting the burden on the plaintiff to show that the use does not fit an exception could raise the standard higher than that in Section 3344.1(a)(1)(A). Overall, drafting the section will make these cases harder for one of the litigants than normal. It simply depends on who bears the initial burden.

Given the structure of the section, and the punitive nature of the damages, it is reasonable to anticipate a court reading the exceptions as an affirmative defense. This is particularly so given the carve-out for fair use. For litigants seeking to wade into these untested waters, however, it may be prudent to include in the pleadings that a use does not fit into any of the exceptions listed in the section.

New York's Approach

New York's approach to this issue diverges from California's in important ways, which could give those arguing for a federal right of publicity yet another data point if entertainers cannot protect their rights consistently.[17] It is perhaps unsurprising for a rap battle to highlight such different approaches to the right of publicity in the context of AI amongst the genre's biggest historic rivals, but these differences could be a harbinger of things to come as the law is forced to develop for new technologies.



Civil Rights Law Section 50-f covers the statutory right of publicity in New York. A central difference between that and Section 3344.1 is the minimum statutory damages a prevailing plaintiff is entitled to recover. Section 50-f(2)(c)(i) imposes minimum damages of $2,000 for any violation of Section 50-f, whether or not a defendant appropriated a deceased personality's publicity rights through a digital replica. Section 50-f's approach to minimum damages suggests a more laissez-faire attitude toward AI-based appropriations, whereas Section 3344.1 takes a far more punitive approach.

This divide is further emphasized by the types of uses Section 50-f punishes.[18] While Section 3344.1 provides that any appropriation by a digital replica in an audiovisual work or sound recording is subject to liability, Section 50-f(2)(b) only punishes defendants for using "a deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work . . . if the use is likely to deceive the public into thinking it was authorized [by the personality's estate]." It further states that a person is not liable under this section if "the person making such use provides a conspicuous disclaimer in the credits of the scripted audiovisual work, and in any related advertisement in which the digital replica appears, stating that the use of the digital replica has not been authorized by the person or persons specified in subdivision four of this section."

Section 50-f(d) carves out numerous exceptions to the rule, many of which are similar to Section 3344.1's exceptions.[19] However, Section 50-f(d)(ii)'s exceptions that pertain specifically to digital uses diverge from Section 3344.1(B)(2)(A)(ii)'s in two important ways. First, it exempts defendants that use a digital replica in "works of political or newsworthy value, or similar works, such as documentaries, docudramas, or historical or biographical works, regardless of the degree of fictionalization." This differs from Section 3344.1(B)(2)(A)(ii)(III), which only allows for "some degree of fictionalization" and prohibits uses that are "intended to create, and [do] create, the false impression that the work is an authentic recording in which the individual participated." Second, Section 50-f(d)(ii) excuses "a representation of a deceased performer as himself or herself, regardless of the degree of fictionalization, except in a live performance of a musical work."

The consequences of these differences become apparent when applying the law to Drake's "Taylor Made Freestyle." While Shakur's estate would likely have a claim under Section 3344.1 if it were enacted before the song's release, it's apparent that Section 50-f would not have covered the appropriation of Shakur's likeness if his estate was subject to New York's laws. Since the musical performance was merely a video, rather than a live performance, the use would not be covered

under Section 50-f(2)(b). Further, the replica of Shakur in the music video does not represent him as a fictional character and thus would not be covered by Section 50-f(2)(b).

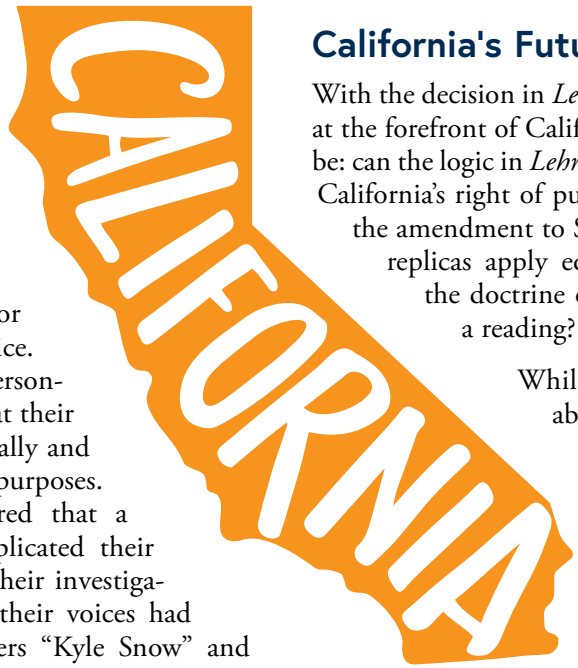
One may expect the common law right of publicity to provide some form of consistency among these different approaches to AI. Indeed, it was the common law, rather than statutory law, that allowed personalities such as Vanna White, Bette Midler and Tom Waits to sustain their claims. However, New York does not recognize the common law right of publicity.[20]

Regarding public policy, a central tension with regulating AI is balancing its use for productive artistic and commercial purposes while protecting the rights of artists, entertainers and workers. California and New York will provide an interesting case study to which pole we should gravitate more closely. However, until then, the only thing that seems clear is the East-West Coast differences are apparent.

Recent Developments

In the months since Section 3344.1's amendment, no decision or complaint has emerged seeking recovery for a digital replica of a deceased celebrity. However, the recent decision in *Lehrman, et al. v. Lovo, Inc.*,[21] on a motion to dismiss, establishes the difficult balance courts are left to strike when interpreting the law in the face of developing technologies – and it once again demonstrates the key differences between California and New York's approach to the right of publicity.

Plaintiffs Paul Lehrman and Linnea Sage brought the case as a putative class action[22] on a number of claims, including violation of New York's civil rights and consumer protection laws, trademark and copyright infringement, and breach of contract, among others.[23] The plaintiffs alleged, in relevant part, that they were voice actors, using the platform Fiverr to develop opportunities.[24] They were separately approached by personnel from Lovo, a company that utilizes artificial intelligence to create synthetic voices for a text-to-speech subscription service. In their discussions with Lovo personnel, the plaintiffs were assured that their voices would only be used internally and only for research and testing purposes. However, the plaintiffs discovered that a podcast that used Lovo had replicated their voices for the two narrators. In their investigation, the plaintiffs learned that their voices had been used to create the characters "Kyle Snow" and "Sally Coleman," whose personas were used to market the tool, first to investors, and then to the general public, in a series of YouTube videos and tutorials showing how to use Lovo's product.



Given this, the plaintiffs alleged that their voices were appropriated in violation of New York Civil Rights Law Sections 50 and 51.[25] Lovo moved to dismiss on the basis that (1) the statute of limitations had run out; (2) that the coverage for digital replicas only extended to deceased personalities; and (3) that the plaintiffs did not allege sufficient facts to support their cause of action.[26]

The second issue presented a complicated question for the court. Lovo sought to invoke "the expressio unius canon of interpretation to suggest that the explicit inclusion of digital replicas of deceased persons in Section 50-f means that living personas are excluded from Section 50's scope."[27] The court disposed of this argument by accounting for the context surrounding Section 50. In particular, the court relied on *Lohan v. Take-Two Interactive Software, Inc.*, which held that "a computer generated image may constitute a 'portrait'"[28] for purposes of Sections 50 and 51. The *Lehrman* court believed that this rendered any amendment to include digital replicas into Sections 50 and 51 superfluous.[29]

The court's invocation of Lohan presented a secondary question. In that case, the court dealt specifically with visual material and determined that a digital replica could be considered a "portrait" within Section 50's text.[30] However, the *Lehrman* court had to determine if the same logic applied to a digital replica of a voice.[31] It answered that such a replica was indeed covered by Section 50, because "any recognizable likeness . . . may qualify as a 'portrait or picture,'" and "Lovo identifies no principled basis for interpreting 'voice' more narrowly than 'picture' or 'portrait' to exclude digital replicas."[32]

California's Future Approach?

With the decision in *Lehrman*, a question that should be at the forefront of California entertainers' minds should be: can the logic in *Lehrman* apply in a similar manner to California's right of publicity laws? Put differently, can the amendment to Section 3344.1 to include digital replicas apply equally to Section 3344, or will the doctrine of expressio unius preclude such a reading?

While it is interesting to speculate about the reasoning a court may use in answering these questions, a solution may soon come without a court's intervention. California Senate Bill 11, introduced in December 2024 in the state Senate, is awaiting the governor's signa-

ture. The bill is designed to specifically address artificial intelligence technology in some areas, including Section 3344. As it exists now, the bill would add a Section 3344(f), stating "For purposes of this section, a voice or likeness includes a digital replica, as defined in Section 3344.1."[33]

If signed, the bill would provide prospective plaintiffs with much-needed clarity on their publicity rights regarding artificial intelligence. Whereas now a plaintiff has to solely plead a cause of action under the common law right of publicity, or else risk wading into murky arguments related to the *White, Midler,* and *Wendt* cases, they would no longer have to worry. If their publicity rights are appropriated with a digital replica, they would be fully protected under both the statutory and common law right of publicity.

These developments highlight yet again the central differences between California and New York's legislative approaches. Where California's Legislature has been active in recent years seeking to patch holes in the case law to account for technological developments, New York's Legislature has taken a more tepid approach. Nonetheless, courts asked to interpret New York case law have announced a more proactive approach to protect plaintiffs' publicity rights. It is unlikely we will ever see a day when the most prominent rappers from Los Angeles and New York will call a truce and stop throwing barbs at each other from across the country. However, they may both soon be able to rest easy, knowing that their voices will be protected against digital impersonators, regardless of what state they're in.

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Endnotes

1. Cal. Civ. Code § 3344.1(a)(2)(A)(i). Though its Assembly Bill name is AB 1836, it will mainly be cited by its code number.

2. *See, e.g., Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (1970) (decided before the passage of § 3344, but relied upon in subsequent cases); *Midler v. Motor Co.*, 849 F.2d 460, 463 (1988) (holding that "likeness" only refers to visual, not vocal imitation); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (1992); *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1397 (1992) (affirming *Midler* and holding that an impression of Vanna White did not sufficiently resemble her to sustain a cause of action under § 3344); *but see Wendt v. Host Intern., Inc.*, 125 F.3d 806, 810 (1997) (holding that there was a triable issue of fact as to whether robots that were modeled according to the plaintiffs' appearances were sufficiently impressionistic under § 3344).

3. *Midler*, 849 F.2d at 463.

4. *Id.*

5. *White,* 971 F.2d at 1397. While Midler and White were unable to recover under the statutory law, they could maintain an action under the common law right of publicity.

6. Cal. Civ. Code § 3344.1(a)(2)(A)(i).

7. *Id.*

8. "[N]ews, public affairs, or sports broadcast or account." § 3344.1(a)(2)(A)(ii)(I).

9. "[C]omment, criticism, scholarship, satire or parody." § 3344.1(a)(2)(A)(ii)(II).

10. Unless the work intends to and does create the impression that the digital replica is an authentic recording. § 3344(a)(2)(A)(ii)(III).

11. § 3344(a)(2)(A)(ii)(V).

12. § 3344(a)(2)(A)(ii)(IV).

13. The use came before the amendment to § 3344.1, but Tupac's estate was able to have the song taken down after sending a cease-and-desist letter.

14. Section 3344(a)(2) pre-amendment provides "(2) For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work."

15. § 3344.1(a)(2)(A)(i).

16. *See, e.g., Cambridge University Press v. Patton*, 769 F.3d 1232, 1260 (11th Cir. 2014) (because fair use is an affirmative defense, its proponent bears the burden of proof in demonstrating that it applies); *see also Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 553 (2023) (Gorsuch, N. concurring) (referring to fair use as an affirmative defense numerous times).

17. For example, there are currently two bills proposed in Congress, the NO FAKES Act of 2024, S.4875, and the No AI FRAUD Act, H.R.6943, would both establish a statutory right for name, image and likeness in the context of AI.

18. Section 50-f(2)(a)-(b). § 50-f(1)(c) defines a digital replica as "a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual."

19. For example, § 50-f(2)(d)(i) almost identically mirrors § 3344.1(a)(1)(B)(i), § 50-f(2)(d)(iv) is similar to § 3344.1(a)(1)(B)(ii), and § 50-f(2)(d)(iii) provides the same exception as § 3344.1(j).

20. *See, e.g., Darden v. OneUnited Bank*, 185 A.D.3d 1004, 1006 (2020).

21. The opinion, rendered on July 10, 2025, has not been published at the time of writing. However, it can be found at *Lehrman, et al. v. Lovo, Inc.*, 2025 WL 1902547 (S.D.N.Y. 2025). For purposes of this article, I will be citing the page numbers reported in the Westlaw citation.22 *Id.* at 3-4.

22. *Id.* at 3-4.

23. *Id.* at 1. While the court's thorough analyses of the copyright and trademark claims are particularly interesting, they are distinct from the right of publicity and thus deserve their own articles. However, for those curious about the outcome, the court granted the motion to dismiss as to the trademark and copyright claims. For the former, the court did not grant plaintiffs leave to amend. For the latter, the court granted leave to amend only as it pertained to the use of the original recordings in the training of the AI model.

24. Recounting of the relevant facts can be found at *id.* at 1-3.

25. *Id.* at 19-20.

26. *Id.* at 21-24. The court's analyses of the statute of limitations and factual claims are interesting, though brief. In short, the court found that the statute of limitations could not preclude the right of publicity claim at the motion to dismiss stage, because the plaintiffs adequately alleged the republication exception applied, as they had alleged the algorithm "continually produce[s] entirely new sound clips using their voices, including well into the limitations period." As to the factual allegations, the court found that there was ample evidence that their voices were identifiable and used in New York. On to the requirement that the use be in advertising or trade, the court found that the investor presentation, and the tutorials and promotional articles were either advertisements, or, at the very least, used to "draw trade to the firm."

27. *Id.* at 22.

28. 31 N.Y.3d 111, 117 (2d Cir. 2018).

29. *Lehrman, supra*, 2025 WL 1902547 at 22.

30. *Lohan, supra*, 31 N.Y.3d at 122.

31. *Lehrman, supra*, 2025 WL 1902547 at 22.

32. *Id.*

33. 2025 California Senate Bill No. 11, California 2025-2026 Regular Session (July 17, 2025). The bill can be tracked at: https://legiscan.com/CA/bill/SB11/2025.

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What New York Lawyers Should Know About In Terrorem Clauses in Wills and Trust Agreements

By Irma K. Nimetz and Frank W. Streng

"In terrorem" is a Latin phrase meaning "in order to frighten."[1] When a last will and testament and/or a trust (revocable or irrevocable) agreement contains an in terrorem clause it means, in simple terms, that if a beneficiary challenges the validity of a will or trust agreement and that challenger loses the will or trust contest, the challenger will forfeit their bequest(s). By contrast, if the challenger prevails and the will is denied probate or the trust agreement is set aside, the in terrorem clause is a nullity with no force or effect.

The purpose of an in terrorem, or no contest, clause is generally to "discourage challenges" to the instrument that "would upset the grantor's distributive intent."[2] It is ironic that a testator or grantor often wishes to insert an in terrorem clause into their instrument to prevent will or trust contests, yet in reality, challenges to instruments containing such clauses are by no means unusual.

Challenges to wills and trusts are typically based upon grounds that the instrument was not duly executed, the testator or grantor lacked capacity, or the instrument was procured by undue influence, duress, or fraud.

It is clear that under New York law, in terrorem clauses are "not favored and must be strictly construed."[3] Practitioners, though, face difficult issues when a client seeks advice as to whether to file objections to the probate of a will in Surrogate's Court or whether to file an action in Supreme Court (or Surrogate's Court) to set aside a trust agreement that may result in triggering an in terrorem clause.

In a recent Court of Appeals decision, *Carlson v. Colangelo*,[4] the court analyzed for the first time an in terrorem clause in a trust agreement. Sixteen years ago, the Court of Appeals provided guidance on in terrorem clauses in wills in *Matter of Singer*.[5] However, uncertainty remains, especially with respect to litigation on in terrorem clauses in trust agreements. Practitioners must be wary when advising clients of their litigation options.

Differences Between Wills and Trusts in the Context of In Terrorem Clauses

One key difference in counseling clients on in terrorem clauses in wills or trusts is the "effective date" of each instrument and the absence of statutes pertaining to in terrorem clauses in trust agreements. In New York, a "propounded instrument" (not deemed a will until it is admitted to probate) is offered for probate in Surrogate's Court and is only admitted to probate when the surrogate is satisfied that the "propounded instrument" is a valid will of the decedent.[6] During a probate proceeding, the decedent's distributees or heirs at law are notified (by citation) of the pending probate proceeding. If a will contains an in terrorem clause, beneficiaries are entitled to conduct limited pre-objection discovery under the Surrogate's Court Procedure Act 1404(4)[7] (i.e., depositions of the attesting witnesses, attorney-drafter, and the nominated executors and proponents) before deciding whether to file objections to the probate of the propounded instrument. Safe harbor provisions under Estates, Powers & Trusts Law 3-3.5(b)(3)(E)[8] include "[t]he institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof."

In contrast to wills, a revocable or irrevocable trust is valid upon its due execution (like a contract). If all of the decedent's "probate assets" are properly transferred to the trust prior to death, then probate of a decedent's last will and testament can be avoided entirely. A trust beneficiary may not receive notice that he or she is a beneficiary for years after the decedent's death. While courts apply the safe harbor provisions, EPTL 3-3.5 and SCPA 1404(4), to trust contests, there are no statutes specifically dealing with in terrorem clauses in trust agreements.

Court of Appeals Opinions Concerning In Terrorem Clauses in Wills and Trusts

Matter of Singer[9] held that a decedent's son did not violate two in terrorem clauses in his father's will when he took the deposition of a witness, his father's former attorney who drafted decedent's nine prior wills and who was not listed in the then existing "safe harbor" provisions of SCPA 1404(4).[10] In reaching its decision, the court held that "[i]nterpreting these [in terrorem] clauses narrowly will allow surrogates to address on a case-by-case basis whether the conduct undertaken is in keeping with the testator's intent."[11] Following *Singer*, the Legislature in 2011 amended EPTL 3-3.5 and SCPA 1404 to broaden pre-objection discovery in probate proceedings for wills containing in terrorem clauses.

In *Singer*, the Court of Appeals reaffirmed the longstanding public policy that "while in terrorem clauses are enforceable, they are 'not favored and [must be] strictly construed.'"[12] However, the court never addressed the narrow issue of an in terrorem clause in a trust agreement until *Carlson v. Colangelo*. In *Carlson*, the court, in a 4-3 opinion written by Judge Rivera, modified an order of the Appellate Division, Second Department, and held that plaintiff Carlson did not violate an in terrorem clause in a trust agreement.[13]

Carlson v. Colangelo

Donald P. Dempsey (grantor) made a pour-over will and revocable trust. In his trust, Dempsey bequeathed to Kristine Carlson: (a) a house ("premises"); and (b) "a stream of income" of up to $350,000. Crissy Colangelo, the daughter of one of Dempsey's former girlfriends, was named as the trustee and residuary beneficiary of the trust. Dempsey also gave Colangelo all of his interest in a company called Dempsaco.

The trust (and the will) contained an in terrorem clause, which resulted in a forfeiture of any bequest if a beneficiary "shall contest any aspect of this Trust, or the distribution of the Grantor's assets pursuant to his Last Will, *inter vivos* Trust Agreement, beneficiary designations or non-probate beneficiary designations, or shall attempt to set aside, nullify, contest, or void the distribution thereof in any way. . . ."[14]

Carlson commenced an action against the trustee and Dempsaco in the Supreme Court, Westchester County. In the complaint, she sought distribution of her bequests, and an accounting, and also alleged that she invested $100,000 with Dempsey in Dempsaco, and as a result was a 50% owner of Dempsaco. Following limited discovery, the Supreme Court granted the trustee's first motion for partial summary judgment, holding that the plaintiff failed to establish an ownership interest in Dempsaco.[15] Thereafter, the Supreme Court granted the defendants' second motion for summary judgment and held that the plaintiff forfeited her bequests, including the premises to which she was otherwise clearly entitled, by unsuccessfully claiming a 50% ownership interest in Dempsaco and thus triggering the in terrorem.[16] The Supreme Court awarded attorneys' fees to the defendants.[17] On appeal, the Appellate Division, Second Department, modified the Supreme Court's order by denying the defendants' motion for attorneys' fees, but otherwise affirmed.[18]

The Court of Appeals held:

> because plaintiff's lawsuit seeks to enforce the Trust provisions as written and intended by the grantor, plaintiff did not attempt to nullify the Trust or challenge its terms. Thus, plaintiff did not violate the in terrorem clause and defendant is not entitled to summary judgment. We further conclude that plaintiff has established her right to summary judgment on her first cause of action regarding her ownership rights to the Premises and her motion should be granted to that extent.[19]

In finding that Carlson did not trigger the *in terrorem* clause by asserting a 50% ownership interest in Dempsaco, the court held:

> [n]owhere does the Trust declare that the grantor is the sole member of Dempsaco or that he holds a 100% interest in the company. . . Since Dempsey could only transfer to Colangelo his own interests, plaintiff's action to recognize her alleged 50% membership in Dempsaco is not a challenge to the Trust's distribution of any part of Dempsey's interest in the company. Plaintiff merely seeks what is hers and nothing more.[20]

In reaching its decision, the court pointed out that the "triggering event depends on the nature, and not the merits, of the plaintiff's claim."[21] Thus, despite the lower court's finding that Carlson did not own a 50% interest in Dempsaco, the court held that the nature of Carlson's claim did not "trigger" the in terrorem clause. In response to the plaintiff's position that the trustee violated the public policy of this state by demanding an indemnification agreement as a prerequisite to receiving her legacy, the court held that the "Supreme Court erroneously held that the plaintiff's public

policy claim 'is trumped by Plaintiff's disregard for Grantor's last wishes'. . . . [P]laintiff's action to protect her interest in the Premises was wholly consistent with the grantor's intent."[22]

The Upshot of *Carlson:* Tread Carefully When Advising Clients on In Terrorem Clauses

What is the significance of *Carlson*? The Court of Appeals unequivocally held that in terrorem clauses in trust agreements, like those in wills, are enforceable, but not favored, and must be strictly construed consistent with New York's longstanding public policy. In addition, "the purpose of [an] in terrorem clause is to discourage challenges to the Trust that would upset the grantor's distributive intent," and thus, an action "meant to require the Trustee to distribute the Trust in accordance with its stated provisions, is not a challenge to the grantor's distributive plan."[23]

How should attorneys counsel clients on litigation options on trust agreements with in terrorem clauses? Triggering an in terrorem clause will result in forfeiture of a bequest, and the safe harbor provisions of EPTL 3-3.5 and SCPA 1404 only apply to prospective will contests. Specifically, there are no statutes in the EPTL or SCPA that deal specifically with in terrorem clauses in trust agreements, and neither the EPTL nor the SCPA sets forth procedures for litigation concerning trust agreements.

In *Carlson*, the trust did not provide any direction for either the timing of the trustee's distribution of $350,000 or a definition of "stream of income." *Carlson* argued that there was a construction issue, presumably protected by the safe harbor provisions of EPTL 3-3.5(b)(3)(E), but there is no such analogous statute and resulting action in connection with trust agreements.

Various bar groups are studying the issues raised above and are working on a proposed statute that provides safe harbor protection for potential challenges to trust agreements that contain an in terrorem clause. However, until such legislation is adopted, practitioners must be wary when advising clients of potential litigation that may trigger an in terrorem clause in a trust agreement.

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Endnotes

1. "In Terrorem," Black's Law Dictionary (12th ed. 2024).
2. *Carlson v. Colangelo,* 2025 N.Y. Slip Op. 02264, at *5.
3. 2025 N.Y. Slip. Op. 02264 at *3.
4. 2025 N.Y. Slip Op. 02264.
5. 13 N.Y.3d 447 (2009).
6. *See* SCPA 1408.
7. SCPA 1404 "Witnesses to be examined; proof required," provides in paragraph 4:

4. In all cases the proofs must be reduced to writing. Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will. No person who has been examined as a witness under this section shall be examined in the same proceeding under any other provision of law except by direction of the court. The attesting witnesses, the person who prepared the will, the nominated executors in the will and the proponents may be examined as to all relevant matters which may be the basis of objections to the probate of the propounded instrument. There shall be made available to the party conducting such examination, all rights granted under article 31 of the civil practice law and rules with respect to document discovery.

8. EPTL 3-3.5:

> Conditions qualifying dispositions; conditions against contest; limitations thereon" provides, in part, that:
>
> (b) A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:
>
> (3) The following conduct, singly or in the aggregate, shall not result in forfeiture of any benefit under the will:
>
> . . .
>
> (E) the institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

9. 13 N.Y.3d 447 (2009).
10. 13 N.Y.3d 447, 453 (2009).
11. *Id.*
12. *Id.* at 451 (*citations omitted*).
13. 2025 N.Y. Slip Op. 02264.
14. *Carlson v. Colangelo,* 2025 N.Y. Slip Op. 02264, at *1.
15. *Carlson v. Colangelo*, 2021 N.Y. Slip Op. 32928(U) at *4 (Sup. Ct., Westchester Co. 2021).
16. *Carlson v. Colangelo,* 2022 N.Y. Slip Op. 34678(U) at *3 (Sup Ct., Westchester Co. 2022).
17. *Id.*
18. *Carlson v. Colangelo,* 221 A.D.3d 773 (2d Dep't 2023).
19. *Carlson v. Colangelo,* 2025 N.Y. Slip Op. 02264, at *3.
20. *Id.* at *4.
21. *Id.*
22. *Id.* at *6-*7. The dissent (written by Judge Garcia) charged that:

> [t]he majority's holding…based on a false construct that plaintiff "merely sought to enforce" the provisions of the Trust, ignores both our longstanding approach to the construction of testamentary documents and plaintiff's conduct . . . *Id.* at * 7.
>
> . . .
>
> Taken to its logical end, under the majority's approach, a challenger could claim, without any support, that decedent had no interest in any of the trust property, that the trust had no property at all to distribute, and that challenger owned all the trust's property-and then avoid the consequences of an in terrorem clause by claiming the suit was merely an effort to ensure that the grantor's intent was fulfilled. *Id.* at *10.

23. *Id.* at *5.

The Elusive Rule of Law

By Barry Kamins

As we approach the semi-quincentennial anniversary of our nation during a time of heightened political polarization, it is an appropriate time to discuss where the United States stands today with respect to the rule of law. That principle of American democracy has played a crucial role from our nation's birth in ensuring that our country endures. It has withstood numerous challenges over the past 249 years and, in doing so, has made our country even stronger.

Former U. S. Supreme Court Justice Anthony Kennedy once said that the term "rule of law" is often invoked, yet seldom defined.[1] Its origins can be traced back to Aristotle and the phrase was popularized by the British jurist Albert Venn Dicey in the 17th century.[2] Bar associations have created task forces to study it, and Law Day has been dedicated to the concept. But, in the end, what does it mean? Is it a rule, a concept, or even an ideology?

By examining "The Federalist Papers," one begins to understand how our Founding Fathers utilized the term in drafting the Constitution. In the Federalist No. 51, James Madison explained that, in devising the Constitution's structure of separate checks and balances, one had to contend with the unpredictable "human factor":

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed and, in the next place, oblige to control itself.

While John Adams proclaimed that we are a "government of laws" and not men, Madison knew that, in the end, men would need to implement those laws. This is the paradox underlying the rule of law.

The genius of Madison was that he understood that no government could ever be free from mistakes, even serious ones, since it was, after all, a system of men governing men. As he put it, "If men were angels, no government would be necessary."[3] His brilliance was in designing a system in which the rule of law would survive, despite the mistakes that would be inevitable.

The government's structure itself was initially designed to factor in the "human condition." Madison explained the proposed constitutional structure of separate checks and balances: "Ambition must be made to counteract ambition." This type of structure was necessary because it was anticipated that the various institutional actors in each of the three branches of government would have personal and political incentives to suppress each other's authority.

Soon after the Constitution was signed, the rule of law faced its first challenge when political parties were first created. This was an early test of Madison's theory since, under the political party regime, it was now possible for the president, House speaker and Senate majority leader to be members of the same political party, allowing them to exert near-total authority. Thus, these leaders were less likely to oppose one another – and less likely to utilize the checks and balances envisioned by the Founding Fathers. Despite challenges like this through the following years, the rule of law has prevailed, sometimes, however, under difficult conditions. Some of the challenges left a stain on our country for many years.[4] What one can conclude from these examples is that the rule of law is necessarily subject to changes in perspectives and morality; what once was considered acceptable has become less acceptable, and vice versa. As Madison acknowledged, ultimately, laws are subject to the interpretation of the people who make and interpret them. The law can only reflect what people determine is right and, therefore, it is subject to human error.

For example, it was not until 1865 that slavery was officially abolished by the 13th Amendment. In that same year, however, the Supreme Court held that people of African descent were never intended to be, nor could they ever be, citizens of this country.[5] It took 12 years to nullify that decision through passage of the 14th Amendment. Even now, the 14th Amendment has come under scrutiny with questions about immigration and birthright citizenship that pose new challenges to existing interpretations of law.

In 1896, in *Plessy v. Ferguson*,[6] the Supreme Court held that states could segregate Black people from white people

under the doctrine of "separate but equal." It took 52 years before the court overruled it in *Brown v. Board of Education*.[7] In doing so, it acknowledged that state-sponsored segregation in public schools was unconstitutional and violated the equal protection clause of the 14th Amendment. The court was not only interpreting the Constitution; it was listening to changing values and mores.

Our Constitution was again challenged after Japan's attack on Pearl Harbor. President Roosevelt authorized persons of Japanese ancestry to be relocated to internment camps. The Supreme Court held that this process did not violate our Constitution[8] and it took 75 years to disavow that ruling. In *Trump v. Hawaii,*[9] Chief Justice Roberts stated: *"Korematsu* was gravely wrong the day it was decided, has been overruled in the Court of history, and – to be clear – has no place in law under our Constitution."

In the above decisions, the Supreme Court overruled its prior rulings and rejected the doctrine of *stare decisis* to rectify decisions that did not comport with our nation's core values. A 2018 report by the Congressional Research Service found that the court had reversed itself 141 times since its initial rejection of *stare decisis* in 1851. Not all reversals, however, are universally applauded.

Recently, in *Dobbs v. Jackson Women's Health Organization,*[10] the Supreme Court overturned *Roe v. Wade,* concluding that an abortion was not protected as a specific right under the Constitution and, in fact, had historically been considered a crime. The ruling eliminates federal protection for abortion rights and allows individual states to regulate or ban abortions as they see fit.

In a joint dissent by Justices Breyer, Kagan and Sotomayor, the justices opined that the majority abandoned *stare decisis* for only one reason: "the composition of this Court. . . . " Further, they stated that the majority "eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. . . ."[11]. And yet, because the Supreme Court has ruled to outlaw federal protection of the right to abortion, that interpretation must be followed under the rule of law – until another Supreme Court rules otherwise, or Congress makes a law either legalizing or making it illegal under federal law. The majority decision and the dissent expose the tensions that are at the heart of the rule of law.

Throughout our nation's history, the rule of law has also been challenged by members of the executive and legislative branches.

Sixty-seven years ago, in *Coover v. Aaron,*[12] the U.S. Supreme Court reacted to a decision by the governor and Legislature of Arkansas to defy the court's previous order that school boards must desegregate. This was the only time in the Supreme Court's history that all nine justices signed a decision as coauthors. In its decision, the court made clear that Arkansas and every state and person in the country was required to follow the court's interpretation of the law.

The decision began as follows: "As this case reaches us, it raises questions of the highest importance of our federal system of government." The court later explained that "It is emphatically the province and duty of the judicial department to say what the law is."[13] The decision was not merely about desegregation: It was the Supreme Court asserting that it is the ultimate arbiter of the law.

In addition to state governments, former presidents have also defied the Supreme Court, thus challenging the rule of law. In 1832, the Supreme Court overturned the conviction of a missionary who was living with the Cherokee Nation. The court found that the Cherokee Nation constituted an independent political community and that Georgia could not enforce its laws against whites on

Cherokee land. Although the order was only directed at the state of Georgia, President Andrew Jackson launched a forced migration of the Cherokee Nation, which was viewed by some as disregarding the court's decision.

During the Civil War, Abraham Lincoln suspended the writ of habeas corpus in apparent defiance of Chief Justice Roger Taney's order that it be restored.[14] Lincoln believed it was necessary to maintain public safety during a precarious time when secessionist movements threatened to interfere with the deployment of Union troops. In doing so, he ignored Taney's order, arguing in his July 4, 1861 message to a special session of Congress that the Constitution was silent as to which branch of the government might exercise the authority to suspend the writ. In addition, he added that in an emergency and when Congress was not in session, he had the authority to take that action. And, ultimately, nobody could stop him, unless they were willing to destabilize the very government itself. In this case, it was Lincoln who decided the law, even though the Supreme Court disagreed.

In contrast, there are other examples where former presidents have reluctantly complied with the mandate of the Supreme Court even though they strongly disagreed with it. When the court ordered President Nixon to turn over the infamous White House tapes, he did so even though he knew that, by doing so, it would be the end of his presidency. During the Korean War, when the court declared as unconstitutional President Truman's order to seize the nation's steel mills, he relented, although reluctantly. And in the 1930s, the court struck down many of the New Deal programs designed by President Roosevelt. While he did not defy those rulings, he toyed with the idea of "packing" the court. While these former presidents might not have agreed with the above rulings, they ultimately demonstrated respect for the rule of law.

Some scholars believe that, in several instances, the rule of law has been abandoned because the Constitution itself has failed to specify adequately the rules that must be followed. Several years ago, the Harvard Gazette hosted a discussion among four distinguished constitutional scholars who focused on the structure of the U. S. Constitution.[15] The panelists agreed that our Constitution, unlike many state constitutions, is a "remarkably short, and in many instances, vague document." Some might argue that it was purposely vague, as the founders knew that there would be many situations that they could not even begin to imagine; that is why it is referred to as a "living" document. This has been both a blessing and a curse.

Despite the gray areas in the Constitution, however, the panel agreed that our system of democracy has worked over the years because we have relied on each president's respect for the institution and a self-conscious effort to exercise restraint. Throughout our history, presidents have created standards of conduct for their successors to follow. These norms, however, have not always been respected, which has brought to light some vulnerabilities in our democracy.

The panel concluded that once a norm is no longer adhered to, it must be formally preserved in writing. As an example, the panelists noted that for 150 years there was no written rule about the number of terms a president can serve. The country relied, instead, on an informal norm, adopted by George Washington, that the president should only serve two terms.

When Franklin Roosevelt did not abide by that norm, however, the process of formally amending the Constitution was invoked. Eventually, the 22nd Amendment was written into the Constitution. The panelists concluded that when presidents will not respect certain boundaries adhered to by their predecessors, that the people must endeavor to make amendments to the Constitution.[16]

In the end, therefore, it will be the rule of law that ensures that our democracy continues to thrive. The rule, however, can only be as strong as the people who uphold it. As Professor Stein expressed, "The rule of law . . . is an ideal, a goal, something to be strived for."[17]

While politically charged current events saturate our endless 24-hour news cycle, will the rule of law continue to endure for the next 250 years in the face of unprecedented challenges? Only time will tell.

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2. Sir Thomas Bingham, The Rule of Law (Penguin 2010).
3. The Federalist No. 51 (James Madison).
4. Will A. Gunn, *How the Rule of Law Has Shaped and Continues to Shape America*, American Bar Association (March 3, 2021), https://www.americanbar.org/groups/public_education/law-day/2021/how-the-rule-of-law-has-shaped-and-continues-to-shape-america/.
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6. 163 U.S. 537 (1896).
7. 347 U.S. 214 (1944).
8. *Korematsu v. U.S.*, 323 U.S. 214 (1944).
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10. 597 U.S. 215 (2022).
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13. Citing *Marbury v. Madison*, 2 L.Ed. 60.
14. *Ex Parte Merryman*, 17 F.Cas 144 (Cir. Ct. Md., 1861).
15. Steven Jarderey, Michael Klarman, Steven Levitsky and Mark Tushnet, Panel: Are There Holes in the Constitution?, Harvard Gazette, Harvard University Law School (July 19, 2018).
16. E.g., the presidential power to pardon.
17. *Supra* n. 1 at 16.

The Need for Reform in Schedule A E-Commerce Lawsuits

By Zhiwei Hua

The rapid growth of cross-border e-commerce has reshaped global trade, with the United States emerging as a key market. E-commerce, the fastest growing area in the global economy, has shortened the distance between buyers and sellers,[1] especially since the outbreak of COVID-19.

However, this expansion has brought significant legal challenges, particularly in the realms of intellectual property protection. This article examines the impact of Schedule A cases – e-commerce sellers operating in the U.S. market. These lawsuits, commonly used to combat intellectual property infringement and counterfeit goods, often yield positive results for plaintiffs, such as asset restraints and preliminary injunctions that impose severe financial and operational burdens on sellers. As such, the law can be both a sword and a shield – intended to protect intellectual property, yet frequently exploited to suppress competition, leading to disproportionate harm to foreign sellers, many of whom are unaware of their legal rights or unable to defend themselves effectively. Because of the increase in suits against Chinese e-commerce sellers, some are considering pulling out of U.S. markets altogether.

Chinese cross-border e-commerce occupies a large sector of the United States market. Temu, owned by Pinduoduo, is a popular shopping marketplace known for its ultra-low prices. Temu claims a 17% market share within the discount store category, and annual sales were forecast to reach $54 billion in 2024.[2] Dissatisfied with selling products to

the United States solely through e-commerce platforms, a significant proportion of Chinese cross-border e-commerce sellers are actively utilizing domestic platforms in the United States such as Amazon, eBay, and Walmart Marketplace. Recent reports suggest that nearly 63% of third-party sellers on Amazon's U.S. platform come from mainland China or Hong Kong, while U.S. sellers make up 34.8%.[3] Besides China and the U.S., the United Kingdom, Canada, and Japan are the other most preferred markets for Chinese e-commerce sellers.[4] Several factors can keep shoppers away from buying from other countries. Recent studies show that 23% of consumers abandon their orders due to slow shipping, highlighting the crucial role of fast delivery in customer retention and satisfaction.[5]

Schedule A Cases

Schedule A cases get their name from the fact that the defendants are identified collectively in a "Schedule A," rather than on the cover or in the body of the complaint.[6] Unlike the Digital Millennium Copyright Act, which only applies to copyright with a "notice and takedown" provision, Schedule A cases cover copyright, patent and trademark.

In Schedule A cases, the suit is filed under seal. As a result, defendants are not initially aware that a lawsuit has been filed against them, which is the intention.[7] The plaintiff then files an ex parte motion for entry of a sealed temporary restraining order to enjoin the offer for sale of the allegedly infringing products. Assuming the plaintiff's motion is granted – which routinely occurs because the defendants are not provided the opportunity to oppose, for reasons to be explained – the plaintiff then provides the temporary restraining order, after it's signed by the court, to online marketplaces. The platforms then close the relevant product listings and institute an asset freeze before the defendants even learn about the proceedings against them.[8]

The U.S. District Court for the Northern District of Illinois has seen a plethora of these cases. Ten years ago, Schedule A cases made up approximately 25% of cases filed in Illinois while 15 years ago, plaintiffs filed, at best, a handful of these cases each year.[9] In June 2023, 88% of trademark cases filed in the same district were against Schedule A defendants.[10]

Regardless of whether the plaintiff seller's true purpose is to protect intellectual property rights or to target competitors, Schedule A cases offer significant advantages. They take less time than other types of lawsuits and allow plaintiffs to sue multiple defendants simultaneously. Schedule A cases also offer significant cost savings. Filing a complaint in federal court requires a $405 filing fee per case. If a plaintiff were to sue each defendant individually, the total cost would be $4,050 for 10 defendants. However, by listing multiple defendants in a single Schedule A case, the plaintiff can pursue all claims under one filing, drastically reducing expenses.

As mentioned above, the plaintiff can file an ex parte motion for entry of a sealed temporary restraining order to enjoin the offer for the sale of the allegedly infringing products.[11] This means the court may grant a temporary restraining order without providing notice to any defendant listed on Schedule A, effectively preventing any defendant from opposing the order at this stage. Under standard civil procedure, it often takes about a month to complete a service of summons and receive the defendant's answer or counterclaim.[12] In contrast, a temporary restraining order, as pre-trial injunction, can be requested immediately after the plaintiff files the complaint and may be granted within a week.

Courts Push Back

Why have Schedule A cases become an area of concern? The answer is in the growth of Schedule A filings. For the last decade, the Chicago federal court has been the hub of this particular brand of intellectual property litigation. One prominent law professor has dubbed Schedule A cases an "abusive" scheme to exploit procedural rules and capitalize on judicial deference to intellectual property owners.[13] For years, most Schedule A cases have been filed in the U.S. District Court for the Northern District of Illinois; of the 938 Schedule A cases filed in 2022, nearly 85% (794) were filed in Chicago.[14] The reason so many of these cases happen in Chicago is because the Northern District court:

> has a broader jurisdictional qualification than many other federal courts, which allows Schedule A cases to reach a broader group of infringers. Specifically, the "minimum contacts" required for the Northern District of Illinois to assert jurisdiction over the defendant is met if the defendant "reasonably could foresee that its product would be sold in the forum."

Because of its size and the "prevalence of the Chicago area to trade," it would be reasonable to expect that a product would be sold in the Chicago area.[15]

However, not all Schedule A cases meet the required standard. On Nov. 4, 2024, U.S. District Judge John Blakey dismissed a copyright infringement case against 18 defendants that, by his reading of the plaintiff's allegations, were not related to each other.[16] The mere allegation that defendants infringe the same intellectual property became insufficient for proper joinder under Rule 20(a)(2). Blakey cited a 2012 case, in which the judge noted that unless there is an actual link between the facts underlying each claim of infringement, independently developed products using differently sourced parts are not part of the same transaction, even if they are otherwise coincidentally identical."[17]

On Nov. 12, 2024, U.S. District Judge Sunil Harjani denied a different copyright owner's motion for a tem-

porary restraining order against 59 defendants, holding that the plaintiff failed to allege a relationship among the defendants that would justify their joinder in a single lawsuit.[18] Many plaintiffs file Schedule A cases with extensive defendant lists, often exceeding 300 defendants. Under common legal principles, it is unlikely that all 300 defendants would satisfy the requirements for joinder. However, many plaintiffs still attempt this approach. Their motives may extend beyond protecting their intellectual property rights. They may also aim to target competitors by using restraining orders to freeze accounts and collect as many settlement fees as possible. This type of abuse places an increased burden on the federal courts.

Targeting of Chinese Cross-Border E-Commerce Sellers

As a dominant force in cross-border e-commerce, Chinese sellers are disproportionately involved in Schedule A litigation. It is common for the majority of defendants listed in a Schedule A case to be Chinese sellers, and as a result, only a small fraction of them appear in court to defend themselves.

One problem that puts Chinese e-commerce sellers at a disadvantage when their plaintiffs are in the United States is that personal delivery or mail service of a summons is impractical. The only feasible method of service is electronic, typically via email, after the plaintiff obtains court approval for alternative service. However, many sellers either fail to provide valid email addresses to e-commerce platforms or the plaintiff may attempt service using incorrect contact information. Consequently, securing default judgments against these defendants becomes relatively easy, reinforcing the strategic appeal of Schedule A filings.

According to a 2023 article in the MIT Technology Review, "it's Chinese sellers who seem to be targeted the most often." One New York-based attorney who has represented e-commerce sellers said "about 70% of his Schedule A defense clients are from China, while fewer than 10% are based in the United States."[19]

Market competition is another contributing factor. China is a manufacturing powerhouse and a major exporter of goods around the world. The low cost of labor and materials, government support, and intense competition among manufacturers are some of the main reasons why Chinese products are often cheaper than those made in other countries.[20] As a result, many consumers prefer to purchase goods online from Chinese sellers to take advantage of these lower prices. Each year hundreds of millions of packages, mostly from Chinese platforms, are sent directly to American consumers eager to take advantage of significantly lower prices on clothing, electronics and other products.[21] Schedule A litigation can, to some extent, serve as a mechanism to curb this growing trend.

"One problem that puts Chinese e-commerce sellers at a disadvantage when their plaintiffs are in the United States is that personal delivery or mail service of a summons is impractical."

Schedule A litigation has effectively become a weapon used to target Chinese cross-border e-commerce sellers, contributing to instability in the e-commerce market. Many sellers – particularly small businesses and individual operators – feel frustrated and helpless when their stores are shut down, often without prior notice or a meaningful opportunity to defend themselves. In many cases, these sellers believe they have done nothing wrong, yet they face severe consequences, including asset freezes and reputational harm. "We have many links, and due to this issue with one link, their lawyer applied to freeze all links in our store, freezing the entire store," said one Chinese Amazon seller, expressing one of their frustrations over the legal actions taken against their store. The seller received a temporary restraining order, followed by a preliminary injunction. The seller emphasized that freezing a single link should not lead to the entire account being frozen, as it causes significant operational losses.[22]

Consequently, many Chinese cross-border e-commerce sellers are considering withdrawing from the U.S. market and redirecting their operations to the European Union and other regions. This trend not only affects the sellers but also represents a potential loss for the U.S. economy, as it may lead to reduced product diversity and competition in the e-commerce sector.

Potential Solutions

To limit abuse, one effective approach is to hold accountable those who initiate litigation with ulterior motives. This can be accomplished through the imposition of monetary fines and disciplinary sanctions. Such measures would help deter frivolous filings and reinforce the integrity of the legal process.

For example, consider a Schedule A plaintiff who obtains a temporary restraining order and uses it to freeze the assets of numerous defendants, but later, during the preliminary injunction stage, several defendants appear and successfully oppose the motion. After the court denies the motion for preliminary injunction, the judge could impose sanctions on the plaintiffs and their counsel. These sanctions may include monetary penalties – such as

requiring the plaintiff to compensate a percentage of the defendants' financial losses resulting from the improperly granted restraining order – as well as disciplinary actions for misuse of the litigation process. The prospect of such severe penalties would compel potential abusers to think twice before initiating litigation in bad faith.

In addition, judges could apply stricter standards in Schedule A cases to help curb abuse. As discussed above, some judges have already denied motions for temporary restraining orders on the basis of improper joinder[23] – a proper and effective approach. Courts should require plaintiffs to submit specific factual evidence demonstrating a coordinated scheme among defendants, rather than relying solely on screenshots of similar product listings. Plaintiffs should also be required to disclose whether they have previously initiated litigation involving the same or similar intellectual property and to report the outcomes of those cases. This would help the court identify repeat filers and detect patterns of abusive litigation.

Furthermore, a regulatory referral mechanism could be established so that repeated misuse by the same plaintiff or law firm would prompt an investigation or formal warning from agencies such as the U.S. Patent and Trademark's Office of Enrollment and Discipline. In serious cases, the agency could consider suspending or invalidating the plaintiff's trademark or patent registration as a disciplinary measure. This would serve as a strong deterrent against abuse while also reducing the burden on the judiciary.

E-commerce platforms should play a more active role in protecting defendants in Schedule A cases. As noted above, most cross-border e-commerce sellers are located outside the United States, and email is typically the most appropriate method of service. Therefore, platforms should take greater care in verifying that sellers' contact information – particularly email addresses – are accurate and up-to-date. Ensuring timely service allows defendants the opportunity to appear in court early and exercise their right to oppose motions for preliminary injunction. Early participation increases the likelihood that weak or unsubstantiated motions will be denied, helping to prevent plaintiffs from abusing the Schedule A process to gain an unfair advantage.

Finally, sellers themselves must take greater responsibility. They should proactively verify whether any of their products infringe existing U.S. trademarks, copyrights, or patents before listing them for sale. When possible, sellers are encouraged to register their own trademarks and patents with the United States Patent and Trademark Office, and their copyrights with the U.S. Copyright Office, to protect their rights and reduce the risk of unintentional infringement. At a minimum, sellers should ensure that they provide a reliable and regularly monitored email address to the platform, so they can be reached in the event of legal service.

The excessive use of Schedule A cases has challenged the courts to ensure procedural fairness and enforcement. Addressing these issues requires a coordinated effort across the legislative, judicial and e-commerce sectors. Ultimately, these reforms aim to strike a more equitable balance between protecting intellectual property rights and safeguarding the interests of legitimate cross-border sellers.

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New York State's Paid Prenatal Leave Law: Open Questions on Safeguarding Employee Privacy in Reproductive Health Decisions

By Charlotte A. Moriarty

As of Jan. 1, New York State became the first state to offer paid time off for employees to receive prenatal care. While the paid prenatal leave law fills an important gap in New York's legal framework, it may raise some concerns relating to employee privacy. This article discusses New York State's paid prenatal leave law and the questions that remain open as New York employers offer this benefit for the first time.

History of Paid Prenatal Leave

On April 22, 2024, Gov. Kathy Hochul signed into law the requirement that private employers in New York provide paid time off for employees to attend pregnancy-related medical appointments. "No pregnant woman in New York should be forced to choose between a paycheck and a check-up – and that's why I pushed to create the nation's first paid prenatal leave policy," announced Gov. Hochul.[1]

The paid prenatal leave law builds on a series of steps New York has taken to protect reproductive health care in recent years. Most notably, in December 2024, New York ratified the Equal Rights Amendment, which enshrined in the New York State Constitution the right to be free of discrimination based on reproductive health care and autonomy, pregnancy, and pregnancy outcomes.[2]

Gov. Hochul first introduced paid prenatal leave as an amendment to New York State's sick leave law, New York Labor Law Section 196-b, during the state's 2024-25 Executive Budget proposal.[3] Shortly before the law took effect on Jan. 1, the New York State Department of Labor released guidelines on paid prenatal leave for both employers and employees.[4] Both the new amendment to the law and the guidelines make clear: Paid prenatal leave's coverage is broad. Private sector employers, regardless of size or industry, must provide 20 hours of paid prenatal leave to all employees, including part-time employees. Nonprofit organizations are covered by the law, but federal, state or local government employees are not. Upon request, employers must allow employees to use this leave until all 20 hours have been used.[5]

Employers must offer paid prenatal leave in addition to the state's required sick leave or any other available leave option that they voluntarily provide, such as vacation or holiday paid time off. Employers cannot require an employee to choose one type of leave over another or require an employee to exhaust one type of leave before using paid prenatal leave.[6]

Eligible employees are entitled to use the 20 available hours once in a 52-week period, which begins upon first use of prenatal leave. If an employee becomes pregnant more than once during this 52-week period, they may use any remaining hours of their 20-hour bank but may not exceed 20 hours. Employers may choose to offer greater than 20 hours but are not required to do so.[7]

Employees may use this benefit in hourly increments for health care services related to pregnancy, such as physical examinations, medical procedures, monitoring and testing, and discussions with health care providers related to pregnancy. The guidelines specify that the benefit is not available to spouses, partners, or other support people, but only to those who are directly receiving prenatal care. The law also applies to all fertility treatment or care appointments. End-of-pregnancy care appointments are covered, but postnatal or postpartum appointments are not.[8]

Unlike the New York State sick leave law, employers may not choose to offer this benefit on an accrual basis (where employees may earn an hour of sick leave for every 30 hours worked), but rather employers must make 20 hours of paid prenatal leave available to employees at the start of their calendar year. Further, there are no minimum work requirements. New employees are eligible for paid prenatal leave at the start of their employment. Employees must be paid at their regular rate of pay or the applicable minimum wage established by the law, whichever is greater.[9]

Employers are prohibited from retaliating against employees for using paid prenatal leave. The guidelines provide the following examples as unlawful retaliation: reducing the number of hours of sick leave, vacation leave, or other leave available to employees because they used paid prenatal leave, changing an employees' work location or hours after they request to use paid prenatal leave, and firing or demoting employees after they request to use paid prenatal leave.[10]

The broad scope of New York State paid prenatal leave is intended to ensure "workers can receive the health care needed to address all pregnancy-related care to create healthy outcomes without jeopardizing their employment or finances."[11]

Policy Goals Furthered

According to the Office of Disease Prevention and Health Promotion of the U.S. Department of Health and Human Services, prenatal care is necessary to prevent and address health concerns for mothers and infants and is most effective when accessed early and continuously throughout pregnancy.[12]

In a 2024 survey of 1,300 women, 65% of respondents reported inflexible work schedules and the inability to take off for appointments as a major challenge they faced while pregnant or while receiving fertility treatments.[13] Studies show that cost is the primary reason why women are unable to receive fertility care.[14]

Employees in New York can now take time off to go to pregnancy-related health care appointments with greater scheduling flexibility and without losing pay. Gov. Hochul's announcement emphasizes that this law

is designed to support low-wage workers who are living paycheck to paycheck and may face greater financial hardship if they had to forgo income to receive prenatal care. The paid prenatal law is intended to improve access to reproductive health care for all covered employees.

Employee Privacy Concerns and Relevant Legal Protections

Under the guidelines, employers are explicitly prohibited from asking for documentation of an employee's need to use paid prenatal leave or inquiring about confidential pregnancy-related health conditions. However, because of the law's specific purpose – for employees attending pregnancy-related medical appointments – an employee requesting to use paid prenatal leave effectively discloses to their employer that they have made a decision related to their reproductive health. This inevitable disclosure may put employees at an increased risk of being subjected to workplace discrimination. As a result, it is crucial that employers maintain the confidentiality of an employee's request to use paid prenatal leave to ensure that employees are not discriminated against or subject to any adverse employment actions based on their use of this leave.

There are several laws aimed at protecting employee health care privacy and preventing discrimination based on an employee's reproductive health decisions or pregnancy status that employers must be aware of as they implement their paid prenatal leave policies.

At the federal level, the Equal Employment Opportunity Commission enforces three federal laws related to pregnancy discrimination. First, Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act, prohibits discrimination based on current, past or potential pregnancy, medical conditions related to pregnancy or childbirth, or having or choosing not to have an abortion.[15] Second, the Americans with Disabilities Act prohibits disability discrimination, including pregnancy-related conditions. The ADA requires employers to maintain an employee's disability-related medical information in a confidential medical file kept separate from the employee's personnel file. This medical information may only be disclosed in limited situations related to their employment.[16]

Third, in June 2024, the Equal Employment Opportunity Commission issued a final rule on the Pregnancy Workers Fairness Act, requiring employers to provide a reasonable accommodation to a "qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an 'undue hardship.'"[17] The future of this law is uncertain as a result of ongoing legal challenges, leadership changes at the EEOC, and shifting priorities of the Trump administration.[18]

Under the New York State Human Rights Law, employers are prohibited from taking any adverse action against an employee because the employee is pregnant, intends to become pregnant, recently was pregnant, or recently gave birth.[19] This law also affords employees the right to have medical information about pregnancy-related conditions kept confidential.[20]

In 2019, New York State enacted New York Labor Law Section 203-e, which prohibits employers from discriminating against or taking any retaliatory personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment based on the employee's or a dependent's reproductive health choices.[21] Following a lengthy legal battle in *CompassCare v. Hochul*,[22] the Second Circuit held that, as of Jan. 2, employers in New York must include a notice of the protections established by New York Labor Law Section 203-e in their employee handbook or similar compilation of policies.

Law Firms Also Subject to Rules of Professional Conduct

Employers in the legal profession are further guided by the ethical obligations to refrain from discrimination. Rule 8.4 of the New York Rules of Professional Conduct prohibits lawyers from engaging in conduct in the practice of law that they know, or should know, constitutes unlawful discrimination or harassment. Conduct in the practice of law includes operating or managing a law firm or interacting with colleagues.[23] Therefore, lawyers who operate or manage law firms in New York must ensure they make paid prenatal leave available to their staff in a nondiscriminatory way to comply with these legal and ethical obligations.

Pregnancy-Related Discrimination in the Workplace

While the above-mentioned legal frameworks exist to protect confidentiality of employee health information and prevent discrimination, the unfortunate reality is that workplace discrimination remains a significant problem in the U.S. Pregnancy-related discrimination can take on many forms, such as unwanted transfer or reduction of work schedules, failing to promote, demoting or firing pregnant workers after learning they are pregnant, or any other adverse action against an employee based on their pregnancy status.[24]

In 2022, the Bipartisan Policy Center published a study finding that, of 2,200 adults, 20% have personally experienced pregnancy discrimination in the workplace, 23% have thought about leaving a job due to a lack of reasonable accommodation or fear of discrimination from an employer during pregnancy, and 21% have been scared

to tell their employers about their pregnancies due to fear of discrimination or retaliation.[25]

Based on this study, it is likely that employees may be reluctant to take paid prenatal leave, either out of fear of discrimination and retaliation, or for any other personal reason of not wanting to share their pregnancy status. If employees are hesitant to request paid prenatal leave, the intended benefit of the law will be undermined.

Issues Employers Might Consider When Implementing Paid Prenatal Leave Policies

Employers will be understandably concerned about protecting employee privacy and reducing the potentially heightened risk of discrimination. The guidelines state that employees should request paid prenatal leave using the same means they currently use to request other forms of leave, though they do not discuss what type of system an employer should maintain.

In order to ensure the law helps those it is intended to, employers can inform their workforce about the availability of paid prenatal leave and articulate what process employees should use to request the leave. Employers might also assure employees that their request will not be shared with anyone other than the personnel necessary to process the request.

Assigning a designated employee representative to answer any questions relating to an employee's use of paid prenatal leave and reminding employees that they need not share any details or medical information as a condition of using paid prenatal leave are additional actions employers might take. Whether a human resources representative or other administrative professional, the designated personnel would need to be well trained in their employer's legal obligations for handling medical information and on compliance with the various anti-discrimination laws to prevent adverse employment actions.

Looking Ahead

As the first of its kind, New York State paid prenatal leave may influence other state or city legislatures to enact similar laws. New York State's paid prenatal leave law has already drawn attention from the New York City Council. In February, the New York City Department of Consumer and Worker Protection proposed amendments to the city's sick leave law, the New York City Earned Safe and Sick Time Act, to incorporate the state's paid prenatal leave law.[26] Following a comment period and public hearing, the city adopted the proposed amendment in June. The amended law, incorporating paid prenatal leave, went into effect on July 2.

The employment law community will monitor the enforcement of the law and any further guidance from the New York State Department of Labor addressing the issues that remain open.

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What Is an 'Essential Function' of a Job?: A Remote Work Quandary

By Geoffrey A. Mort

During and since the COVID-19 pandemic, employees have performed their jobs remotely to an extent never before seen. As a result, a controversy over whether employees can carry out their responsibilities as well from home as in the office or other work site has been simmering. Employers' experiences with remote work to date certainly suggest that for at least some occupations, employees are in fact as effective at performing their duties when working at home as opposed to in the workplace. The debate over remote work, which has resulted in considerable litigation, has been particularly heated in cases where employees are disabled and assert that while their condition prevents them from being in an office or other workplace environment, they nonetheless can effectively perform the essential functions of their job working remotely. As discussed below, courts have become less receptive to employers' arguments that physical presence in the workplace is per se an essential function of most employees' jobs.

Discrimination that violates the Americans with Disabilities Act includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[1] The ADA defines a "qualified individual" as a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position" that that individual holds.[2] If employees demonstrate that they can perform the essential functions of the job with or without a reasonable accommodation, the employer must then show that providing the accommodation sought would pose an undue hardship to it.[3]

There are many measures that can constitute reasonable accommodation permitting an employee to perform the essential functions of one's job, and one of the most common is remote work. In part because of widespread telecommuting during the pandemic, as well as advances in technology that make telecommuting easier, remote work accommodations have become, as noted above, increasingly prevalent. Remote work accommodations range from working at home full-time to doing so only one day per week or less.[4] At the present time, many employers are insisting that all of their employees again be physically present at the office – a development that has presented challenges for disabled employees whose health conditions make it difficult or impossible for them to perform their duties in an office environment.

The Essential Functions Requirement

Employers who resist agreeing to remote work as a reasonable accommodation often argue that because physical presence at work is an essential function of a job, an employee unable to work in the office is not a qualified individual under the ADA and thus is not entitled to an accommodation. As the court in *Shannon v. NYC Transit Authority*[5] pointed out, a reasonable accommodation "can never involve the elimination of an essential function of a job." As such, an accommodation that entails not performing an essential function is unreasonable as a matter of law.[6] Where disabled employees assert that they can perform all of their position's essential functions while working remotely, however, courts must then determine what the essential functions of an employee's job actually are. This assessment is not always an easy one.

Significantly, the term "essential functions of the job" is not defined in the ADA. However, the ADA regulations promulgated by the Equal Employment Opportunity Commission do address this question. According to the regulations, essential functions means "the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential function' does not include the marginal functions of the position."[7] The regulations then provide several reasons why a job function might be deemed essential and go on to provide examples of evidence that can show whether a particular function is essential or not.

The regulations' examples can provide significant guidance to courts grappling with this issue. They include the employer's judgment about what functions are essential; the feasibility of performing them remotely; written job descriptions; the amount of time required to perform the function; the work experience of past incumbents in the job; and the consequences of not requiring the incumbent to perform the function.[8]

Courts have followed this same approach, observing that "there are a number of relevant factors that may influence a court's ultimate conclusion as to a position's essential functions."[9] In assessing the factors set forth by the EEOC regulations and case law,[10] courts often consider whether "job restructuring" and "part-time work or *modified work schedules*"[11] represent reasonable accommodations that still allow an employee to perform the essential functions of a job.[12]

Remote Work as an Accommodation for Employees With Disabilities

Many employees with disabilities find it difficult or impossible to work in an office or other workplace environment yet can perform their jobs capably while working from home. Such individuals may, for example, suffer from immune system disorders or be physically unable to manage the commute from home to workplace. Although a significant number of employers readily agree to reasonable accommodations involving remote work for such workers, others do not. Particularly in the last year, some employers have promulgated "return to workplace" policies requiring most or all employees to be physically present at work for at least one or two days per week. These directives give rise to many of the disputes and sometimes litigation involving remote work as an accommodation.

The numerous Court of Appeals and district court decisions in the Second Circuit on this issue are, by and large, not sympathetic to employers' argument that simply declaring a job function to be essential is sufficient to establish that it is. The court in *McMillan v. City of New York*[13] specifically ruled that "[p]hysical presence . . . is not, as a matter of law, an essential function of all employment."[14] Rather, courts must conduct a "fact-specific inquiry"[15] into "both the employer's description of a job and how the job is actually performed in practice."[16]

Connors v. Certified Mktg. Services[17] and *Schuler v. Dow Chem. Co.*[18] present analyses of this issue leading to very different outcomes. In *Connors*, the plaintiff was an accounting manager who suffered a knee injury and became unable to travel to the office as a result. Her primary duties were financial reporting, working with the company's CPA, taking care of tax payments and supervising the contractor payroll and accounts receivable function. After Carolyn Connors asked for a reasonable accommodation that involved working remotely, the company took the position that her duties were all essential functions of the job and required her daily, full-time presence in the office. When she responded that she could only work from home, she was terminated.

After the ensuing lawsuit was commenced, Connors observed that the reports she was responsible for preparing were "available electronically"[19] and therefore could be easily prepared at home, and that her supervisory duties involved mainly checking the accuracy of two managers' accounting work. Looking at all the facts, the court concluded that the accommodation sought by the plaintiff allowed her to perform the essential functions of her job and that remote work was a viable, reasonable accommodation. In doing so, the court pointed out that "working from home might qualify as a reasonable accommodation in that it is a 'modification of adjustment to the work environment'"[20] and declined to accept the defendant's argument that merely designating duties as official functions made them so.

In *Schuler*, although the plaintiff – who suffered from multiple sclerosis – sought a "defined leave of absence" as opposed to working remotely, the court conducted the same analysis regarding essential functions of the job as did the *Connors* court. Kim Schuler's duties as an administrative specialist, unlike the plaintiff in *Connors*, clearly could only be performed if she were physically present in the workplace. They included locating records in the workplace, distributing the mail, bringing in food for luncheons and monitoring the stock of supplies. The court thus determined that the "vast majority of Schuler's job duties . . . required her to be present at the [work] site" and as a result the plaintiff's "proposed accommodation would eliminate the essential functions of the job."[21]

How Courts Assess Essential Functions Arguments

The feasibility of performing essential functions remotely was addressed by the court in *Mosby-Meachem v. Memphis Light, Gas & Water Division.*[22] In that case, an in-house attorney who was placed on bed rest due to pregnancy complications sought a temporary remote work accommodation. The plaintiff presented evidence of prior successful remote work on her part as well as testimony from colleagues that confirmed her ability to handle her duties competently while working from home. Her employer, on the other hand, struggled to show how her physical presence at the office was actually necessary to capably carry out her responsibilities. Again, an employer's insistence that an employee's presence at the workplace was an essential function of her job was, by itself, not sufficient to justify denying her a reasonable accommodation.

Hernandez v. City of Hartford[23] addresses several key issues that repeatedly arise in ADA reasonable accommodation cases where a disabled employee seeks remote work as an accommodation. The first is an argument sometimes made by employers that physical interaction with co-workers is itself an essential function of a job. The *Hernandez* court rejected this notion, holding that the fact that some of the plaintiff's duties involved interacting with other employees did not establish that physical presence in the office was an essential function precluding a work-at-home accommodation.

The court in *Hernandez* also discussed the related question of when an apparently important duty is nonetheless not an essential function. The plaintiff was an administrative assistant at a municipal government agency who had pregnancy complications, including premature labor. Her reasonable accommodation request to be allowed to work remotely for a limited period of time was not granted. The defendant argued to the court that face-to-face communication with other employees was an essential function of her job, along with handling emergencies and answering the telephone. Although interaction with co-workers was involved in carrying out her responsibilities, the plaintiff contended that it was not an essential function, and the court agreed. The court found that having certain "daily duties does not establish that they were 'essential functions'" and that while there were "daily tasks with which plaintiff dealt, they were not necessarily 'essential.'"[24]

Many court decisions dealing with the essential functions issue, particularly in cases where plausible arguments are advanced by both parties, required detailed assessments of the employee's job duties and how they fit into the employer's business operations. There are perhaps few better examples than *Sivio v. Vill. Care Max*,[25] where the employee was a care manager whose responsibilities

included making home visits to clients. Enza Sivio suffered from an allergy to pet hair and sought a reasonable accommodation of not being required to undertake some home visits. The employer argued that the accommodation she requested eliminated an essential function of the care manager job.

In its analysis, the court observed that Sivio had in fact sought a more limited accommodation, i.e., to be excused from conducting home visits to any clients with pets. The court then denied the employer's summary judgment motion, reasoning that "a reasonable jury could conclude that conducting home visits for members with pets was not an essential function of Sivio's role as a care manager."[26] (Had the employer introduced evidence showing that most of Sivio's clients were pet owners, however, the result might well have been different.)

Of course, courts willing to closely examine the facts of a case involving a dispute about essential functions can easily reach the opposite conclusion, as did the 6th Circuit in *EEOC v. Ford Motor Company.*[27] In *Ford*, the plaintiff was a steel buyer who sought remote work as an accommodation. As in many other cases, the employer argued that presence in the workplace was an essential function of his job, contending that face-to-face interactions with team members was critical. The decisive factor, however, was that the employer was able to demonstrate that prior attempts at telework with those in the plaintiff's role had been unsuccessful. The court held that while the plaintiff's functions could be carried out remotely, they could not be performed effectively other than by physical presence in the workplace, and ruled for the employer.

Conclusion

In today's post-pandemic world, courts clearly consider remote work as a potential reasonable accommodation. Nonetheless, these cases are increasingly fact-specific and, as demonstrated above, usually depend on whether the employees can show they can effectively perform the core elements of their jobs while working remotely. Cases where a court effectively takes employers at their word that it is essential for employees to be physically available to perform their duties are much less common than before 2020. There is little doubt that the pandemic and the massive disruptions that it caused showed that many jobs previously considered unsuitable for remote work could in fact be performed capably remotely.

In sum, employer arguments based on outdated assumptions about workplace operations or the premise that a court will automatically take an employer's word regarding workplace circumstances over that of an employee are encountering less sympathetic treatment by many courts. The decline in judicial leniency for employers' generalized arguments about what constitutes an essential function of a job reflects the ever-evolving nature of the workplace and arguably is more consistent with the spirit and letter of the Americans With Disabilities Act than had previously been the case.

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Endnotes

1. *McBride v. BIC Consumer Products Mfg. Co., Inc.*, 583 F.3d 92, 96 (2d Cir. 2009).
2. 42 U.S.C. § 12112(a).
3. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 135 (2d Cir. 1995).
4. ADA regulations state that a reasonable accommodation may include "modifications or adjustments to the work environment, or to the manner of circumstances under which the position held . . . is customarily performed." 29 C.F.R. § 1630.2(o)(ii).
5. 332 F.3d 95, 100 (2d Cir. 2003).
6. *See Lewis v. NYPD*, 908 F. Supp. 2d 313, 328 (E.D.N.Y. 2012).
7. 29 C.F.R. § 1630.2(n).
8. *Id.*
9. *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013).
10. *See Stone v. City of Mt. Vernon*, 118 F.3d 92, 97 (2d Cir. 1997).
11. *Ray v. Weit*, 708 Fed. Appx. 719, *4 (2d Cir. 2017), citing 42 U.S.C. § 12111(9)(B) (emphasis added).
12. *See, e.g., Rodal v. Anasthesia Group of Onondaga P.C.*, 369 F.3d 113, 120 (2d Cir. 2004) (a modified work schedule may constitute a reasonable accommodation in some circumstances).
13. *McMillan v. City of New York, supra* n. 9.
14. *McMillan, supra* n. 9, at *12.
15. *Hampson v. State Farm Mut. Auto Ins. Co.*, 2015 U.S. Dist. LEXIS 192061, *23 (N.D.N.Y. 2015).
16. *Id.*
17. *Connors v. Certified Mktg. Services*, 2005 U.S. Dist. LEXIS 16777 (N.D.N.Y 2005).
18. *Schuler v. Dow Chem. Co*, 2018 U.S. Dist LEXIS 1018 (W.D.N.Y. 2018).
19. *Connors*, *supra* n. 17, at *16.
20. *Connors*, *supra* n. 18, at 19.
21. *Schuler*, *supra* n. 19, at 21–22.
22. 883 F.3d 595 (6th Cir. 2018).
23. 959 F. Supp. 125, 130–32 (D. Conn. 1997).
24. *Id.*
25. 436 F. Supp. 3d 778 (S.D.N.Y. 2020).
26. *Id.* at 793.
27. 782 F.3d 753 (6th Cir. 2015).

Without Cause, But Within Reason: The Intersection of Contract Law and CPLR Article 78

By Marc I. Gross

When private vendors bid for government work, their contracts usually include a standard clause for termination "without cause" or "for convenience" by the agency. This clause is not negotiated, but rather compelled and usually set forth in standard appendices. The power of termination enables governments to act flexibly, responding to budgetary or funding issues or to significant changes in policy necessitating redirection of funding. Given its "plain language," these termination clauses appear to give agencies absolute discretion to cancel contracts at any time.

But what if vendors challenge the contract's cancellation under New York State CPLR 78, i.e., on grounds that the government abused its power or acted "arbitrarily and capriciously"? New York jurisprudence on this issue is, at best, muddled, and warrants scholarly and judicial review. This article seeks to lay the foundation for such review and argues that a more just outcome would be to limit the power of New York agencies to cancel contracts, regardless of their adhesive contractual terms. While courts should recognize a presumption of reasonableness on the part of the agencies, this presumption should be rebutted if the vendor demonstrates that the termination was made in bad faith or an abuse of discretion.[1] Stated otherwise, in the context of government contracts, the term "termination without cause" should be contextually interpreted as "termination without fault [on the vendor's part] and not unreasonable [on the agency's part]."

This outcome would be consistent with public policy concerns given the inherent imbalance of power between government agencies and private vendors. Without such constraint, agencies could, for example, arbitrarily cancel contracts midstream and give them to other contractors at lower prices.

Recognition of this rebuttable presumption is supported by a recently litigated dispute between a midtown Manhattan homeless shelter and its municipal funding agency. The court there held that, in the context of a government contract, cancellation "without cause" still had to be "within reason," and found that the shelter had demonstrated a lack thereof, thereby compelling continued funding until the contract's expiration date.[2]

Standard Government Contract Service Termination Clauses

The only terms generally negotiated between a vendor and government agency are those contained in the request for proposals, i.e., the goods and/or services to be rendered, the charges therefor, the amount and terms of payment, and the commencement/duration of the contract. While those negotiated terms are reflected in the final agreement, most of the conditions attendant thereto have been standardized, just like contracts between tenants and landlords. For instance, the standard multipage Appendix A incorporated into New York City agency contracts with outside vendors provides as follows:

> Section 10.01 Termination by the City Without Cause
>
> The City shall have the right to terminate this Agreement, in whole or in part, *without cause*, in accordance with the provisions of Section 10.05.[3]

The standard New York City contract also empowers the agency to terminate the contract for cause, e.g., unsatisfactory performance of the services.[4] Contracts with federal agencies have a similar termination clause, though such agencies are empowered to terminate "for convenience."

Different procedures govern termination "with" or "without" cause. In the former, the agency must give the vendor written notice and an opportunity to "cure" the default. When the termination is "without cause," the city need only provide the time frame for cessation without any opportunity to cure (though the city remains obligated to pay for all services rendered prior to termination).

Significantly, though, the distinction of termination with or without cause has materially different consequences for the vendor. If the vendor is terminated "with cause," and then fails to cure the "default," the vendor may be barred from bidding on any future contracts with the city. In contrast, if the vendor is terminated "without cause," it can continue to bid on future contracts. As such, vendors more often litigate terminations "with cause" to avoid being barred from bidding for future contracts. There is no similar incentive to litigate termination "without cause." Indeed, in this Alice in Wonderland context, it is generally better for the vendor to be terminated without cause than with cause. So long as the termination is without cause, the vendor can continue to bid on future contracts. The exception is in cases where arbitrary cancellation in midstream of a contract would be a death knell, like the homeless shelter in the *Grand Central* case whose sole source of income was its contract with the city.

Federal Case Law

Given the similarity of contractual terms and conditions, federal case law can provide some guidance to New York State courts for adjudication of this issue. For nearly 50 years, federal courts have judicially imposed a requirement that despite the express right to terminate "for convenience," contracts cannot be canceled in "bad faith or a clear abuse of discretion in its actions."[5]

Jurisprudence concerning the government's power to cancel contracts with private vendors can be traced back to the American Civil War. The government needed flexibility to cancel orders if battlefield conditions changed, or hostilities ceased altogether. For instance, during the Civil War, Rule 1179 of the Army Regulations required that contracts for subsistence stores "expressly provide

for their termination at such time as the Commissary-General may direct."[6] However, these contracts did not include any requirement that the government state the grounds for termination. As such, the courts deemed the government's termination to be a "breach of contract" by the agency, thus giving rise to the question of appropriate remedies (e.g., lost profits).[7]

Even after numerous contracts were canceled during and after World Wars I and II, resolution of claims arising from termination relied upon statutes or regulations, rather than the terms of the contracts themselves.[8] It was not until after World War II that the federal government required "termination for convenience" clauses be inserted in civilian agency contracts. In time, these clauses expanded to all non-warfare related contracts.[9] It was not until 1967 that the Federal Procurement Regulations (applicable to all agencies) mandated termination for convenience clauses,[10] which "permit[ed] the Government to terminate a contract for commercial products or commercial services either for the *convenience of the Government or for cause*."[11]

The government's unilateral right to terminate a contract for convenience or cause gave rise to litigation over whether such contractual clauses were enforceable. It is hornbook law that a contract exists only if "consideration" has been exchanged. As noted in Williston on Contracts, "[a]n agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract."[12] Given that there was no expressed limitation on the government's right to terminate, vendors contested cancellations that were premised on mere "convenience" on grounds of unenforceability.[13] Initially courts such as *Sylvan Crest* found that such unilateral termination contracts were enforceable, and that the "consideration" was the government's obligation to give "reasonable" notice before cancellation.[14] This reasoning was rejected in *Torncello v. United States*, which held that the right to terminate had to be limited to prevent a finding of lack of consideration, and that reasonable notice was not sufficient consideration.[15]

Other courts took the position that the common law "implied duty" that all parties act in "good faith" is implicit in any contract, regardless of a right to termination for convenience. By the same token, the Uniform Commercial Code expressly requires that "[e]very contract or duty within this act imposes an obligation of good faith in its performance and enforcement."[16] Hence, when terminating contracts, the government needed to exercise its discretion reasonably, not abusively.[17]

In the seminal *Kalvar* case, the court held that there was a "presumption that public officials act conscientiously in the discharge of their duties" but that this presumption was rebuttable if the contractor demonstrated the officials had acted in bad faith.[18] Courts thereupon wrestled over the degree of bad faith sufficient to rebut the presumption. *Kalvar* suggested "irrefragable proof" akin to a "specific intent to injure the plaintiff."[19] The concurring opinion in *Torncello* asserted that while proof of specific intent was sufficient, it was not the only means of rebuttal, contending that "abuse of discretion" should also satisfy the vendor's burden.[20] *Krygoski Construction Co. v. United States* then expanded "abuse of discretion" to include consideration of bad faith, the reasonableness of the decision, the degree of discretion delegated to the official, and violations of application regulations or statutes.[21] In 2002, the Federal Circuit clarified the vendor's burden of proof to be "clear and convincing."[22]

As such, ample federal jurisprudence is available to guide New York state courts without having to reinvent the proverbial wheel.

The Intersection of CPLR Article 78 and State Agency Contracts

Article 78 created an expedited proceeding whereby courts assess whether an administrative decision "was made in violation of lawful procedure, was affected by an error of law or was an arbitrary or capricious or an abuse of discretion."[23] As noted by the Court of Appeals in *Pell v. Board of Education*,[24] the court must decide whether the agency decision was "rationally based":

> The arbitrary or capricious test chiefly "relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact." Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.
>
> [. . .]
>
> [A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.[25]

Some New York state courts confronted with Article 78 claims arising out of contract cancellations without cause have held that the statute limits unbridled discretion regardless of the standard contractual clause. In *Karanja v. Perales*, the Appellate Division, First Department, made unequivocally clear that:

> We are committed to the view that a Medicaid provider denied reenrollment . . .
>
> [The provider] is entitled to a statement of the reasons why reenrollment is denied, and to article 78 relief if those reasons are arbitrary and capricious.[26]

Nine years later, in *RX 2000, Inc. v. DeBuono*,[27] the New York State Department of Health terminated a pharmacy's contract to participate in the state's Medicaid program. The agency argued that it had the right to terminate without cause, adding that the pharmacy had filled fraudulent prescriptions. The First Department, Appellate Division, reversed the lower court's decision upholding the termination, initially noting that:

> While the [Medicaid Program] statute gives respondents the right to terminate without cause, such termination is subject to review under CPLR article 78 to determine if the decision was made in bad faith and therefore arbitrary and capricious.[28]

The court then reviewed the facts and determined that "the decision to terminate was made in bad faith," noting the absence of evidence that the pharmacy knew the prescriptions were fraudulent (while pointing out that the state was otherwise aware of a prescription forgery ring, but had failed to notify the pharmacy).[29]

On the other hand, several New York state courts, even those in the same Appellate Department, have held that the "without cause" language provides absolute immunity to any termination challenge without regard to Article 78. Some courts gave primacy to the without cause clause but still cited facts that amply supported the reasonableness of the municipal agency's decision to terminate. For instance, in *Red Apple Child Development Center v. Community School Districts Two*,[30] the panel held that "[a] contract terminable without cause does not give rise to a protected property interest, such as would afford the right to a hearing as to the propriety of the termination."[31] In so holding, the court not only ignored *Karanja* and *RX2000* (decided by appellate panels in the same department) but also relied upon cases that were 60 to 110 years old involving disputes between private corporations.[32] Nonetheless, the court noted that the petitioner's contract to operate a child care center had been terminated after its CEO was arrested for allegedly attempting to bribe an agency inspector after he uncovered falsified documentation, which was clearly sufficient to demonstrate good faith on the agency's part.[33]

Similarly, in *Big Apple Car, Inc. v. City of New York*,[34] a radio dispatch car service contract with the New York City Human Resources Administration, was terminated after federal authorities began investigating fraudulent overbilling. Given these facts, there was clearly a reasonable basis for termination, and thus no evidence supporting an Article 78 challenge. However, while upholding the termination, the court also held that the terms of the contract precluded the need to show any justification: "A party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive."[35] In so ruling, the court ignored Article 78 and *Karanja*'s interpretation thereof, instead relying upon much older cases involving disputes between private companies, not municipal agencies and private companies.[36] It may well be, though, that this case had not been filed under Article 78, because there is no mention thereof in the opinion.

The holding in *A.J. Temple Marble & Tile, Inc. v. Long Island Rail Road*[37] is most perplexing. The petitioner in an Article 78 proceeding claimed that it had been damaged by the agency's rejection of its service contract bid. Citing *Krygoski* and *Torncello*, the lower court held that the agency's power to terminate "for convenience" could be reversed if the vendor "can show that the government acted in bad faith or abused its discretion."[38] The court then found that the agency's action was reasonable because the vendor's bid had been ranked lower than competing bids. On appeal, the Appellate Division affirmed the dismissal, but on more narrow grounds:

> Contrary to the plaintiff's contention, "[a] party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive." Accordingly, it was proper for the Supreme Court to grant that branch of the defendant's motion which was for summary judgment dismissing the first cause of action, which sought to recover damages, *inter alia*, for breach of contract and breach of an implied duty of good faith and fair dealing.[39]

The court did not address the language of Article 78, nor cases cited by the lower court, nor the prior First Department cases that were contrawise. As such, the precedential value of its statement of the law might be questioned, especially given the facts of the case which clearly evidenced the agency's reasonableness. Arguably, the statement of law in the case should be deemed *obiter dictum*.[40]

Thus, while some New York state court decisions have given lip service to government agencies' absolute right to terminate, the same courts also reviewed facts that clearly demonstrated the terminations were reasonable and not arbitrary.

The Recent *Grand Central* Decision

The litigation that prompted this article involved Mainchance, a drop-in center that has served homeless individuals in midtown Manhattan for over 30 years. The shelter operates 24/7 and provides a place where on a first-come, first-served basis, up to 72 homeless people can sleep overnight, have dinner and breakfast, shower,

and receive medical and housing consultation services. Mainchance's fiscal sponsor is the Grand Central Neighborhood Social Services Corp. Nearly all Mainchance's funding comes from New York City's Department of Homeless Services.[41]

In January 2024, the Department of Homeless Services notified Mainchance that it was terminating its most recent contract with the facility as of June 30, 2024, two years before the contract's expiration date. At the time, the department offered no reason for the termination, orally or in writing. At a New York City Council meeting in April 2024, a department official stated that the premature closure was due to Mainchance's "underperformance." Mainchance thereupon filed an administrative notice of dispute challenging the underperformance claim, noting that it had previously exceeded the department's prescribed performance goals, and that periodic audits had graded the shelter's performance as good to excellent. In response, the department pivoted, conceding that there was no underperformance, but instead asserting that the termination was due to a "policy" decision to shift from overnight drop-in centers (where homeless people sleep in chairs) to overnight safe havens (where homeless sleep on beds but otherwise receive the same services provided by drop-in centers).

In response, Mainchance pointed out that it had already submitted a proposal to convert to a safe haven, and that the proposal was being actively considered by another office within Homeless Services. Mainchance's fiscal sponsor, Grand Central, thereupon filed an Article 78 petition to enjoin the termination and compel continued funding of the drop-in center until the contract expiration date.

Given that Mainchance's contract contained the standard language entitling the Department of Homeless Services to terminate without cause, it is not surprising that the agency asserted that it had an "absolute right" to cancel at any time. In effect, the city argued, the precise terms of the contract gave it an unbounded right to terminate "at will," as is the case in, for instance, contracts between private companies and their employees. The court held otherwise: "While DHS did reserve to itself the right to terminate the Contract, this does not give it the right to do so in an arbitrary and capricious manner."[42]

Contrasting the decision in *Institute for Puerto Rican/Hispanic Elderly,*[43] the court reasoned that:

> Petitioners [in that case] signed a contract knowing the possibility they would lose the bid process and be replaced, whereas here, the [Department of Homeless Services] has no plan in place to replace Mainchance with an alternative shelter, essentially reducing the aid provided to persons suffering housing insecurity based upon the preference for safe havens over drop-in centers. Yet respondents do not point to a new safe haven that will serve the community petitioners have served for the past 25 years.[44]

The court proceeded to cite several other facts evidencing the capriciousness of the termination decision, including

the department's failure to explain "why Mainchance is the only drop-in center which petitioners seek to close."[45] It concluded that the department's "decision to terminate the Contract lacked a rational basis and is otherwise arbitrary and capricious" and compelled the agency to continuing funding Mainchance's operations until expiration of its contract in June 2026.[46]

As the foregoing demonstrates, there is a reasonable basis to conclude that, regardless of standard terms that empower a municipal or state agency to terminate a contract "without cause" or for "convenience," at least in New York State, administrative agency decisions are subject to the requirements of Article 78, and can be challenged as arbitrary, unreasonable or capricious.

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Endnotes

1. *See Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976) (discussed infra at n. 18).

2. *Grand Cent. Neighborhood Soc. Servs. Corp. v. Park*, No. 155327/2024, 2024 N.Y. Misc. LEXIS 7061 (Sup. Ct., N.Y. Co. Sept. 18, 2024) (Kotler, J.S.C.) (discussed *infra* at n. 32).

3. Emphasis added. Paragraph 10.05 sets forth the procedures for termination.

4. Such terminations are contractually characterized as "defaults" by the vendor.

5. *See Kalvar*, 543 F.2d at 1301 (where contract included "termination-for-convenience clause," termination could be reversed upon proof that government "had evinced bad faith or a clear abuse of discretion in its actions").

6. John Cibinic, Jr, James F. Nagle & Ralph C. Nash Jr, Administration of Government Contracts 941 (5th ed. 2016); *United States v. Speed*, 75 U.S. 77, 78 (1868).

7. *See United States v. Corliss Steam Engine Co*., 91 U.S. 321 (1875) (finding the Navy Department had authority to suspend work under a contract and enter into a breach settlement for partial performance); *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963). *See generally* Cibinic, *supra* note 6, at 941–59.

8. Contract Settlement Act of 1944, Pub. L. 78-395, 58 Stat. 649.

9. Cibinic, *supra* note 6, at 942.

10. Miscellaneous Amendments to Chapter, 32 Fed. Reg. 8467, 8477-79 (June 14, 1967).

11. *See* FAR 12.403(a) (2021) (emphasis added). Different notice and remedies apply depending on which of these reasons are the basis for termination.

12. 1 Samuel Williston, A Treatise on the Law of Contracts § 105, at 418 (3d ed. 1957 & Supp. 1979) (quoted by Cibinic, *supra* note 6, at 949).

13. *See* Matthew S. Pearlman & William W. Goodrich, Jr., *Termination for Convenience Settlements – The Government's Limited Payment for Cancellation of Contracts*, 10 Pub. Cont. L.J. 1 (1978) (quoted by Cibinic, *supra* note 6, at 948).

14. *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945).

15. 681 F.2d 756 (Ct. Cl. 1982) (*Torncello*).

16. UCC § 1-304 (Obligation of Good Faith).

17. *See Librach v. United States,* 147 Ct. Cl. 605, 612 (Ct. Cl. 1959) ("Hence, this court is required to apply the rule that, in the absence of clear evidence to the contrary, it must be presumed that the public officials involved in the termination of the plaintiffs' contract were acting conscientiously in the discharge of their duties when the contract was terminated for the purported convenience of the Government.") (emphasis added); *Hoel-Steffen Const. Co. v. United States*, 684 F.2d 843 (Ct. Cl. 1982); *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968). *United States v. Chem. Found*., 272 U.S. 1, 14–15 (1926); *New River Min. Co. v. Roanoke Coal & Coke Co*., 110 F. 343, 345 (4th Cir. 1901); *Knotts v. United States*, 128 Ct. Cl. 489, 492 (Ct. Cl. 1954).

18. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301–02 (Ct. Cl. 1976) (quoting Librach, 147 Ct. Cl. at 612).

19. *Id.*

20. *Torncello*, 681 F.2d at 773–74 (Davis, J., concurring) (finding that public official acted in bad faith when "terminat[ing] a contract for convenience to get a better price of which [the public official] had full knowledge (and which was available) at the time when he deliberately entered into the contract with plaintiff").

21. 94 F.3d 1537, 1543 n.3 (Fed. Cir. 1996) (*Krygoski*); *Accord, Irwin Cty. v. United States*, 170 Fed. Cl. 355, 370 (2024).

22. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234 (Fed. Cir. 2002).

23. CPLR 7803(3).

24. 34 N.Y.2d 222 (1974).

25. *Id.* at 231–32 (quoting 1 N.Y. Jur. Administrative Law § 184); then quoting *Diocese of Rochester v. Planning Bd*., 1 N.Y.2d 508, 520 (1956)) *Accord; Matter of Rysiejko v. City of New York*, 232 A.D.3d 432 (2024).

26. *Karanja v. Perales*, 163 A.D.2d 264, 265(1st Dep't 1990) (*Karanja*) (internal citation omitted) (the court reversed the trial court's finding that termination was arbitrary or capricious).

27. 261 A.D.2d 162 (1st Dep't 1999).

28. *Id.* at 504 (citing *Karanja*, 163 A.D.2d at 264).

29. *Id. See also Farmacia Honeywell, Inc. v. DeBuono*, 276 A.D.2d 206, 207 (1st Dep't 2000) (court held that where termination was "without cause," the pharmacy was "entitled to a statement of the reasons why reenrollment is denied, and to [A]rticle 78 relief if those reasons are arbitrary and capricious." In that case, termination of the pharmacy's participation in the Medicaid drug plan was deemed reasonable given that the over 100 prescriptions were forgeries) (internal citation omitted) (quoting *Karanja,* 163 A.D.2d at 265); *701 Pharmacy Corp. v. Perales*, 930 F.2d 163, 166 (2d Cir. 1991) (Pharmacies contested license terminations due to regulatory violations, including handling of controlled substances. The court held that "Judicial review of the Department's termination decision . . . is available under Article 78 **. . . .** Such a review, of course, is common. **. . .** Even when the termination is without cause, the Department will be obligated to state its reasons for the termination to enable the Article 78 court to determine whether the decision was made in bad faith and therefore arbitrary and capricious").

30. 303 A.D.2d 156 (1st Dep't 2003).

31. *Id.* at 158 (internal citation omitted).

32. *N.Y. Tel. Co. v. Jamestown Tel. Corp*., 282 N.Y. 365 (1940) (dispute between private parties over telephone charges); *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N.Y. 608 (1891) (dispute over insurance policy coverage).

33. *See also Inst. for Puerto Rican/Hispanic Elderly v. N.Y.C. Dep't for Aging*, No. 103869/12, 2012 N.Y. Misc. LEXIS 5738, at *7 (Sup. Ct., N.Y. Co. Dec. 10, 2012) (*Institute for Puerto Rican/Hispanic Elderly*) (citing the "without cause" termination clause, but then proceeding to review the facts which demonstrated that after expiration of the petitioner's contract, bids were requested for a new contract, which resulted in petitioner's proposal being ranked the lowest. As such, the court held Dep't of Homeless Services had "provided a rational basis for their determination and have not acted arbitrarily or exceeded their authority by entering into a contract with [a competing bidder]").

34. 204 A.D.2d 109 (1st Dep't 1994).

35. *Id.* at 111.

36. *A.S. Rampell, Inc. v. Hyster Co*., 3 N.Y.2d 369 (1957) (dispute between car manufacturer and dealer); *Div. of Triple T Serv., Inc. v Mobil Oil Corp*., 60 Misc. 2d 720 (Sup. Ct., Westchester Co. 1969) (franchise dispute), *aff'd*, 34 A.D.2d 618 (2d Dep't 1970).

37. 256 A.D.2d 526 (2d Dep't 1998).

38. *A.J. Temple Marble & Tile, Inc. v. Long Island R.R.*, 172 Misc. 2d 422, 424 (Sup. Ct., Queens Co. 1997), *aff'd in part*, 256 A.D.2d 526 (2d Dep't 1998).

39. *A.J. Temple Marble & Tile, Inc. v. Long Island R.R.*, 256 A.D.2d 526, 527 (App. Div. 1998) (quoting *Big Apple Car*, 204 A.D.2d at 111) (citing *Division of Triple T.,* 60 Misc. 2d at 720).

40. The author thanks Stanley M. Grossman, his mentor at Pomerantz LLP, for this "term of art."

41. The Department of Homeless Services is part of New York City's Department of Human Services.

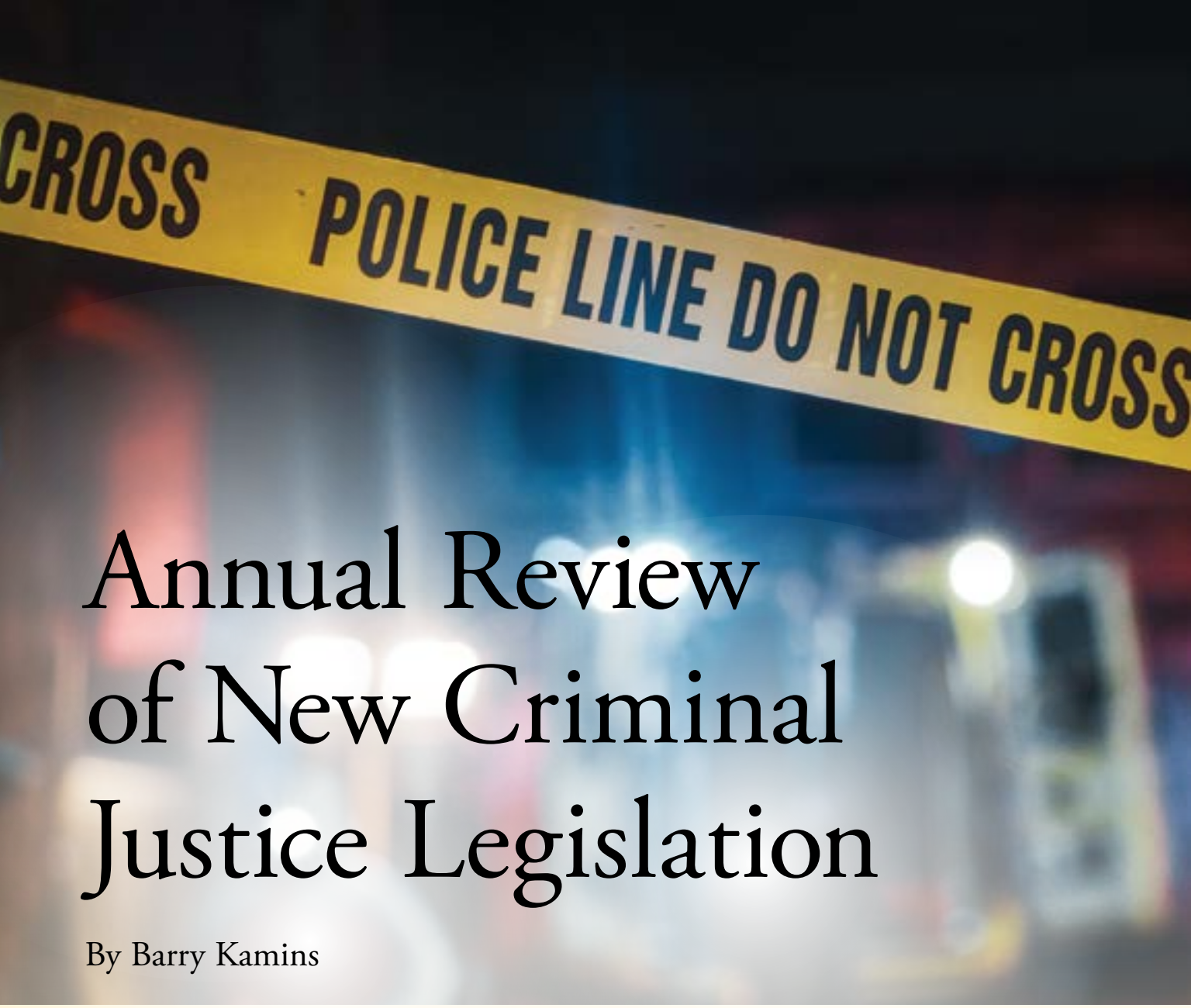
42. *Grand Cent. Neighborhood Soc. Servs. Corp. v. Park*, No. 155327/2024, 2024 N.Y. Misc. LEXIS 7061, at *8–9 (Sup. Ct., N.Y. Co. Sept. 18, 2024).

43. See n. 33 *supra*.

44. *Id.* at *11.

45. *Id.* at *11-12. Mainchance suggested that the decision to prematurely terminate its contract may have been precipitated by its proximity to a luxury five-star hotel built and owned by Turkish businessmen, at least one of whom was indicted for funneling campaign contributions to New York's mayor, himself who was indicted as well but then pardoned.

46. *Id.* at *12.



Annual Review of New Criminal Justice Legislation

By Barry Kamins

This column reviews new legislation amending the Penal Law, Criminal Procedure Law and related statutes. The discussion that follows will highlight key provisions of the new laws, which the reader should review for specific details. Where indicated, legislation enacted by both the Assembly and Senate is awaiting the governor's signature; the reader should check to determine whether the governor has signed or vetoed a bill.

In the past legislative session, the most substantive piece of legislation related to discovery reform and it addressed what prosecutors claim were several unintended consequences of the 2020 legislation, which was transformative in nature. While courts will now have more discretion in determining whether a prosecutor has complied with the discovery statute, the recent amendments did not change the fundamental premise of the discovery statute that prosecutors cannot be ready for trial without having complied with their discovery obligations.[1]

The first modification of the discovery statute narrows the scope of material that must be disclosed by prosecutors. Under the 2020 legislation, there was a list of 21 categories of information that had to be disclosed; the introductory paragraph provided that as to each category, prosecutors were required to disclose all information that "related to the subject matter of the case." The introductory paragraph has been deleted and the scope of disclosure for each of the 21 categories is now determined by the language found in each section.

Prosecutors had argued that courts had interpreted the "related" standard in the opening paragraph of CPL 245.20 so broadly as to require the disclosure of plainly irrelevant materials that have nothing to do with the charges. By removing the opening paragraph, the Legislature eliminat-

ed the need for prosecutors to locate irrelevant materials, though they are still required to provide the defense with all the information needed to defend the charges.

The new catch-all provision in section "v" requires a prosecutor to disclose any material beyond the 21 categories that is "relevant to the subject matter of the *charges* against the defendant" (emphasis added).

The second modification of the law addressed the timing of a challenge to a certificate of compliance. Previously, there was no time limit within which a defendant was required to file this challenge. Prosecutors complained, however, that this promoted gamesmanship on the part of defense counsel. By "lying-in-wait," it was claimed that defense counsel held back until the speedy trial time had passed before notifying prosecutors of defects in the certificate of discovery.

The amendment requires that a challenge to a certificate of compliance be made within 35 days of its service upon defense counsel, provided that the prosecution has filed an indictment or information prior to the filing of the certificate (CPL 245.50(4)). A court may extend the time period to challenge a certificate of compliance for good cause shown. Any such extension shall be excluded from a speedy trial calculation, unless the court finds that either the prosector unreasonably delayed in responding to the defense's good faith efforts to confer, or did not file the certificate in good faith. Finally, defense counsel may challenge its validity beyond the 35-day period where the grounds for such challenges are based on a material change in circumstances.

The challenge to the certificate of compliance must now be accompanied by an affirmation alleging that: (1) after the filing of the certificate, defense counsel timely conferred in good faith or made good efforts to confer with the prosecution regarding the basis for the challenge; (2) efforts to obtain the missing discovery from the prosecution or otherwise resolve the issues raised were unsuccessful; and (3) no accommodation could be reached.

The third, and most significant, amendment provides criteria for adjudicating defense challenges to a certificate of readiness. When the discovery law was substantially revised in 2020, the statute created a new compliance mechanism for prosecutors. Thus, pursuant to CPL 245.20(1), a court must determine whether the prosecution has "exercised due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery." In addition, "the prosecutor shall make a diligent good faith effort to ascertain the existence of" discovery materials outside of their possession. (CPL 240.20(2)). The Legislature coupled these obligations under CPL 245 to the CPL 30.30's speedy trial requirements. Thus, for the first time, the prosecution could not be ready for trial, for purposes of CPL 30.30, until a proper certificate of compliance was filed.

In addition, under the law that was enacted in 2020, the people were required to submit a certificate of compliance, attesting to good faith compliance with CPL 245, before they could provide notice that they were ready for trial.[2] At that point, the statute requires a court to "make inquiry on the record as to [the People's] actual readiness."[3]

The new law, however, did not define "due diligence." Subsequently, in *People v. Bay*,[4] the Court of Appeals defined "due diligence" in the context of filing a valid certificate of compliance.

Under the recent amendment, the Legislature has now adopted *Bay's* "due diligence" analysis (with some differences). Pursuant to CPL 245.50(1), a certificate of compliance can now be filed by the prosecution even if certain materials or information are not disclosed. The prosecutor, however, must identify that information, and state that it could not be obtained despite the exercise of due diligence. Under CPL 245.50(5), a court must now assess due diligence by considering the following factors: (1) the efforts made by the prosecutor to comply with the requirements of the discovery statute; (2) the volume of discovery provided and the volume of discovery outstanding; (3) the complexity of the case; (4) whether the people knew that the belatedly disclosed or allegedly missing material existed; (5) the explanation for any alleged discovery lapses; (6) the prosecutor's response when apprised of any allegedly missing discovery; (7) whether the belated discovery was substantively duplicative, insignificant or easily remedied; (8) whether the omission was corrected; (9) whether the prosecution self-reported the error and took prompt remedial action without court intervention; and (10) whether the prosecution's delayed disclosure of discovery was prejudicial to the defense or otherwise impeded its ability to investigate effectively the case or prepare for trial.

It should be noted that, in *People v. Bay*, the Court of Appeals held that a defendant need not demonstrate prejudice because a speedy trial dismissal is not contingent on a finding of prejudice. The Legislature, nevertheless, added "prejudice" as a relevant factor in determining a prosecutor's due diligence.

The Legislature also inserted language in the statute to make clear that a court must look at the totality of circumstances, i.e., a court shall not assess the prosecutor's efforts "item by item" and "no one factor shall be determinative."[5] Finally, a court must explain the basis for its determination "on the record or in writing."

The amendment is also consistent with *Bay's* conclusion that a prosecutor's good faith is not sufficient, standing alone, to cure a lack of diligence. Thus, an inadvertent oversight will not be excused if it could have been avoided with the exercise of due diligence. The new statute provides: "[A] court shall not invalidate a certificate of compliance where the party has exercised due diligence

and acted in good faith in making reasonable inquiries and efforts to obtain and provide the material required to be disclosed pursuant to section 245.20 of this article" (emphasis added).

In the debate over whether the discovery law should be amended, prosecutors argued that, after the 2020 law was enacted, there had been a significant increase in statewide dismissals pursuant to the speedy trial statute. The Legal Aid Society, however, noted that 92% of the dismissals occurred in the five counties in New York City and that the majority of them were in misdemeanor cases.

Further, the Legal Aid Society stated that "dismissal rates in New York City can be explained by the New York City's intransigence toward complying with the law on lower-level offenses like misdemeanors. As we can see every day in our criminal courts, the NYPD routinely fails to timely share case evidence with prosecutors."[6]

To address the problem, two bills have been introduced: one before the state Legislature and one at the New York City Council. Each bill has the same purpose. Under the proposed state law, district attorney offices would have direct access to law enforcement records and databases.[7] Under the New York City local law, the Administrative Code would be amended to give prosecutors within New York City the ability to access any electronic recordkeeping system maintained by the New York City Police Department.[8]

A second significant legislative change relates to the expansion of electronic court appearances in criminal proceedings. A new section of the Criminal Procedure Law now permits electronic appearance at arraignments, guilty pleas, sentencing and evidentiary hearings.[9] Such appearances must be based on consent of the defendant and they can be terminated if an attorney does not have an adequate opportunity to confidentially consult with a client.

Electronic proceedings cannot be conducted, however, at trials or grand jury presentations and they may not be conducted when a defendant is under the age of 18. The law requires the chief administrative judge to adopt rules to regulate the conduct of these electronic appearances.

The Office of Court Administration has promulgated Rule 200.9-a on an interim basis starting on July 8, which was the effective date of the new law. Under the proposed rule, the decision whether to consent belongs to the defendant and not their counsel. As a result, for all evidentiary hearing, plea and sentencing proceedings the court must both (1) make a clear record regarding consent before scheduling a virtual proceeding and (2) confirm such consent before allowing the proceeding to go forward. The office has solicited public comments about the above proposed rule that were due by Aug. 8.

Each year, the Legislature enacts new crime laws and expands the definition of others, and this year was no exception. In returning to the crime of identity theft, the Legislature amended the definition of "personal identifying information" which, if obtained fraudulently, can constitute the crime of identity theft. That definition will now include "medical information" and "health insurance information."[10] In expanding the definition of this crime, the Legislature was responding to an increase in medical identity theft in which physician identification numbers and patient identification information have been stolen at an increasing rate.

The definition of "promoting an obscene performance by a child" (P.L. Section 263.10) has been expanded to include a "performance created or altered by digitization."[11]

The definition of a "rapid-fire modification device," a type of weapon, now includes a "pistol converter."[12]

A number of procedural changes were enacted in the past legislative session. In last year's session, the Legislature provided more security for jurors by permitting a court to issue a protective order that prevents the names of prospective jurors from being made public.[13] This year, the Legislature clarified the definition of "good cause," which permits such anonymous juries. The court can issue an order upon a finding that good cause exists to believe that there is a threat to the safety or integrity of the jury.[14] In a separate bill, jurors will now be paid $72 per day, an increase of $32.[15]

The Legislature has also enacted a number of provisions related to problem solving courts. Twenty-six counties in the state have at least one mental health court. A new bill permits a case to be transferred from a county without a mental health court to an adjoining county that does have one, provided the district attorneys of both counties give their consent.[16]

With respect to defendants who have been charged with a misdemeanor but found unfit to proceed to trial, a new bill addresses their needs before they are returned to the community. Once the defendant is sent for treatment by the court, the misdemeanor is automatically dismissed. Before the defendants are ultimately released, the new bill provides that they will be referred to case management and services appropriate to support them.[17]

Finally, the Legislature has expanded judicial eligibility for presiding over designated youth parts. The bill will permit Court of Claims judges and Supreme Court judges outside of New York City, who are acting Supreme Court justices assigned to the criminal term, to preside over designated youth parts.[18]

The Legislature has enacted procedural safeguards for certain classes of defendants. In 2022, legislation was enacted to protect access to abortion and gender-affirming care in the wake of the U.S. Supreme Court's overruling of *Roe v. Wade*. This year, a bill was enacted that prohibits a police officer from arresting a person for engaging in any "legally protected health activity." In addition, the police are now required to engage in child-sensitive arrests when arresting an individual who is legally charged with the care and custody of a child under the age of 18 years.[19]

For the first time in 60 years, the Legislature has increased fines for corporations that have been convicted. The new increased penalties are as follows: $80,000 for a felony conviction; $40,000 for a Class A misdemeanor conviction or an unclassified misdemeanor for which a term of imprisonment of three months is authorized; $15,000 when the conviction is a class B misdemeanor or an unclassified misdemeanor for which a term of imprisonment is not in excess of three months; $4,000 when the conviction is for a violation.[20] When a corporation is convicted of corrupting the government under Article 496 of the Penal Law, the fine is any amount not exceeding three times the amount of the corporation's gain from the commission of the offense.

Finally, the Legislature enacted various forms of relief for victims of crimes. Orders of protection for non-family domestic violence offenses will now be filed under the statewide computerized registry, along with family offenses.[21] A health care worker who is the victim of a felonious assault now has the right to give a statement to the police at his or her workplace rather than the police station.[22]

In addition, a prosecutor must now mail a crime victim a copy of the final disposition of a case.[23] Last year, the Legislature enacted a law that requires a prosecutor to inform a crime victim of the defendant's incarceration status. This year, it clarified what information must be provided: the contact information for the Department of Corrections and Community Supervision and the Office of Victim Assistance.[24]

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Endnotes

1. 2025 N.Y. Laws, Ch. 56, eff. August 7, 2025.
2. CPL 30.30(5).
3. *Id.*
4. 41 N.Y.3d 200 (2023).
5. CPL 240.50(5).
6. Gov. Kathy Hochul, *Defense Bar Remain at Odds on Discovery Reforms*, N.Y.L.J. (March 24, 2025).
7. S 613, not yet passed by either the Assembly or Senate.
8. Int. No. 1262.
9. L. 2025, N.Y. Laws, Ch. 55, eff. July 8, 2025.
10. L. 2024, N.Y. Laws, Ch. 613, eff. April 21, 2025.
11. L. 2025, N.Y. Laws, Ch. 55, eff. July 8, 2025.
12. L. 2025, N.Y. Laws, Ch. 115, eff. October 9, 2025.
13. 2024 N.Y. Laws, Ch. 60, eff. December 21, 2024.
14. 2025 N.Y. Laws, Ch. 31, eff. December 21, 2024.
15. 2025 N.Y. Laws, Ch. 55, eff. June 8, 2025.
16. A 7563, awaiting the signature of the governor.
17. S 1744, awaiting the signature of the governor.
18. S 8196, awaiting the signature of the governor.
19. 2025, N.Y. Laws, Ch. 131, eff. June 30, 2025.
20. S 2551, awaiting the signature of the governor.
21. A 7265, awaiting the signature of the governor.
22. S 4906, awaiting the signature of the governor.
23. A 6332, awaiting the signature of the governor.
24. 2025 N.Y. Laws, Ch. 23, eff. March 13, 2025.

Oh, What a Tangled Web We Weave, Counselor

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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 approached the witness, I whispered, "What happened?" She looked up at me, smirked, and said, "My grandson thought I would seem more credible in a wheelchair." I froze. The judge looked at me impatiently, the jury was staring at the witness. . . . What to do? Too late; she was 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 instructed. I decided 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

Dear Marcus:

Your question raises an interesting and important ethical dilemma that lawyers often face in varying degrees of severity. Many trial lawyers are familiar with the incentive to make one's own client come off as likeable as possible to the jury, even if that means the lawyer is presenting the client or even him or herself in some peculiar way.

It begins with showing small truths to the jury that are irrelevant to the claim being tried, such as eliciting testimony from a female witness about how she dotes on her children or has a husband who does charity work. It may escalate to allowing the jury to believe the most minor misrepresentations, like the lawyer who dresses in

a $1,000 suit and gold watch to get his client acquitted of petty theft (why would the defendant need to steal if he can afford such a high-priced lawyer?), or the lawyer who wears shoes with worn-through soles and stands with one leg bent at the knee, the better for jurors to notice them (what a simple, homely, credible old soul). A lawyer who keeps on ascending the ladder of connivery may soon enter the realm of outright lying to the jury. Fortunately, most lawyers do not stretch the rules to that extent.

And yet, as honest and conscientious as an attorney may be, it is a fact of life that witnesses and clients sometimes are not. Many lawyers know this well enough from their experience in dealing with opposing witnesses, but the possibility of one's own witness going rogue and threatening to drag the lawyer down is a real ethical danger, especially to civil lawyers who are likely to be less used to this hazard than lawyers in criminal cases. A trial can be a crucible of pressure, in which conflicting values and loyalties clash; a lawyer does owe duties to their client, to the court, and to opposing counsel, and it is necessary to have a sense of how to manage conflicting duties without violating one of them.

The Forum previously examined a lawyer's duty of candor in a situation where a client led his lawyer to believe strongly that he would knowingly give false evidentiary testimony.[1] Your question implicates the distinct issue of how a lawyer should handle a witness's attempt, through non-evidentiary conduct, to deceive the court and jury as to their credibility.

A Lawyer's Duty of Candor to the Court and Opposing Counsel

A lawyer has a duty of candor to both the court and to opposing counsel. Rule 3.3(b) of the New York Rules of Professional Conduct states that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[2] The rule obligates lawyers to take some action to prevent fraudulent conduct by some "person" in a trial, whether that be their own client, or a friendly witness, or an opposing witness. "Fraudulent" does not have the same meaning that it has in tort law: "Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal."[3] In other words, fraud is an attempt to change the outcome

of trial through trickery, rather than winning honestly on the merits.

It is important to recognize an important aspect of this rule: It regulates conduct. There are numerous rules that regulate a lawyer's use of testimony, evidence or material information. Lawyers shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact" made by them,[4] or "offer or use evidence that the lawyer knows to be false,"[5] or "use perjured testimony or false evidence,"[6] or "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false."[7] Unlike those rules, Rule 3.3(b) regulates "conduct," and does not condition its regulation of conduct on whether it is "material" or "immaterial," or whether it successfully alters the outcome of the proceeding. All that matters is that the conduct be criminal or fraudulent.

What your witness did, Marcus, was not done by the lawyer (and thus escapes Rule 3.3(a)(1)), and also is unlikely to be considered "evidence" or "testimony," as a witness's mere physical appearance or demeanor is not usually deemed formal evidence, thus arguably falling outside of Rules 3.3(a)(3) and 3.4. But because your witness's misrepresenting herself physically to the jury was "conduct," you are responsible for taking remedial action out of your duty of candor if you knew that her conduct was "criminal" (doubtful here) or "fraudulent" (possible here).

We believe that you should have acted. Although her physical appearance or demeanor was not evidence, it could be a factor used by the jury in deciding credibility. A witness who puts on a suit and tie for the first time solely to appear credible to a jury may well have similar motives. Surely, such acts – putting on a nice suit, using a wheelchair – fall onto a continuum, from benign to malign. Malignity may depend upon the case: A plaintiff's feigning a physical disability due to medical malpractice in a case for that medical malpractice is much worse than here.

Your witness's conduct falls into an in-between gray area. It may not be a representation that is material to the claim being tried. It may have no outcome-determinative effect at all, especially if the jury takes its job seriously and is well instructed. It is innocuous to coach a witness to wear a suit to court, even if they have never worn one. It would cross the line to coach the witness to use a wheelchair. While you did not coach the witness, you, nonetheless, should have acted because of how far along on the benign-malign continuum this fell. Your witness arguably crossed the line into fraud on the court, as her stated purpose was to deceive the jury into finding her more credible.

A Lawyer's Duty Not To Knowingly Allow False Testimony

You should not attempt to rely on the grayness and ambiguity of the question to justify absence of remedial action on your part, because even if her conduct was not technically fraudulent, the risk of your witness's deception entering oral testimony as perjury was high: Opposing counsel could have, innocently, asked the witness why she was in a wheelchair. And she would have probably answered with a falsehood. Or perhaps the witness, unprompted but trying to act out her part, would mention a disability.

"We believe that you should have acted. Although her physical appearance or demeanor was not evidence, it could be a factor used by the jury in deciding credibility."

Rule 3.3(b) requires a lawyer to take remedial action once he or she has knowledge that a person has engaged in fraudulent deception in court. Furthermore, Rule 3.4(a)(5) requires that a lawyer shall not knowingly "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false."

You may not have known in advance whether she would so testify, and you got lucky that she did not, but had she so testified, you would have known that she had lied, and you would have been obligated to take remedial action immediately anyway. This would have been even worse, as the court would see that you had allowed her to testify in a wheelchair while you knew that she was not actually disabled. As to such testimony: "the lawyer cannot ignore an obvious falsehood."[8] And note that even if her merely being in a wheelchair was not criminal conduct, perjury is criminal. Once she testifies falsely, the lawyer who knows that it is false becomes ethically complicit if he or she does nothing.

And do not forget about Rule 8.4: a lawyer shall not (c) "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"; or (d) "engage in conduct that is prejudicial to the administration of justice." Conduct is

not just action; it is also inaction, and inaction in the face of a need for action is misconduct.

In sum, like the proverb that one should not allow one's cattle to graze on one's own land too close to one's neighbor's land, for risk that the cattle will cross the boundary, a lawyer should avoid ethical gray areas. Your witness's conduct was either fraudulent to begin with, or was so close to it that you should have acted to defuse the situation before it could escalate, even if it did not ultimately escalate.

Balancing a Lawyer's Duties to Client, Court, and Opposing Counsel

We acknowledge that this is easy to say, and difficult to do. Calling the issue to the attention of the court could have resulted in the witness being sent home without testifying, possibly costing your client the case. And if you are handling the case on a contingency fee basis, it may well sting even harder.

While an attorney must, most fundamentally, represent a client's interests, the duty of candor is paramount over the client's interests. "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal."[9]

Your witness created a bad situation for both you and your client, and it is understandable that you did not want to risk blowing up your key witness by broaching the subject, as that might sink your client's case, which no lawyer should ever want to do. But you must remember that your witness also created a bad situation for your client, and could have sunk your client's case, especially without your quick remedial action. Your witness deceived the jury and came close to committing provable perjury, which could have destroyed her credibility and dragged her down, as well as you and your client.

> The disclosure of a client's [or indeed, witness's] false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement.[10]

You should have taken remedial action, but preferably in a way that would not harm your client. That is where the difficulty in your case lies. The situation was particularly sensitive as to your relationship with your client because your client, watching the trial, may have been completely unaware of any wrongdoing, and may never have even suspected what you knew – that your witness was feigning a disability.

Remedial action should be as limited as possible while still achieving the goal of remedying the problem without harming your client's interest. Withdrawing from the representation and abandoning your client in the middle of trial was out of the question; it would in effect betray an innocent client, would not remedy the situation and the court would likely have forbidden withdrawal.[11]

Eliciting testimony from your witness about her feigned disability, and then impeaching her on it, was not ideal, as it would likely elicit perjured testimony and if successful would run the great risk of destroying your key witness's credibility as to her entirely honest testimony on the actual subject matter that was up for trial of fact, interfering with the administration of justice by preventing an important witness from usefully describing the battery that she witnessed.

In our view, the best course of action would have been to grab the wheelchair right after she told you of her intention, and to quietly tell her to get out of it. Failing that, once she had wheeled herself to the stand, the best course of action would have been to ask for a side conference with the judge and opposing counsel out of earshot of the jury, to arrive at an arrangement whereby either the witness would be made to leave the wheelchair, or would have to give an honest explanation for it.

We all know that in the heat of the moment, we may not always choose the best course. You did second best, which was quite risky. You did not bring up her wheelchair at all when questioning her, so you did not elicit false testimony. But you took the risk that your opposing counsel would bring it up, mindful of the possibility that your opposing counsel would question her about it, possibly resulting in the roof falling in on you and your client.

On the whole, in matters of ethics and professionalism, it is better to steer away from gray areas and danger zones. Perhaps, should something like this happen again, it would simply be best to ask for a brief adjournment to enable you to think about and chart the best course of action.

Sincerely,
The Forum, by
Jean-Claude Mazzola, jeanclaude@mazzolalindstrom.com
Adam Wiener, adam@mazzolalindstrom.com
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QUESTION FOR THE NEXT FORUM

To the Forum,

I have found myself in a strange and amazing predicament. Let me explain. I am an American. I was born and reared in Albany, in the state of New York – anyway, just over the river, in the country. So, I am a Yankee of the Yankees – and practical; yes, and nearly barren of sentiment. My father was a blacksmith, my uncle was a horse doctor, and I was both, at first. Then I went over to Albany and studied law under Amos Dean, and after a few years' practice joined, at the time, the fledging New York State Bar Association in 1876. Although a fine lawyer, I was raised rough, and a man like that is a man that is full of fight – which goes without saying. During an argument conducted with crowbars with a fellow attorney we used to call Hercules, I was laid out with a crusher alongside the head that made everything crack. Then the world went out in darkness, and I didn't feel anything more, and didn't know anything at all – at least for a while.

When I came to again, I was sitting under an oak tree, on the grass, in a most familiar place to me on the corner of Eagle and Pine streets. Not entirely familiar; for although there was the gleaming white marble Court of Appeals right in my line of sight, next door was another building, a courthouse, of which I have never known. There were wheeled carriages of the kind I have never seen, with not a horse or draught animal around, and two very smartly attired officials, both in a dark suit of clothing, each with a shiny badge, a small caliber sidearm neatly holstered, and finely polished black boots.

"Are you OK, buddy?" said the fellow.

"Are you hurt, sir?" added the madam.

Well, after gathering my composure and figuring that these officials were checking on my well-being, I thanked them for their concern and got myself up to figure out what was what.

I made myself across the street to the familiar courthouse and although it was the building I knew, nothing was familiar to me. There were women judges and lawyers, and all of every race. I took the decision to explore what I now knew to be the "new" courthouse next door. I watched a trial and, while familiar in some respects, the lawyers behaved in a most cordial and polite way, with the judge setting them straight if they were otherwise. I heard the judge admonish one and remind him of the Standards of Civility. What are they? I saw lawyers examining a witness with no officer present. And yet, while advocating for their clients, they displayed a fine degree of cordiality and respect for each other. Even so, things did flare, and one reminded the other of the Rules of Professional Conduct. Are there such rules? In another room I saw lawyers debating before a judge through a most peculiar picture frame on her bench. What kind of magic was that!?

By now, I had realized that by some strange action I had been projected into the future. As a member of the highest esteem in the New York State Bar Association, I found my way to our library and found you through the Journal. From the date on the masthead, I, quite perplexed, know that the year 2026 is soon to be here.

Since you seem to be an expert in most things related to law practice, while I work to understand my unique predicament, would you be so kind as to provide me with a brief primer on my observations to help bring me up to speed on our practice over the last 150 years?

Sincerely,
Josiah Perplexatus[12]

Endnotes

1. *See* Vincent J. Syracuse, Amanda M. Leone, and Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9, pp. 49-51.
2. *See* Rule 1.0(w), defining "tribunal" to include "court."
3. *See* Comment 12 to Rule 3.3.
4. *See* Rule 3.3(a)(1).
5. *See* Rule 3.3(a)(3).
6. *See* Rule 3.4(a)(4).
7. *See* Rule 3.4(a)(5).
8. *See* Comment 8 to Rule 3.3.
9. *See* Comment 2 to Rule 3.3.
10. *See* Comment 11 to Rule 3.3.
11. *See* Rule 1.16(d).
12. With assistance from Mark Twain's "A Connecticut Yankee in King Arthur's Court" (1889).

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Court Can't 'Just Say No'

By David Paul Horowitz and Katryna L. Kristoferson

Inherent Power of Courts

It is well settled that a court in New York State has the inherent power to control its own calendar. As the Court of Appeals stated in *Headley v. Noto*,[1] in the context of multiple actions:

> It is well recognized that the power to control its calendar is a vital consideration in the administration of the courts (citation omitted). Indeed, a litigant should be prevented from repeatedly bringing his claim into court, thereby harassing the other parties involved and clogging the court's calendar.

A court may permanently enjoin a party and/or counsel from commencing an action based upon the same claims as a prior action where that prior action has been litigated to conclusion:

> In light of the plaintiff's history of engaging in frequent, protracted, and often frivolous litigation by attempting to relitigate the fraud issues, the Supreme Court properly permanently enjoined the plaintiff, his current and former counsel of record in this action, and their affiliates from instituting any further actions that are related to his amended complaint in any courts of this State against these defendants (citations omitted).[2]

Citing *Braten*, a court may enjoin a party from making a motion without prior judicial approval where the party has made multiple frivolous motions in the action:

> Furthermore, given the plaintiff's history of engaging in frivolous litigation, the Supreme Court properly enjoined him from making any further motions in this action in the absence of prior approval by the court (citation omitted).[3]

A large, if not the largest, part of any court's calendar consists of motions. As anyone who has sat through the call of a motion calendar, particularly in a large urban county, knows the number of motions to be heard on a given day can be daunting. As the First Department recognized in *Grisi v. Shainswit*:

> We are also not unmindful of the crushing volume of motions – including the patently meritless, frivolous and untimely – with which a Justice presiding over a civil part under the individual assignment system is confronted.[4]

So, given the court's inherent power and the large volume of motions (some of which will, no doubt, be "patently meritless, frivolous and untimely"), can a court condition the making of a motion upon receipt of prior approval from the court?

'No!'

So as not to bury the lead, a court may not condition the making of a motion upon obtaining prior approval from the court to make the motion (except in extremely narrow circumstances à la *Duffy v. Holt-Harris* above). More on that below. But first, there are procedural preconditions (some might say hurdles) a court may require before a motion can be made.

'Before Moving You Must . . . '

That being said, courts have imposed requirements that must be complied with before a motion can be made, and those requirements sometime blur the line between prior approval and something less onerous.

Courts have devised a number of tools to control the process of addressing and deciding motions. Some of those rules are, no doubt, designed to reduce the number of motions that require an order or decision and order by a court, thereby reducing the burden on the court (an altogether worthy goal given the limited judicial resources available to litigants). For example, requiring a pre-motion conference designed to get the parties to resolve their dispute without the need for the court to rule on the motion, is permitted, and a pre-motion conference is required pursuant to Rule 202.70 Rule 24 "Advance Notice of Motions" in the Commercial Division:

> Rule 24. Advance Notice of Motions. (a) Nothing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interests. However, in order to permit the court the opportunity to resolve issues before motion practice ensues, and to control its calendar in the context of the discovery and trial schedule, pre-motion conferences in accordance herewith must be held. The failure of counsel to comply with this rule may result in the motion being held in abeyance until the court has an opportunity to conference the matter.

Rule 24 goes on to address various aspects of the pre-motion conference. Notwithstanding the precatory paean to the unfettered right of counsel to make a motion, the

restrictions imposed by Rule 24 almost certainly delay the hearing on the motion, once made.

Even without delay, a party seeking to make a motion is required, in essence, to preview the motion with the court. And since the preview will necessarily be on less than a full set of motion papers, and after an oral presentation that may be less than that afforded during oral argument, the presentation by counsel will be truncated. While this may not matter in many instances (think a garden variety disclosure dispute), it will matter in more complex motions.

Because the motion is being previewed by the court, the judge will almost certainly form an opinion as to the merits of the motion and likely convey that to the parties, which can have a chilling effect. If the judge conveys, directly or otherwise, that she believes the proposed motion is without merit, the lawyer who believes the motion is meritorious may decide against making the motion believing it would be an exercise in futility. This not only waives seeking relief in the first instance but bars any possibility of appellate review.

A Court Cannot Condition Making a Motion on Obtaining Prior Approval

What a court cannot do is condition the making of a motion upon receiving prior approval from the court, a point driven home recently by the First Department in *Reyes v. City of New York*,[5] where that court held:

> Supreme Court improvidently exercised its discretion in denying the motion on the ground that plaintiff failed to first conference the matter with the court in accordance with its Part Rules. The court may not condition the making of a motion on prior judicial approval (citation omitted).

Reyes cited the court's decision in *Costigan & Co., P.C. v. Costigan*:

> Defendants' motion for a default judgment was improperly denied by the IAS court since it relied on noncompliance with rule 24 (a) of the Rules of the Justices of the Commercial Division. That rule purports to bar a motion unless a prior conference has been held on the issue raised by the motion. Since such a rule effectively conditions the making of a motion on prior judicial approval, it violates a party's statutory right to make a motion and is void (citation omitted).[6]

In a subsequent decision citing *Costigan*, the First Department clarified the procedure where the Rule 24(a) was not followed:

> The Rules of the Commercial Division of the Supreme Court (22 N.Y.C.R.R. 202.70 [g] rule 24) provide for a premotion conference to be held in nondiscovery disputes. The motion court's part rule states that "[d]iscovery disputes should first be addressed through a court conference prior to the filing of a motion." Both rules further provide that a party's failure to comply may result in the motion being held in abeyance until the court has the opportunity to conference the matter. Neither side requested a premotion conference prior to filing the motion and the cross motion. Based on this procedural failure, the court marked both the motion and the cross motion off calendar with leave to renew after plaintiffs' compliance with the rules. Rather than marking the motions off calendar, the motion court should have scheduled a conference and then decided the motions if the conference did not resolve the parties' disputes.[7]

Costigan in turn cited the court's 1991 decision in *Hochberg v. Davis*.[8] In *Hochberg*, the First Department, acknowledging that "it is undisputed that courts have an inherent power over the control of their calendars and the disposition of business before them," nonetheless issued an order directing the judge whose part rule was at issue "to rescind his Motion Calendar rules for Part 3 of the Supreme Court, New York County, conditioning the making of written motions on prior judicial consent." The court explained:

> Even though the practice of conditioning the making of motions on prior judicial approval may, in some instances, discourage the filing of frivolous motions, it may also prevent a party from exercising the option to move for relief to which he or she may be entitled.

Hochberg in turn cited *Grisi v. Shainswit*,[9] an Article 78 proceeding seeking a writ of mandamus to compel the court to issue a written order denying the plaintiff's application:

> Since they wish to appeal from the denial of their application for a physical examination and further deposition, and no appeal lies from a ruling, as distinct from an order (citation omitted), which must be in writing (citation omitted), the defendants, petitioners herein, thereupon commenced this proceeding seeking a judgment in the nature of a writ of mandamus directing the court to issue a written order reflecting its denial of their application.

The *Grisi* court explained that a writ of mandamus would not ordinarily have been available to plaintiff's counsel:

> In this case, petitioners are unable to point to any authority, statutory or otherwise, which mandates that a court issue a separately signed, written order embodying its ruling on an oral application. Ordinarily, in such circumstances, we would dismiss the petition for want of a showing of a clear legal right to the relief sought. The reality, though, is that the application was orally presented, not by design, but only because petitioners were denied the opportunity to move formally on papers. In this connection, we note a growing tendency in the Supreme Court civil trial parts to condition the making of a written motion on prior judicial approval. In certain instances, a refusal to allow the motion is accompanied by an express, but oral, denial of the motion. In others, the request is simply refused, effectively resulting in a denial of the motion. In either event, there is no record avail-

> able for appellate review. In some instances, as here, there is not even a written order. Our difficulty with this practice is that it tends to frustrate a litigant's statutorily provided right of appeal from an intermediate order (citation omitted).

The *Grisi* court concluded:

> [F]undamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases. As already noted, the right to take an appeal from an intermediate order is statutory (citation omitted), as is the right to "full disclosure" of all "material and necessary" evidence (citation omitted). A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record, thereby foreclosing the opportunity for appellate review. At the very least, in instances where the court, in its discretion, refuses to entertain a written motion, the denial of which would be otherwise appealable had the motion been made in writing, the putative moving party should be afforded the opportunity to make a record reflecting the respective positions of the parties on the particular issue and the court's reasoning and decision, as well as a recitation of the facts and documentation that were considered in the court's determination.

Grisi is regarded by most as the ùr-decision in this arena.

Grisi, *Hochberg*, *Costigan*, and now *Reyes* form an uninterrupted line of cases in the First Department, all to the same effect: A court may not condition the making of a motion on prior judicial approval.

What about in the other Appellate departments? None of them cite to *Grisi*, *Hochberg*, or *Costigan* (*Reyes* is too new) for the proposition discussed in this column. We are unaware of contrary authority in the other departments, so that on the authority of, *inter alia*, *Mtn. View Coach Lines, Inc. v. Storms*,[10] trial courts in the other departments are bound to follow the First Department decisions:

> The Appellate Division is a single State-wide court divided into departments for administrative convenience (citations omitted) and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (citations omitted). This is a general principle of appellate procedure (citations omitted), necessary to maintain uniformity and consistency (citation omitted), and, consequently, any cases holding to the contrary (citation omitted) are disapproved.

However, the other departments are free to follow, or not follow, the First Department decisions:

> Such considerations do not pertain to this court. While we should accept the decisions of sister departments as persuasive (citations omitted), we are free to reach a contrary result (citations omitted). Denial of leave to appeal by the Court of Appeals is, of course, without precedential value (citations omitted).[11]

One other thing before we go: A separate line of cases holds that a court may not restrict the timing of a summary judgment until, for example, all disclosure is certified to be complete: "[I]n view of the fact that CPLR 3212 (a) permits a party to "move for summary judgment . . . after issue has been joined," the court improperly limited the appellants to moving for summary judgment only after the court certified that discovery was complete," citing, *inter alia*, *Hochberg*.

Conclusion

It is never easy to tell a judge, "You can't do that." (Though some of us no doubt thrill at the prospect of doing so.) However, when it comes to preserving your client's right to make a motion, in the face of a rule or practice requiring prior approval from the court, it is necessary to tell the judge just that, remembering to preface your admonition with, "Respectfully, Your Honor" or, in truly egregious circumstances, "Most Respectfully, Your Honor."

With summer a distant memory, and with seemingly every case adjourned earlier in the year put over to the Tuesday after Labor Day, please take a moment and let us know if we missed any decisions from the Second, Third, and Fourth Departments.

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 on CPLR updates, motion practice, and implicit bias, and teaches a course on bias and the law at the Elizabeth Haub School of Law at Pace University.

Endnotes

1. 22 N.Y.2d 1 (1968).
2. *Braten v. Finkelstein*, 235 A.D.2d 513 (2d Dep't 1997).
3. *Duffy v. Holt-Harris*, 260 A.D.2d 595 (2d Dep't 1999).
4. 119 A.D.2d 418 (1st Dep't 1986).
5. 233 N.Y.S.3d 58 (1st Dep't 2025).
6. 304 A.D.2d 464 (1st Dep't 2003).
7. *Briarpatch Ltd., L.P. v. Briarpatch Film Corp.*, 68 A.D.3d 520, 520 (1st Dep't 2009).
8. 171 A.D.2d 192 (1st Dep't 1991).
9. 119 A.D.2d 418 (1st Dep't 1986).
10. 102 A.D.2d 663, 664-665 (2d Dep't 1984).
11. *Id.* at 665.

New York State Bar Association To Host Convocation on Media Literacy in a Digital World

By Susan DeSantis

The New York State Bar Association is bringing together leaders from education, the law, the judiciary, politics, and the media to explore the critical role of media literacy in protecting democratic values.

"Misinformation and digital manipulation can shape public opinion," said Kathleen Sweet, president of the New York State Bar Association. "The convocation will highlight practical strategies to foster critical thinking and informed decision-making about media content."

New York State's Chief Judge Rowan Wilson will kick off the event, which will take place from 8:30 a.m. to 4:30 p.m. on Oct. 20 at the Bar Center in Albany. The program is free and will be available virtually.

Constitutional scholar and former U.S. Solicitor General Noel Francisco, partner in charge at Jones Day in Washington, will be the featured speaker. Christopher Riano, of counsel at Holland & Knight and a lecturer on constitutional law at Columbia University, will lead the discussion.

Judge Joseph F. Bianco, circuit judge on the U.S. Court of Appeals for the Second Circuit, and Peter Sagal, host of NPR's "Wait Wait . . . Don't Tell Me!" will address the convocation virtually.

Commissioner of the New York State Department of Education Betty Rosa and New York State Senator Shelley Mayer, who chairs the Senate Education Committee, will discuss media literacy for students. Melinda Person, president of New York State United Teachers, will join them on a panel moderated by Susan Arbetter, anchor of Capital Tonight on Spectrum News.

Professor Howard Schneider, executive director of the Center for News Literacy at Stony Brook University, will moderate another panel that will include students and tackle how media literacy is defined. The last panel of the day will focus on strategies, and will be moderated by Jay Worona, a partner at Jaspan Schlesinger Narendran in Garden City and former deputy executive director and general counsel for the New York State School Boards Association.

The convocation, "Media Literacy Education: Safeguarding Democracy in a Digital World," will be available to stream in classrooms. Registration is required.

NYSBA Leader Rises to Presidency of Continuing Legal Education Association

By Susan DeSantis

Kathy Suchocki, associate executive director of the New York State Bar Association, was installed as president of the Association for Continuing Legal Education at ACLEA's annual meeting in Montreal.

Suchocki, ACLEA's president-elect for the past year, ascended to the presidency following a successful year implementing the New York State Bar Association's new membership model. As senior director of continuing legal education and law practice management for the New York State Bar Association, Suchocki oversees the production of 500 legal education courses each year.

Under the new model, NYSBA members receive free continuing legal education courses. Membership in two of the association's law practice sections, such as the Trusts and Estates Law Section or the Family Law Section, or demographic groups such as the Women in Law Section or the 50+ Section, is included with association membership, as are downloadable forms and e-books.

"We are so proud of Kathy Suchocki and wish her great success in her role

as president," said Kathleen Sweet, president of the New York State Bar Association. "Our new membership model has been successful because of the high-quality programming that her department produces. It has made membership more valuable than ever."

Suchocki elaborated on the success of NYSBA's all-inclusive membership model.

"The future of CLE lies in creating learning experiences that are personalized, tech-forward, and immediately relevant to a lawyer's evolving practice," she said. "It's about making CLE not just mandatory, but meaningful. With NYSBA's new membership model, we have seen huge increases in viewership and registrations for webinars. We have seen more members taking advantage of all the available content, not just CLE programs but all of our books and forms."

When asked why the bar association's legal education courses are so popular, she pointed to her practice of using member feedback for continuous improvement.

"A strong guiding principle for deciding what continuing legal education programs will appeal to members centers on relevance, practicality, and engagement. My guiding principle in coordinating and scheduling CLE topics is to focus on what's timely, practical, and meaningful to our members. We pay close attention to feedback, emerging trends in both the law and the profession, and real-world issues attorneys are facing in their day-to-day work. Whether it's regulatory or statutory changes, AI's impact on legal practice, or wellness in the workplace, the goal is to offer programs that educate, equip, and engage our members – all while respecting their time and professional challenges," she said.

New York State Bar Association President Named Lawyer of the Year

By Jennifer Andrus

New York State Bar Association President Kathleen Sweet has been named Best Lawyers' Lawyer of the Year in professional and medical malpractice defense law for the Buffalo region.

The Best Lawyers award is highly selective, with only 5% of U.S. lawyers and 3% globally receiving the honor. The designation is the result of thousands of confidential peer evaluations and a rigorous vetting process.

At Gibson McAskill & Crosby, Sweet defends medical and legal malpractice actions and represents health care professionals who face disciplinary hearings. She also represents physicians who are the subject of state and federal investigations.

As president of the New York State Bar Association, Sweet leads the largest voluntary state bar association in the country.

NYSBA Releases Updated Edition of 'Real Estate Titles: The Practice of Real Estate Law in New York'

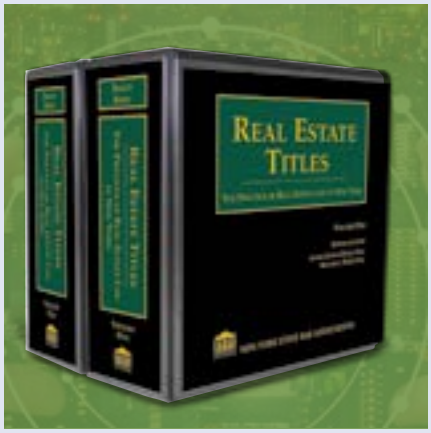
By Jennifer Andrus

The New York State Bar Association has released a revised edition of "Real Estate Titles: The Practice of Real Estate Law in New York." The 5th edition of this reference book is an invaluable resource for all real estate professionals. Written and updated by many of the leading real estate practitioners, this title's in-depth coverage is unparalleled in this area of practice.

All aspects of real estate transactions are covered in 34 chapters, including contracts of sale, title search, mortgages, deeds, liens and real estate financing. All practitioners will benefit from this publication, from the beginning real estate practitioner to those dealing with the most complex issues.

This edition is dedicated to the memory of co-author Michael J. Berey, who died shortly before it was released. Bailey, who edited it along with Berey, pays loving tribute to his friend and co-author.

"A tremendous loss for the legal community but at the same time Mike Berey poured himself and his time into writing and editing 'Real Estate Titles' and leaves behind what I am sure he considered the greatest book on real estate law ever written," he wrote. "I am the one truly honored to write, edit and collaborate with a legend and master of real estate law – my good friend Mike Berey. And I am so glad that we have 'Real Estate Titles' – not only to remember him by but to continue to learn from his teachings."



"Mike was our oracle," added real estate attorney and friend Richard Fries. "His mastery of real estate law, title, tax, administrative law, statutes and regulations was legendary."

"Real Estate Titles: The Practice of Real Estate Law in New York" is available as a free e-book as part of your New York State Bar Association membership. A print edition is also available to members at a discounted rate.

Catherine van Kampen Shares Her Passion for Developing the Next Generation of NYSBA Leaders

By Jennifer Andrus

Catherine van Kampen is the managing director of staff attorneys and senior counsel at Bernstein Litowitz Berger and Grossmann with expertise in complex international litigation. She is the co-chair of the New York State Bar Association's Committee on Leadership Development. She and Co-Chair Christopher McNamara developed the Leadership Academy in 2025 and plan to make it an annual event open to all NYSBA members.

How does the Committee on Leadership Development encourage a sense of belonging for all members in the association?

The legal profession is very conservative, but change is the only constant in life. As communities change, society changes; for bar associations to be successful, you have to reflect the communities you serve. You might go to a bar association and feel there isn't a place for you because you don't look like everybody else. We say – everyone has a place here. If you care, are competent and committed, coming with the best intensions for the association, you belong here. Every single member has the opportunity to become a leader and to develop their capacity for leadership.

What inspired you to create the Leadership Academy?

Many other bar associations have costly leadership certificate programs available only to a selected few. We realized that most solo and small firm practitioners cannot afford that type of training. We identified a real need and knew we could provide this education to NYSBA members for free. It's the gift that the association is giving itself – to train the next generation of our own leadership. We look forward to offering it again in 2026.

You have been recognized for your commitment to pro bono work on behalf of women and girls. How do you fit pro bono work into your schedule?

I try to do something with pro bono every day. It could be half an hour on my lunch break or before I start work. If you take small steps every day, the cumulative effect over time is tremendous. Pro bono work is a gift; it's an opportunity to serve others. If you align your interests and your values with an area of need in a community, you can really do beautiful things. My passion over 30 years has been women and children, particularly refugees and immigrants.

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

The New York State Bar Association has wonderful attorneys and they're fun! People here are in high spirits; they are passionate about the law. I don't see a lot of cynicism; I see a lot of love for the law! New York is a microcosm of the world, people speak multiple languages, it's mind blowing. You're not going to see that in other states.

What advice do you have for new lawyers?

My advice is to join your state bar association, like NYSBA, get involved, and volunteer, even if you don't have that much experience, don't worry about it. Bring your enthusiasm, your time and your talent, because your bar association needs you.

Finish this statement: I would join NYSBA because…

NYSBA offers opportunities for professional development and network building that no other bar association offers at the state level.

Regulation Long Overdue: Feds Strive for a Friendlier Approach to Cryptocurrency

By David Alexander

The recent enactment of U.S. federal regulations around cryptocurrencies should help provide long-sought clarity and guidance and the easing of tensions in the digital marketplace.

The federal administration has initiated a more friendly approach to federal regulation by establishing a working group on digital assets and encouraging more flexiblity. In addition, three bills passed through the U.S. House of Representatives on July 17 to provide much sought-after guidance.

The topic was the focus of a continuing education program, "Recent Cryptocurrency Issues," sponsored by NYSBA's Committee on Continuing Legal Education, the Business Law Section, and the section's Private Investment Funds and Securities Regulation committees.

Stuart Levi, intellectual property and technology partner at Skadden; Katrina Paglia, chief legal officer at Pantera and Jon Firester, managing director in the capital markets consulting practice at EY, were the speakers. Anastasia Rockas, partner, investment management at Skadden and chair of the Business Law Section's Private Investment Funds Committee, moderated the hour-long talk.

The GENIUS Act

The greatest challenge with blockchains and cryptocurrencies is that they are exchanged on decentralized open markets and are thus prone to fluctuate in value.

However, in the last few years stablecoins have emerged. Stablecoins are digital assets tied to tangible assets, such as the U.S. dollar, and are therefore less volatile because the money used to purchase them is placed in an actual bank.

The Guiding and Establishing National Innovation for U.S. Stablecoins Act, the first federal crypto law in U.S. history, authorizes and regulates the distribution of stablecoins by establishing a regulatory framework for issuers and coin holders. Its passage by the House allows only U.S regulated banks and authorized firms to issue stablecoins, which are backed 1:1 by the U.S. dollar or other liquid assets. The GENIUS Act could bring the once obscure technology further into the mainstream economy, according to The Washington Post.

"The thought is that a well-regulated stablecoin could become a very efficient payment mechanism very fast, if not instantaneous, and be very inexpensive to process, allowing for both peer-to-peer transactions as well as more centralized transactions," said Firester.

Levi agreed with that assessment and explained some additional advantages of stablecoins.

"One thing they offer is the ability to send money around the world quickly, cheaply, and nearly instantaneously. But the second thing to keep in mind is the credit card payment rails, which have worked very well for a long time, and still do work very well, impose a fee on merchants and the merchants are increasingly pushing that fee onto customers."

Similar stablecoin fees should be less burdensome on the buyer.

The Clarity Act

Another law the House passed on July 17 is the Digital Asset Market Clarity Act, which divides regulatory oversight between the Securities and Exchange Commission and the Commodity Futures Trading Commission, with the SEC overseeing tokens that meet securities criteria, while digital commodities will come under CFTC's jurisdiction.

It still needs to pass through the Senate along with a third bill the House passed during what was dubbed "Crypto Week" on Capitol Hill. The Anti CBDC Surveillance Act would prevent the Federal Reserve from issuing digital currency.

Paglia foreshadowed this outcome.

"We are optimistic that they are going to get passed this year. We'll go back to the regulators with those laws in mind, and we'll end up, hopefully, in a place where we know where in the lifespan of a digital asset are you a commodity, are you a security," said Paglia.

Increasing the Pace of Federal Guidance

Overall, the U.S. has moved slower than the European Union and China in putting federal regulations in place regarding digital assets, but the passage of the bills signals a greater urgency.

"The U.S. is moving quickly to apply a regulatory framework that should help the good actors in this space," said Firester. "It's good for players that either are in the U.S. or want to participate in the U.S. Many crypto firms have been pushing for correct regulation so they can operate in a compliant way rather than trying things and discovering through enforcement what was and was not frowned upon."

CLASSIFIEDS

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CIVIL ACTION – LAW

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Plaintiff:
No. 25-03167
v.
Miguel Angel Amaya,: custody
Defendant:
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Scott E. Lash, J.

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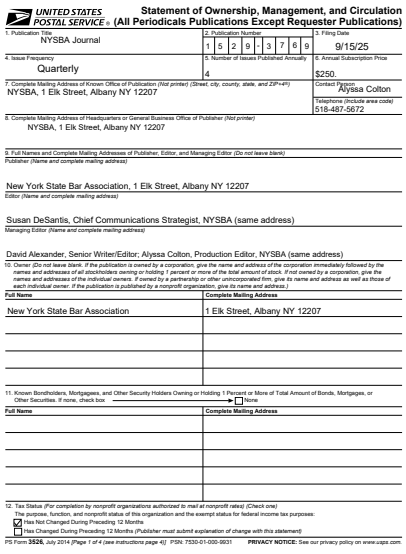

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1. Publication Title: NYSBA Journal
2. Publication Number: 1 5 2 9 3 7 6 9
3. Filing Date: 9/15/25
4. Issue Frequency: Quarterly
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6. Annual Subscription Price: $250
7. Complete Mailing Address of Known Office of Publication (Not printed) (Street, city, county, state, and ZIP+4®): NYSBA, 1 Elk Street, Albany NY 12207
Contact Person: Alyssa Colton
Telephone (Include area code): 518-487-5672
8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer): NYSBA, 1 Elk Street, Albany NY 12207
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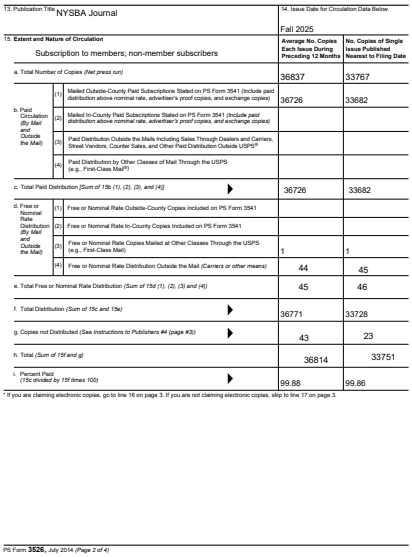

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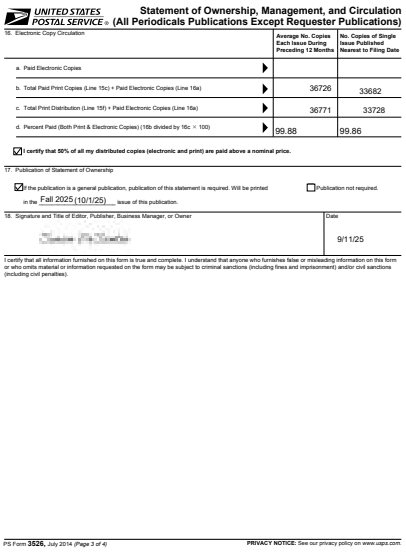

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