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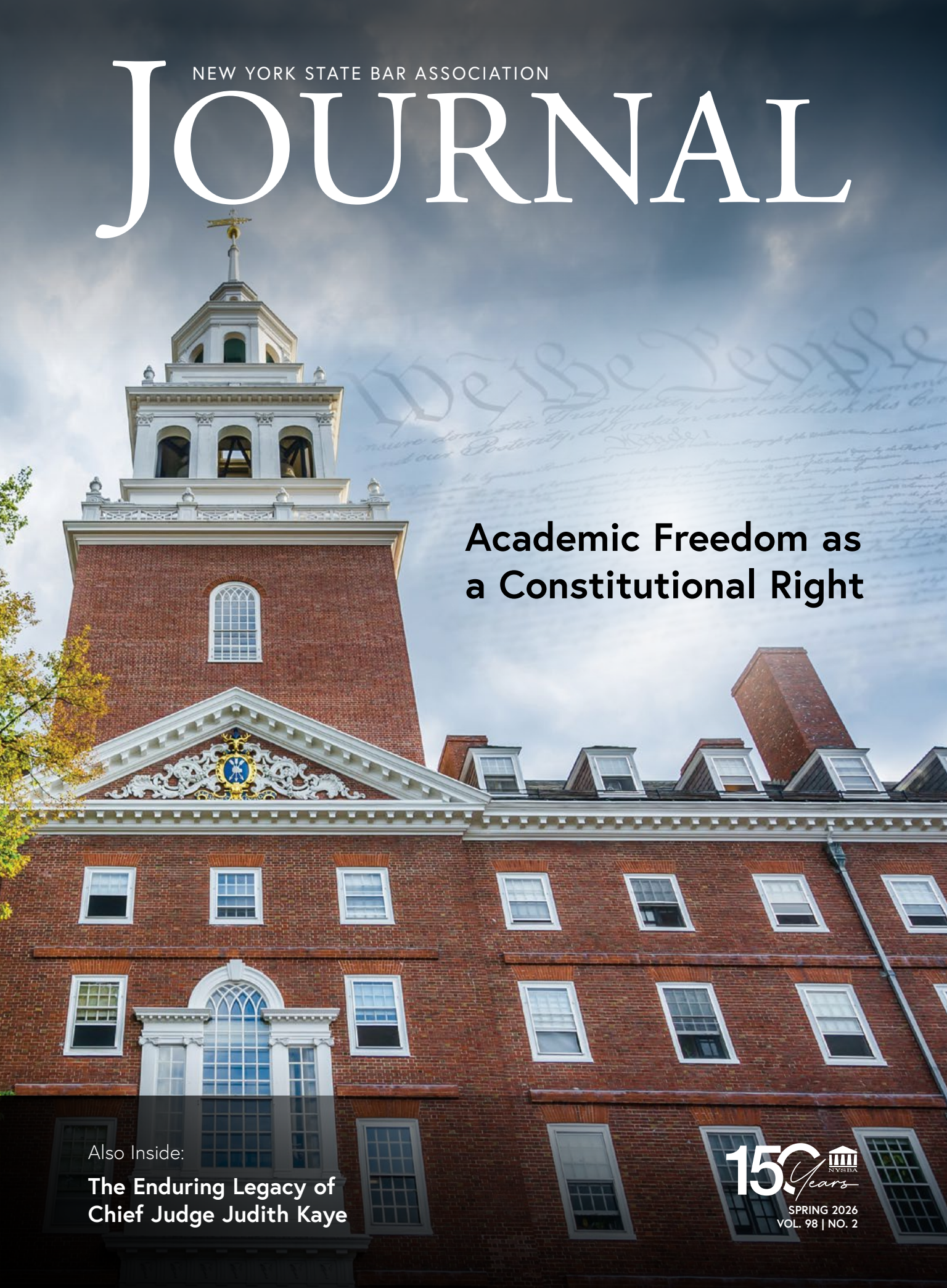

Academic Freedom as a Constitutional Right

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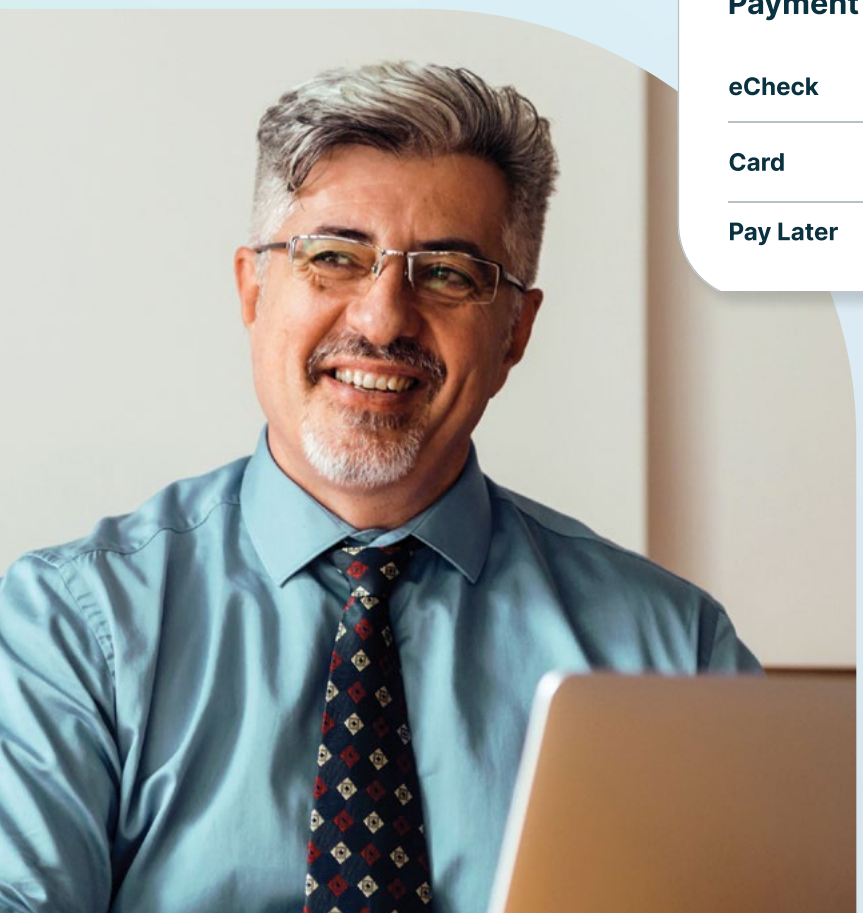

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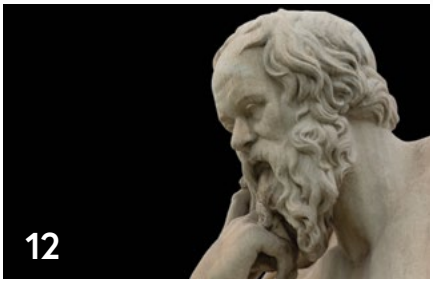

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Library subscription rate is $250 annually. New York State Bar Association Journal is published quarterly by the New York State Bar Association, One Elk Street, Albany, NY 12207. Print (ISSN 1529-3769), Online (ISSN 1934-2020). Periodicals postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes to: NYSBA, One Elk Street, Albany, NY 12207.

NEW YORK STATE BAR ASSOCIATION
JOURNAL

SPRING 2026
VOL. 98 | NO. 2

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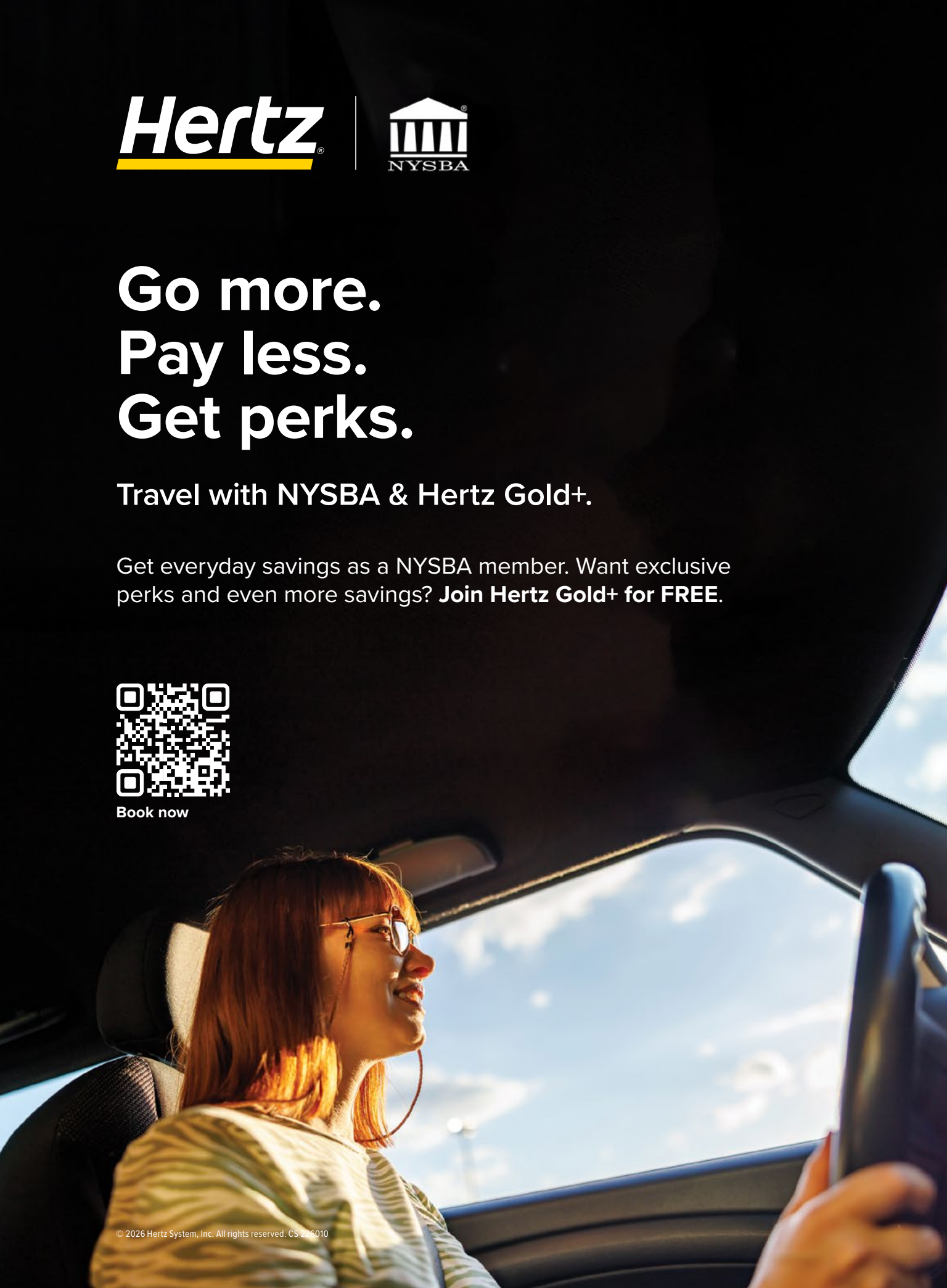
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Happy 150th, NYSBA!

Our sesquicentennial is well underway and we have much to celebrate.

Annual Meeting 2026

Thousands of lawyers attended our meeting at the Hilton Midtown in New York City. NYSBA staff came together to execute one of our biggest and best meetings ever:

The **Constance Baker Motley Symposium** celebrated the courage and entrepreneurial spirit of Madam C.J. Walker and the guidance and wise counsel she received from her business manager and lawyer, Freeman Ransom, as told by her great-great-granddaughter, journalist A'Lelia Bundles. It was inspiring.

The **Presidential Summit** featured Pulitzer Prize winning historian Jack Rakove, and former Assistant U.S. Attorney and January 6 prosecutor, and Co-Director of the Peter Gruber Rule of Law Clinic at Yale Law School Sonia Mittal. They engaged in a riveting discussion of constitutional failure, moderated by MS NOW'S Lawrence O'Donnell. Hundreds of members attended this timely and thought-provoking program.

The **Presidential Gala** took place at the historic Plaza Hotel and Gov. Kathy Hochul received the Association's highest honor, the Gold Medal. She recalled to those in attendance her days as an idealistic young New York lawyer and shared stories of her humble roots and unlikely ascension to becoming New York's first woman governor.

Rural Ready. In partnership with the Unified Court System and led by Presiding Justice Elizabeth Garry of the Appellate Division, Third Department, we launched "Rural Ready," an interactive website and recruiting initiative to address New York's legal deserts and the justice gap in communities where more lawyers are needed. Please check it out at nyruralready.com.

…

When I was sworn in last June, membership was the top priority for my term as president. There's good news on that score: For the first time in over a decade membership increased year over year from 2025 over 2024, and the momentum keeps building. With our beloved late Executive Director, Pam McDevitt, the membership and marketing departments, and the Membership Committee, launched a new all-inclusive membership model in late 2024. Membership in every section has grown by at least 10%. Participation in NYSBA CLE programming is breaking all-time records. We now have over 45,000 active dues-paying members, including members in over 30 countries. Indeed, our growing International Section, led by Brazil's Helen Naves and Torsten Kracht of Washington, D.C., continues to produce and deliver exceptional programming.

Speaking Out for the Profession and in Defense of the Rule of Law

As we have for 150 years, this year we have stood up for the profession and spoken out in defense of the Rule of Law. And as others joined the chorus, we have also acted. We have delivered timely programming on topics of urgent concern. At a NYSBA webinar on March 10, experts provided guidance on "The Limits of Federal Law Enforcement," an issue many of us wrestle with in the context of immigration enforcement actions and peaceful protests.

Currently, we are lobbying Congress to block Attorney General Pam Bondi from interfering with and thwarting attorney discipline proceedings for administration attorneys and to stop her efforts to exempt DOJ attorneys specifically from such investigations. It continues to be our position that any lawyer who abandons their oath to the Constitution by intentionally misrepresenting the facts or law in court should be properly subject to the same discipline as every other attorney, even if they work for the Department of Justice.

What's Next?

"My NYSBA AI." We continue to review vendor proposals to support an AI platform for members only that would allow you to query NYSBA's incredible and encyclopedic content. From CLE materials, to Association policies, Committee and Section reports, NYSBA history and member benefits resources and services, with the entry of a query members will get answers. Stay tuned.

Making History in 2026

With the installation in June of Taa Grays as President and Michelle Wildgrube as President-Elect, our association will be led by its first Black woman and first Asian woman, respectively. And, for the first time in its history, the office of President will pass from one woman to another, and then another. We celebrate the diversity of our membership as reflected by our leaders.

Thank You

Finally, as my year winds down, let me express my gratitude for an amazing year filled with opportunities, challenges, experiences and people I will never forget. To the NYSBA leadership team and staff, my family and my law firm – thank you for your support this year.

2026 ANNUAL MEETING

New York State Bar Association Honors Gov. Kathy Hochul as Part of 150th Anniversary Celebration

By Susan DeSantis

The New York State Bar Association honored Gov. Kathy Hochul, New York's first female governor, with the Gold Medal, the association's highest honor, during its Annual Meeting Gala Dinner at The Plaza Hotel. She is the first governor to receive the award since Gov. Nathan L. Miller was awarded the inaugural Gold Medal in 1952.

Past presidents were also recognized at the Gala, which kicked off the association's 150th Anniversary celebration.

"Gov. Hochul has been instrumental in protecting reproductive health care, championing New York's Equal Rights Amendment, enacting prudent gun control laws and standing up to racial injustice," said Kathleen Sweet, president of the New York State Bar Association. "I am pleased that we honored the governor and all our past presidents at the Gala. Our past presidents built the association, which is now the largest and most respected voluntary state bar association in the nation."

President Kathleen Sweet presented the Gold Medal to Gov. Kathy Hochul.

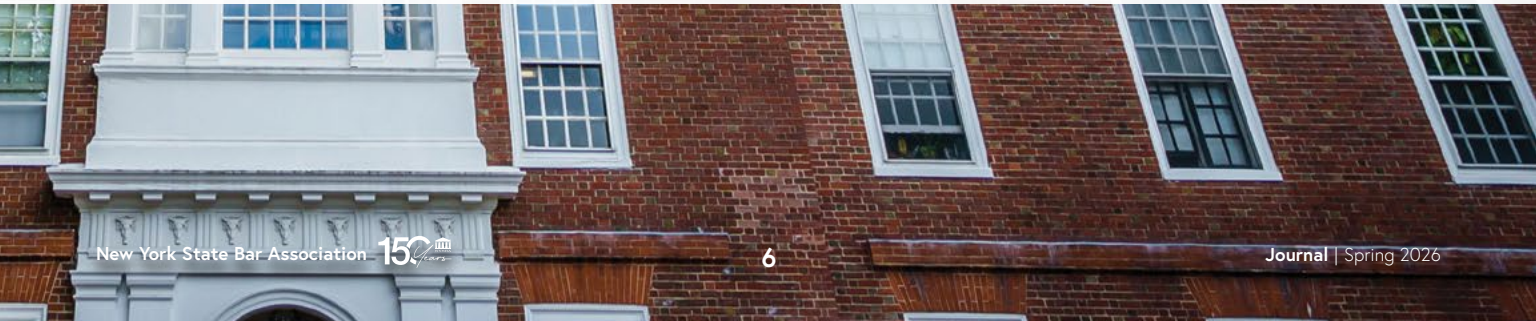
Photo Credit: David Handschuh/OCA

Chief Judge Rowan Wilson and Attorney General Letitia James were among the dignitaries who were on hand to celebrate along with Gov. Kathy Hochul and President Kathleen Sweet.

(L-R): Treasurer Susan Harper, President Kathleen Sweet, Secretary Thomas Maroney and President-Elect Taa Grays grabbed a moment together before the evening's program got underway.

Academic Freedom as a Constitutional Right

By Seth F. Gilbertson



For more than half a century, courts, universities and scholars have invoked academic freedom as both a constitutional doctrine and a defining institutional value. Yet despite this illusive importance, there is no stable or widely accepted legal framework governing the scope, limits and enforceability of academic freedom in the context of modern higher education.[1]

Today, that framework faces renewed pressure as government actors seek greater control over curriculum, research, governance and institutional priorities. This article examines how the struggle to protect academic freedom will almost inevitably end up in the Supreme Court, which may have to confront fundamental questions about the role of universities in democratic society and the extent to which academic freedom remains a meaningful constitutional guarantee under the First Amendment.

Recent legislative initiatives, institutional policies and political interventions aimed at teaching, research, admissions and governance have thrust academic freedom into the national spotlight as courts across the country are now adjudicating challenges to these measures, placing both individual and institutional academic freedom under renewed scrutiny. Critics increasingly see this moment as one of sustained pressure, and in some contexts, a direct attack on the traditional autonomy of colleges and universities.

The modern legal doctrine of academic freedom can be seen emerging from a trilogy of Supreme Court cases. First, the concept of a First Amendment protected right failed to find support in *Adler v. Board of Education*.[2] That changed a few years later with *Sweezy v. New Hampshire*.[3] Then, the court finally enunciated full support in *Keyishian v. Board of Regents*.[4] Subsequently, the law of academic freedom has developed into interrelated concepts that continue to structure modern disputes: (i) the customary freedoms of the university; (ii) the regulation of faculty speech[5] and (iii) the distinction between public and private institutions. The core principles underpinning these concepts are being tested by the contemporary legal and political environment. These tests suggest an increasing likelihood that the Supreme Court will revisit *Keyishian*'s core holding in the near future.

Origins: *Adler, Sweezy*, and the Emergence of Constitutional Academic Freedom

The modern legal doctrine of academic freedom largely emerged from the constitutional struggles of the Cold War era. In *Adler v. Board of Education*, the Supreme Court upheld New York's Feinberg Law, which excluded so-called "subversives," including teachers and university faculty, from public employment. However, the 6-3 decision in 1952 provoked powerful dissents by Justices Black, Douglas and Frankfurter, warning that ideological screening threatened the vitality of the educational system and the democratic process itself. ("Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect."[6])

That warning soon took jurisprudential form. Just five years later, in *Sweezy v. New Hampshire*,[7] the court confronted a state investigation into a university guest lecturer's classroom content and political associations. Writing for a four-member plurality, a newly minted Chief Justice Earl Warren took up the argument that freedom in higher education is essential to a democratic society. Perhaps more enduring, however, was (former Harvard professor) Justice Felix Frankfurter's concurrence, which articulated "the four essential freedoms" of a university: "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[8]

Justice Frankfurter's formulation captured both the institutional and individual dimensions of academic freedom. It recognized that universities require broad autonomy to fulfill their educational mission, while also protecting faculty members' independence in teaching and scholarship. The four freedoms thus framed academic freedom not merely as an employment right, but as a structural constitutional principle tied to democratic governance and freedom of inquiry.

Keyishian and the Constitutionalization of (Some) Academic Freedom

In January 1967, the Feinberg Law again found its way before a very different looking Supreme Court in *Keyishian v. Board of Regents*.[9] The case arose from the University at Buffalo, where four faculty members and a librarian refused to sign a state-mandated loyalty oath required by the law. Their refusal cost them their jobs, halted their careers, and exposed them to public hostility in a political climate still under the influence of McCarthyism.

At the time, New York law required nearly all public employees, including university faculty, to certify that they were not members of any "subversive" organization. The new public University at Buffalo (previously the University of Buffalo), after incorporation into the State University of New York system, became the unlikely epicenter of this constitutional confrontation over the individual autonomy of public university faculty.

The once-private university professor employees, now public employees and suddenly subject to the Feinberg Law, challenged the constitutionality of the oath despite the court's decision in *Adler* less than 15 years earlier. As a result, they became isolated within their own institution, received only tentative support from

national academic organizations, and faced intense local political pressure in then-conservative Buffalo. The litigation unfolded against a backdrop of congressional investigations, campus protests and public suspicion toward universities as havens for subversive thought. Such circumstances can be thought of as a microcosm of the broader cultural conflict that defined the era (and observant readers may detect a rhyme with our own).

When the Supreme Court ultimately sided with the faculty, it did more than invalidate a single state statute. Justice William J. Brennan's majority opinion (joined by *Adler* dissenters Justices William O. Douglas and Hugo Black) repudiated the core assumptions underlying such oaths and recognized academic freedom as a protected right in sweeping terms. Public employment could no longer be conditioned on ideological conformity, and academic freedom became a "special concern of the First Amendment." The government could not by law "cast a pall of orthodoxy" over the classroom.

Drawing from *Sweezy*, Justice Brennan emphasized that the nation's future depends upon "that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"[10] In doing so, the court cast academic freedom as both an individual and institutional constitutional value, linking the autonomy of faculty and universities to the health of democracy.

Yet *Keyishian* did not define the precise contours of academic freedom. Nor did it allocate authority between individual professors and institutional leadership. Implementation would be left to future courts, administrators, faculty leaders and legislatures.

Is Academic Freedom Free Speech?

A persistent source of confusion lies in the relationship between academic freedom and free speech. Grounded in the First Amendment, free speech protects citizens, including public employees, from most governmental restrictions on expression. Academic freedom reflects a more focused constitutional concern, aimed at preserving the conditions necessary for teaching, research and intellectual inquiry within educational institutions.

Both concepts recognize that duties like teaching and research cannot be meaningfully separated from employment responsibilities in the public university context. Academic freedom protects scholarly inquiry even when it occurs within the scope of professional duties. Subjecting academic expression to restrictive conventional public-employee speech analysis may limit the constitutional protection precisely where it is most essential for university faculty. Simply put, when a public university hires faculty to do scholarship or research, subsequently directing the output of their inquiry is counterproductive to the effective pursuit of knowledge.

At the same time, academic freedom also safeguards institutional autonomy. Public universities must retain substantial authority to design curricula, set academic standards, govern admissions and structure research enterprises in ways that best serve their mission and enhance the public good. Institutional prerogatives also may arise from the structural freedoms articulated in *Sweezy*.

The traditional balancing of a public university employer's right to regulate its faculty was rendered even more uncertain in 2006 by *Garcetti v. Ceballos*.[11] In *Garcetti*, the Supreme Court held that public employees do not receive First Amendment protection for speech made pursuant to their official duties. However, the court explicitly declined to decide whether the public-employee speech doctrine it formulated applies to academic speech, saying that "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[12] Lower courts have subsequently diverged in their treatment of faculty expression. Some courts have recognized a distinct constitutional status for academic speech, while others have treated faculty work much as ordinary employment activity subject to managerial control.

In response to this uncertainty, efforts to regulate faculty speech have become emboldened. Universities must balance core tenets of academic inquiry and constitutional risk against legislative mandates and political pressure in an environment of legal ambiguity. The resulting compromise can effectively limit both faculty autonomy and institutional discretion.

Individual and Institutional Academic Freedom Under Modern Pressure

In recent years, both individual and institutional academic freedom have come under sustained pressure not seen since the Red Scare of the early Cold War era. Legislatures and executive officials increasingly assert control over classroom instruction, research agendas, admissions practices, diversity initiatives and institutional governance. Public and private universities, both of which are largely dependent on government sources of funding, face mounting demands to align curricula and programming with prevailing ideological agendas enforced through purse string persuasion, regulatory mandates and even directed control.

Government interventions implicate individual academic freedom when the professorate is directed to attend to or avoid specific viewpoints, methodologies or subject matter. They implicate institutional academic freedom when universities are compelled to redirect research, restructure programs, modify admissions practices,[13] disband diversity initiatives or police classroom speech in ways that distort educational objectives. In both contexts, the

traditional autonomy of the educational enterprise is increasingly constrained.

Recent reporting in both industry and national media outlets documents an unprecedented escalation in attempts to regulate the academy at the federal level.[14] From curricular restrictions and content mandates to the restructuring of tenure protections to the politicization of university governance, faculty and institutions must navigate an environment of unprecedented interference.

Lawsuits challenging state statutes and institutional policies increasingly cite both individual and institutional academic freedom, arguing that new restrictions undermine the constitutional principles articulated in *Sweezy* and *Keyishian*. These cases highlight the unresolved tension between public accountability and intellectual autonomy, a feature of academic freedom jurisprudence since its inception.

Reconsidering *Keyishian*?

The convergence of ambiguous jurisprudence, contemporary political intervention, divergent circuit decisions and escalating litigation ripens *Keyishian's* holding for certiorari. In recent years, state legislatures and governing boards have enacted measures that place both individual and institutional academic freedom squarely before the courts. Even more recently, the federal government has aggressively deployed its regulatory and enforcement machinery in novel ways to force viewpoint-inflected changes on both public and, even more notably, private universities. This includes tying certain funding eligibility to compliance with practices that critics say have little or no relationship with the purpose of the funding.[15]

Florida may provide one of the most prominent recent examples of state-level challenges to individual academic freedoms. There, the state has sought to restrict how faculty may teach about race, gender and systemic inequality, limited public funding for diversity, equity and inclusion programs, and even empowered state authorities to reshape curricula and academic priorities.[16] Faculty members have challenged the legislative restrictions on classroom instruction and university programming, arguing that statutory limits on how certain subjects may be taught impermissibly intrude into core academic functions and violate the First Amendment.[17] Similar challenges have emerged in Texas and Kentucky, where legislatures are accused of imposing content-based restrictions on instruction.[18]

Recent litigation involving Harvard University is the most prominent example of a private university finding itself at the center of fights over institutional academic freedom. In *President & Fellows of Harvard College v. United States Department of Health & Human Services, et al.* and its companion case *American Association of University Professors – Harvard Faculty Chapter et al. v. United States Department of Justice, et al*,[19] Harvard challenged federal actions that froze and terminated substantial research funding while conditioning future access to government funding on changes to curriculum, governance, and internal academic policies. Harvard contended that these demands impermissibly intrude into core institutional judgments concerning teaching, research and governance. While Harvard found success on summary judgment, the government is appealing to the First Circuit.[20]

These disputes implicate both dimensions of academic freedom. Individual faculty plaintiffs argue that curricular mandates and speech restrictions undermine their ability to teach and conduct research in accordance with professional standards. Universities assert institutional academic freedom, contending that legislative microman-

agement of curriculum, governance and research priorities violates the four freedoms articulated in *Sweezy* and *Keyishian*. In this sense, modern litigation increasingly mirrors the structural constitutional questions that animated Cold War-era loyalty oath cases, albeit in a different political register.[21]

Together, these developments have produced doctrinal fragmentation and institutional uncertainty. Lower courts remain divided on how to balance legislative authority against constitutional academic freedom, particularly where funding, institutional governance and curricular content intersect. Circuit splits concerning academic speech, combined with high-profile challenges to state regulation of university instruction and governance, present precisely the kind of constitutional conflict that invites Supreme Court review.

Should the court reengage, it will confront fundamental questions about the nature of academic freedom in the modern regulatory state. Is academic freedom primarily an individual right, an institutional prerogative or a blend of both? How far may legislatures intrude into curricular and research decisions? How can universities retain meaningful autonomy in an era of heightened political oversight? The answers will determine whether the constitutional commitment articulated in *Keyishian* retains practical force, or whether academic freedom becomes largely symbolic in a higher education ecosystem increasingly governed – and funded – by external authority.

Conclusion

The constitutional framework established in *Sweezy* and *Keyishian* protected both individual scholars and the institutional autonomy of universities. Today, that framework faces renewed pressure as government actors seek greater control over curriculum, research, governance and institutional priorities.

As litigation advances on several fronts, it seems almost inevitable that the Supreme Court will revisit *Keyishian*. When it does, the court may have to confront fundamental questions about the role of universities in democratic society and the extent to which academic freedom remains a meaningful constitutional guarantee. In that sense, we will find out if the wave that crested and broke on the shore of Lake Erie more than half a century ago left *Keyishian* as a high-water mark that is now beginning to recede.

Seth F. Gilbertson is a member of the SUNY Office of General Counsel, serving as chief campus counsel for University at Buffalo. Prior to this role, Gilbertson was a partner at Bond, Schoeneck & King, where he served as deputy chair of the firm's higher education group. His practice focuses primarily on student and employment matters for colleges and universities.

Endnotes

1. Within the context of academic governance, the foundational principles have remained largely stable since at least 1940. *See* American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, AAUP Policy Documents and Reports, 11th ed., Johns Hopkins University Press, 2015, pp. 14-19.

2. *Adler v. Board of Educ. of City of New York*, 342 U.S. 485 (1952).

3. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

4. *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

5. For purposes of economy, this article will not address the First Amendment protected rights of students.

6. *Adler*, 342 U.S. at 510 (Douglas, J., dissenting).

7. *Sweezy*, 354 U.S. 234 (1957).

8. *Id.* at 263.

9. For an entertaining and exhaustive exploration of the *Keyishian* case's background, see Elliot Friedman's *'A Special Concern': The Story of Keyishian v. Board of Regents*. 38 JCUL 195 (2011).

10. *Keyishian*, 385 U.S. at 603.

11. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

12. *Id.* at 425.

13. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 312–15 (1978) (recognizing a university's interest in academic freedom, including discretion in selecting its student body, as a factor supporting consideration of race in admissions). *But see Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (rejecting reliance on academic freedom to justify race-conscious admissions practices and limiting deference to universities' admissions judgments).

14. Alan Blinder, *Texas A&M Ends Women's Studies and Overhauls Classes Over Race and Gender*, N.Y Times, Jan. 30, 2026; Vimal Patel, *The Conservative Overhaul of the University of Texas Is Underway*, N.Y. Times, Dec. 10, 2025; Sarah Viren, *A Professor Was Fired for Her Politics. Is That the Future of Academia?*, N.Y. Times, June 6, 2025; David M. Rabban, *The Legal Status of the Assault on Higher Education*, Chron of Higher Educ., Dec. 19, 2025; Ryan Quinn, *GOP State Lawmakers Targeting DEI and Tenure Again*, Inside Higher Ed, February 11, 2025 (discussing state legislative efforts to influence institutional practices).

15. *See President and Fellows of Harvard College v. United States Department of Health and Human Services* and *American Association of University Professors–Harvard Faculty Chapter v. United States Department of Justice*, 798 F. Supp. 3d 77 (D. Mass. 2025), Memorandum and Order at ECF No. 238 (Sept. 3, 2025); *see also* Exec. Order 14173 (revoking EO 11246 and related orders directing elimination of discriminatory policies); Exec. Order 14151 (directing agencies to identify and review grantees whose DEI-related activities may be inconsistent with federal policy); OMB Federal Grant Pause (Jan. 27–28, 2025); Compact for Academic Excellence solicitation letters (Oct. 2025).

16. *See* Stop WOKE Act (Individual Freedom Act), Fla. Stat. (2022) (prohibiting certain instructional content deemed to "espouse" particular viewpoints on race, gender, and systemic inequities); Fla. Senate Bill 266 (2023) (codified as part of Postsecondary Educational Institutions statutes, restricting DEI funding and general education curricula, revising curricular review, and altering governance duties of university boards), signed May 15, 2023, effective July 1, 2023.

17. *See* Compl., *Austin et. al. v. Lamb et. al.*, No. 1:25-cv-00016-MW-MJF, (N.D. Fla. 1/16/2025); *see also Pernell v. Florida Board of Governors of the State University*, 84 F.4th 1339 (11th Cir. 2023) (challenge to Florida's restrictions on classroom instruction and university programming).

18. *See, Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) (challenging university speech policies in Texas as content- and viewpoint-based; *Woodcock v. Univ. of Kentucky*, 2026 U.S. Dist. LEXIS 2976, 2026 WL 64108 (E.D. Ky. Jan. 8, 2026). North Carolina is poised to take a radically different approach by redefining the concept of academic freedom itself. *See* Ryan Quinn, *UNC Plans To Define Academic Freedom – and Its Limits*, Inside Higher Ed, January 29, 2025. The ACLU of Utah is currently challenging that state's so-called Freedom to Read statute. *See* ACLU Utah, *Vonnegut Estate, Authors, and Student Plaintiffs Take Utah to Court Over the Freedom To Read*, Press Release - January 6, 2026, complaint available at https://www.acluutah.org/app/uploads/2026/01/HB29-Complaint-Filed.pdf.

19. *See President & Fellows of Harvard College v. United States Department of Health & Human Services, et al.*, 25-cv-11048 (D. Mass. April 21, 2025) and *American Association of University Professors – Harvard Faculty Chapter et al. v. United States Department of Justice, et al.*, 25-cv-10910 (D. Mass. April 11, 2025). Judge Burroughs' summary judgment decision (798 F. Supp. 3d 77 (D. Mass. 2025)) can be found at https://www.harvard.edu/federal-lawsuits/wp-content/uploads/sites/17/2025/09/gov.uscourts.mad_.283718.238.0_1.pdf.

20. The dispute between Harvard and the Trump administration has also been the source of volatile negotiations. *See* Michael C. Bender, Alan Blinder, Mark Arsenault & Michael S. Schmidt, *Trump, Changing Course, Throws Harvard Deal Talks Into Chaos*, N.Y. Times, February 4, 2026.

21. *See, e.g.*, Dana Goldsten, *How Politics Is Changing the Way History Is Taught*, N.Y. Times, October 27, 2025; Emma Green, *Inside the Trump Administration's Assault on Higher Education*, New Yorker, October 13, 2025; Adam Harris, *An Existential Threat to American Higher Education*, The Atlantic, November 5, 2023.

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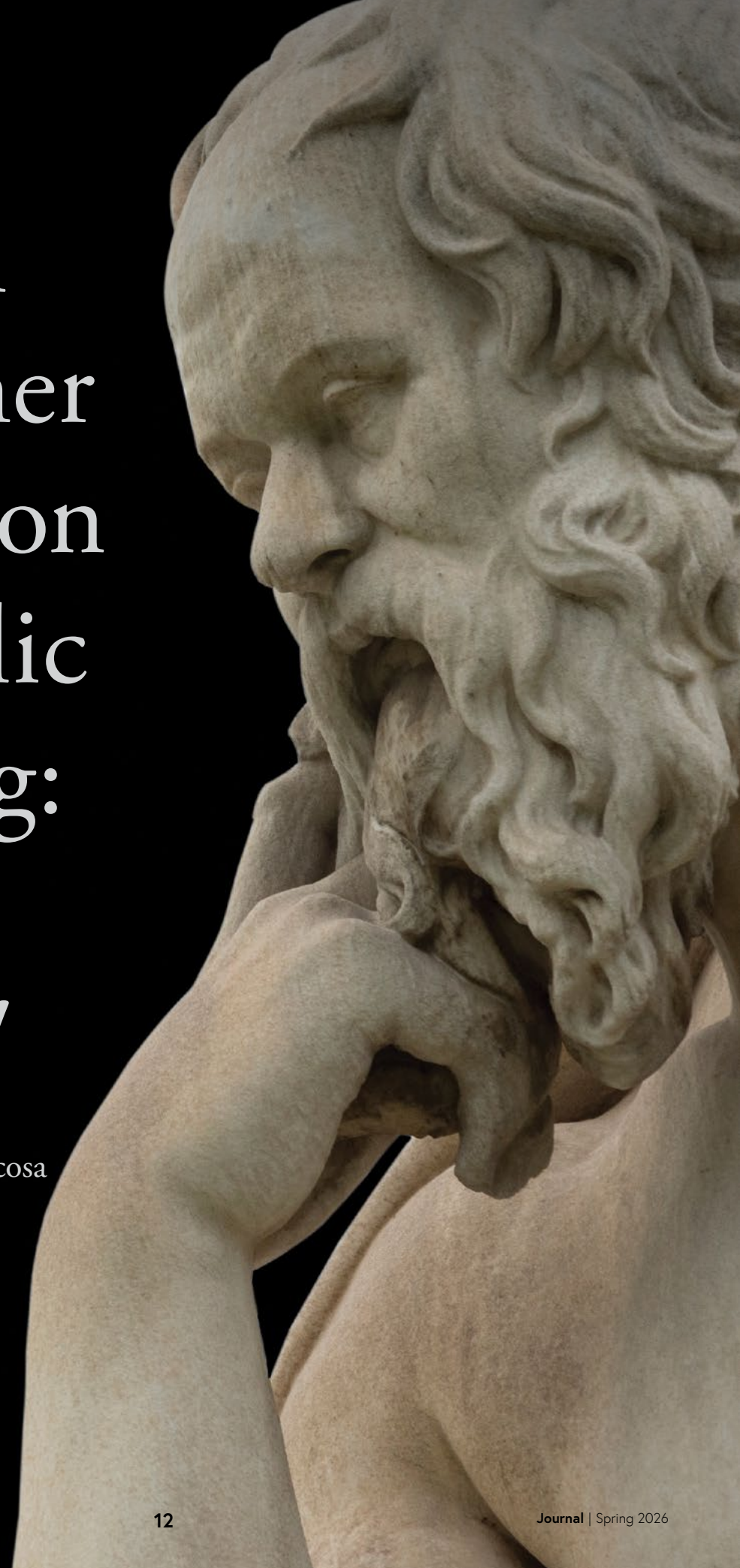
The Mission of Higher Education vs. Public Funding: *Caveat Emptor!*

By Hon. Joseph W. Bellacosa



If Socrates were around today pondering this subject, he might ask, at what point does higher learning come at too great a cost – a nettlesome question posed by someone who had to drink a cup of hemlock for constantly poking about.

In medieval times, Galileo paid a high price to continue a scientific search of this planet's place in the cosmos. To escape the clutches of the Inquisition that threatened his work, liberty and very life, he acquiesced (sort of) to his tormentors' insistence that the sun circled the centering earth, instead of the other way around. In a likely apocryphal aside, he is said to have whispered wryly: *"E pur si muove"* ("And still, it [the earth] moves"). Recall, too, foolish Dr. Faustus, whose bargain for knowledge and power cost him his soul. Life, conscience and soul are about the costliest prices anyone can ever pay.

Ask many lawyers what they studied in college and chances are they will say they majored in the liberal arts. It's easy to see why. The core values of a liberal arts curriculum – to deliver knowledge and wisdom with open-minded and independent inquisitiveness – serve attorneys well throughout their professional careers. They also serve society well, by producing an educated citizenry that helps democracy work. Yet today, the liberal arts are facing challenges never seen before, as a younger generation of students veers more and more toward technology programs that promise high paying jobs after graduation. This leaves liberal arts schools struggling with declining enrollments and trying to pay the bills by reaching out to alumni and private sources for donations and searching for more government funding to keep programs afloat. Yet, private and government funds can come with unwelcome tentacles, and that presents a huge challenge: How to keep liberal arts institutions free of narrow-minded political or partisan entanglements?

Using the Socratic practicum of raising questions and providing no answers, one might ask whether the mixed bag of public, and even private, funding exerts undue influence by the nature of fiscal freight of political and ideological intrigues. To be sure, not all financial assistance is ill-intended, though too often its subsuming motivations are hidden. In a time when external funding often comes with significant pressures, this and other questions directly impact the discussion around the importance of a liberal arts education.

The fact that the classical university model, started in Bologna, Italy, in 1088 A.D., survives in roughly the same pedagogic framework to this day provides a glimmer of hope that the modern version will escape the traps set by the tricky treasure hooks of grants and other funding sources. One thing seems likely not to survive: the so-called "liberal" arts curriculum, as the connotation of the word has lost its etymological equanimity and a penny-pinching loss of perspective has substantially wiped that traditional course of study from the academic curriculum. "Philosophy," as the pure love of wisdom, often gives way to the more mundane power of the purse and utilitarianism.[1]

That said, part of the overall problem – significant, though surely not all – is whether institutions of higher education and their leadership possess the virtues of courage, vision, objectivity, and intelligence to resist the enticements of overbearing public funding. At the baseline, however, the critical need for public funding remains undeniable in connection with the research grant system that supports important discoveries in medicine, science, and advancement of the humanities. Society unquestionably benefits from the work of dedicated educators who also pursue their primary teaching roles, rendered with moral and intellectual integrity.

Finding and maintaining the right balance on the financial ledgers to support that dual mission does create, however, a dangerous dance with wolves. Grantors often appear disguised as innocent sheep, but underneath are government types, or beneficent philanthropists ("lovers of humanity"), with a few coyly hiding their "vaulting ambition"[2] (a form of *philautia* – lovers of self).[3] Not satisfied with named buildings and favored programs, some narcissistic donors often seek a voice at the table of the C-suites of academic leadership.

This discourse focuses principally on the academy itself and its need for robust resistance, or at least astute caution, against incursions that diminish intellectual freedom when inappropriate government influence infiltrates for the sake of wired fund transfers and grant contracts – visualized as a Trojan horse that rolls across the academic threshold to the "shocked" ministers of the enclosed academy. *Caveat emptor* (buyer beware)!

Consider, as one egregious example, an exposé of the University of Chicago in the Wall Street Journal.[4] It recounts the disastrous financial consequences when higher education jumps the shark of its core educational mission and instead outstretches toward the stars of mighty dollars to support hifalutin goals, like elite rankings status and educational celebrity. Socrates' humility of purpose is missing when motivations push a mission creep that can lead to financial ruin or distress.

Let me turn to a higher plane of consideration and an exhortation that describes the educational mission in "The Idea of a University," by John Henry Newman. In this book, Newman states that a university:

> aims at raising the intellectual tone of society, at cultivating the public mind, at purifying the national taste, at supplying true principles to popular enthusiasm and fixed aims to popular aspiration, at giving enlargement and sobriety to the ideas of an age, at facilitating the exercise of political power and refining the intercourse of private life.[5]

I ruefully wonder about how his capacious mission statement could get lost among modern leaders of higher learning in their quest for ever-more robust funding to boost balance sheets along with overblown notions of elite celebrity status – an addiction-like craving at the expense of time devoted to education, per se, in lieu of fundraising as their priority portfolio task.

To be fair, the challenge of the practical modern world must be recognized, right along with idealists who yearn for the soaring aspirations of a John Henry Newman in his "Idea of a University," or for a Thomas More in his "Utopia." Bottom line, the big bills must still be paid and reliance on haloed saints just won't clear the checks.

I also turn attention to some secular sources to fill in the picture. A former Yale Law School dean, Anthony Kronman, in his book, "The Assault on American Excellence," opens with this blunt warning: "our colleges and universities are not political institutions [and] … their work is not the pursuit of politics by other means."[6] The educational mission and political objectives are often obscured by funding entanglements that should serve as a *caveat emptor* – a canary in a coal mine. The allure of money often carries with it the danger of corruption of educational goals – susceptible to conflicts of interest and misaligned purposes.

John Sexton, former president of New York University and also a former dean at its law school, adds his voice to this subject in a book entitled "Standing for Reason – The University in a Dogmatic Age."[7] Referencing Newman, he designates the university as a "sacred space." The flipside is that the university should not be converted into something instead called a "safe space" that shuts down open discussion and the robust exchange of ideas that foster the pursuit of knowledge and wisdom in service of a better self and contribution to the civic good.

Keeping the educational mission somewhat sacrosanct within the bounds and controls of the academy itself is key here, though distortions from within by the academy leaders and teachers are another major problem – not always stemming from just financial considerations, but from a form of ideological indoctrination. (That broad subject would better be dealt with elsewhere, as it is beyond the scope of this commentary.)

I proffer one more secular source, to wit, Chief Judge/Justice Benjamin Cardozo, who wrote of a "hoarded treasure," – a letter in the hand of his friend and predecessor at the Supreme Court, Oliver Wendell Holmes, who privately expressed a "measure of success" of any endeavor as "not place or power or popularity makes the success that one desires, but the trembling hope that one has come near to an ideal."[8]

References of this kind pinpoint a "trembling hope" for "measuring success" in higher education, too, despite challenges of fiscal intermingling. My bottom-line assessment, therefore, is not a broad criticism as such of the world as it is, but a yearning for discernment, and a means for how to swing the fiscal pendulum back toward the *in medio stat virtus*[9] principle for the pristine mission ideal and operational reality of higher educational institutions. They are too essential and valuable as a civilizing attribute to society's welfare to be allowed to be diminished, or worse, fail. So, how then can the success of the higher learning realm be measured under the Holmes-Cardozo gold standard in light of the fiscal resource incursions, especially from government entanglements?

Start with the plain fact that already sky-high tuitions cannot alone pay the freight. So, wherefrom comes the rest of the dollars for the relentless budget-busting demands? Annual operating funds flow, of course, from tuition and robust enrollments, prospects with the onset of artificial intelligence casting some doubts on the investment and value of time and money for meaningful jobs and sustaining careers from college degrees. They also flow from donations and endowments.

And then looms the "Big Nut" of governments providing funds either directly to public education institutions or through grants and specialized contracts of service or consultation to all kinds of educational entities, including private sector research institutions. Even indirect funding of public educational enterprises spreads the equation by ready access and availability for student assistance loans that bump enrollments to garner greater income for the colleges.

Major studies and reforms are needed also to bring about a redirection of massive endowment tax-benefited funds at elite institutions since they otherwise grow exponentially, traducing a mostly vanished imaginatively applied Rule against Perpetuities.[10]

A not-unrelated unease springs from the emergence of another phenomenon – out-of-control spending and pay packages in the athletics departments of many higher

educational institutions. Some of them suffer scandalous exposés of non-academic personnel being disproportionately advantaged to the detriment of teaching personnel and the educational program. The rationalization that these programs, in turn, generate funds to support the educational mission is flimsy at best, as the programs are unfairly unequal in their distributive allocation; rather, the capital costs and operational costs likely siphon off far more than they return to the overall budget bucket.

Too many institutions of higher learning seem not satisfied with the classical middle ground attitude of striving principally for excellence of their educational outcomes, laying aside other distractions that diminish curriculum needs for the main purpose (see, e.g., lavish stadia and field houses that rise higher in importance and fiscal allocation over less costly library stalls and shelves with carrels for quiet private study.)[11]

Different governments of various tenures throughout history pursue their own interests to affect open discourse within the academy in service of non-academic ends – a contamination of First Amendment values – using money and other arm-twisting methods of persuasion of a given period or era. Such intrusions are more evident in our own time because we live the "breaking news" cycles in real time.

The academy, and now even the legal profession, can fall victim to the trap of collaboration with governmental powers-that-be because money rules, not high ideals. Compacts, academic regulations and controversial actions or inactions emerge and can even pop up in classrooms, as teachers punish or chill open discourse with questionable practices, unfair grading methods, or direct silencing of student expression. All such stratagems and policies deployed by governmental authorities to influence teaching practices and curricula should be anathema to the purity of purpose of the higher educational atmosphere and mission.[12]

Let me emphasize that I do not urge divestment or total disengagement from government funding or other tributaries of monetary support. The real world expects institutions to work mutually in collaborative common cause, with respect and grace, but with guardrails too, to protect the higher desiderata of the educational enterprise. Taking a page from the jurisprudence realm, realism must act as a counterweight to the idealism of a liberal arts education, and the funding rivers must be kept flowing and open to operate the universities. Educational policy, per se, however, must be formulated and implemented by educators, not manipulated by political leaders or bureaucrats; indeed, rigorous discipline must also be exerted to keep academic bureaucrats and teachers faithful to mission.

In sum, institutions of higher learning ought to be shielded somewhat like Caesar's wife – kept at a reasonable remove and protected so as to remain true to their only spouse, that is, as independent and free from political and mercenary corrupting influences. Governments, after all, play to the changing flavors of electorates; they and their replacements also have a tendency toward domination and control during their temporary reigns in power. The academy, on the other hand, should remain fixed on its mission North Star, ignoring political winds and whims.

Like Socrates, I raise more questions and provide few answers. He tendered no apologies for his method, nor shall I.[13]

Caveat emptor!

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Endnotes

1. Compare Hillsdale College, a traditionalist outlier founded in 1841 and located in Michigan, hewing to the classical liberal arts curriculum model while eschewing all governmental funding to preserve its pristine educational mission.

2. From Shakespeare's "Macbeth" 1.7.25-28: "Vaulting ambition,/which o'leaps itself,/ And falls on th'other." (Among many required readings in a classical liberal arts curriculum!)

3. *See*, Alan Blinder and Stephanie Saul, *Wealthy People Have Always Shaped Universities. This Time Is Different*, NY Times, Nov. 25, 2025. at A8.

4. Sara Randazzo and Heather Gillers, *Colleges Face a Financial Reckoning. The University of Chicago Is Exhibit A*, Wall Street Journal Oct. 30, 2025, https://www.wsj.com/us-news/education/colleges-face-a-financial-reckoning-the-university-of-chicago-is-exhibit-a-8918b2b0?mod=article_inlineWSJ.

5. John Henry Newman was an Oxford Anglican don, later a Catholic cardinal, and recently declared a saint and doctor of his faith in 2019.

6. Joseph W. Bellacosa, *A Call for Higher Education Reform* (book review), New York Law Journal, Oct. 11, 2019, https://www.law.com/newyorklawjournal/2019/10/11/a-call-for-higher-education-reform.

7. Joseph W. Bellacosa, *A Call To Bring Sacred Values Into the Fabric of a University* (book review), NYLJ June 26, 2019, https://www.law.com/newyorklawjournal/2019/06/26/a-call-to-bring-sacred-values-into-the-fabric-of-a-university.

8. Benjamin Nathan Cordozo, Selected Writings of Benjamin Nathan Cardozo, edited by Margaret E. Hall (University of California, 1947), p. 86.

9. "Virtue is located in the middle" – a principle from St. Thomas Aquinas adapted from a maxim in Aristotle's "Ethics" (more required reading in a classical curriculum).

10. The medieval Rule of Perpetuities, wisely operative for the common good to control inordinately perpetual wealth accumulations, somewhat limited generational hoarding of real property and personal assets to something like transfers within two lives in being plus 25 years. It helped to free up the alienation of property – a rule that was whimsically the bane of countless law graduates fearing a complicated question on bar exams in that genre. Would that something like that venerable rule could be shaped to rein in abuses of hoarding such massively accumulating funds, *ad infinitum*. These bloated mountains of assets seem to operate as offshore tax-free havens with little oversight or social accountability, except for their own aggrandizement.

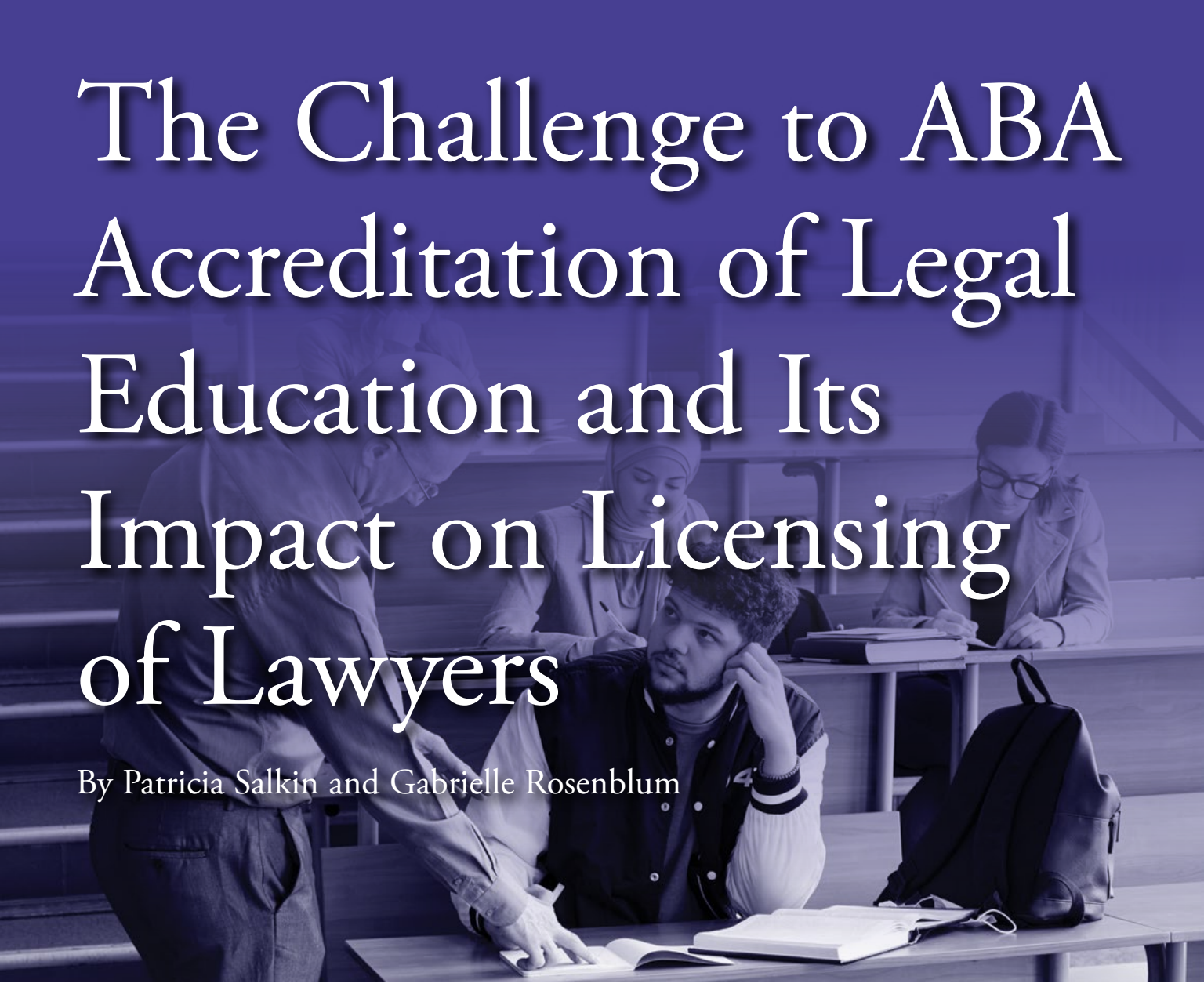
11. Shakespeare, "Julius Caesar," 4.3.23-28: Brutus:

> Contaminate our fingers with base bribes,
> And sell the mighty space of our large honors
> For so much trash as may be grasped thus?
> I had rather be a dog and bay at the moon
> Than be such a Roman.
> (More classical reading requirements of a liberal arts education!)

12. Joseph W. Bellacosa, *Regulation of Hate Speech by the Academy vs the Idea of a University: A Classic Oxymoron?* 67 St John's Law Review 1 (1993).

13. A series of Socratic-like questions persist: Who is the "buyer" who must "beware?" (a) The schools? (b) The current taxpayers, whose taxed incomes ultimately provide the funds? or (c) Future generations saddled with the insatiable everyday-growing national debt?

The Challenge to ABA Accreditation of Legal Education and Its Impact on Licensing of Lawyers



By Patricia Salkin and Gabrielle Rosenblum

A long-standing system of accreditation for law schools has come under scrutiny under the Trump administration. What's at stake is nothing less than a sea change in the process that decides who gets to be a lawyer. Having a national system of accreditation ensures a level of quality education that supports the acceptance of portability of law degrees from school to school across the country. However, in states like Florida, Texas, and Tennessee, where the individual state courts are poised to determine the quality of the legal education provided by the schools in their states, this could create portability chaos for the legal profession. And now, there could be even more chaos if the federal government wins its challenge to the American Bar Association's accreditor status.

Standards for legal education were adopted by the American Bar Association in 1921,[1] and in 1952 the United States Department of Education recognized the ABA's Council on Legal Accreditation as the accreditor for the juris doctorate degree.[2] In 1998, New York State recognized the ABA as the sole accreditor for legal education in the state.[3] However, the council's status as the sole recognized national accreditor for legal education in the United States is being challenged by the federal government. The timing could pose significant problems as the ABA's approval as an accreditor is up for review in 2026 by the U.S. Department of Education.[4]

Much of the criticism of the council as an accreditor is centered on the policy activities of the ABA's House of Delegates and its standing committees,[5] yet critics fail to separate that part of the ABA from the accreditation activities conducted by the Council on Legal Accreditation. The council's accreditation project has been acknowledged as separate and independent from the larger ABA as part of its recognition as an accrediting body for law schools.[6] This is because the larger ABA operates through its governing and policymaking bodies, neither of which appoints members of the council and neither have input into individual school accreditation

decisions. With respect to the Standards for Approval of Law Schools,[7] the council has final decision-making authority on content,[8] and may take action contrary to the opinion of the House of Delegates.

The DOJ's Antitrust Lawsuit

In 1995, the U.S. Department of Justice filed an antitrust lawsuit against the ABA in which it alleged that the ABA engaged in anticompetitive conduct with respect to law school accreditation.[9] The DOJ alleged that legal educators "dominate the law school accreditation standard-setting and enforcement process," set faculty salary standards that "ratchet[] up law school salaries" and prevent competition from non-accredited schools.[10] In 1996, the ABA entered into a consent decree,[11] which was modified in 2001.[12] In 2006, the ABA acknowledged that it violated six provisions of the consent decree and paid a $185,000 fine.[13]

In December 2025, the Federal Trade Commission issued a letter characterizing the ABA as "ha[ving] a monopoly on the accreditation of American law schools" and the power over who may seek admission to the bar.[14] The FTC contends that the ABA's monopoly is to blame for the high cost of legal education and also "harms competition and consumers by mandating that every law school follow an expensive, elitist model of legal education." In addition to referencing the 1995 lawsuit, the FTC criticized accreditation requirements concerning diversity, equity, and inclusion, suggesting that they "raise competitive concerns" where there is no alternative accrediting option.[15]

Diversity, Equity and Inclusion Standard Becomes a Lightning Rod

The Heritage Foundation's Project 2025 took aim at accreditation agencies on multiple grounds, including calling for a "radical overhaul of the [Higher Education Act of 1964's] accreditation requirements," particularly those that "… force institutions to adopt policies that have nothing to do with academic quality and student outcomes," namely, diversity, equity, and inclusion policies.[16] In an executive order signed on Jan. 21, 2025,[17] President Trump called for a withdrawal from DEI practices. Then in an April 2025 executive order, he stated:

> The American Bar Association's Council of the Section of Legal Education and Admissions to the Bar (Council), which is the sole federally recognized accreditor for Juris Doctor programs, has required law schools to: "demonstrate by concrete action a commitment to diversity and inclusion" including by "commit[ting] to having a student body [and faculty] that is diverse with respect to gender, race, and ethnicity." As the Attorney General has concluded and informed the Council, the discriminatory requirement blatantly violates the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).[18]

A July 2025 Heritage Foundation legal memorandum accused the ABA of being politicized and no longer neutral, claiming, "… it has become an activist group pushing hard-left policies."[19] It accused the council of using their view of diversity to discriminate against students on the basis of race and other characteristics.[20]

In February 2025, the council suspended the enforcement of Standard 206,[21] and in May 2025 the council extended the suspension until August 2026.[22] In February 2026, the council extended the suspension until August 2027 and voted to send a proposed repeal of Standard 206 for notice and comment.[23]

In November 2025, the Florida attorney general accused the ABA of violating the First Amendment and religiously discriminating against St. Thomas University College of Law when it determined that the school was noncompliant with Standard 205(c) on non-discrimination and equality of opportunity.[24] The Council of the Section of Legal Education and Admissions to the Bar subsequently concluded that the school sufficiently demonstrated compliance.[25]

New Accreditation Pathways for Admission to the Bar

In January 2026, supreme courts in Texas[26] and Florida[27] eliminated the requirement that lawyers admitted to the bar graduate from an ABA-accredited law school. The Supreme Court of Ohio recently announced an advisory committee to examine law school accreditation,[28] and the Supreme Court of Tennessee asked for public comments on "potential regulatory reforms to increase access to quality legal representation," including potential reforms to licensure requirements.[29] The Iowa House Higher Education Committee advanced a bill that would require the state supreme court to adopt or amend its rules and no longer require that a person graduate from an ABA-accredited law school in order to sit for the bar.[30]

Reactions have varied.[31] Law school deans from Texas support the ABA accreditation, noting that while it is imperfect, it provides a proven standard of quality.[32] Others argue that rather than promoting quality, it has driven up the cost of legal education, making access to the profession more difficult.[33] The Association of American Law Schools noted that there are about 33 non-ABA accredited law schools in the United States, and that "most have extremely low bar exam pass rates, poor job outcomes, and high attrition rates," and that these schools have "not solved access to justice gaps."[34] The association's leaders noted that state-run or regional systems would hurt the public, potentially leading to

applicants leaving the state who might not want to limit themselves to practicing in one jurisdiction, and to higher costs of compliance.[35]

The chair of the ABA Council rejects the criticism that the accreditor places undue burdens and increased costs, or that it stifles innovation and competition.[36] Regarding cost, he suggests that "any move *away* from a single national accreditor could jeopardize these low prices," as "[s]chools would need to seek approval from multiple accreditors, likely leading to an increase in accreditation fees and compliance costs."[37] He also notes that the legal profession is not the only one with a national accreditor, and that "state licensing authorities have the final say on which candidates qualify for licensure "[b]ut these authorities rely on accrediting bodies to maintain consistency in education, improve the profession, and protect patients and clients."[38]

Committee on Legal Education and Admissions Reform Weighs In

In July 2025, the Committee on Legal Education and Admissions Reform, established by the Conference of Chief Justices and the Conference of State Court Administrators, released a report on the legal profession and made recommendations for state courts.[39] One of the recommendations is to "encourage law school accreditation that serves the public," and further recommends that "state supreme courts should encourage an accreditation process that promotes innovation, experimentation, and cost-effective legal education geared toward lawyers meeting the legal needs of the public."[40] While the report does not specifically address the recent criticisms of the ABA Section of Legal Education, it broadly suggests support for state courts taking a more active role in shaping legal education and, by extension, law school accreditation.

The ABA Council Takes Action

In August 2025, the council adopted "Core Principles and Values of Law School Accreditation," in which it set out four core goals of accreditation, substantive values guiding the standards, and procedural values guiding its work.[41]

In December 2025, the council announced that a special advisory committee would review the Standards for the Approval of Law Schools, with representatives including state supreme court justices, law school deans, and professors.[42]

The council also passed two amendments to its bylaws to more clearly highlight its independence. One of the amendments revises the number of times that the ABA House of Delegates can review changes made to accreditation standards, interpretations, or rules, "and to clarify that the purpose is consultation to provide feedback to the Council before it makes its independent determination."[43] The other amendment establishes an Accreditation Council of the Section of Legal Education and Admission to the Bar.[44]

Conclusion

Since 1952, the American Bar Association Council on Legal Education has been the sole arbiter of the standards for legal education in the U.S., with input from the legal community and the public. It has been the council's recognition in all 50 states that has enabled students to pursue licensure in any state even after graduation. But this is changing as some states begin to set legal education standards that supersede the ABA or simply no longer require ABA accreditation as a prerequisite for bar admission. As this unfolds, law students will need to know before choosing a law school where they want to practice and would likely need to make decisions about which law schools to attend on that basis. Further, employers will be restricted on which schools they may want to recruit from based on portability considerations.

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8. *Id.*

9. *U.S. v. American Bar Ass'n*, 943 F. Supp. 436 (D.D.C. 1996). After it was denied provisional accreditation by the ABA, the Massachusetts School of Law also brought an antitrust action against the ABA as well as the Law School Admission Services, Law School Admission Council, the Association of American Law Schools, and others alleging anticompetitive practices. The district court granted the ABA's motion for summary judgement. *See also, Massachusetts Sch. of L. at Andover, Inc. v. Am. B. Ass'n*, 937 F. Supp. 435 (E.D. Pa. 1996), aff'd, 107 F.3d 1026 (3d Cir. 1997).

10. Complaint at 6, *U.S. v. American Bar Ass'n,* (D.D.C. 1996) (No. 1:95-cv-01211). https://www.justice.gov/atr/case-document/file/485696/dl.

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Forever Young: Student Employee Unionization in Higher Education

By William A. Herbert

College and graduate school provide students with many opportunities: to study, research, engage in new ideas, transform, and develop functional skills for a fruitful life. Among the essential skills students need are critical thinking, curiosity, creativity, and effective practices in free expression.

Important elements of student life today are the high cost of higher education, food, housing and child care. Student work on campus includes teaching and research and non-academic jobs in dormitories, libraries, dining, administrative offices, and outsourced dining services on campus. Off campus, students find work as baristas, in retail and similar positions.

The nature of student work has changed over the decades. Student jobs today provide a richer second curriculum with valuable lessons about work, discipline, life, shared responsibilities, and insights into the economy. Those work experiences and the need for increased

compensation, benefits and job security have resulted in a massive growth in graduate student employee and undergraduate student employee unionization. Today, there are approximately 200,000 union-represented graduate and undergraduate student employees (see Figures 1 and 2).

This unionization trend is consistent with a 2024 Gallup poll finding that 77% of those aged 18-34 approve of labor unions.[1] Working conditions are the primary focus in student organizing and negotiations, which can be influenced by social movements.[2] Unionization has resulted in contracts with provisions covering job security, compensation, benefits, leaves, grievance-arbitration and stronger protections against sexual harassment and discrimination.[3]

Contrary to attacks on higher education for purported "wokeness," issues concerning labor relations are not topics in most classroom curricula except in specialized programs like CUNY's School of Labor and Urban Studies and Cornell University's School of Industrial and Labor Relations. It is far more common for students to learn about collective bargaining on their own, rather than in the classroom. The practice of unionization provides first-hand education in workplace representational democracy and citizenship, including maintaining a majority coalition and making hard necessary compromises.

Federal and state laws can set the framework for student employee unionization and bargaining or create legal barriers. For example, Florida excludes part-time undergraduates from the right to unionize at public institutions.[4] Colleges and universities have the choice to challenge or delay student employee organizing and bargaining or work to create a constructive environment for student labor relations through negotiated voluntary recognition procedures.

A Short History of Student Employee Unionization Prior to 2020

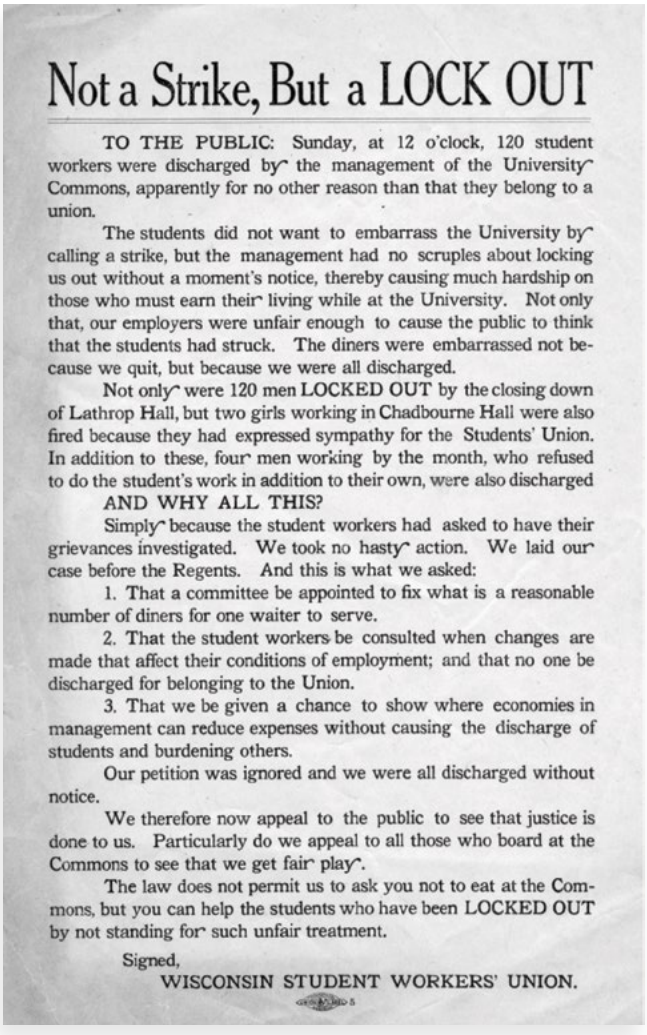
While student employee unionization and labor activism have grown exponentially since the end of the COVID-19 pandemic, it is not a new phenomenon. The earliest known student unionization effort was in January 1914 when dining workers formed the Wisconsin Student Workers Union and called a strike that resulted in a lockout (see Image 1). A century later, in 2016, undergraduate student protests at Long Island University led to the end of the university's lockout of its faculty.[5]

Formal unionization efforts by student employees did not begin until the enactment of state public sector collective bargaining laws including New York's Taylor Law,[6] and the 1970 decision by the National Labor Relations Board to start asserting jurisdiction over higher education.[7]

Undergraduate Student Employee Unionization Prior to 2019

The first union-represented undergraduate student employee bargaining unit was certified in 1970 at the University of Oregon.[8] Negotiations led to a first contract in July 1971 and successor agreements were reached with standard collective bargaining provisions concerning wages, hours, scheduling, discipline, and grievance-arbitration procedures.[9]

Over the next few years, undergraduate student employees voted down union representation at Ohio University[10] and Michigan State University,[11] and the New York City Office of Collective Bargaining dismissed an undergraduate student employee representation petition at CUNY.[12] In the private sector, the National Labor Relations Board's precedent finding that student employees were not protected under the National Labor Relations Act,[13] because they were primarily students[14] stymied undergraduate student employee unionization on private campuses for decades.



Not a Strike, But a LOCK OUT

TO THE PUBLIC: Sunday, at 12 o'clock, 120 student workers were discharged by the management of the University Commons, apparently for no other reason than that they belong to a union.

The students did not want to embarrass the University by calling a strike, but the management had no scruples about locking us out without a moment's notice, thereby causing much hardship on those who must earn their living while at the University. Not only that, our employers were unfair enough to cause the public to think that the students had struck. The diners were embarrassed not because we quit, but because we were all discharged.

Not only were 120 men LOCKED OUT by the closing down of Lathrop Hall, but two girls working in Chadbourne Hall were also fired because they had expressed sympathy for the Students' Union. In addition to these, four men working by the month, who refused to do the student's work in addition to their own, were also discharged

AND WHY ALL THIS?

Simply because the student workers had asked to have their grievances investigated. We took no hasty action. We laid our case before the Regents. And this is what we asked:

1. That a committee be appointed to fix what is a reasonable number of diners for one waiter to serve.

2. That the student workers be consulted when changes are made that affect their conditions of employment; and that no one be discharged for belonging to the Union.

3. That we be given a chance to show where economies in management can reduce expenses without causing the discharge of students and burdening others.

Our petition was ignored and we were all discharged without notice.

We therefore now appeal to the public to see that justice is done to us. Particularly do we appeal to all those who board at the Commons to see that we get fair play.

The law does not permit us to ask you not to eat at the Commons, but you can help the students who have been LOCKED OUT by not standing for such unfair treatment.

Signed,

WISCONSIN STUDENT WORKERS' UNION.

Image 1.

The oldest existing undergraduate student employee bargaining unit is at the University of Massachusetts-Amherst.[15] In 2002, United Auto Workers became the representative of resident advisors at the university. The bargaining unit was expanded later to include peer mentors.[16] The current contract for the 500 student employees is 33 pages long with provisions covering a wide range of traditional bargaining subjects.[17] Prior to the pandemic, the NLRB had certified only one undergraduate bargaining unit, that of dining employees at Grinnell College in Iowa.[18] Pre-pandemic organizing efforts by resident advisors at George Washington University and Reed College and intercollegiate scholarship football athletes at Northwestern University[19] were unsuccessful.

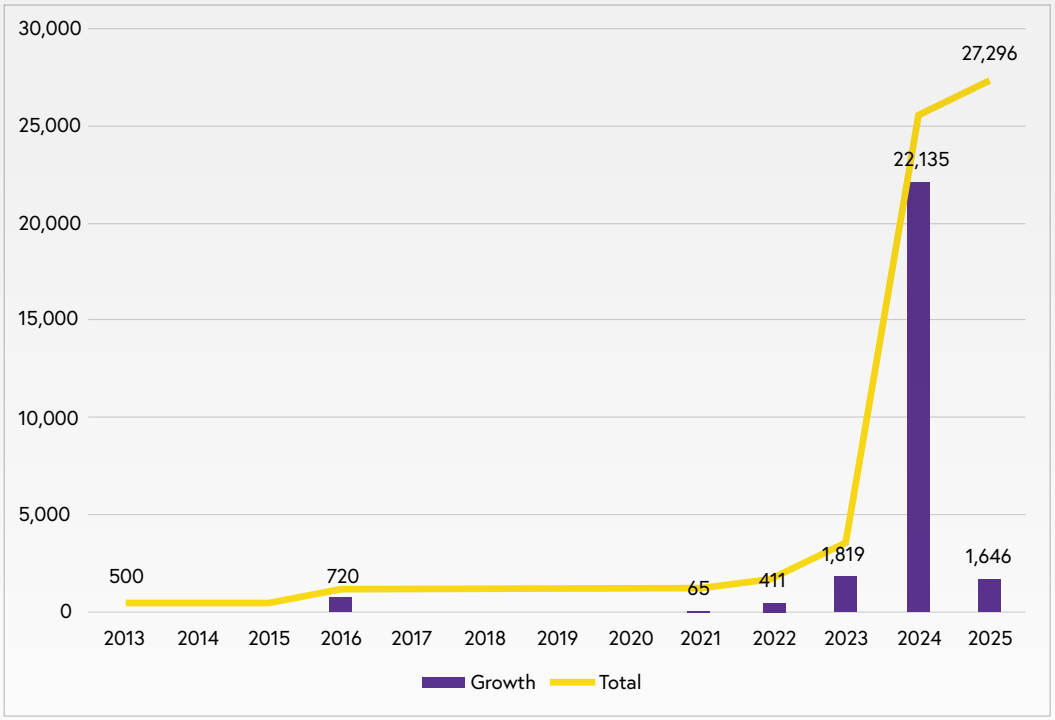
Graduate Student Employee Unionization Prior to 2019

In 1969, graduate student employee union representation began at CUNY[20] and the University of Wisconsin-Madison.[21] Thereafter, graduate student employee unionization grew at a steady rate at public universities based on decisions finding they had collective bargaining rights.[22] One example of this precedent is the 1991 Public Employment Relations Board decision under the Taylor Law concerning a petition at SUNY.[23]

By January 2013, there were 62,656 graduate student employees represented in bargaining units at 28 public universities in a dozen states including New York and New Jersey, along with those working at the SUNY and CUNY research foundations[24] (Figure 2). The absence of graduate student employee unions at private universities before January 2013 was due, in large part, to the NLRB precedent finding them to be primarily students without rights under the National Labor Relations Act.[25] This precedent dated back to the 1972 decision in *Adelphi University*,[26] which had been largely followed,[27] until the NLRB's 2016 *Trustees of Columbia University* decision.[28] In that decision, the agency ruled that both graduate and undergraduate student employees are covered under the National Labor Relations Act because they satisfy the common law test of employee, the legal standard previously upheld by the United States Supreme Court.[29]

A 2020 study demonstrated that the *Trustees of Columbia University* decision set off a wave of successful unionization efforts at private universities prior to the pandemic.[30] Between 2013 and 2019, graduate student employee representation grew by 31%, with the largest growth at private universities. By Jan. 1, 2020, there were 16 new bargaining units: five at public universities and 11 at private universities including Columbia, The New School, and New York University, all of which are combined units of graduate and undergraduate employees. By the beginning of 2020, the number of union-represented graduate student employees grew to

Figure 1. Undergraduate Student Employee Representation Growth, 2013-2025.



Source: Data taken from William A. Herbert, Apkarian, and Joseph van der Naald. 2024 Directory of Bargaining Agents and Contracts in Institutions of Higher Education and William A. Herbert, Joseph van der Naald, and Jacob Apkarian. Every Grain of Sand: 2024 Changes to the Scope of Higher Education Unionization." Journal of Collective Bargaining in the Academy 16, no. 1 (2025) and National Center database for new bargaining units in 2025.

83,050. (Figure 2.) The resultant collective bargaining agreements have increased compensation and benefits,[31] provided increased protections against discrimination and sexual harassment,[32] and made their terms and conditions of employment enforceable through grievance-arbitration procedures.

In 2019 and 2020, there was a major drop-off in new student unionization caused by two factors: the pandemic and the strategic decision by unions to withdraw pending petitions to avoid the likely overturning of the *Columbia University* decision by a Trump-selected NLRB majority.[33]

The Post-Pandemic Surge in Student Employee Unionization

Following the pandemic and 2020 presidential election results, the rate of student employee unionization expanded exponentially.

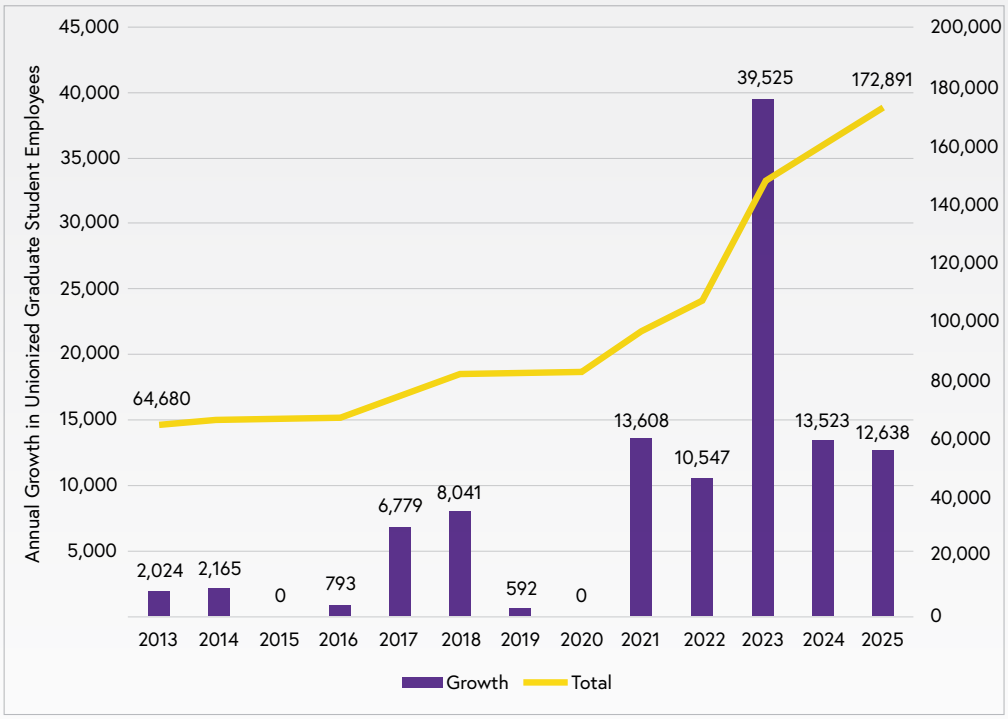
In 2022, four new undergraduate bargaining units were established, including one at Barnard College, along with the campus-wide expansion of the Grinnell bargaining unit. The next year, a dozen new undergraduate bargaining units were certified across the country, including at Columbia, Fordham, Rensselaer Polytechnic Institute, and Skidmore.[34]

The most significant increase in undergraduate employee representation occurred in 2024. In that year, there were another dozen units formed representing more than 22,000 employees. Over 90% of that total, however, was in a single new unit at California State University. An additional seven pending representation cases were withdrawn following the 2024 presidential election including at NYU, The New School, Clark University and petition for the Dartmouth men's basketball team.[35] Those withdrawals were likely due to expected changes under a second Trump administration.

Last year saw continued but slower growth in undergraduate student employee representation with new bargaining units at Macalester College, Temple University, and Beloit College. By the end of 2025, there were over 27,000 undergraduate employees represented in higher education (Figure 1).

In 2021, 2022 and 2023, the number of union-represented graduate student employees grew nationwide by 63,680 with 62% (39,535) in 2023 alone.[36] In that year, there were 23 newly certified or recognized graduate student employee units on campus including at Cornell, Fordham, Syracuse and the SUNY Research Foundation. In 2024, representation continued to grow with 16 new bargaining units representing 13,523 graduate student employees, including at Alfred University, the Icahn School of Medicine at Mount Sinai, the University of

Figure 2. Graduate Student Employee Representation Growth, 2013-2025.



Data from William A. Herbert, Jacob Apkarian, and Joseph van der Naald. 2024 Directory of Bargaining Agents and Contracts in Institutions of Higher Education and William A. Herbert, Joseph van der Naald, and Jacob Apkarian. Every Grain of Sand: 2024 Changes to the Scope of Higher Education Unionization. Journal of Collective Bargaining in the Academy 16, no. 1 (2025) and National Center database for new bargaining units in 2025.

Chicago School of Law, and the University of California, College of the Law, San Francisco. Last year saw a significant drop in new and enlarged bargaining units but continued growth in the number of represented graduate student employees[37] (Figure 2).

The Future of Student Unionization

In 2024, Proskauer Rose attorneys predicted that undergraduate bargaining units were "here to stay."[38] The prediction was only partially true for unionization of both undergraduate and graduate student employees.

It is likely that student employee representation growth will continue in states with public sector collective bargaining laws applicable to student employees in higher education. For example, late last year a petition was filed to represent a proposed unit of 1,400 at Portland State University.[39] Undergraduate work and unionization efforts on public sector campuses will be impacted if the Trump administration is successful in cutting the current level of work-study funding.[40]

History has shown that precedential stability under public sector collective bargaining laws is far more common than under the National Labor Relations Act. The potential for future increases in student union representation is more likely under public sector precedent as well as proposed legislation in New York State to permit intercollegiate athletes to unionize,[41] and bills in other states to extend or expand collective bargaining rights in higher education. A pending public sector collective bargaining bill in Virginia would cover higher education students employed in any capacity.[42]

The future of student employee unionization in the private sector is far less certain. As at public institutions, proposed cuts in federal work-study spending will decrease undergraduate student employment. In addition, the Trump administration's aggressive immigration policies have already negatively impacted employment of noncitizen graduate student employees.

Furthermore, the legal future of student labor rights under the National Labor Relations Act might be changed in the next few years. Whether there is a change will depend on the position taken by the new NLRB's general counsel concerning the 2016 *Trustees of Columbia University* decision, the new board majority's approach to that precedent, and the real potential for presidential interference in the board's independence under the unitary executive theory.[43]

During the first Trump administration the NLRB proposed a rule to reverse the *Trustees of Columbia University* decision but withdrew the proposed rule after comments were submitted. Unlike prior inflection points, agency reconsideration of the student employee status under the NLRA will require an analysis of the large body of empirical evidence from negotiated contracts at private and public institutions that can answer the prior theorical arguments and concerns regarding the feasibility of student employee representation.

If the new NLRB majority reverses precedent recognizing student employee status, continued unionization growth will require voluntarily recognition by universities following the lead of Syracuse University and other institutions. Whether a particular institution will agree to voluntarily recognize a union will depend on the values of its leaders and trustees, its collective bargaining experiences with other unionized employees, and what legal advice it relies upon.

The success and impact of undergraduate and graduate student employee union representation will require overcoming certain known challenges. First, grant funding for graduate student employment may not be adequate to cover negotiated compensation increases agreed to by the university. This will require the university to cover the difference, or the principal investigator will have to reallocate the grant money. Other challenges are the constant turnover of students because of the academic cycle and reported bargaining unit divisions resulting from union positions on issues extraneous to terms and conditions of employment.

Finally, future research on student employee representation should include longitudinal qualitive research examining how student experiences in labor organizing and being represented by a union impacted their views about representational democracy and the trajectory of their lives and careers after leaving higher education.

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34. William A. Herbert, Jacob Apkarian, and Joseph van der Naald, *supra* note 15.

35. *See* William A. Herbert, Joseph van der Naald and Jacob Apkarian, *Every Grain of Sand: 2024. Changes to the Scope of Higher Education Unionization*, 16 Journal of Collective Bargaining in the Academy, Article 10 (2025). *See also Trustees of Dartmouth College*, NLRB Case No. 01-RC-325633 (petition withdrawn following NLRB certification of the union).

36. *2024 Directory of Bargaining Agents and Contracts in Institutions of Higher Education*, *supra* note 30.

37. One of the new graduate student employment units in 2025 was at Pennsylvania State University. In late 2025, the university filed exceptions with the Pennsylvania Labor Relations Board challenging the certification of that unit, which includes 4225 employees. *See Pennsylvania State University*, Case No. PERA-R-24-276-E.

38. *See* Elizabeth Dailey, Mallory Knudsen, Steven Porzio, and Paul Salvatore, *Undergraduate Bargaining Units Are Here to Stay – and 20,000 Members Stronger,* Proskauer Labor Relations Update (March 4, 2024), https://www.jdsupra.com/legalnews/undergraduate-bargaining-units-are-here-2548332.

39. *Portland State University*, OERB Case No. Case No. RC-022-25 (filed Dec. 19, 2025).

40. *See* Laura Spitalniak, *Congress Moves To Reject Trump Plan To Slash Education Department Funding*, Higher Ed Drive (Jan. 20, 2026), https://www.highereddive.com/news/congress-moves-to-reject-trump-plan-to-slash-education-department-funding/810024.

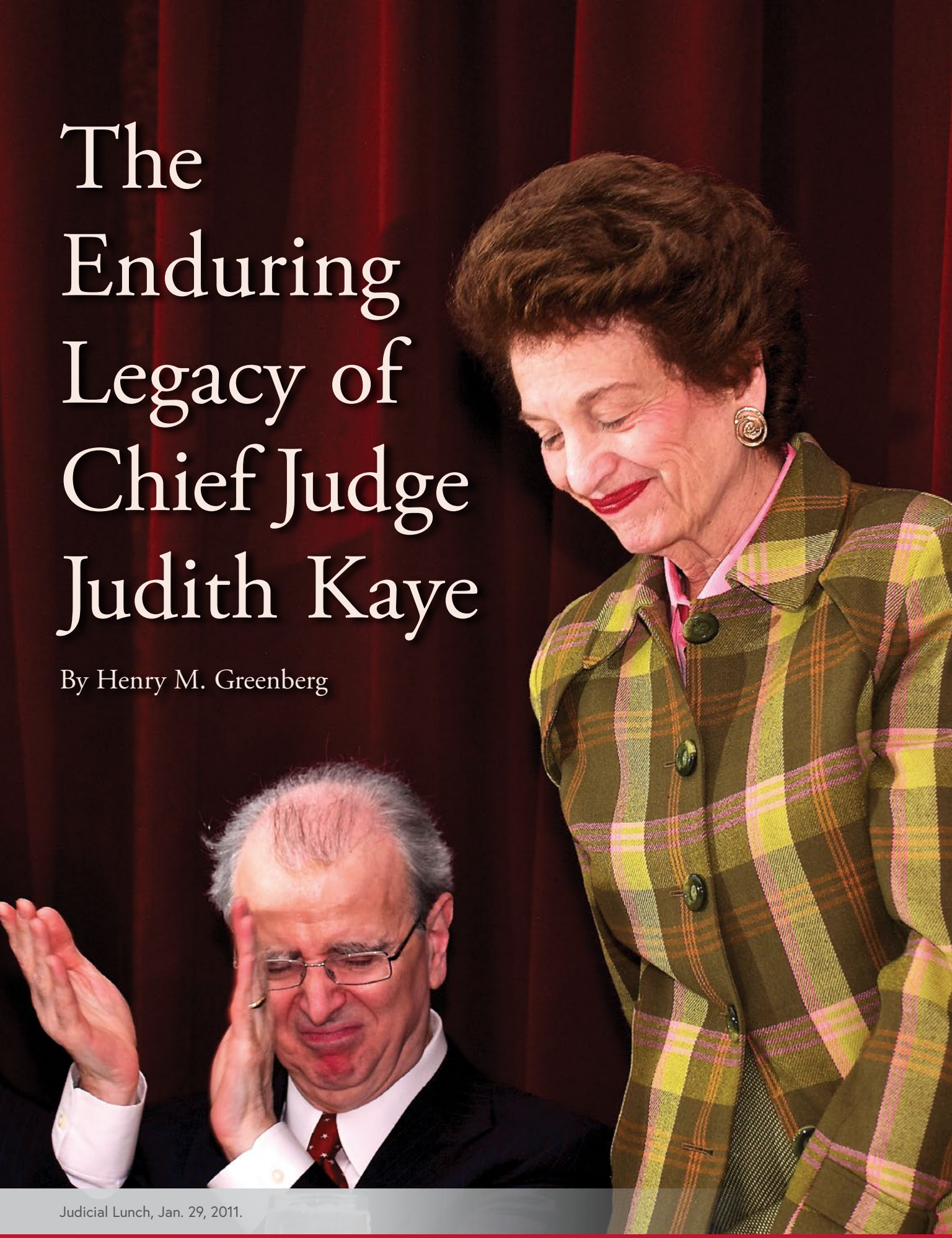
41. *See* NY A 2014 (introduced on Jan. 7, 2026), https://legiscan.com/NY/text/A02014/2025.

42. *See* VA HB 1263, §40.1-57.4 (introduced on Jan. 14, 2026), https://legiscan.com/VA/text/HB1263/id/3318364/Virginia-2026-HB1263-Introduced.html.

43. *See Trump v. Wilcox*, 605 U.S. __, 145 S. Ct. 1415 (2025) (Supreme Court majority issued a decision granting an emergency stay overturning lower court decisions reinstating NLRB Board member Gwynne Wilcox. The shadow docket decision strongly indicates that the majority's view that presidential power includes summarily discharging NLRB Board members for any reason.). It remains to be seen whether presidential authority under the unitary executive theory will be deemed to trump the quasi-judicial ethical mandates of the Administrative Procedure Act, 5 U.S.C. §§ 551-706, thereby necessitating board members and administrative law judges to resign to avoid complying with ethically improper directives from outside the agency.

The Enduring Legacy of Chief Judge Judith Kaye

By Henry M. Greenberg



Judicial Lunch, Jan. 29, 2011.

Judith S. Kaye passed away on Jan. 7, 2016. Her death caused a statewide lament. Flags flew at half-mast on government buildings. The media paid homage to her life and legacy. Fifteen hundred people crowded into Lincoln Center to attend her funeral. Lawyers and laypersons alike – some who had never met Judith Kaye – mourned her passing.[1]

Almost immediately a flood of academic commentary and scholarship appeared in law reviews praising her career.[2] Her previously unpublished memoir came out in 2019 in a book that included select judicial opinions and articles.[3] Not since the death in 1938 of the legendary Benjamin Cardozo had New Yorkers seen such a response to the death of a jurist.

For a quarter century – from 1983 to 2008 – Judith Kaye sat on the New York Court of Appeals. She was the first woman associate judge and chief judge of the Court of Appeals. She was the longest serving chief judge in New York history. She authored more than 600 judicial opinions, many of which spawned state and national trends. She was the most accomplished court administrator of her time, rewriting "the script for how a twenty-first century chief judge can lead the courts in delivering justice."[4] All the while she found time and energy to publish over 200 extrajudicial writings – on a "kaleidoscopic range of topics"[5] – "confront[ing] as educator, scholar and advocate many of the most important issues facing our country."[6]

Even now, 10 years after her death, Judith Kaye's imprint on the law – and on those who knew her well or at a distance – is as large as ever. But why was she so admired? Why has her stature remained undimmed? To find the answers one must realize that there are two Judith Kaye stories, and both are inspiring.

Two Stories of Judith Kaye's Life and Career – in a Nutshell

The first story begins when young Judith – the daughter of immigrants who fled religious persecution in Eastern Europe – graduated from Barnard College and embarked on what she hoped would be a career in journalism. She soon realized, however, that journalism was a male bastion. The best job she could find was as a "social reporter" for a newspaper in New Jersey.

Undaunted, she enrolled in New York University Law School, attended classes at night, and graduated sixth in her class in 1962. Once again, she embarked on a career path only to find that few if any law firms were willing to interview a woman, much less offer a job. After scores of rejections, however, a door opened: Sullivan & Cromwell hired her as a litigation associate. That was all she needed. It didn't take long for her colleagues to recognize her brilliant legal mind, and in 1975 she became the first woman partner of Olwine, Connelly, Chase, O'Donnell and Weyer.

The second Judith Kaye story begins in 1983, when she is thriving in private practice as a commercial litigator and comes to the attention of Gov. Mario Cuomo, who is looking to appoint a woman – the first – to the Court of Appeals. He appoints her. And the rest is history.

Coming to the bench directly from private practice, Judge Kaye spent her first years transitioning from the "fundamentally different roles" of lawyer to judge, advocate to arbiter. She once joked that "[f]or a long time after my appointment to the Court of Appeals I marked every passing week as a triumph of survival – my own as well as the law of the State of New York."[7]

The self-deprecating humor notwithstanding, she quickly mastered the craft of judging, writing opinions in high-profile cases, such as one her first year on the court striking down New York's mandatory death penalty for murder committed by an inmate already serving life imprisonment.[8] "Limited only by the human imagination," the court's docket – roughly 60% civil and 40% criminal – was extraordinarily diverse.[9] "Lawyer heaven" is the phrase she used to describe the experience of deciding the novel and challenging issues that came before her.[10]

Through opinions and scholarly articles, she earned a national reputation as a forceful advocate for independent state constitutional adjudication – the doctrine that state courts should look to their own constitutions instead of limiting their decisions to analysis under the U.S. Constitution. In *Immuno A.G. v. Moor-Jankowski,*[11] for example, she held that the New York state constitution provided protection for speech greater than the minimal protections required under the U.S. Supreme Court's interpretation of the First Amendment.[12]

Judith Kaye advanced the state constitution more than anyone in modern New York history. Due in no small part to her efforts, state constitutional law is no longer seen as an arcane field of study. New York courts now "accept and routinely apply state constitutionalism when necessary to effectively safeguard individual rights and liberties."[13] That would not be true but for her leadership as the Court of Appeals' "foremost student and proponent of state constitutional adjudication."[14]

In 1993, Gov. Cuomo appointed her to the position of chief judge. By this time, she had a national reputation as a brilliant jurist – indeed a "judge's judge."[15]

Now, in addition to being chief judge of the Court of Appeals, she assumed what amounted to a second full-time job – chief judge of the State of New York. In that capacity, she oversaw the state's judicial branch of government and set priorities for the largest, busiest, and most complex court system in the nation. She quipped that she had two jobs, and "each … took 80 percent of my time."[16]

Under the Kaye administration, New York's court system became a "laboratory for court innovation and a model emulated by state judiciaries large and small."[17] She transformed and modernized courts through myriad reforms. Here are a few of her signature initiatives:

• Children and Families

Judith Kaye's highest priority was the welfare of children and families involved with the legal system, especially in the areas of divorce, foster care, domestic violence, child abuse and neglect, adoption and juvenile delinquency. She instituted new rules to open family court to public scrutiny and address flaws in matrimonial litigation. She introduced the Adoption Now program that reduced by 50% the number of children awaiting adoption. She also created the Permanent Judicial Commission on Justice for Children, an interdisciplinary institution within the state court system to develop and advocate for positive policy changes on behalf of children. These and other accomplishments in this area "make her a candidate for the most consequential family law judge in American history."[18]

"Judith Kaye's highest priority was the welfare of children and families involved with the legal system, especially in the areas of divorce, foster care, domestic violence, child abuse and neglect, adoption and juvenile delinquency."

Judge Kaye initiated a project to put children's centers in the courts to provide a safe space for children while their parents and guardians are in court. Photo courtesy of the Historical Society of the New York Courts.

• Jury Reform

She revolutionized New York's jury system, making it a model for jury reform for the nation. She improved the treatment of jurors and eliminated virtually all automatic exemptions from the jury pool, thereby diversifying and expanding it. She also eased the emotional and economic strain of jury service by eliminating mandatory sequestration. This had the added benefit of saving the state millions of dollars every year.[19]

• Problem Solving Courts

To deal with the modern-day societal problems that caused people to repeatedly return to court, she established hundreds of problem-solving courts, including community courts, drug treatment courts, domestic violence courts, and mental health courts. This was a judicial revolution, as it challenged "tradition-bound judiciaries to rethink their most fundamental precepts and to focus more intensively on the human beings and societal trends reflected in these cases."[20]

• Commercial Division

She nurtured and expanded the Commercial Division in the New York State Supreme Court. Under her watch, the Commercial Division became a nationally renowned forum to resolve complex business disputes with efficiency and expertise and thus help attract and retain business in New York.[21]

• Public Trust

Acutely aware of negative public attitudes about government, she held herself to the highest ethical standards. She had zero tolerance for judicial misconduct and took steps to enhance public trust and confidence in the judiciary and legal profession. This included mandatory continuing legal education; mandatory arbitration of attorney-client fee disputes; rules requiring letters of engagement in most cases; reform of the fiduciary appointment process; standards of civility and statements of clients' rights.[22]

In her judicial role, she was first among equals on the Court of Appeals, respected as an intellectual leader and consensus builder. Widely regarded as one of the nation's finest legal writers,[23] her carefully crafted opinions shaped New York law. She authored seminal rulings recognizing adoption rights of same-sex couples[24] and ensuring that all public-school students – rich and poor – had "the opportunity for a meaningful high school education" that would prepare them "to function productively as civic participants."[25]

Among her most memorable writings was a prophetic dissent in *Hernandez v. Robles,*[26] decided her last year on the court in 2008. A four-judge plurality held that same-sex couples had neither a constitutional nor a statutory right to marry.[27] Chief Judge Kaye could not disagree more strongly. She wrote: "While encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the exclusion of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone."[28]

Vindication was not long in coming. In 2011, New York's Legislature enacted the Marriage Equality Act, which recognized the right of same-sex couples to marry.[29] A few years later, the U.S. Supreme Court in *Obergefell v. Hodges*[30] required all 50 states to recognize same-sex marriage, following a slew of lower court decisions (many citing the *Hernandez* dissent) striking down bans on same-sex marriage across the nation.[31]

Chief Judge Judith Kaye addresses the House of Delegates at the 2008 Annual Meeting in New York City.

The irony of *Hernandez* is that Judith Kaye was not a "great dissenter." Only 12% of her judicial opinions were dissents.[32] As a colleague reminisced, "[s]he preferred to lead from the front, seeking consensus when possible."[33]

In the 1990s, she rejected overtures by the Clinton administration to move to Washington, D.C. and become U.S. attorney general, and a justice of the U.S. Supreme Court. She never regretted those decisions. She adored New York and loved being on the Court of Appeals. She served as chief judge until 2008, when she reached the mandatory retirement age of 70. She then joined the international law firm Skadden, Arps, Slate, Meagher & Flom, where she focused on arbitration and projects that improved the lives of underprivileged children.

After a lengthy battle with cancer, she died at her home in Manhattan at age 77.

A Towering Figure in the Law

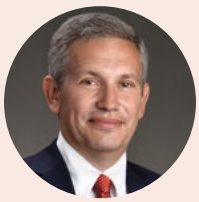
Beyond Judith Kaye's professional contributions and attainments – astounding though they are – was a great-souled human being. She embodied the spirit of the legal profession and an elevated vision of the promise and potential of public service. Her pristine character and unique personality contributed to her being a towering figure in the law.

She projected a commanding yet accessible presence. She stood tall, 5'10" or 5'11", spoke in a melodic voice, and was always meticulously dressed, wearing colorful blouses and her trademark red shoes. Warmth, dignity, elegance, gravitas, rectitude, and high intelligence exuded from her every word and movement. She was always composed, always appropriate. She had deep empathy for people and never forgot from whence she came. Nor did she stand on ceremony. Telephone callers to chambers were often surprised to discover the person answering the phone was not a receptionist, but rather, the judge.

Displays of respect for public service and public servants are rare. We live in a cynical age. The coarsening of public discourse ever quickens. Judith Kaye is our answer to the cynics. She was a miracle, the best of the best – a perfect blend of brilliance, compassion and practicality. New York has given America many of its greatest jurists, but none stands higher than her. Future generations will see in her a singular example of how a person born without privilege can rise to greatness and how a lawyer can make the world gentler and just.

Judith Kaye was chief among chief judges in New York history.[34] She lives on in the writings and works that she left us. She lives on in the mind and memory of a forever grateful legal profession. And she lives on in the hearts of those blessed to have known her.

What Hamlet said of his late father rings true when said of Judith Kaye: She was a woman, take her for all in all, we shall not look upon her like again.[35]



Henry M. Greenberg, past president of NYSBA, is vice chair of statewide programming for the Historical Society of the New York Courts, which was founded by Judith Kaye in 2002. He served as her law clerk from 1988 to 1990.

Endnotes

1. In preparing this article, I drew heavily from my previous writings about Judge Kaye. *See* Henry M. Greenberg, *'Lawyer Heaven': Clerking for Judith S. Kaye*, in Of Courtiers & Princes: Stories of Lower Court Clerks and Their Judges 69 (Todd C. Peppers ed., 2020); Henry M. Greenberg, *The Making of a Judge's Judge: Judith S. Kaye's 1987 Cardozo Lecture*, 81 Brooklyn L. Rev. 1363 (2016); Henry M. Greenberg, *Judith Smith Kaye: A Chief Judge for the Ages*, 79 Albany L. Rev. 1247 (2015/2016).

2. For example, shortly after Judith Kaye's death, Brooklyn Law School and New York University Law School dedicated in her memory issues of their law reviews that together contain 13 articles about her judicial career. *See* 92 N.Y.U. L. Rev. 2-100 (2017); 81 Brook L. Rev. 1349-81 (2016). Similar tributes in scholarly publications predated her death. *See, e.g.*, 84 N.Y.U. L. Rev. 647, 650-680 (June 2009) (containing nine tributes in recognition of her 25 years of service to New York, including from Stephen G. Breyer, Ruth Bader Ginsburg and Sandra Day O'Connor of the U.S. Supreme Court); Vol. 80/ No. 9 N.Y. State Bar Journal 5, 10-31 (Nov./Dec. 2008) (containing seven articles in recognition of her 25 years of service on the Court of Appeals).

3. Judith S. Kaye, Judith S. Kaye in Her Own Words: Reflections on Life and the Law, With Selected Judicial Opinions and Articles (Henry M. Greenberg, et al. eds., 2019).

4. *See* Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. Rev. 655, 661 (2008).

5. Susan Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 Alb. L. Rev. 1977, 1983 (2012).

6. Sandra Day O'Connor, *A Distinguished Path in Public Service*, 84 N.Y.U. L. Rev. 662, 663 (2009).

7. Judith S. Kaye, A Five-Year Retrospective, Address at New York State Family Court Judges Conference 10 (Sept. 24, 1988).

8. *People v. Smith*, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 468 N.E.2d 879 (N.Y. 1984), *cert. denied*, 469 U.S. 1227 (1985).

9. Judith S. Kaye, *The Importance of State Courts: A Snapshot of the New York Court of Appeals*, 1994 N.Y.U. Ann. Surv. of Am. L. xi, xiv (Apr. 1999).

10. Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, Vol. 78/No. 8 N.Y. State Bar Journal 10-11 (Oct. 2006).

11. 77 N.Y.2d 235, 549 N.Y.S.2d 906, 567 N.E.2d 1270 (N.Y. 1987).

12. *Id.* at 249, 549 N.Y.S.2d at 913, 567 N.E.2d at 1277.

13. Stewart F. Hancock, *New York State Constitutional Law – Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence*, 77 Albany L. Rev. 1331, 1332 (2014).

14. Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 Temp. L. Rev. 1163, 1166 (1994).

15. *See* Henry M. Greenberg, *The Making of a Judge's Judge: Judith S. Kaye's 1987 Cardozo Lecture*, 81 Brooklyn L. Rev. 1363, 1372 (2016).

16. Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. Times (Jan. 7, 2016), available at https://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html (last accessed on Feb. 12, 2026).

17. Jonathan Lippman, *Judith Kaye: The Great Reformer*, 92 N.Y.U. L. Rev. 85, 92 (2017).

18. Andrew Schepard, *Judith S. Kaye: A Chief Judge for Families and Children*, 55 Fam. L.Q. 239, 240 (2022).

19. Lippman, *Judith Kaye: The Great Reformer*, *supra* note 17, at 86-87.

20. *Id.* at 87.

21. *Id.* at 89.

22. *Id.* at 90-91.

23. Renowned legal writing teacher Bryan Garner considered Judith Kaye among 18 legal writers that are worth emulating. *See* Dan Slater, *Tress and the Law, Judge Kaye's Last Legal Issue*, Wall Street Journal, Dec. 31, 2008, available at https://blogs.wsj.com/law/2008/12/31/trees-and-the-law-judge-kayes-last-case/ (last accessed Feb. 13, 2026). *See also* Gerald Lebovits, *Daughter of the Empire State: Lessons in Legal Writing From New York Chief Judge Judith S. Kaye*, Vol. 93/No. 4 N.Y. State Bar Journal 58, 59 (July/Aug 2021) ("Kaye was … a scholarly writer with an effective – and affecting – pen.").

24. *Matter of Jacobs*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (N.Y. 1995).

25. *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 908, 769 N.Y.S.2d 106, 111, 801 N.E.2d 326, 332 (N.Y. 2003).

26. 7 N.Y.3d 338, 821 N.Y.S.2d 770, 55 N.E.2d 1 (N.Y. 2006), abrogated by *Obergefell v. Hodges*, 576 U.S. 644 (2015).

27. *Id.* at 357-379, 821 N.Y.S.2d at 774-791, 55 N.E.2d at 5-22.

28. *Id.* at 391, 821 N.Y.S.2d at 799, 855 N.E.2d at 30 (Kaye, C.J., dissenting).

29. 2011 Laws of N.Y., ch. 95 (eff. July 24, 2011).

30. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

31. *See* Roberta A. Kaplan, *The Dissent That Paved the Way to Equal Dignity: Chief Judge Judith S. Kaye's Dissent in Hernandez*, 92 N.Y.U. L. Rev. 56, 62 (2017) ("There can be no question that Chief Judge Kaye's Hernandez dissent had a significant impact in paving the way towards marriage equality. To date, Chief Judge Kaye's dissent has been cited at least 116 times, in 16 cases and 150 law review articles. It was cited explicitly in at least seven state court decisions (California, Connecticut, Maryland, New York, New Jersey, Iowa, and Montana, and two federal marriage equality decisions in the Ninth and Tenth Circuits.") (citations omitted).

32. "In all, she wrote 522 majority opinions, 77 dissents, and 28 concurrences." Albert M. Rosenblatt, Editorial Preface, in Judith S. Kaye in Her Own Words: Reflections on Life and the Law, With Selected Judicial Opinions and Articles, *supra* note 3, at XIII.

33. *Id.*

34. *See* Randal T. Shepard, *Judith Kaye as a Chief Among Chiefs*, 84 N.Y.U. L. REV. 671, 821 (2008).

35. *See* William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, act 1, sc. 1 ("He was a man, take him for all in all, I shall not look upon his like again.").

Don't Wear a Wrap Dress and Other Valuable Lessons From Judge Kaye

By Jennifer Smith

On Jan. 7, we marked 10 years since the passing of Judith S. Kaye, the first woman to serve on the New York Court of Appeals and to this day its longest-serving chief judge. During her lifetime, Judge Kaye was recognized and lauded for her brilliant legal mind and innovative executive skills and in death she was rightfully and permanently enshrined as a bright star in the legal firmament. I will always be in awe of the mark Judge Kaye left on New York jurisprudence, and I know I am not alone.

When I think of her now, however, as I have almost every day for the past decade, it's not because of her legal acumen; rather, more often than not it is the smaller moments and helpful lessons I learned from working closely with her and observing her interactions and habits during what she dubbed her post-Court of Appeals "afterlife" or sometimes her "second act" at the law firm of Skadden, Arps, Slate, Meagher & Flom that come to mind.

To have known Judge Kaye as a jurist and as a formidable lawyer was to only know a small part of the whole of who she was. An incomplete description of her attributes might also include devoted wife, mother, grandmother, friend, serious reader, incomparable grammarian and ruthless editor of her own written word, runner and walker, patron of the opera, lover of the theater and of New York City and New York State in equal measure. All these aspects of Judge Kaye the person were not necessarily apparent to the general public, but her status as a legal luminary belies her impact on those who knew her personally and benefited from observing how she moved through the world and conducted herself. I am one such beneficiary.

At the time I began to work with Judge Kaye I was not sure whether I could continue to practice law. My husband also worked in a big firm and we had three young kids, the youngest just a year. I was feeling intense pressure to leave the legal profession altogether – a feeling undoubtedly familiar to many lawyers with families. But when the opportunity to work with Judge Kaye arose, I could not turn it down. I expected challenging and interesting work at a high level, and she delivered. What I did not expect was that as a mother of three grown children herself, she understood the phase of life I was in and what it meant to have a young family. Sheryl Sandberg's book "Lean In" was a topic of much discussion back then, but Judge Kaye, ahead of her time as usual, was skeptical. She mused that in her own career she did not "lean in" as much as "hang in." Perhaps because she felt she owed her career to "hanging in" she downplayed the active role she played in her own successes and preferred to demur when asked for advice. "I don't give advice," she would say, "except, don't wear a wrap dress." For those not in the know, the idea of a "wrap" dress is to enable the wearer to get dressed quickly and look pulled together by wrapping one garment around the body. However, a wrap dress means any strong wind or careless dive into the back of a taxi carries the potential for exposure of one's non-legal briefs. She was joking but also communicating effectively one of her bedrock principles: there are no shortcuts or substitutes for preparation and care in how you present yourself professionally and personally. She also understood that a wrap dress, like the notion of work-life balance, is a great idea in theory but ultimately a mirage.

Clothing was important to the judge, and she was always impeccably dressed. I can see her now in a well-loved designer suit and Forever 21 scarf in blue and orange – New York City's colors – and she was well-known for wearing red shoes under her judicial robes. She understood the profound power clothes can have to communicate. While she was on the court, she spoke about wanting more red shoes on the bench – her winking way of advocating for more women judges. In recognition of this, her office at Skadden was full of red shoe *tchotchkes* – from tape dispensers to door stops and paperweights – gifted to her over the years. One of her favorites was the Champion of Justice Award she received from the Harry and Jeanette Weinberg Center for Elder Justice from the Hebrew Home in Riverdale. The award was fashioned out of an actual red shoe affixed to a wooden box. A good way to get on her good side was to wear red shoes, provided you wore them with stockings, *always* with stockings.

Judge Kaye also downplayed her status as "the first woman to" despite the many barriers she broke through, but she never minimized her femininity or her love for and pride in her family. She was absolutely in love with her grandchildren and let everyone know it. She took long vacations with her family before her time on the Court of Appeals. Family time was important and so was work. She made room for both. She often told me that while in private practice prior to her time on the court, when things got busy at work she and her husband would meet at home for dinner with the family and then return to the office.

Judge Kaye had the work ethic of an Olympic gold medalist. Her dedication to legal writing is legendary. She was an assiduous preparer who by all appearances was untouched by the urge to procrastinate. But for her, the practice of law in all its forms was not work; it was a labor of love. I think working at her big desk, bent over a draft of something, was one of her favorite places to be. But it was the work she loved regardless of location. She could and did work anywhere. Once as she was preparing to attend and present at an international arbitration conference in Mauritius, I asked her what she planned to do on the flight. I was thinking about all the sleeping and binge-watching I would be catching up on if I found myself in her situation. In response she told me that she was looking forward to "curling up" on the 21-hour

flight to review and comment on a draft chapter of "The Restatement of U.S. Law on International Arbitration." Feeling deeply inadequate I did not ask her about her plan for the return flight.

Although she was a runner while she was on the court, she was mostly devoted to walking in her post-court "afterlife." Exercise was her way to quiet her mind, ground her thoughts as she traipsed through New York City. Indeed, Judge Kaye walked to the Skadden offices from her apartment 30 blocks away nearly every day, in all kinds of scenarios, weather-related or otherwise. Not even a group of rowdy Santas traversing midtown bars during SantaCon could deter her. And she was an early bird. When it was still in operation, the clothing store Forever 21's Times Square location used to be open by 7:30 a.m. and she would frequently stop in on her walk to work and pick something up. Walking back and forth to her home on the Upper West Side also provided opportunities for her to be spontaneous and exercise her love of the arts by stopping by the theater district in Times Square or the Lincoln Center box office to catch an unplanned performance. She loved the opera and had subscription seats at the Metropolitan Opera House, and I am sure she walked to those performances as well.

Just as she took care of herself by exercising and patronizing the arts, Judge Kaye cared about others, especially the people in her orbit. For example, she knew the name of every single person who worked at Skadden. From rainmaking partner to cafeteria staff, she knew not just the name but some unique facts about that person, such as the names of all their kids and what the kids wanted for their birthday. The older (and more forgetful) I get, the more I am in awe of this skill. I can still see her coming off the elevator and announcing the names of the two receptionists sitting behind a set of glass doors. She would shout their names in greeting, over-enunciating the last syllable of their names – genuinely happy to see them – and stop and chat before continuing to her office. She was generous with her time and with compliments. And this was not just a Skadden phenomenon. Whether attending the Annual Meeting of the New York State Bar Association, or Pomodoro, her home-away-from-home New York City neighborhood restaurant, or Lodge's, a favorite store in downtown Albany, she received a hero's welcome. Her kindness was not performative – it was truly felt and to the bone. Especially when it came to colleagues and coworkers. I never saw her get mad. I think she recognized when people tried their best and, in general, she did not waste time sweating the small stuff.

If there was one thing Judge Kaye did not consider to be small stuff, though, it was tardiness. She was always on time. Because lateness mattered to her, it mattered to me. She typically eschewed overscheduling, but there was a time when circumstances dictated that she attend an

Chief Judge Kaye, pictured with WABC-TV anchor Sade Baderinwa, at the launch of the Jury Duty Social Awareness postage stamp in 2007. Judge Kaye worked with the federal government and the U.S. Postal Service to create the commemorative stamp, which was designated to call attention to the importance of jury service. Photo courtesy of the Historical Society of the New York Courts.

event at Hofstra University on Long Island in the morning and an important pitch in lower Manhattan in the afternoon. I volunteered to drive, thinking that would eliminate the uncertainty of multiple Ubers. The error of that line of thinking was apparent when, while en route from the morning meeting, I realized to my horror that I had put the wrong address into the GPS. I corrected the error, but when the GPS was finished recalculating the route, it looked like we would be late for the pitch. I floored the gas pedal. She looked at me and said, "Jennifer, I am going to be quiet now." Miraculously, we pulled up to the location on time and just as the attendees were gathering to go inside. I believe that if I had made her late to that pitch it would have been just fine and she would not have held it against me. But I am grateful, to this day, that I did not have to test that belief.

In the years since she passed away, I continue to hang in. I am still practicing and still trying to follow all the advice she never spoke in words but imparted in deeds. Be prepared. Be kind. If you are lucky enough to love what you do and the people you do it for, do not give up. Work hard but enjoy the breaks if you can take them. Don't skip the arts or exercise. Dress like you give a damn. I will never live up to the standard she set in knowing so many names, but I do make my best effort. When it comes to long flights I refuse to change my binge-watching ways – even Judith S. Kaye could be wrong once in a while. But she was 100% right about red shoes and wrap dresses.

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Immigration Topics Every Lawyer Needs To Know Under Trump 2.0

By Remzi Güvenç Kulen

January 2026 marked the completion of President Trump's first year of his second term in the White House. While the year was filled with new initiatives, Trump's focus on immigration is perhaps the most consequential, not just because of the protests it has sparked but also because of the legal questions it has raised. Over the year, immigration law has been reshaped less through new legislation than through changes in enforcement priorities, executive interpretation, and administrative practice. The result has been a meaningful shift in how immigration law functions in daily practice – and in how often it intersects with legal work well outside the traditional immigration context.

For lawyers, the central lesson of the past year is not simply that immigration law has become more complex, but that it has become more integrated into the broader legal and regulatory landscape. Immigration considerations now influence decisions in corporate governance, criminal defense, family law, education, health care and finance.

What defined the administration's first year was not comprehensive statutory reform, but the assertive use of executive authority and administrative discretion. Federal agencies emphasized enforcement, reassessed discretionary programs, and started to coordinate more closely across departments. Longstanding statutory provisions – particularly those granting the executive branch broad authority over entry and enforcement – were interpreted expansively, prompting litigation and ongoing debate over the limits of presidential power. Birthright citizenship, which has made its way to the Supreme Court, is one significant area where the administration is challenging precedent.

At the same time, immigration adjudication became increasingly data driven. Agencies continued to rely on interconnected databases, information sharing, and enhanced vetting procedures. While these tools were not

new, their expanded use over the past year reinforced the importance of accuracy and consistency across all filings and records that intersect with immigration status.

This article examines the administration's first year through a practical, fact-based lens. It focuses on documented enforcement trends, executive actions, adjudicatory practices, and litigation developments, while identifying the legal risks those developments revealed. Where policies were proposed, challenged, or only partially implemented, they are discussed as indicators of direction rather than settled law. The aim is to provide lawyers across disciplines with a clear understanding of what changed in practice – and what areas now require heightened caution when advising clients whose legal, financial, or personal decisions intersect with immigration law.

Immigration Enforcement as Governing Policy

One of the most consequential developments during the administration's first year is the way immigration enforcement priorities have broadened, interior enforcement has intensified, and compliance review has become a recurring feature of interactions between noncitizens, institutions, and the federal government. Having campaigned on the issue, President Trump started his term by issuing several orders on immigration issues.

Over the year, Immigration and Customs Enforcement continued enforcement activity well beyond border settings, contrary to previous practice.[1] Before the current administration, ICE arrests were rarely seen in courts and public places.[2] Now arrests and detentions occur in a range of contexts, including workplaces and routine encounters with government agencies. "Notices to Appear" are issued in circumstances that surprise many individuals, including cases involving people with pending applications or approved petitions. As courts have long recognized, the approval of an immigration petition does not confer lawful status or immunity from enforcement, and the past year reinforced that principle in concrete terms.

Worksite enforcement plays an especially prominent role. Employers across industries face more I-9 audits, document requests, and compliance reviews.[3] In some instances, investigations have been initiated not through physical inspections but through discrepancies identified in data shared across agencies such as the Internal Revenue Service.[4] Employers learned that inconsistencies between payroll records submitted to tax authorities and job information contained in immigration filings could trigger further scrutiny. Even technical deficiencies – such as incomplete forms, outdated documentation, or inconsistent job titles – have proven sufficient to generate penalties or referrals.[5]

Technology significantly amplifies these enforcement efforts. The Department of Homeland Security and related agencies rely on integrated systems linking information held by U.S. Citizenship and Immigration Services, the Department of State, Customs and Border Protection, the Internal Revenue Service, the Social Security Administration and state agencies. These systems enable cross-checking of employment data, tax filings, travel history, student enrollment records, and benefits usage. When inconsistencies emerge, cases may be flagged for additional review without any site visit or individualized tip.

For lawyers, what became clear over the course of the year is that immigration enforcement no longer operates in isolation. It now functions as part of a broader compliance environment in which information flows across agencies and is evaluated continuously. Advising clients requires attention not only to immigration filings themselves, but to the consistency of information across employment, tax, educational, and regulatory contexts. Immigration compliance has become an ongoing risk-management concern rather than a discrete procedural step.

Executive Power in Practice: How Authority Is Asserted and Tested

The administration's first year underscored the central role of executive authority in shaping immigration law. Rather than pursuing comprehensive legislative reform, immigration policy is now driven largely through executive orders, agency memoranda, and enforcement guidance. This approach places renewed emphasis on statutory provisions that grant the executive branch broad discretion over entry, enforcement, and national security determinations.

Presidential authority under the Immigration and Nationality Act Section 212(f), which permits restrictions on the entry of noncitizens deemed detrimental to the interests of the United States, featured prominently throughout the year.[6] While this authority has long been recognized by the courts, its continued invocation reinforces how quickly executive action can affect immigration outcomes in practice. Even where particular initiatives were challenged or limited through litigation, the assertion of authority itself had immediate operational consequences for agencies, employers, and individuals.

The administration also has advanced executive initiatives touching on constitutionally sensitive areas, including citizenship at birth. Executive Order 14160, "Protecting the Meaning and Value of American Citizenship," was announced by President Trump on Jan. 20, 2025. The executive order sought to end birthright citizenship for children born in the U.S. to parents who are undocumented or present on temporary visas, directing federal agencies to withhold citizenship, passports, and Social Security numbers from these children.[7] Immediately fol-

lowing this order, lawsuits challenging its legality were filed on Jan. 21, and preliminary injunctions blocking its implementation were issued on Feb. 6, 2025.[8] Although executive orders of this nature were promptly met with judicial scrutiny and remain unresolved, their announcement alone created uncertainty for families, hospitals, and state agencies responsible for issuing documentation and determining eligibility for benefits. In practice, lawyers are often required to advise clients in real time on unsettled questions, with the understanding that constitutional disputes may take years to resolve.

Discretionary immigration programs were similarly reassessed through executive and administrative action. For example, on March 25, 2025, the Department of Homeland Security terminated Cuban, Haitian, Nicaraguan, and Venezuelan humanitarian parole programs and ended parole and associated employment authorization for beneficiaries admitted under those programs.[9] The notice cited the Immigration and Nationality Act's grant of authority to the secretary of Homeland Security, emphasizing its "narrow discretionary authority to parole inadmissible aliens into the United States" and stating that the programs are "inconsistent with the Administration's foreign policy goals."

Asylum applications were not an exception to this shift, as asylum processing priorities were reviewed through agency guidance rather than statutory change. In February 2026, DHS published a Notice of Proposed Rulemaking to extend the asylum processing and employment authorization waiting period from the statutory minimum of 150/180 days to 365 days, pause the acceptance of initial Employment Authorization Document applications when average processing times exceed 180 days, and impose additional eligibility and procedural requirements, all through internal agency guidance and policy memoranda.[10]

While not every proposed adjustment has been fully implemented or sustained (such as changes to asylum initial Employee Authorization Document timelines), the pattern of review highlights the extent to which discretionary protections depend on executive priorities and are therefore vulnerable to significant shifts.

For practitioners, the lesson of the first year is not that executive initiatives uniformly prevailed, but that executive power – once exercised – reshapes the legal landscape immediately. Legal practitioners and clients feel the impact of guidance, enforcement posture, and adjudicatory standards long before courts issue final rulings. For example, following the issuance of Executive Order 14160, lawsuits were promptly filed and preliminary injunctions issued, yet the executive order signaled a broader shift in immigration policy and enforcement with immediate and long-term operational consequences. Hospitals, state vital records offices, and federal agencies had to seek guidance and adjust policies regarding birth certification and documentation reflecting widespread uncertainty.

Executive orders force legal practitioners to face the necessity of advising clients on real-time developments, including looming expiration of temporary protected status, stricter citizenship eligibility requirements, extended processing times, and the challenges posed by an influx of clients navigating incomplete and evolving information within a suddenly uncertain legal landscape, in which executive orders and agency guidelines were issued, paused, amended, and left in legal limbo pending judicial resolution. The consequences of these rapid shifts are difficult to quantify, yet their effects are readily observable in news reporting and in the daily lives of immigrants. For many, the question is immediate and tangible: if not today, what will happen to me tomorrow? Effective counseling therefore requires attention to how authority is being applied in practice, alongside close monitoring of litigation that may later constrain or redirect executive action.

Employment-Based Immigration: Heightened Scrutiny and Compliance Reality

Employment-based immigration did not change dramatically by statute during the administration's first year, but it was meaningfully affected by adjudicatory trends and enforcement practices that reshaped how employers plan, hire, and retain foreign talent. For many organizations, what had once been viewed as a routine administrative process became a more complex compliance exercise.[11]

H-1B and L-1 adjudications have continued under existing legal standards, yet practitioners observed sustained scrutiny of job duties, wage levels, and employer-employee relationships. Requests for Evidence remained common, particularly in cases involving third-party worksites, smaller or emerging companies, or roles that did not fit neatly into established occupational categories. Adjudicators focused closely on whether job descrip-

tions accurately reflected day-to-day duties and whether wage levels aligned with those duties.

Compliance review reinforces these trends. Site visits and post-approval inspections examine whether actual employment conditions matched representations made in filings. In practice, discrepancies – such as changes in work location, reporting structure, or job responsibilities – can trigger further inquiry even where petitions had already been approved.

Permanent residence pathways were similarly affected. Permanent labor certifications and immigrant petitions are now subject to extended processing times and increased evidence requests, with closer examination of recruitment practices, business necessity arguments, and employer financial documentation. For employers and sponsored employees alike, these delays complicate workforce planning and retention decisions.

The willingness to revisit longstanding aspects of employment-based immigration through executive interpretation reinforces the importance of cautious planning. Public debate and litigation during the year concerning potential restructuring of employment-based programs served as an additional signal of risk, even where proposals were not implemented as binding law.[12] A presidential proclamation titled "Restriction on Entry of Certain Nonimmigrant Workers," effective Sept. 21, 2025,[13] introduced a $100,000 fee for each H-1B visa application from overseas. Effective Feb. 27, 2026, DHS finalized a rule replacing a longstanding random H-1B lottery with a weighted salary system where applicants with higher prevailing wages will have a better chance of being selected for the H-1B quota.[14]

Concrete practice experiences illustrate these dynamics. Employers are encountering enforcement inquiries after discrepancies surfaced between payroll records submitted to tax authorities and wage information listed in visa petitions.[15] Multinational companies face delays when L-1 petitions are subjected to extended review of corporate structure and specialized knowledge claims. These outcomes are driven not by new legal requirements, but by more exacting application of existing ones.

For corporate and in-house counsel, what became apparent over the course of the year is that employment-based immigration now requires earlier planning, tighter documentation discipline, and realistic expectations regarding timing and scrutiny. Treating these filings as routine or low risk is no longer a viable approach.

Family-Based Immigration and Consular Processing: Predictability Erodes

Family-based immigration remained grounded in the same statutory framework during the administration's first year, yet the experience of families seeking reunification reflects increased scrutiny and diminished predictability. These changes affect not only immigration practitioners, but also family lawyers and others advising clients whose personal decisions intersect with immigration status.

"Individuals with pending or approved family petitions have encountered enforcement action following travel, background checks, or routine interactions with government agencies."

Adjudications of marriage-based and immediate-relative petitions continue to emphasize the bona fides of relationships. Over the course of the year, practitioners observed more frequent requests for additional documentation and interviews that delve deeply into financial integration, shared residence, and the consistency of personal histories. Waivers in green card marriage cases have become rare. While fraud prevention has always been part of the process, its application became more exacting, resulting in longer adjudications even in cases involving long-established relationships.

Consular processing adds another layer of uncertainty. Administrative processing following interviews became increasingly common, extending wait times with limited transparency regarding resolution. In some cases, applicants are required to process visas in their country of nationality rather than in third countries where they reside or work, increasing logistical and financial burdens for families.

A recurring issue throughout the year was the disconnect between petition approval and legal security. Approval of an I-130 petition does not confer lawful status, prevent detention, or bar the initiation of removal proceedings. In practice, individuals with pending or approved family petitions have encountered enforcement action following travel, background checks, or routine interactions with government agencies such as interviews with U.S. Citizenship and Immigration Services. These outcomes reinforce the need for careful counseling regarding the limits of family-based filings.

Public-charge considerations also feature more prominently in adjudications. Officers frequently request detailed financial documentation addressing income stability, assets, and support arrangements. The new rule asserts that immigrants who cannot be self-sufficient or supported by family or private entities should not be granted permanent status. However, the rule lacks guidelines for applying a public-charge test and leaves the determination up to government officials. Consulates have been instructed to consider the age and health of visa applicants in deciding if someone is likely to become a public charge despite not having the training to determine how health conditions and past benefit use predict future self-sufficiency. While the governing legal standards did not change by statute, their application requires thorough preparation and realistic client counseling.

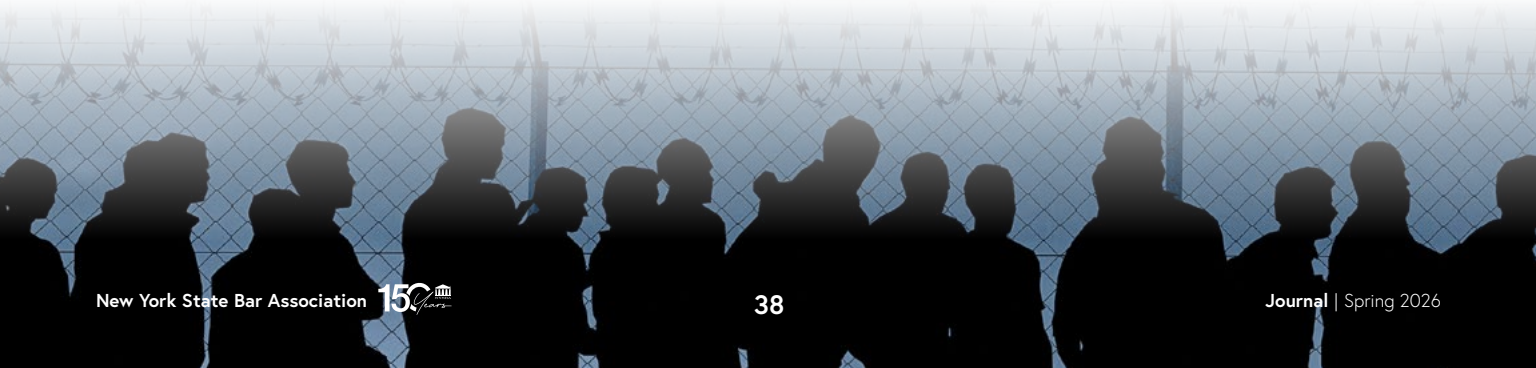
For lawyers advising families, the experience of the first year made clear that family-based immigration no longer offers the predictability it once did. Clients must be counseled candidly about processing delays, enforcement exposure, and the practical risks that exist even where eligibility appears straightforward.

Humanitarian Programs and Discretionary Relief: Fragility in Practice

Humanitarian immigration programs are grounded in statute, but their operation depends heavily on executive discretion. The administration's first year brought renewed attention to this reality, as discretionary relief mechanisms were reassessed, narrowed, or applied with increased caution. The termination of Temporary Protected Status programs for vulnerable communities ended work authorization and status for thousands of individuals. According to a Congressional Research Service report, as of March 2025, approximately 1.3 million foreign nationals from 17 countries were covered by temporary protected status programs.[16] Among the largest groups, 605,015 Venezuelan, 330,735 Haitian, 51,225 Honduran and 2,910 Nicaraguan as well as 3,860 Syrian nationals were protected under TPS. Many of these nationals' TPS designations were repeatedly extended for years, and in some cases decades. They now face the prospect of being forced to depart the United States with pending legal challenges offering only temporary relief in the face of mounting uncertainty. For individuals and institutions that rely on these programs, the year underscored how quickly humanitarian protection can become uncertain.

Asylum adjudication continued under existing legal standards, yet the process has become slower and more exacting. Credible-fear screenings, merits determinations, and procedural reviews reflect heightened scrutiny, contributing to growing backlogs and prolonged uncertainty for applicants. According to the Migration Policy Institute, the Trump administration all but ended refugee resettlement and sharply curtailed asylum processing, paused decisions on many asylum cases, and terminated humanitarian parole programs that previously provided temporary protection from deportation.[17] These policy shifts slow access to humanitarian protection relative to prior years. Litigation concerning asylum procedures, expedited removal, and access to hearings became more active, reinforcing that asylum law is shaped as much by judicial oversight as by agency practice.

Humanitarian parole continued to function as a discretionary, case-by-case mechanism. While parole has always been understood as temporary, developments during the year reinforced how dependent it is on executive priorities. In January 2025, Trump signed an executive order directing the Department of Homeland Security to terminate "all categorical parole programs" that conflicted with his immigration priorities. This order specifically targeted humanitarian parole programs that allowed nationals from Cuba, Haiti, Nicaragua and Venezuela to enter and reside temporarily in the U.S. with work authorization – programs that previously facilitated lawful entry and work for hundreds of thousands of immigrants. Public debate and litigation surrounding parole programs underscore the breadth of executive authority to grant, limit, or rescind such



relief, leaving beneficiaries with limited recourse when policies shift.

For criminal defense attorneys, nonprofit organizations, and social-service providers, these developments can have significant consequences. Clients who rely on humanitarian relief for stability often face narrowing options and increased enforcement exposure. The first year made clear that humanitarian programs, while critical, are among the most legally fragile areas of immigration law and require ongoing monitoring and contingency planning.

Business, Investor and Trade Immigration: Immigration as Transactional Risk

Business and investment-based immigration categories are often viewed as relatively stable, because they rest on long-standing statutory and treaty frameworks. Over the administration's first year, however, these categories demonstrated how sensitive even established pathways are to adjudicatory posture and enforcement emphasis. For corporate and transactional lawyers, immigration status increasingly emerged as a material operational risk.

E-2 treaty investor adjudications continued under existing standards, but practitioners observed more exacting review of source-of-funds documentation, business structure, and operational control.[18] Applicants are routinely asked to provide extensive financial records, including multi-year tax filings, banking histories, and evidence tracing investment capital through multiple entities. Interviews became longer and more detailed, and extensions of status are more likely to require in-person adjudication rather than paper review. For investors operating active businesses, this reduces predictability and complicates long-term planning.

EB-5 immigrant investor cases reflect similar trends.[19] While the statutory framework remains intact, adjudications place greater emphasis on lawful source and path of funds, regional center compliance, and project documentation. Processing delays affect project financing timelines and investor expectations, introducing uncertainty into development and capital planning.

Trade-based categories such as TN and E-3 visas remain available, but adjudications reflect closer scrutiny of job duties, credentials, and employer legitimacy. Outcomes at ports of entry and consulates are sometimes inconsistent, reinforcing the importance of precise documentation and advance legal preparation.

Immigration issues also arose indirectly in transactional contexts. Mergers, acquisitions, and corporate restructurings raised questions about visa portability, successor-in-interest obligations, and the impact of corporate changes on foreign national employees. In some matters, the immigration status of key personnel became a factor in deal timing, risk allocation, or valuation.

"International students and academic institutions experienced a noticeable shift during the administration's first year, not through elimination of student visa programs, but through increased oversight and compliance expectations."

What became evident over the course of the year is that business immigration cannot be treated as an ancillary concern. For companies and investors, immigration status affects continuity, compliance, and execution. Lawyers advising in these areas must identify the possible negative or positive consequences of immigration on any legal activity early on and integrate them into broader strategic planning.

Students, Scholars, and Educational Institutions: Compliance as Governance

International students and academic institutions experienced a noticeable shift during the administration's first year, not through elimination of student visa programs, but through increased oversight and compliance expecta-

tions. In May 2025, the Department of Homeland Security revoked Harvard University's certification to enroll international students under the Student and Exchange Visitor Program, a decision that would have prevented Harvard from hosting or enrolling foreign students. This action endangered the legal status of about 6,700 international students at the university and triggered a lawsuit by Harvard alleging retaliation and violations of constitutional and administrative law.[20] For education counsel and institutional advisors, immigration compliance increasingly became a core governance issue rather than an administrative afterthought.

Student visa adjudications continued under existing classifications, but processing delays and expanded vetting affected enrollment and financial planning, and student mobility. Consular interviews are more frequent, and applicants face increased questioning regarding academic intent, financial resources, and post-study plans. Security and background checks contribute to delays that disrupt academic schedules and research activities.[21]

Institutions faced heightened responsibility to maintain precise compliance with reporting obligations, particularly under the Student and Exchange Visitor Information System. Errors or delays in reporting enrollment changes, employment authorization, or address updates carried more serious consequences than in prior years. In practice, issues that once resulted in corrective action now risked status violations or the need for reinstatement filings.

For students, these developments reduced flexibility. Decisions about travel, employment, or program changes require careful legal review. For universities, the experience of the first year underscores the need for robust internal systems, staff training, and coordination across academic and administrative units.

The broader implication is that student immigration now operates within a compliance-intensive framework. Lawyers advising educational institutions or students must approach immigration status as an ongoing regulatory obligation rather than a one-time admissions issue.

Litigation and the Courts: Immigration Law Shaped in Real Time

The administration's first year reinforced the central role of the federal courts in shaping immigration law. Executive and administrative actions routinely triggered litigation, and judicial intervention often determined how – and whether – policies were implemented. As a result, immigration law during this period has evolved in real time, influenced as much by court orders as by agency guidance.

Administrative Procedure Act challenges featured prominently. Plaintiffs contested agency actions alleged to exceed statutory authority, depart from prior policy without adequate explanation, or fail to follow required procedures. For example, after the administration began mass terminations of international students' Student and Exchange Visitor Information System records and visa status in early 2025, numerous plaintiffs filed lawsuits challenging those actions under the Administrative Procedure Act, alleging that the government failed to provide explanation, notice, or lawful justification – classic Administrative Procedure Act grounds for claiming arbitrary and capricious agency action.[22] Courts found repeatedly that neither of the stated reasons for termination was permitted under applicable regulations, rendering the decisions arbitrary and capricious under 5 U.S.C. § 706(2)(A).[23] Courts responded with a range of outcomes, including nationwide injunctions and geographically limited relief.[24]

Constitutional claims also played a significant role. Executive initiatives affecting entry, citizenship, and enforcement priorities prompted challenges grounded in due process and equal protection principles. While many of these cases remain unresolved, their pendency alone influenced agency behavior and client decision-making. Lawyers frequently find themselves advising clients under standards that are subject to change on short notice.

Beyond high-profile challenges, individual litigation increased. Mandamus actions have become a more common tool for addressing prolonged adjudication delays involving employment authorization, adjustment of status, and other benefits. Habeas corpus petitions continue to serve as an essential mechanism for challenging detention practices, particularly in cases involving prolonged custody.[25]

Practice Lessons for Lawyers Across Disciplines

Taken all together, the developments of the administration's first year yield several lessons relevant to lawyers across practice areas.

First, immigration status must now be treated as a material legal consideration in a wide range of matters. Corporate transactions, employment agreements, criminal plea negotiations, family law settlements, academic admissions, and real estate transactions may all be affected by immigration

exposure. Early identification of these issues is essential, as delayed recognition often limits available options.

Second, approval does not equal security. The past year demonstrated repeatedly that approved petitions and pending applications do not insulate individuals from enforcement action. Continuous vetting and data-driven review mean that immigration status is subject to ongoing scrutiny. Lawyers must counsel clients accordingly, particularly with respect to travel, compliance, and criminal exposure.

Third, executive authority shapes practice even while contested. Litigation may ultimately constrain or overturn particular initiatives, but policies often affect outcomes long before courts issue final decisions. Lawyers must advise clients based on how the law is being applied in practice, not solely on anticipated judicial outcomes.

Fourth, interdisciplinary collaboration is no longer optional. Non-immigration lawyers must recognize when matters implicate immigration law and involve specialized counsel promptly. Informal or incomplete advice regarding work authorization, unlawful presence, or consular processing now carries heightened risk.

Finally, compliance culture matters. Clients who maintain consistent documentation, accurate reporting, and disciplined internal processes are better positioned to navigate a data-driven enforcement environment. Lawyers play a critical role in shaping that culture through proactive guidance and informed risk assessment.

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Addressing the Threat of Fake Job Candidates

By Priscilla Lundin

With the rise of artificial intelligence, remote hiring has entered a new era. Legitimate job candidates use AI tools to polish their resumes, cover letters and job applications; and deceptive candidates exploit AI tools to misrepresent their credentials, skills and experience. Threat actors, including those directed by state-sponsored regimes, leverage AI tools – including deepfakes and synthetic identities – to scale hiring fraud and evade traditional screening. In this new era, onboarding an AI-generated impostor into a remote role is not just a bad hire; it is a high-consequence business threat with potential far-reaching and overlapping employment, cybersecurity and sanctions consequences.

Experian's 2026 Future of Fraud Forecast highlights the top five fraud threats expected to have the biggest impact on business and consumers this year. Experian predicts that deepfakes will outsmart human resources, rating it as the second-highest threat. Employment fraud is set to escalate in the remote workforce as generative AI tools generate hyper-tailored resumes and deepfake candidates capable of passing interviews in real time. Experian believes that employers will unknowingly onboard individuals who aren't who they say they are on a much larger scale, giving bad actors access to sensitive systems. This emerging threat is expected to reshape how organizations verify identity and intent in the hiring process.[1]

Defining the AI Impostor: Deepfakes and Synthetic Identities

Deepfakes and synthetic identities are separate concepts that, when used together, form a single fraud: a deepfake impostor using a synthetic identity.

- **Deepfakes** are the result of visual/audio impersonation. A combination of "deep learning" and "fake," a deepfake refers to visual or audio content manipulated by advanced AI tools to change how a person, object, or environment appears. Deepfakes include: face swapping (digitally replacing one person's face with another); face re-enactment (altering a real person's facial features); face generation (creating an entirely fake person); speech synthesis (text to AI-generated voice); and voice cloning (mimics a real person's voice and speech patterns).[2] In 2025, advances in generative AI made it much easier "for just about anyone" to create higher quality deepfakes that are more realistic and harder to detect.[3]
- **Synthetic identity** is broader. It is a fabricated or heavily altered identity that combines real and fake data. Synthetic identity candidate fraud is defined by the Federal Reserve in the financial context as "[t]he use of a combination of personally identifiable information (PII) to fabricate a person or entity in order to commit a dishonest act for personal or financial gain."[4] Primary elements of personally identifiable information are identity elements that are, in combination, typically unique to an individual or profile; for example, name, date of birth, Social Security number and other government-issued identifiers. Supplemental elements of PII can help substantiate or enhance the validity of an identity but cannot establish an identity by themselves; for example, mailing or billing address, phone number, email address, or digital footprint.[5]

A deepfake impostor using a synthetic identity (AI impostor) uses a stolen, purchased, or fully synthetic identity with matching AI-generated fake information, such as a fake LinkedIn profile and engagement history, a fabricated resume, and an authentic-sounding cover letter. For a virtual interview, virtual onboarding and remote employment, the AI impostor animates the face of the synthetic identity with deepfake video and audio.[6]

"Generative AI has blurred the line between what it is to be a human and what it means to be a machine," said Vijay Balasubramaniyan, CEO and co-founder of Pindrop, an information security company, in an April 2025 CNBC article.[7]

Remote jobs are a gateway for AI imposters. According to the research and advisory firm Gartner, "The rise of AI-generated job seeker profiles means that by 2028 globally 1 in 4 applicants will be fake."[8]

"Deepfake candidates are infiltrating the job market at a crazy, unprecedented rate," said Balasubramaniyan in a July 2025 CNBC article.[9] He said his company caught a deepfake candidate called "Ivan X" internally who "represented himself as a Russian coder when he applied to Pindrop for a posted backend senior engineering role."[10] He seemed qualified on paper, but things fell apart during his virtual interview when the recruiter saw red flags: his facial expressions were out of sync with his words; his voice did not align perfectly with his lip movements; and he couldn't immediately respond when the recruiter asked an unexpected technical question, pausing unnaturally before answering.[11] Eight days later, "Ivan X" reapplied to the same posting through a different recruiter, using the same identity and credentials. Having already identified him as an AI impostor, human resources gave him a second video interview to collect more information. They were startled that "Ivan X" looked like a different person. When he abruptly dropped the call and then rejoined, his deepfake image had improved, "highlighting how quickly these bad actors can improve their use of technology," said Pindrop's Chief People Officer Christine Kaszubski Aldrich.[12]

North Korean Remote IT Worker Scheme Impacts National Security and Sanctions

The Democratic People's Republic of North Korea's remote IT-worker scheme is a years-long, regime-directed campaign using skilled tech workers posing as remote employees who use fraudulent identities from other countries to infiltrate companies in the U.S. and elsewhere.[13] Once hired, these workers route salaries and contract payments back to the North Korean regime, steal sensitive data, and, in some cases, threaten to leak or lock systems to extort additional payments – conduct U.S. authorities describe as directly funding prohibited weapons programs, including ballistic missiles.[14] U.N. officials estimate that North Korean IT-worker schemes have generated global proceeds of $250 million to $600 million annually since 2018, with some part of that coming from U.S. companies.[15]

Federal Agency Warnings: 2022-24

Beginning in May 2022, U.S. authorities issued a series of advisories and public service announcements to U.S. and foreign businesses, describing how IT workers acting on behalf of the North Korean state were obtaining remote positions using fraudulent identities with foreign and U.S companies and routing their salaries to the regime in violation of U.S. and U.N. sanctions. The May 16, 2022 joint guidance from the State Department,

Treasury, and the FBI emphasized the reputational and legal consequences for companies and individuals who enable or process transactions for North Korea, including possible sanctions designation under U.S. and U.N. authorities. That advisory identified "red flag indicators" for employers hiring remote workers, such as incorrect or frequently changing contact information; requests to ship company-issued devices to addresses not shown on identification documents; and stolen, altered, or otherwise falsified identity documents, including those created with image-editing software.[16]

On Oct. 18, 2023, an FBI public service announcement provided follow-up guidance for companies that had inadvertently hired, or suspected they had hired, synthetic North Korean IT workers. The announcement reiterated that the wages – totaling millions of dollars – were funding North Korea's weapons programs, including ballistic missiles, and warned that the same schemes can enable data theft and money laundering. The FBI urged employers to use live-video interviews and cross-check resumes against online profiles, independently verify contact and address details and scrutinize mismatches with shipping addresses for company equipment, and restrict remote-access and collaboration tools on corporate devices while reporting suspicious activity to the Internet Crime Complaint Center and other federal contacts.[17]

A May 16, 2024 FBI public service announcement shifted focus to "U.S.-based facilitators" – sometimes called "laptop mules" – who are paid to help North Korean IT workers secure fraudulent employment with U.S. companies by hosting them in domestic "laptop farms" and installing remote-access tools so overseas workers can appear to log in from the United States. That PSA urged employers to implement stronger identity-verification processes during hiring and onboarding; educate HR staff, hiring managers, and technical teams about foreign remote-worker schemes; and monitor applicants and employees for suspicious address changes, particularly just before company laptops are shipped to a purported U.S. location.

New York State Department of Financial Services Cybersecurity Advisory

On Nov. 21, 2024, the New York State Department of Financial Services issued an industry letter to the financial institutions it regulates, urging caution when hiring for all-remote technology positions. The department advised covered entities to:

- Raise awareness by briefing executives, HR, hiring managers, security teams and key vendors on North Korean remote worker risks and red flags.
- Strengthen hiring controls through tighter identity and background checks, live video interviews, multi-factor ID verification, IP address/location checks and careful reference checks.
- Harden and monitor remote access by enforcing least-privilege access (especially for technical roles), restricting remote-access tools, tracking corporate device use and location, and promptly investigating and reporting suspected North Korean IT-worker incidents to law enforcement and regulators (including NYDFS).[18]

KnowBe4 and Amazon Publicly Disclose Inadvertent North Korean Hires

On July 15, 2024, KnowBe4, a cybersecurity company that provides security awareness and simulated phishing training, discovered during the onboarding process for a remote software engineer that he was a North Korean IT worker. The company investigated, shared the collected data with the FBI and Mandiant, its cybersecurity expert, and confirmed that no illegal access had occurred and no data was compromised or exfiltrated. KnowBe4 chose to publicly disclose the incident – through a blog post, online FAQ, and press release/white paper – as a warning to other companies.[19]

In a July 23, 2024 incident-report blog post, KnowBe4's executive chair and founder, Stu Sjouwerman, explained that the company's internal investigation found that HR had conducted four separate videoconference interviews with the candidate, confirming that he matched the photo provided on his application. However, the candidate had altered the photo to create a profile picture that matched his face during the video interviews. The background check and other standard pre-hiring checks were performed and came back clear based on the candidate's stolen U.S. identity. The post-incident review found the background check inadequate: the names used were inconsistent, and references were not properly vetted, relying only on email references. He was discovered when unusual computer activity was flagged as soon as he logged in to his company laptop and began loading malware, triggering alerts to the company's Security Operations Center. When the security team reached out, the imposter claimed he was troubleshooting a speed issue, then became unavailable for a call and stopped responding. Security quarantined the workstation and later determined that during the 25 minutes the imposter was online, he had unsuccessfully attempted to manipulate session history files, transfer potentially harmful files, and execute unauthorized software.[20]

Sjouwerman reported that a key change in KnowBe4's practices is that the company no longer ships laptops directly to new employees' home addresses. Post-incident, KnowBe4 ships equipment to UPS-Store-style

pickup locations near the address on the job application and requires a photo ID check after other vetting is complete. This single step would have prevented the incident discussed in the previous paragraph.

On Dec. 20, 2025, Amazon disclosed that earlier in the year, the company's security monitoring had flagged unusual behavior on a company laptop assigned to a systems administrator. The device was physically located in Arizona, but the keystrokes reaching Amazon's Seattle infrastructure showed latency slightly above the normal threshold, "a subtle but telling indicator of overseas access."[21] Amazon Chief Security Officer Stephen Schmidt later noted that the company had prevented more than 1,800 suspected North Korean operatives from being hired using fake or stolen identities, a 27% quarter-over-quarter increase in 2025.[5] Schmidt and subsequent reporting described how Amazon combines AI-driven anomaly detection with manual review to spot suspected North Korean applicants, which included looking for inconsistent education histories, hijacked or suspicious online profiles and geographic discrepancies between claimed location and technical signals. Schmidt added that Amazon's visibility into large-scale cyber threats "gives us a responsibility to share what we're learning." He warned that "small details give them away," such as incorrectly formatted phone numbers and inconsistent education histories, and that tech and AI companies are "prime targets" for North Korean IT-worker schemes because they combine valuable data with remote roles that are easy to abuse.[22]

DOJ's Concerted Enforcement Response

In March 2025, the U.S. Department of Justice announced coordinated nationwide enforcement actions targeting North Korean remote-worker schemes, including indictments of multiple U.S.-based facilitators, searches of 29 laptop farms in 16 states, and evidence that more than 130 U.S. companies had been tricked into hiring North Korean IT workers.[23] In July 2025, the FBI issued a warning to U.S. businesses about North Korean IT workers and outlined steps they should take, including:

- Scrutinize identity and employment documents for inconsistencies and independently verify prior employment and education.
- Cross-check photos and contact details against social-media or other online profiles.
- Use unobscured live-video interviews and ask simple movement or location-specific questions to help detect AI-generated or manipulated video.
- Ship laptops and other equipment only to the address on the worker's identification and delay system access until background checks are complete.
- Train and brief HR, hiring managers, and third-party IT vendors about these schemes as contract IT work is a common way North Korean workers get in.[24]

In July 2025, in a case that received national attention, Christina Chapman, a 50-year-old Arizona resident, was sentenced in the U.S. District Court for the District of Columbia to an 8 1/2 year prison sentence, plus restitution of $284,566 in salary not yet paid to the North Koreans from their 309 inadvertent U.S. employers and a money judgment against her in the amount of $176,850. That amount was equal to the fees she received from the North Koreans for hosting a "laptop farm" at her home from 2020 to 2023, which generated more than $17 million in salaries funneled to the North Korean regime. Based on press releases and reporting, the unnamed victimized companies included a Fortune 500 car maker, a major television network, a Silicon Valley technology company, an aerospace manufacturer, a luxury retail company and a major media and entertainment company. According to reporting, Nike filed a crime-victim impact statement with the court, disclosing it had unwittingly hired a remote North Korean worker to whom they had paid about $70,000.[25]

In February 2026, 29-year-old Ukrainian national Oleksandr Didenko was sentenced to five years in prison for running an identity-rental service and paying U.S. hosts to operate laptops in several states; at least one was sent to Chapman's laptop farm. His operation helped North Korean IT workers get jobs at about 40 unnamed U.S. companies. He also agreed to forfeit more than $1.4 million and to pay restitution tied to the identity-theft conduct.[26]

The corporate victims of the North Korean IT worker scheme reflected in the DOJ prosecutions total 479 to date. There are hundreds more, reported Mandiant Consulting Chief Technology Officer Charles Carmakal at a May 2025 annual security conference media briefing in 2025: "Literally every Fortune 500 company has at least dozens, if not hundreds of applications from North Korean IT workers," he said, adding that nearly every chief information officer he has spoken to "[h]as admitted they've hired at least one North Korean worker, if not a dozen or few dozen."[27]

Conclusion

When KnowBe4 publicly disclosed its discovery of an AI imposter hire during onboarding, Sjouwerman had this advice: "If it can happen to us, it can happen to almost anyone. Don't let it happen to you."[28]

The first step in preventing an AI impostor from getting a foot in the door is to harden those doors, including those for staffing agencies and other third-party vendors. The FBI and the New York State Department of Financial Services recommend identifying and closing gaps in the end-to-end hiring process. Employer-facing alerts and articles on this subject provide valuable guidance.[29] Some large employers, including Google, have reintroduced mandatory in-person interview rounds – even for hybrid or remote roles – to address AI-assisted and deepfake-enabled interview fraud.[30]

Initiating and implementing changes to the hiring process require compliance not only with applicable federal laws and regulations, but also with the "rapidly expanding patchwork" of state regulation regarding AI use in hiring. For example, New York City employers and employment agencies must follow the requirements of Local Law 144 (effective 2023) for the use of Automated Employment Decision Tools. These tools substantially assist or replace discretionary decision-making in hiring or promotion for jobs used in New York City.[31] Technology and human resource managers will need to ensure they are in compliance with state law involving biometric verification privacy and will need to monitor evolving legislation.[32]

Being deceived into hiring an AI imposter is a now foreseeable risk in remote hiring; like other foreseeable high-impact threats, an organization may not be able to prevent every incident but is expected to plan for it.[33] It is also a foreseeable risk that the AI imposter is a state-sponsored actor. Strict liability exposure is an added sanctions risk even when victims lack actual knowledge as to where salary payments are going. This means that companies must take compliance programs into account and voluntarily report incidents to law enforcement in a timely manner.[34]

By analogy to ransomware, employers should plan for deepfake and synthetic-identity hiring risks with the same kind of risk-based, scaled-to-the-organization controls and incident-response planning, rather than waiting for a catastrophic incident to force change.[35]

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ABA Opinion 518 and the Evolving Role of the Lawyer-Mediator

By Ellen Waldman

The American Bar Association Standing Committee on Ethics and Professional Responsibility, in issuing Formal Opinion 518 in October 2025, has arguably done the mediation field a favor, although not everyone may agree. In revisiting lawyer-mediator obligations when dealing with unrepresented parties and clarifying a neutral's obligations to be truthful in an environment where negotiation deceptions abound, the opinion has prompted wide-ranging conversations about the permissibility of various tactics used to encourage settlement. Blanket confidentiality protections, while useful in encouraging party frankness, can have the unintended effect of dampening discussion of specific mediator maneuvers, including moves that might shade into misrepresentation. In focusing a spotlight on permissible strategies versus impermissible manipulations, Opinion 518 reminds us that the process only works so long as the integrity and trustworthiness of the mediator remain paramount.

The Doctrinal Divergence: Why Mediators Face Stricter Standards

Before examining the opinion's specific guidance, it is essential to understand the doctrinal foundation that creates asymmetric obligations for lawyer-mediators compared to lawyers representing parties in negotiation. This asymmetry is not accidental but reflects the fundamentally different roles these professionals occupy and the distinct reliance interests they create.

The Advocate's Safe Harbor: Rule 4.1 and Comment 2

As a reminder, Model Rule 8.4(c) imposes a "no-lie" zone for attorneys in both their personal and professional lives, prohibiting conduct involving "dishonesty, fraud, deceit or misrepresentation." Rule 4.1 forbids a lawyer "in the course of representing a client" from "making a false statement of material fact or law to a third person." However, as every practicing negotiator knows, Comment 2 carves out an exception to these rigorous probity requirements by categorizing "a party's intentions as to an acceptable settlement of a claim" and/or "expressions of opinion as to the value or worth of the subject matter of the negotiation" as falling outside the category of material facts. Consequently, lawyers who are functioning in a representational capacity have a hall pass to puff, exaggerate or misrepresent their clients' valuation of the case and willingness to settle.

As ABA Formal Opinion 06-439 articulates, counsel, in their role as advocate, may "downplay a client's willingness to compromise" or engage in "overstatements or understatements of the strengths or weaknesses of a client's position" without triggering Rule 4.1 or 8.4(c) liability. In practical terms, this means that a lawyer representing Party A can say "This is our final offer" when it is not, or can vastly overstate the strength of their case, and these statements fall outside the prohibition on false statements of material fact. All participants in the negotiation understand this dynamic and appropriately discount such assertions.

The Neutral's Obligation: Rule 8.4(c) Without Exception

Lawyer-mediators, however, occupy different ethical terrain. Because they represent no party, Rule 4.1 does not apply to them – they are not representing a client in the mediation. They remain subject to Rule 8.4(c)'s prohibition on conduct involving "dishonesty, fraud, deceit, or misrepresentation," but critically, that rule applies without the negotiation convention safe harbor that Comment 2 to Rule 4.1 provides.

Opinion 518's animating principle is straightforward: "False statements that would not be regarded as statements of 'material fact' under Rule 4.1, or violate Rule 8.4(c), coming from a party's lawyer are likely to be taken at face value coming from a lawyer-mediator precisely because of the lawyer-mediator's role as a neutral."

The Reliance Rationale

This doctrinal distinction rests on a reliance rationale. Parties engage opposing counsel with appropriate skepticism. They expect posturing, discount hyperbole, and take advocacy communications with a heavy dose of salt. But the lawyer-mediator's institutional role fundamentally alters the communicative context.

Mediators, having presented themselves as honest brokers above the competitive fray, have implicitly encouraged the parties to view what they say as wholly credible. "Given the lawyer-mediator's neutrality, parties are likely to trust the lawyer-mediator to play it straight, and to not exaggerate or make false statements designed to lead the parties to an agreement." Having been informed under Rule 2.4(b) that the mediator represents no party and serves a facilitative rather than representative function, parties reasonably expect unvarnished assessment. The mediator's neutrality creates enhanced reliance interests that Rule 8.4(c) protects and the puffing permission accorded advocates by 4.1 is simply inapplicable.

Clarifying the Mediator's Role to Unrepresented Parties

Opinion 518, formally titled "A Lawyer's Duties to Avoid Misleading Communications When Acting as a Third-Party Neutral Mediator," seeks to clarify two obligations. The first is set out in Rule 2.4 of the Model Rules of Professional Conduct and receives support in Standards I(A)(2) and VI(A)(5) of the AAA/ABA/ACR Model Standards of Conduct for Mediators. Essentially, Opinion 518 reiterates the lawyer-mediator's responsibility to ensure that parties understand the difference between a lawyer's role and function when operating as a third-party neutral as opposed to when functioning in a representational capacity.

It is critical that parties, especially when unrepresented or unfamiliar with the process, understand this role differentiation and appreciate how the constraints imposed by the mediator's neutral status will affect them throughout the process. Although emphasizing that the depth and detail of the role differentiation discussion will differ depending on the sophistication of the parties, the opinion suggests that simply saying, "I am a lawyer, but not YOUR lawyer in this process" is insufficient. Rather, the opinion repeats Rule 2.4's suggestion that mediators delve into such matters as the inapplicability of the attorney-client evidentiary privilege and advises that instead of simply issuing blanket statements in a retainer agreement or introductory remarks, mediators offer parties an opportunity to discuss what the lack of an attorney-client relationship with the mediator means in terms of parties' ability to develop fully informed judgments on the choices they face throughout the process.

The 'Best Interest' Prohibition

Although reminding lawyer-mediators of their duties to explain their role as neutrals hardly breaks new ground, the opinion's identification of one purported consequence of the non-partisan stance does introduce a restriction that some may view as problematic. In delineating the difference between lawyer as counsel versus lawyer as neutral, the opinion states:

> under the Model Rules, a lawyer must act in the client's interest. Various provisions of the Model Rules give expression to that responsibility, however, that is not the role of a lawyer-mediator. The lawyer-mediator's role is to assist the parties in resolving their dispute, regardless of where the interest of the party may lie.

As a consequence, the opinion circumscribes the commentary that a mediator might offer in the service of helping a party think through the possible benefits of accepting a particular offer. The opinion notes:

> the obligation to avoid misleading the parties about the lawyer-mediator's role also means that, in conducting the mediation, the lawyer should not state that ... a proposed settlement is in a party's best interest. ... Otherwise, the party may rely on the lawyer-mediator's assurance, mistakenly believing that the lawyer-mediator is acting in the party's best interest as the party's lawyer.

For those mediators who view their job helping both parties reach outcomes that, for each of them, was better than the alternative of surrendering decisional authority to a factfinder unaware of the goals, needs and interests animating the conflict, Opinion 518's stark declaration that a mediator's goal is to help the parties reach an agreement, irrespective of whether that agreement is in a (or either) party's best interest does not sit comfortably. The opinion seems to consign mediators to the limited role of

dispute settlement functionary, focused solely on closure regardless of consequence. The goal of achieving pareto-optimizing, interest-satisfying outcomes is reserved for parties and counsel.

Formulated by legal ethicists, not mediators, it is perhaps unsurprising that Opinion 518 presents a competitive, hyper-adversarial vision of the negotiation process, one where the best interest of one party is ineluctably achieved through the corresponding detriment of the other. We mediators, when striving to help incorporate the relational, emotional, reputational and even spiritual impacts of a dispute into the parties' calculus, like to imagine our work as helping parties reach a place of agreement where they are both better off than where they started and will likely end up if they continue in discord. Even if one party might, in settling in mediation, relinquish the satisfaction of a complete judicial victory, the field's premise is grounded in the assumption that both parties benefit from a cessation of hostilities and the preservation of financial, psychological and creative resources for other pursuits. If we are not committed to offering services designed to improve outcomes for parties, both individually and as a dyad, as compared to the alternatives they face in court or elsewhere, then I am not sure what value, as a field, we are offering.

The Legal Information/Legal Advice Boundary: Shifting Goal Posts

Part of the assistance mediators provide is helping parties think through the various risks, benefits and other consequences of choosing to settle versus continuing to negotiate or gambling on a courtroom verdict. All mediators would agree that when a party is represented, it is surely the attorney's – not the mediator's – role to advise whether to settle and on what terms. But the question of how to respond when a pro se party asks for guidance in the mediation process requires a more nuanced answer. Of course, mediators must remind the unrepresented parties that they are not their lawyer and cannot proffer legal advice. And all our ethical codes, including Opinion 518, recommend advising parties to "seek legal advice from counsel of their choice." But what if outside legal counsel is not available or affordable? What then?

While the opinion does not answer this perennial thorn in the thoughtful mediator's side, it does offer some guidance on what a mediator can and cannot say when trying to help parties reflect on the degree to which an offer satisfies their interests. While a mediator should be careful with both represented and unrepresented parties to avoid communicating in a way that parties might misinterpret as the rendering of legal advice, mediators may:

> provide legal information or discuss the parties' respective views of how a tribunal would resolve a legal or factual question. A mediator may offer an opinion as to how a tribunal is likely to rule on an issue, but the lawyer-mediator should not state or imply that a settlement is in the party's best interest because a tribunal is likely to decide adversely to the party.

In other words, it would seem acceptable for evaluative mediators to lead a party toward settlement waters with truthful information and modest prediction so long as they avoid telling the party that drinking would be in their best interests. Translating this into the mediation context, a mediator could say, "I suspect a fact-finder would likely determine the damages in this case to be somewhere in the range between a quarter and a half million dollars," but cannot follow up that prediction with, "and therefore, given the costs and stress of litigation, I think it is in your best interest to take the defendant's offer of $400,000."

In parsing what exactly a lawyer-mediator can and cannot say when helping parties think through their options, the opinion, perhaps inadvertently, makes its greatest contribution to the mediation ethics canon. It highlights the analytical shortcomings surrounding a formulation that our field treats as settled, but is, in fact, in transition.

Ethical codes, in an effort to encourage informed party decision-making and discourage heavy-handed mediator intrusion, almost uniformly parrot the same mantra. Mediators can offer legal information but must steer clear of legal advice. Yet this distinction is not uniformly defined or understood. And, indeed, it would seem that the goalposts are moving.

In 1999, the North Carolina courts noted that a mediator could "pose questions regarding the feasibility of a proposed settlement, but should … at no time … express an opinion about or advise for or against any proposal under consideration."[1] In 2000, the Dispute Resolution Commission of the Virginia courts identified a similar dividing line, stating that mediators, lawyers and non-lawyers alike, could offer general legal information in the form of brochures, statutes or cases, but could not "apply legal principles to facts in a manner that … predicts a specific resolution of a legal issue … or recommends a course of action by a disputant as a means of resolving a legal issue."[2]

Now, 25 years later, the mediation world – and ethics guidance – is changing. The current standards governing North Carolina's court-connected mediators advise practitioners that their first move when asked by disputants for their opinion is to encourage parties to utilize "their own resources" and avoid "imposing" the mediator's view of the merits of the dispute or the acceptability of any proposed settlement." However, the drafters clarify that "this subsection does not prohibit a mediator from expressing his or her opinion as a last resort to a party or attorney who requests it. …"[3]

Rule 3.857 of the California Rules of Court states that a California mediator may provide information or opinions

that he or she is qualified by training or experience to provide, and further Advisory Committee commentary clarifies that a mediator may opine on a "set of facts as presented" or express a "view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about … what position the participant should take in light of that opinion."[4]

The Florida Standards of Conduct for mediators leads with the admonition that mediators must not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute or direct a resolution of any issue. But this statement is followed by a grant of permission to "point out possible outcomes of the case and discuss the merits of a claim or defense."[5] Clarifying commentary specifies that a mediator may "raise issues, discuss strengths and weaknesses of positions and help evaluate resolution options." What a mediator can't do is opine on how the particular judge assigned to the case will resolve the matter if the parties don't settle.[6]

Following the permissive track set down in Florida, California, North Carolina and elsewhere, Opinion 518 invites lawyer-mediators to evaluate the strength of the parties' legal arguments and "offer an opinion as to how a tribunal is likely to rule on an issue," so long as the evaluation does not conclude with a concrete directive. Given that we have now redefined "legal information" to include the predictive application of law to the parties' specific facts, one might sensibly ask what work the prohibition against legal advice is doing. The opinion acknowledges as much when it states: "The lawyer-mediator may, of course, provide truthful information that helps the parties to conclude for themselves, or even makes it obvious to them, whether a proposed resolution is in their best interest, given their objectives."

If a mediator can provide sufficient legal information to make settlement desirability obvious to a party, and the only bar is to avoid the talismanic language "you should take this offer as it is in your best interest," we have to question whether the legal information/advice distinction continues to serve as a meaningful ethical boundary or merely formalistic distinction. Perhaps it is time to openly discuss the compromises we have struck in our effort to encourage informed party deliberations and respond to market demands for mediator input and evaluation. Surely, as ethical guidance increasingly acknowledges the prevalence of mediator influence on party decision-making, it is incumbent on counsel to schedule preliminary discussions with prospective mediators to ensure that the process the mediator plans to deliver aligns with counsel and parties' expectations.

Communicating With Parties: Avoiding Dishonesty, Fraud, Deceit and Misrepresentation

The second topic that Opinion 518 addresses is the lawyer-mediator's duties of scrupulous honesty when communicating with parties. While acknowledging that mediators, in conveying information learned in one caucus room to parties waiting in another, will "often provide mediation-appropriate insights" to help parties evaluate settlement opportunities, the opinion notes that the interplay of Rule 8.4(c) and Rule 4.1 Comment 2 imposes limits on what a mediator can say.

As noted earlier, whereas attorneys can bluff and bluster about how they value their case and what their clients will settle for, mediators cannot independently engage in the same behavior and cannot place their own imprimatur on a party or counsel's statement if they know that statement to be untrue.

Practical Implications

One obvious implication of Opinion 518 is explicitly stated in the text: "A lawyer-mediator must be both thoughtful and cautious in communicating information from one party to the other, and in answering questions that may be asked about the information communicated, or about the lawyer-mediator's views of the information."

For example, if counsel to Party A says in caucus, "We are offering $100,000 and this is our last and best offer," the mediator may safely convey to Party B that an offer of $100,000 has been made and that Party A says it is his last and best offer. What the mediator cannot do is lend credence to Party A's claim of immovability and finality, if the mediator knows it not to be true. A mediator may carry a party's "dirty water" – meaning carry an attorney's misleading hyperbole and downright misstatements that enjoy the safe harbor of Rule 4.1's Comment 2 from one caucus room to the other. But the mediator should not give credence to such statements, if the mediator knows them to be false, by suggesting that the mediator credits them and implying that the opposing party should as well.

One may ask about the impact of Opinion 518 on other common mediator behaviors. Take the commonly deployed technique that is presented in training programs as a clever dodge for defusing reactive devaluation bias. One party has a settlement idea; it's creative and it entails moving off a previously affirmed "final offer." But

the party does not want to claim ownership of the idea because of fears that it makes him or her look weak. So the party asks the mediator to present the idea as their own. Can the mediator do so?

Surely, the mediator could carefully wordsmith language to obscure agency by saying "an idea emerged in my discussion with the other side." And maybe, if asked point blank, "Was it the other side's idea?" the mediator could respond, "It seems like a good idea; does it matter?" But colloquies that previously did not require a mediator to deliberate over whether a response constitutes a little white lie now require more attention. As the opinion states, mediators need to be "thoughtful and cautious" as they continue to try and help parties find common ground in an environment where negotiators are allowed to adopt a slippery relationship to certain truths and where "imperfect information" is the coin of the realm.

Bright-Line Do's and Don'ts

Although incorporating the opinion's statements into practice requires nuance, we can extrapolate the following prescriptions.

- **Representations concerning settlement parameters.** A mediator cannot state "this is the best offer the opposing party will make" when that assertion is false. Such statements, while potentially permissible from party counsel as negotiation puffery, constitute actionable misrepresentation from a neutral. The prohibition extends to "any inappropriate gloss in describing to one party the position that the other party is taking." The mediator must convey party positions with precision, resisting the temptation to enhance their persuasive force through strategic reframing.
- **Crediting known falsehoods.** Even when accurately conveying party representations that constitute permissible negotiation puffery, the mediator cannot "give credence" to statements the mediator knows to be false "by suggesting that the lawyer-mediator credits them or by implying that the opposing party should do so." The mediator may transmit party statements that would qualify as puffery if made by counsel (assertions about settlement willingness, case valuation, or litigation strength) but must maintain clear attribution and avoid any communicative act that validates the substance.
- **Transparent conveyance.** Mediators may relay party statements, including those that would constitute negotiation puffery from counsel, "as long as the lawyer-mediator makes clear the origin of such statements and that the statements do not represent an opinion of the lawyer-mediator."
- **Facilitative information.** The mediator may "provide truthful information that helps the parties to conclude for themselves" whether a resolution serves their objectives. The distinction lies in enabling party self-assessment rather than usurping it. Determining how the delivery of information, including mediator opinion and forecasting, will function in any particular dispute scenario remains murky and a matter of debate.

Conclusion

When it comes to navigating the tricky line between facilitation, manipulation and deception, ABA Formal Opinion 518 clarifies what many practitioners intuitively understood but lacked the doctrinal framework to articulate: neutrality imposes distinctive obligations that transcend those applicable to advocates. By explicitly acknowledging that Rule 8.4(c) operates asymmetrically across professional roles, and in demanding greater communicative precision from neutrals precisely because neutrals occupy positions of enhanced trust, the opinion reminds lawyer-mediators of their obligations of probity and fidelity to the truth.

In limning the familiar contours of the information/advice divide, and expanding the definition of "legal information" to include opining on probable judicial outcomes, the opinion underscores the increasingly porous nature of a line that has traditionally undergird the ethical structure of the field. In so doing, the opinion has sparked useful conversation and should lead us to continue to ponder whether the conceptual structures erected in the field's infancy continue to supply useful guidance to a now established and ever-maturing profession.

This article appears in NY Dispute Resolution Lawyer, a publication of the Dispute Resolution Section. NYSBA.ORG/drs.

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Akshatha Achar, a recent graduate of Brooklyn Law School and former intern at the center, contributed to this article.

Endnotes

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What To Do if You Suspect Witness Coaching

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

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To the Forum:

I am a recently admitted New York lawyer. I was involved in a case in which parties were disputing ownership of a historical artifact from a foreign country that had mysteriously disappeared from a museum. I was taking a remote online deposition of an opposing witness, a curator of the museum where the artifact was last known to have been. He was represented by local counsel in the foreign country, who was off camera; only the witness was on camera. While English was not his first language, he spoke well enough that a translator was not used, but I could tell that he was uncomfortable speaking English. His counsel spoke fluent English. I began the questioning with elementary questions about the witness' name, location, background, and so on, questions that did not directly pertain to the dispute in the case.

From the beginning, the witness began to do something curious: after I would ask a question, he would remain silent for a few moments, staring in the general direction of the camera, then answer, and then he would stare off to his side, in the direction where I knew his counsel to be. I was not sure what to make of this. I know that it is unethical for counsel to coach his or her client during deposition, but I had never seen it done before, and so did not know quite what it looked like in practice. I was willing to chalk the oddity up to the witness' lack of proficiency in English.

When I got to the substance of the dispute, and the disappearance of the artifact, the peculiarities escalated. The witness started to take noticeably longer to answer my questions, and, upon finishing his answers, immediately turned to look in his counsel's direction. A handful of times he looked toward his counsel before or during his answer. Much worse, his counsel started to aggressively interfere in his answering. I would ask an appropriate and relevant question about the witness' knowledge of the museum's treatment of the artifact, and before the witness could answer, his lawyer would jump in, object that his client had no way of knowing the answer, and instruct his client either not to answer, or to answer with "I don't know." This happened multiple times, with varying reasons given for the objection: that his client was too high up to know the specific details of the artifact's treatment by other employees, or that his client had not been at the museum long enough to know. There were even a few times where the witness, after beginning an evasive answer to a question, would stumble over his English and pause, and then his lawyer would jump in and make the same objection, explaining that his client's hesitation in answering was due to lack of personal knowledge, and he would then direct his client to not answer further. Opposing counsel also made a slew of objections based on lack of foundation and the form of my questioning.

At first, I tried to reformulate my questions to somehow satisfy opposing counsel, but as he kept objecting, I got tougher and told the witness that I demanded that he answer my question as asked. Opposing counsel objected again, and the witness told me that he would not answer on advice of his counsel, parroting his counsel's reason: lack of personal knowledge, or lack of foundation, or bad form. There was even an instance where, after a break in which the witness' camera and microphone

were off, the witness came back and immediately gave an unprompted short speech about how he was not going to answer questions about how museum employees other than himself treated the artifact.

The result of the deposition was that the witness dodged many important substantive questions that he simply refused to answer. As both the witness and the attorney were in a foreign country, I didn't believe any order from a New York judge would have teeth, and that I would have to seek judicial intervention in the foreign country, an expensive and time-consuming process.

In any event, what troubled me was whether and to what extent the witness' counsel had improperly coached him. When the witness was looking to the side, or while his camera was off during break, was opposing counsel signaling to him as to how to answer? Was there any way for me to prove it? And considering that the witness repeated his counsel's objections to me, were such objections just subtle means of suggesting an answer to the witness? What tricks should I be on the lookout for in the future?

Sincerely,
N. Ept

Dear Mr. Ept:

Your question touches on something that many lawyers have experienced for themselves: depositions can sometimes feel like the gunfight at the O.K. Corral.

Depositions often present situations where the so-called adversarial process can start to really become adversarial. While there are many who will tell you that the rules applying to trials must be followed at depositions, the problem is that there is no judge to keep control or to shame participants into acting with civility. Put candidly, many lawyers are often nervous about the prospect of a clumsy witness letting slip into the record something that they perceive, albeit out of perhaps needless paranoia, to be mortally wounding to their preciously cultivated presentation of the facts. The lawyer defending the deposition peppers the questioning lawyer with the same vapid objections over and over until there is a blow-up. And, of course, no matter how loudly the lawyers may scream at each other, the court reporter is probably still transcribing each sentence of the exchange in nice little lowercase letters ending in a period, obscuring from future readers any embarrassing breach of decorum that might have taken place.

The point is that if you are a lawyer doing the questioning at a deposition, it is not just the witness' deposition; it is your deposition, and, keeping with the Wild West analogy, if order is to be maintained so that you can get on with your important work, you are going to have to be not just the lawyer, but the lawman, protecting your line of questioning from the bad actors who lie in wait to derail it.

Counsel for the witness may try to trip you up by instructing the witness not to answer your question. This can take the form of impermissible witness coaching. Preliminarily, let us be clear: witness coaching is not permitted by the Rules of Professional Conduct.[1] The New York Rules of Professional Conduct make clear that rules regarding the conduct of an attorney before a tribunal apply to conduct during depositions.[2] A lawyer must not, therefore, undermine the integrity of a deposition, including by eliciting false testimony from his own client.[3]

It matters not where the lawyer is in the world. In your case he was in another country. Still, a lawyer who is appearing in, and participating in, a New York action, before a New York tribunal, although that be in a remote deposition, is still subject to the New York Rules of Pro-

fessional Conduct as to his conduct toward the tribunal.[4] So don't worry – these rules have teeth even though the witness and his lawyer are in a foreign country.

Lawyers are not permitted to pass notes to a client witness during a deposition and, in our view, will cross the proverbial red line if a lawyer tries to instruct a client witness on how to answer a particular question. Arguably, there may be good reason for the attorney to interject – including attempting to undo the witness' perjury, or to correct an obvious mistake, either one that is so important that its correction is needed and appreciated by the other side (like a witness' grossly misrepresenting, through ignorance, which specific company in a conglomerate he works for), or one that is so trivial that no one will take offense at the lawyer's input ("you mean Tuesday, not Monday"). Such interjections are innocuous and may be welcomed. But barring that, it should be obvious that a lawyer can neither feed a friendly witness a string of answers to question after question, nor coach the witness on even a single question. Doing so is both a breach of court rules and ethical rules. This is because a witness' answer enters the evidentiary record produced by the disclosure stage in a case, and so a lawyer's manipulation, which is really a form of evidence tampering, is an activity that a lawyer, as an officer of the court, may not engage in.

It is also true that a witness cannot normally decline to give an answer, save for those specific exceptions set forth in 22 N.Y.C.R.R. Section 221.2, which states that a witness must answer all questions, except:

> (i) to preserve a privilege or right of confidentiality.
>
> (ii) to enforce a limitation set forth in an order of a court.
>
> (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.

Only a few kinds of objections are permitted in depositions, like form and lack of foundation. But if the witness can, he is required to answer notwithstanding objections, and upon his refusal to answer, the questioning lawyer can take the dispute to the judge, who is likely to compel answers. Thus, it is a violation of court rules, and an ethical violation, for a lawyer to instruct a deponent not to answer a question, unless the question falls into one of those three limited exceptions mentioned above, or be otherwise justified by CPLR Rule 3115. 22 N.Y.C.R.R. Section 221.2 makes this explicit: "An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision."

Lawyers can get themselves into trouble when they tell witnesses, "Don't answer that question." And, sadly, it is amazing that many lawyers simply do not understand the rules that limit the use of such an instruction at a deposition. A deponent cannot refuse to answer a question on the grounds that the question was already asked and answered.[5] Relevancy is not a basis on which to instruct a witness not to answer.[6] Excessive form objections are also discouraged and even sanctionable.[7]

In the event that a court does find that an attorney has obstructed a deposition, the court has practical measures that it can take. For example, the court may mandate that a further deposition takes place.[8] And it may appoint a special referee to oversee remaining depositions in the case pursuant to CPLR 3104, with costs of the referee possibly charged to the wrongdoing party.[9] The court may also impose sanctions on "any party or attorney" in a civil action under 22 N.Y.C.R.R. Section 130-1.1 when that attorney's objections or interruptions are characterized as frivolous.[10]

So, a lawyer cannot overtly tell a deponent what to say, and cannot, without good reason permitted by the rules, tell a witness not to answer. There are however certain lawyers who try to use a more subtle and nuanced way to violate the ban on witness coaching, thereby incurring the same judicial counteraction mentioned above – by interrupting or objecting with an intimation to the deponent of what his answer should be. This is ordinarily disallowed by court rules and ethical rules. In fact, 22 N.Y.C.R.R. Section 221.1(b) states: "Every objection raised during a deposition shall be … framed so as not to suggest an answer to the deponent … ." A lawyer can violate this rule in a few ways. One is by interrupting to follow up a questioner's question with the line "if you recall," "if you know," or "don't guess."[11] Another is by interrupting before the witness can answer, to state that the witness would not know the answer to the question.[12] Yet another is by interrupting before the witness can answer, to state what the witness ostensibly knows.[13] The lawyer's framing the interruption as a form objection requesting clarification of the question does not absolve him of the gratuitous suggestive material within the spoken objection. That is, he cannot say "objection to form because the witness would not know the answer to the question as asked." Nor can he gratuitously ask for clarification in a way that telegraphs to the witness what to say.[14] Another impropriety is to make such a lengthy barrage of the same objection that the witness adopts the objection as his answer to questions.[15] And of course, a lawyer may not secretly instruct a deponent on what to say during a break in the deposition.

Such witness coaching is a violation of New York Rules of Professional Conduct 3.3 (Conduct Before a Tribunal) and 3.4 (Fairness to Opposing Party and Counsel).[16] It is of course a violation even if it goes undetected by the other side. Sometimes witness coaching by means other than a lawyer's objections or interruptions is hard to detect. Especially when a deposition is conducted online; the questioning lawyer often cannot see exactly what the witness' lawyer is doing during the deposition.

Hidden witness coaching may come in the form of a lawyer's passing handwritten notes to his deponent client; texting his client; typing a note on his computer screen that his client can read; nodding, mouthing words, or writing notes to the side off camera; mumbling into the witness' ear; squeezing the witness' hand or straight-up instructing the witness on what to say during a break. All of it is improper but it can be difficult to detect. However, if proven, it is taken very seriously.[17]

So then, Mr. Ept, what should you have done in your deposition? First, as we see it, the non-party witness' counsel was clearly beyond the pale of acceptable behavior. He repeatedly interrupted your deposition before the witness could answer, instructing him not to answer, or instructing him to say, "I don't know." He even interrupted the deponent mid-answer to tell him to change his testimony to "I don't know." This was unambiguously wrong of him. His repeated objections infected the mind of the deponent, who began to parrot the same bad objections back at you. He also made a slew of form and foundation objections, probably sanctionable frivolous conduct per the cases above cited. And the result was that the witness refused to answer many important questions. It sounds as if you muddled through to the end without raising a confrontation with your adversary, resulting in much wasted time. While that is a serviceable approach inasmuch as it leaves you with a written record that you can then take to a judge and get at least a new deposition, you could have done better.

You need to remember that you are the master of your deposition, that you ask the questions, that the witness is legally required to answer them, and that there are almost no valid objections that can be made at a deposition – privilege, form, maybe foundation, and little else. You should not compromise, because the witness may not be available to testify at trial, especially in this case where the witness is a non-party residing in another country. So do not let your adversary bully you. As long as you remain civil about it, there is nothing wrong with being commanding and assertive, and telling him that his objections to form are frivolous, that your questions are properly worded, that he is illegally and unethically putting answers into the witness' mouth, that the deponent is required by law to answer, that his unprofessional conduct is being recorded, and that if he and the deponent continue to obstruct then you will halt the deposition and take the written transcript, and video record if available, to the judge, and have him or her compel the witness to answer, with a request for costs paid for the motion and the continued deposition. Remember: you are the lawman.

As for your suspicions that your deponent's counsel was signaling answers to him from off screen and instructing him on what to say during a break, it is unfortunately clear that you lacked hard proof of this. You had your suspicions and you had your grounds for suspicion: that the deponent kept looking off screen and gave a speech about refusing to answer questions immediately after coming back from a break. If you have such a suspicion, the most important thing to do is to document it in the record. If the witness keeps looking toward his lawyer, ask the witness what he is looking at and whether he is being coached, get his answer on record, and instruct him to stop looking off screen and to look at you, and if necessary and possible, halt the deposition and resume it in person with all persons in one room for you to monitor.

If you see him with papers in front of him, immediately halt the deposition, ask him what those papers are, and demand to be given a copy of them. If you hear your deponent receiving a string of text messages, demand to know who is texting him, and demand that he put his telephone away. If you believe that his lawyer has been coaching him during the break, then ask him about that, and instruct him that such coaching is improper. Do not be deterred from asking because of attorney-client privilege – it does not protect improper witness coaching. If the witness' counsel requests a break in the middle of a very specific unfavorable line of questioning, then demand that he tell you why – he must do so. If the

deponent comes back from a break and wants to change an answer, grill him on why. If the witness' counsel is making repeated form objections, ask him what the grounds for them are – he must tell you.

Put as much of this into the transcript as possible. You may be able to read it to the jury at trial, and if the witness' testimony becomes adverse, you can minimize the impact through recitation of the record. You may not be able to prove that the witness' counsel is coaching him, but you will have evidence toward it, and who knows – maybe the lawyer or the deponent will slip up and tell you something that you can take to a judge. You should never surrender to their insidious tactics. If you keep up the pressure on them and keep them aware of where the ethical and legal red lines are, then you will get the most out of the deposition and will be in the best position to achieve a win for your client.

Sincerely,
The Forum, by
Vincent J. Syracuse, VSyracuse@thsh.com
Jean-Claude Mazzola, jeanclaude@mazzolalindstrom.com
Adam Wiener, adam@mazzolalindstrom.com

QUESTION FOR THE NEXT FORUM

To the Forum:

I am a longtime New York lawyer, and a very busy one. I am writing because I have recently had to deal with the use of artificial intelligence to record conversations and meetings. AI has made it easy to create transcripts of conversations, especially on Teams or Zoom calls. All one has to do is press a button and, like magic, the result is a record of the conversation that includes transcripts and summaries that recognize voices to determine who is speaking. Some of this technology even edits out foul language. I am concerned that the use of this technology creates risks and all sorts of ethical pitfalls. I know that I cannot record conversations with clients without their consent, but what rules apply when clients record conversations with me? Do I have an obligation to discuss the use of AI and its risks, including attorney-client privilege issues? Additionally, is this something that I should address in my engagement letters?

The use of AI technology to create notes and transcripts is not limited to attorney-client conversations. I know that my clients are being told that handwritten notes are old fashioned and that they should buy hardware that automatically creates transcripts of all conversations and meetings. Some of my clients are also using AI to summarize documents and meetings, which are sometimes sent to me, but I am concerned that they may become discoverable and whether they are privileged materials.

I recognize that the rules regarding the use of AI in the situations that I have outlined are rapidly evolving, but I would appreciate guidance from you that would put me on the right track.

Sincerely,
G O. Skynet

Vincent J. Syracuse is a founding partner of Tannenbaum Helpern's litigation and dispute resolution practice and has 50 years of experience in litigation. He received NYSBA's Sanford D. Levy Professional Ethics Award and has chaired NYSBA's program on ethics and civility for over 20 years. He co-chairs the Ethics Committee of the Commercial and Federal Litigation Section. He has been a co-author of the Attorney Professionalism Forum since 2012, which was published in a collection in 2021.

Jean-Claude Mazzola is founding partner of Mazzola Lindstrom LLP with over 25 years of experience as a commercial litigator. He is chair of NYSBA's Committee on Attorney Professionalism.

Adam Wiener is an associate attorney at Mazzola Lindstrom LLP, where he focuses on contract law, bankruptcy, real estate finance, defamation, and constitutional law.

Endnotes

1. N.Y. RPC 3.4(a) and its Comment [1].
2. N.Y. RPC 3.3, Comment: [1] (because a deposition is "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority").
3. *Id.*, Comments [5]-[6].
4. *See* N.Y. RPC 8.5(b)(1) (("For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits")). *Cf. id.*, Comment [1] ("the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the conduct occurs"), and Comment [7] ("The choice-of-law provision applies to lawyers engaged in transnational practice").
5. *Rodriguez v. Goodman*, 2015 N.Y. Slip Op. 31412(U) (Sup. Ct., New York Co., 2015).
6. *Brightman v. Corizon, Inc.*, 72 Misc. 3d 1213(A) (Sup. Ct., New York Co., 2021).
7. *Phillips Auctioneers v. Grosso*, 2023 N.Y. Slip Op. 31051(U) (Sup. Ct., New York Co., 2023) ("Although objections to the form of the question are permitted under CPLR 3115(b), [attorney's] form objections were excessive. In fact, she asserted over 100 form objections, which is an independent basis for sanctions alone").
8. *Terzi v. Fortune Home Builders*, 2009 N.Y. Slip Op. 30871(U) (Sup. Ct., New York Co., 2009).
9. *Slapo v. Winthrop Univ. Hosp.*, 186 A.D.3d 1281, 1283-1283 (2nd Dep't 2020).
10. *Freidman v. Fayenson*, 41 Misc. 3d 1236(A) (Sup. Ct., New York Co., 2013); *Ortega v. Rockefeller Ctr. N. Inc.*, 2014 N.Y. Slip Op. 33667(U) (Sup. Ct., New York Co., 2014) (imposing costs of motion and of continued deposition).
11. *Freidman* (ruling that statements of this type are improperly coaching or suggestive because they prompt the witness to say "I do not recall").
12. *Rodriguez.*
13. *Id.*
14. *Guggenheim Sec. v. Falcon's Beyond Glob.*, 2025 N.Y. Slip Op. 33769(U) (Sup. Ct., New York Co., 2025) (lawyer said, in response to a question to the witness, "Post closing?," prompting the witness to adopt his words and ask, "Post closing?").
15. *Id.* (witness started to make form and asked-and-answered objections that his lawyer had been making).
16. *Sciara v. Surgical Assoc.*, 32 Misc. 3d 904 (Sup. Ct., Erie Co., 2011).
17. *See Fla. Bar v. James*, 329 So. 3d 108 (Fla. 2021) (attorney suspended for 91 days for texting deposition answers to his deponent client; he accidentally sent some texts to the questioning attorney, who forced disclosure of all texts).

AI Accelerates Operational Intelligence, Not Wisdom

The Legal Profession Spent Decades Mistaking One for the Other

By Libby Clark

The debate over artificial intelligence in law misses the fundamental issue: the profession's decades-long erosion and underinvestment in the development of the human capacities that technology cannot (and will not) replace. What appears to be a technology problem is an institutional one.

I have spent decades inside the wellbeing reform movement, hosting the Lawyer-to-Lawyer Wellbeing Roundtable, speaking at conferences, and leading workshops on the profession's structural contributions to the ills plaguing the profession. This vantage point reveals that AI has brought every underlying weakness into focus at once. As automation accelerates operational intelligence, it makes human judgment the limiting factor in legal legitimacy. The future of law will belong to professionals capable of deciding under pressure, taking responsibility without procedural cover, and exercising ethical stewardship when systems cannot resolve value conflicts. What must be restored is not a better toolset, but the human disciplines that technology cannot supply and institutions neglected to cultivate: the willingness to decide, to take responsibility, and to hold the line when systems cannot.

Law evolved to manage risk through precedent, process, and delay – structures that are legitimate and necessary features of any institution. Precedent preserves continuity; process enables coordination; structured deliberation allows for reflection. But over time, law has increasingly used these structures defensively, as shields against accountability rather than frameworks for judgment. Precedent, when divorced from judgment, reduces exposure by anchoring decisions in what "had always been done" rather than serving as a framework for interpretation. Process diffuses responsibility across institutions in ways that could enable collaboration but increasingly serves to enable individuals to avoid accountability. Delay – which can enable reflection – is used to soften hard choices or make them disappear altogether. These structures worked when information was scarce and time was the constraint. Over time, they have also ensured that judgment was no longer institutionalized as a measure of value.

AI removes all the former scaffolding – both good and bad. It eliminates delay, compresses precedent, and automates pattern recognition at a scale no human can match. What once required teams, time, and billable hours now happens in seconds. This is not necessarily a threat to law as a societal function, but rather the logical conclusion of how the business of law commodified itself. The profession spent decades mimicking machine logic – scale, speed, volume – while abandoning the human disciplines that gave precedent, process, and deliberation their meaning. Now AI does the machine part better than we ever could. However, we optimized for operational intelligence and hollowed out the judgment that legitimacy requires. Once the scaffolding falls away, what remains becomes clear: sound judgment, ethical stewardship, and the willingness to take responsibility for outcomes when process, precedent, and delay no longer provide cover. These capacities have not been institutional strengths because they were never systematically trained, reliably rewarded, or structurally reinforced. Rather, they have always been individual ones – and now they may be the only ones that ever really mattered.

The prevailing assumption in legal discourse is that artificial intelligence will reduce the need for human involvement by making legal work faster, cheaper, and more accurate. This assumption is backwards. As automation

takes over the tasks that passed once for judgment (i.e. precedent matching, risk flagging, pattern recognition), it does not eliminate the need for human judgment. It concentrates responsibility in the decisions that remain: the ones involving ambiguity, competing values, incomplete information, and unpredictable consequences. Fewer lawyers will touch more consequential choices. The margin for error will narrow, not expand. In this environment, the absence of cultivated judgment is not merely inefficient; it is dangerous.

In practice, judgment is what remains when automated outputs conflict, when data is incomplete, when values collide, and when consequences cannot be predicted. It is the capacity to decide which risks are tolerable, which outcomes are unacceptable, and which principles must govern when no rule clearly applies. These decisions cannot be optimized or outsourced. They must be owned. In our most recent past, the lawyers who exercised real judgment by telling uncomfortable truths, making unpopular calls, and accepting accountability, were tolerated, sometimes admired, and often penalized. Risk minimization was rewarded. Moral clarity was not. Judgment existed, but it lived at the margins.

The cracks were visible long before AI forced a reckoning. Wellbeing initiatives and calls for reform revealed a profession trained to execute process – often at superhuman scale – while neglecting the cultivation of judgment. Precedent, meant to anchor judgment and preserve continuity, was increasingly used as a shield against responsibility rather than a framework for interpretation. Process and delay absorbed work that judgment once carried.

The problem, then, is not that law failed to adopt technology responsibly. It is that the profession has failed to treat judgment as a trainable, accountable discipline. Legal education has emphasized analysis without consequence. Professional advancement rewards risk avoidance over decision-making. Institutions are optimizing defensibility rather than discernment, and now AI simply exposes what the system deprioritized for decades.

That exposure brings the profession to a convergence point where the stakes extend beyond practice and into legitimacy itself. The rule of law does not rest on speed, scale, or predictive accuracy. It rests on human judgment exercised openly and with accountability, especially when precedent is thin and pressure is high. When judgment is replaced by process, law becomes procedural rather than principled. When responsibility is endlessly diffused, legitimacy erodes.

Yet much of the profession's response to AI reflects mimicry rather than adaptation: ethics frameworks without ownership, AI policies without judgment, systems still designed to avoid responsibility. The profession is using AI to double down on the structures that hollowed out judgment in the first place.

What the debates over AI, lawyer wellbeing, the billable hour, and the rule of law all reveal is the same underlying loss. The profession did not simply become inefficient, overworked, or technologically exposed. It lost its sense of itself as the "system architect": the designer and steward of accountability, judgment, and institutional integrity. Lawyers should be the professionals who build intentional structures that protect space for human judgment. These containers preserve slowness, deliberation, and reflection where those serve human values, not where they serve gatekeeping, bureaucracy, or professional monopoly. Instead, our profession has used delay to protect turf rather than to protect judgment. It has defended process as a barrier to entry rather than as a framework for accountability.

Autonomy became risk. Judgment became inefficiency. Ethics became compliance. Counsel became output. Lawyers were trained to execute process and manage exposure, rather than to exercise judgment and responsibility inside living systems. The machinery grew more sophisticated even as the vocation hollowed out.

Recent scholarship has begun to identify these structural vulnerabilities, with Woodrow Hartzog and Jessica Silbey arguing in "How AI Destroys Institutions" that AI's core affordances (i.e. undermining expertise, short-circuiting decision making, and isolating humans) are inherently destructive to civic institutions, including law. While the analysis is both necessary and illuminating, the legal profession's particular vulnerability to these dynamics is not accidental or the result of AI alone. It results from decades of failing to treat judgment as a trainable, accountable discipline. Human-centered language, absent structural accountability, reproduces the very dynamics that hollowed out judgment in the first place. Structural accountability means the institutions that cultivate judgment also bear responsibility for its exercise – where consequences flow back to the source. Without that, training is content (by "content creators"), rather than intentional implementation with reinforcement by the professional institutions themselves.

AI did not cause this reckoning, but it has brought every underlying weakness into focus at once.

Libby Clark writes about the impact of emerging technology on the legal profession. She is the first chair of the New York State Bar Association's Standing Committee on Attorney Well-Being and co-chair of its Attorney Well-Being Task Force. In 2023, she co-founded LikeWell.Org with Dr. Kerry Murray O'Hara, PsyD, an education and training platform for the legal profession built on the premise that "the future of law is human." Clark is a former general counsel and chief operating officer who now acts as outside general counsel and strategic adviser to leaders and organizations on high-stakes judgment under pressure.

Save Me!

By David Paul Horowitz and Katryna L. Kristoferson

A Magnificent, Benevolent Statute

CPLR 205(a) is a statute every New York State litigator must be familiar with. Known as the "savings statute," the statute (and its predecessors) "has existed in New York law since at least 1788," and traces "its roots to seventeenth century England."[1] The Court of Appeals in *Malay v. City of Syracuse*[2] explained in 2015:

> The statute and its predecessors were "designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits" (citation omitted), by "remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has had timely notice of the action." … The statute's "broad and liberal purpose is not to be frittered away by any narrow construction."

The Second Department further explained:

> CPLR 205(a) and its predecessors were "designed to insure to the diligent suitor the right to a hearing in court [until he or she] reaches a judgment on the merits." The "core purpose" of the statute is to provide "a genuine bite at the apple," by "remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has had timely notice of the action." In other words, CPLR 205(a) provides "a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim."[3]

Put another way:

> The general intent of the statute is to accommodate plaintiffs whose actions are dismissed for mainly procedural reasons which do not implicate personal jurisdiction, laxness, or the merits, particularly since the defendant has had timely notice of the action.[4]

But It's Not for Everyone

Notwithstanding its "broad and liberal purpose," the statute excludes from its warm embrace dismissals based upon four enumerated bases:

1) Voluntary discontinuance.
2) A failure to obtain personal jurisdiction over the defendant.
3) A dismissal of the complaint for neglect to prosecute the action.
4) A final judgment upon the merits.

In 2008, the statute was amended in tandem with CPLR 3216 to add predicate requirements to be taken by a court where the court seeks to dismiss a pre-note of issue action for neglect to prosecute. The amendment added the following requirement when a court serves a CPLR 3216 demand to resume prosecution:

> Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

In *Woloszuk v. Logan-Young*[5] the Fourth Department reversed a dismissal under CPLR 3216 where the trial court's court-served demand failed to comply with the necessary requirements.

For Everyone Else …

In all other situations where an action is dismissed, the statute provides in pertinent part:

> If an action is timely commenced and is terminated in any other manner … the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

A Corollary Statute for Certain Actions Involving Real Property

Effective Dec. 30, 2022, a new CPLR provision, CPLR 205-a, titled "Termination of certain actions related to real property," was added.[6] It encompassed and was limited to: "action[s] upon an instrument described under

subdivision four of section two hundred thirteen of this article." If you are like us, you'll have to look that up, so we'll save you the trouble. CPLR 213(4) applies a six-year statute of limitations to:

> 4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;
>
> (a) In any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.
>
> (b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.

However, there are four critical areas where the two statutes differ, and those differences all serve to restrict the applicability of CPLR 205-a when compared with CPLR 205(a):

(1) CPLR 205-a expands the concept of a "neglect to prosecute" a prior action, which, when applicable, precludes a plaintiff from commencing a new action.

(2) "Section 205-a provides, in subdivision (a)(2), that a plaintiff in a mortgage foreclosure action is entitled to only one qualifying six-month grace period. For other actions not involving mortgage foreclosure and that instead are governed by CPLR 205(a), there is no restriction on the number of times that a plaintiff may qualify for a six-month statutory grace period."

(3) "Under section CPLR 205-a, a successor in interest or an assignee of the original plaintiff may not commence a new action unless it pleads and proves that such successor or assignee is acting on behalf of the original plaintiff."

(4) "Acts that must be accomplished within each statute's respective six-month grace period."[7]

CPLR 205-a Is Less Tolerant of Neglect

While CPLR 205-a permits the same six-month period for the commencement of a new action, it has far greater exclusions from its protection than CPLR 205(a), barring re-commencement if the underlying action is dismissed by:

1. A voluntary discontinuance.
2. A failure to obtain personal jurisdiction over the defendant.
3. A dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision 3 of Section 3126, Section 3215, Rule 3216 and Rule 3404 of this chapter.
4. For violation of any court rules or individual part rules.
5. For failure to comply with any court scheduling orders.
6. By default due to nonappearance for conference or at a calendar call.
7. By failure to timely submit any order or judgment.
8. Upon a final judgment upon the merits.

As Many Bites at the Apple as You Like Under 205(a)

The Second Department in *Tumminia v Staten Is. Univ. Hosp.*[8] addressed the issue of whether CPLR 205(a) was only available one time to a plaintiff, or whether a plaintiff could invoke the savings statute on multiple occasions so long as all the criteria in the statute were satisfied on each occasion, and resolved the question by holding that multiple invocations were permissible:

> The issue of whether CPLR 205(a) permits a litigant to file an otherwise untimely new action within six months of the dismissal of a prior action where

> that prior action was, itself, only made timely by a previous application of CPLR 205(a) appears to be an issue of first impression in the New York State appellate courts. Respectfully, we disagree with the Second Circuit and conclude that the plain language of CPLR 205(a) does allow for such a successive application of CPLR 205(a).

"When resolving a question of statutory interpretation, the primary consideration is to ascertain and give effect to the legislature's intent." The "plain language of the statute [is] 'the clearest indicator of legislative intent.'"

Given that *Tumminia* was a matter of first impression, in a subsequent New York Supreme Court case, *Estate of Aida Figueroa v. Jewish Home Life Care, Manhattan*,[9] Justice Gerald Lebovits was confronted with the issue of the retroactivity of the decision, and held:

> *Tumminia* announced no new rule. To the contrary, the Second Department reached its conclusion based on the language of CPLR 205-(a). Accordingly, this court concludes that *Tumminia* applies to actions pending when it was issued.

Only One Bite Under 205-a

Noting the plain language of the recently enacted CPLR 205-a, the *Tumminia* court held that a plaintiff was limited to one bite of the apple under the new statute:

> The newly-enacted CPLR 205-a(a)(2) specifically provides that "in no event shall the original plaintiff receive more than one six-month extension." Although FAPA made a change to CPLR 205 by providing that CPLR 205 "shall not apply to any proceeding governed by" CPLR 205-a (citation omitted), it did not add a similar provision to CPLR 205(a) stating that the original plaintiff shall not receive more than one six-month extension.

Eligible Plaintiffs

The Court of Appeals in *Ace Sec. Corp. v. DB Structured Prods., Inc.*[10] adhered to the statutory intent underpinning CPLR 205(a):

> Where, as here, the litigant commencing the second action is not the original plaintiff, application of CPLR 205 (a) would protect the rights of a dilatory – not a diligent – suitor. By failing to bring the action within the statute of limitations, HSBC signaled that it had no intention to pursue its claims in court. CPLR 205 (a) does not apply and HSBC's failure to commence an action within the statute of limitations is fatal.

Unlike CPLR 205(a), CPLR 205-a, which contains the same language as the original statute, to wit, that "the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator," spells out in subsection (a)(1):

> (1). a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff[.]

How Are the Six Months Measured?

A party intending to commence a new action under CPLR 205(a) or CPLR 205-a must do so "within six months after the termination." Of course, in order to ascertain the deadline by which a new action must be commenced, it is necessary to establish the "termination" date for the original action (accrual date).

As with many other procedural issues, there is a split in authority among the departments. Prior to the 2026 decision in *HSBC Bank USA, N.A. v. Hillaire*,[11] the Second Department also had no clear answer. *Hillaire*, a decision by Justice Mark Dillon, flagged the differing standards among the departments and within the Second Department, and enunciated a bright line rule:

> Cases from the Appellate Division, First, Third, and Fourth Departments, have measured the six-month grace period pursuant to CPLR 205(a) as running from either the date of the dismissal itself or the entry date of an order of dismissal without imposing any waiting period for service of the order of dismissal with notice of entry or for the potential filing of a motion for leave to reargue, a motion for leave to renew, or an appeal. In other words, appellate cases throughout the State, and within our own judicial department, are not uniform. The trial bench and the practicing bar are entitled to judicial clarity on this issue.

Justice Dillon highlighted the conflicting interpretations:

> Under certain circumstances, both statutes [CPLR 205(a) and CPLR 205-a] permit the plaintiff a six-month window to recommence an action that otherwise would be untimely, measured from the "termination" of a prior action. Is the termination of the prior action the date an order of dismissal is executed by the court, the date the order of dismissal is entered with the clerk, or the date that the order of dismissal is served upon other parties with notice of entry? Is the termination of the prior action delayed 30 days for the potential filing of a notice of appeal pursuant to CPLR 5513(a) or a motion for leave to reargue pursuant to CPLR 2221(d), and further delayed by the appellate process when an actual appeal is undertaken, or is there no termination of the prior action until a final judgment is entered or served with notice of entry?

For those of you clutching your chests while simultaneously dialing 911, Justice Dillon mercifully opened the decision with the court's holding:

> We conclude, for reasons stated below, that when no appeal is taken by a party from an order of dismissal, the six-month period for recommencing an action under CPLR 205-a, and by extension under CPLR 205(a), begins to run once 30 days have elapsed following service of the order of dismissal with notice of entry.

However, and this is a big however, to the extent there is contrary case law in the other departments, the *Hillaire* decision is only binding in the Second Department.

And if an Appeal Has Been Taken …

The Court of Appeals in *Malay*, *supra*, held:

> [T]his Court has not addressed the issue of when a prior action terminates for purposes of CPLR 205 (a) where, as here, an appeal is taken as of right but is dismissed by the intermediate appellate court due to the plaintiff's failure to perfect. We resolve that question now by adhering to the *Lehman Bros.* decision and holding that, where an appeal is taken as of right, the prior action terminates for purposes of CPLR 205 (a) when the nondiscretionary appeal is truly "exhausted," either by a determination on the merits or by dismissal of the appeal, even if the appeal is dismissed as abandoned.

Act(s) Required Within the Six-Month Period To Recommence

This is perhaps the most dangerous difference between the two statutes, and the issue that was critical in *Hillaire*:[12]

> Whereas CPLR 205(a) requires that service of process for a recommenced action merely be "effected" upon defendants within six months from the termination of the prior action, CPLR 205-a requires that service of process be "completed" within that same time period. The language of CPLR 205-a places more time pressure upon plaintiffs to successfully recommence actions, as the additional time for completing service of process, rather than merely effecting service of process, upon defendants eats into the operative six-month statutory period.
>
> …
>
> Thus, plaintiffs seeking to recommence mortgage foreclosure actions under CPLR 205-a must necessarily budget more time for both effecting and completing service of process than may be required when CPLR 205(a) is applicable.

So, was service completed in *Hillaire* within the six-month period?

> In this appeal, the dismissal order, directing dismissal of the 2013 action, was e-filed and served with notice of entry on March 29, 2022. Contrary to the defendants' contention, for the purposes of CPLR 205-a, the 2013 action terminated when the plaintiff's right to appeal expired 30 days later, on April 28, 2022. There was then a six-month grace period in which the plaintiff was permitted to commence a new action and complete service, ending on Oct. 28, 2022. Insofar as this action was commenced on Sept. 9, 2022, and the defendants concede that the plaintiff completed service upon them on Oct. 20, 2022, less than six months from the termination of the 2013 action, this action was timely commenced.

Accordingly, the Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.[13]

Conclusion

The gift that both CPLR 205(a) and CPLR 205-a affords some litigants is vivifying; squandering it is a malefaction. Although many practitioners will spend their entire careers without needing it, for those who do the savings statute will likely be the greatest gift they receive from the CPLR.

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 Elisabeth Haub School of Law at Pace University.

Endnotes

1. *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017).
2. 25 N.Y.3d 323 (2105).
3. *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017).
4. *HSBC Bank USA, N.A. v. Hillaire*, 2026 N.Y. Slip Op. 00353 (2d Dep't 2026).
5. 237 A.D.3d 1497 (4th Dep't 2025).
6. A.07737, 2021 Assembly (N.Y. 2021), https://nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=A07737&term=2021&Summary=Y&Memo=Y&Text=Y.
7. *HSBC Bank USA, N.A. v. Hillaire*, 2026 N.Y. Slip Op. 00353 (2d Dep't 2026).
8. 241 A.D.3d 17 (2d Dep't 2025).
9. *Estate of Aida Figueroa v. Jewish Home Life Care, Manhattan*, 2025 N.Y. Slip Op. 25276 (Sup. Ct., New York Cty. 2025).
10. 38 N.Y.3d 643 (2022).
11. *HSBC Bank USA, N.A. v. Hillaire*, 2026 N.Y. Slip Op. 00353 (2d Dep't 2026).
12. *Id.*
13. *Id.*

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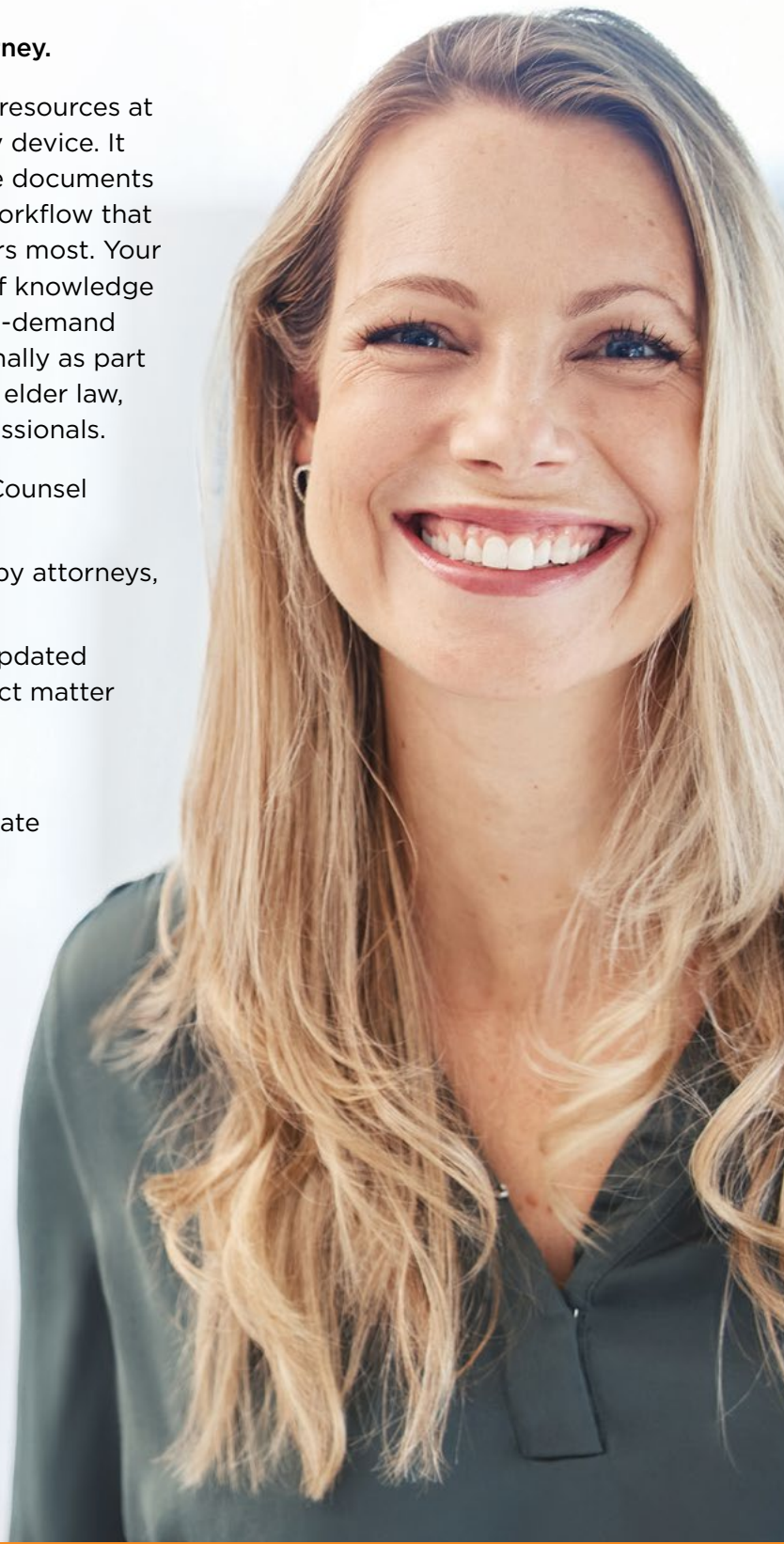

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