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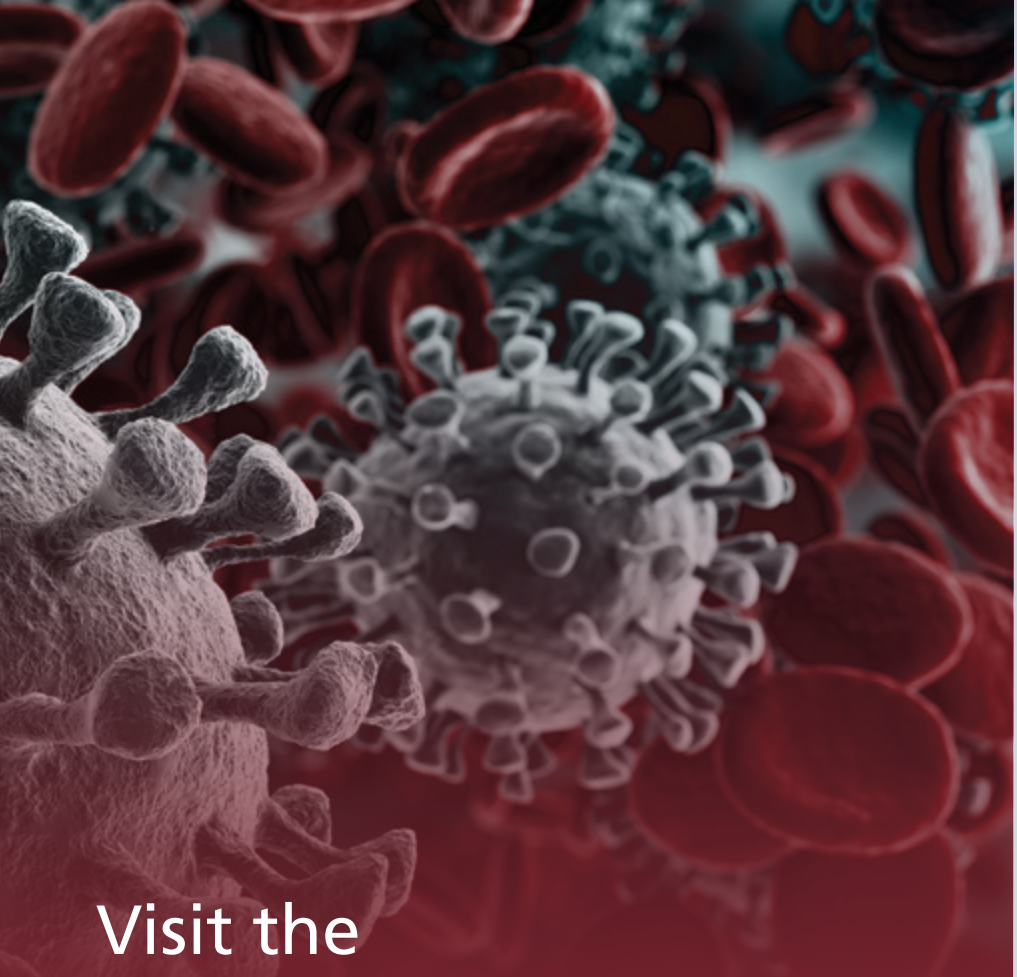

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Planning for a Just Post-Pandemic Future

We thought this would be over by now. We told ourselves everything would be back to normal now that we have the vaccine, the simple cure-all that allows us to return to the office and send our kids back to school free of worry. But nothing is ever that simple.

The pandemic has been a cruel instructor, and if it's taught us anything, it is that our society is built on a series of interconnected systems. When one of those systems doesn't function, the rest of those systems suffer for it.

The pandemic has brought into view the stark inequalities that exist in our society, and we've only seen those inequalities exacerbated as it drags on. In education, housing, business and, yes, access to the legal system, we've seen those who started with a disadvantage further burdened, further disenfranchised.

We've learned that when we react to the pandemic – when we change one of society's constituent systems – some of the most disadvantaged among us get left behind. Not everyone has a computer, not everyone has a smartphone or a tablet. And, for some, even if we give them the fanciest models of all the latest tech, they may still not know how to use them. It's easy to take so much of our lives for granted and make assumptions about others.

These issues were laid bare on Sept. 13, during Chief Judge Janet DiFiore's hearing on civil legal services. The message we received from organizations, attorneys and clients alike is that people are desperate for help. It is our duty as lawyers to assist and empower these people who, through no fault of their own, are facing eviction, job loss, family crisis or homelessness.

The disproportionality at which the pandemic impacted those who are already struggling is staggering.

According to the Robinhood Poverty Tracker, a shared project of the Robinhood Foundation and Columbia University that tracks economic conditions in New York City, 55% of Black workers and 59% of Latino workers lost their jobs in the early days of the pandemic, while 43% of white workers lost theirs. Meanwhile, out of those workers deemed essential, 31% of Black workers continued to work on site during what was then considered the peak of the pandemic, compared to 14% of Latino workers and 11% of white workers.

Those who were disadvantaged before the pandemic now struggle to access services like unemployment insurance, housing assistance and legal services. The message we heard from civil legal service providers on the 13th is that the need keeps growing.

Having the assistance of a lawyer can mean all the difference.

Aaron Morris, a Brooklyn High student who has lived in a Brooklyn shelter with his parents since February 2020, experienced just how fragile the system is. The devices his school gave him to attend class remotely weren't of much use as his shelter lacked Wi-Fi. His father advocated for the school to provide a tablet with reliable cell service, but time and time again the device failed. Disconnected and despondent that he couldn't attend class, Aaron stopped trying to log in altogether. Then his father connected with Legal Aid and the Morrises joined a suit demanding the city equip shelters with Wi-Fi so that unhoused students could attend class. Months later,

Aaron's shelter had Wi-Fi. His grades skyrocketed and, thanks to Legal Aid, he started an engineering internship at Cooper Union.

Aaron was lucky to have someone as tenacious as an advocate as his father on his side as well as Legal Aid to help him through a situation that would be insurmountable to many.

When I think of Aaron and his family, I think of what it's like to walk into the office of a civil legal services attorney. You see and hear things that you would rarely hear in most law firms.

There's the sound of a child crying. The squeals of laughter as siblings play tag on the hallway floor. These lawyers do far more than interpret the law; they serve as social workers and confidants. They open doors that would otherwise be left closed. The lawyers who are willing to be civil legal services practitioners are amongst the best and most admirable in the profession. In the coming months, they will be called on to do much more.

Right now, Paycheck Protection Program money, government funding, subsidies and eviction moratoriums are keeping the true cost of the pandemic at bay.

That bill is going to come due, and civil legal services lawyers will have to be there to shepherd the less fortunate through. Those who have not had an advocate over the past year have probably suffered. Access to a lawyer hasn't been simply about being represented in a courthouse. Having legal representation during the pandemic has, for many, meant keeping a job, keeping a roof overhead or continuing an education.

> "Access to a lawyer hasn't been simply about being represented in a courthouse. Having legal representation during the pandemic has, for many, meant keeping a job, keeping a roof overhead or continuing an education."

We must be prepared in the coming months to be the dam against the tides that threaten to wash the hopes and dreams of so many away.

A recent Census Bureau survey found that more than six million American households are behind on rent. More than three million who are behind on payments believe they may be evicted in the next two months. It was right for New York State to extend its eviction moratorium, but the moratorium is now set to expire in January, traditionally one of the coldest months, during what has so far been a peak month for COVID-19 infections.

We must keep in mind what Attorney General Merrick Garland wrote in his Aug. 30th letter regarding the eviction moratorium: "Once again, the legal community has an obligation to help those who are most vulnerable. We can do that by doing everything we can to ensure that people have a meaningful opportunity to stay in their homes and that eviction procedures are carried out in a fair and just manner."

As we move toward a post-pandemic future, we need to ensure that the changes that we retain from this period benefit us all. Remote work and reliance on technology can mean less stress and better work/life balance for us, but we must ensure that those without access to such technology and education on how to use them are not denied access to justice. We cannot abandon the lessons the pandemic has taught us. We must redouble our efforts to provide access to justice to all.

Finally, we must be cognizant of the fact that change is coming to our profession, one way or another. We need to seize the reins and define our future, or else others will shape it for us. It's important we take charge and embrace the opportunity. Otherwise, the permanence of change will be upon us, and we will be completely unprepared.

You'll hear much more about the post-pandemic future of our profession in the coming months from the task force I appointed, which has begun its work. I invite you to explore these topics in more detail in this issue in which young lawyers share their thoughts on the future of the profession and we look at the imprint the pandemic has left on the modern law office.

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THE FUTURE OF THE Legal Profession

Carol Schiro Greenwald, Ph.D.
is a marketing and management strategist, trainer and coach. She is the author of "Strategic Networking for Introverts, Extroverts and Everyone in Between" (ABA, 2019) and "Build Your Practice the Logical Way – Maximize Your Client Relationships" (with Steven Skyles-Mulligan, ABA, 2012).

COVID-19 and Its Lasting Impact on the Legal Profession

By Carol Schiro Greenwald

COVID-19 and its delta variant have created ever-changing workplace scenarios for lawyers and law firms. Should we go hybrid? If so, how will that work in practice? Should we continue to be mostly remote? How will we replicate the collaboration and cooperation of the 2019 workplace under new workplace guidelines?

Amid all this flux and uncertainty, law firms responded quickly and efficiently. The 2020 move-out was almost instantaneous. Technology, which has moved slowly into law firms, exploded as firms added security features, upgraded computers and monitors, reinforced cybersecurity for home use, linked mobile apps to office databases and added videoconferencing technology, plus all the lights and cameras needed to participate effectively in meetings online.

To understand where we are now and where we are going, NYSBA appointed a task force on the future of the legal profession. The task force is sending out a survey to find out what you, in the trenches, think about the future for lawyers and law firms and is gathering information at public forums held by its four working groups. The association is also delving into this topic in this edition of the Bar Journal. For this article, I conducted electronic interviews with 23 New York lawyers; six are solos and the rest are in small to mid-size firms, ranging from two to 100 lawyers. Their geographic reach is fairly evenly divided into thirds: one-third covering New York City, one-third regional/New York State, and one-third either national or international in scope. All major practice areas are represented.

Most firms found that remote work did not impact productivity, although those unable to create a separate office space faced greater challenges. Similarly, most felt that client service levels did not decline. But many have missed the collaborative and collegial aspects of in-office activity.

These lawyer respondents are optimistic about the future and proud of their responses to the pandemic. The lawyers felt that their firms did well in 2020 in terms of both clients and revenue, and very well in 2021. Only 16% reported fewer clients in 2020; 35% reported revenue decreases in 2020. With most of the firms seeing growth even in the worst of COVID times, it is not surprising that 85% are optimistic about growth in 2022. The management challenges during this period were diverse, ranging from managing a digital transformation to supporting the culture and retaining talent.

FIRM CULTURE

Firm culture is an especially important aspect of ensuring continued high-quality client service in the face of the pandemic. Culture and attitude determine whether a firm can manage this roller coaster or whether it will manage them.

According to Joel Weiss, managing partner of the intellectual property boutique Weiss & Arons: "The 2020–21 pandemic year challenged our firm to remain relevant and vital in the new world order. Every firm is being challenged on some level to reconstruct itself to deal with what seems to be a new distributed model. Throughout the pandemic, our emphasis has been safety first. This will continue as the unwritten portions of the pandemic develop."

Amy Goldsmith, partner and chair of the privacy/cybersecurity group at Tarter Krinsky & Drogin, stresses the importance of lawyers' attitudes: "The most important impact felt by Tarter Krinsky & Drogin as a result of the pandemic is not defined by a singular word but by several: adaptability, resilience and teamwork."

Nancy Schess, partner at the management-side employment boutique firm, Klein Zelman Rothermel Jacobs & Schess, similarly focuses on attitude: "We have all learned the importance of both flexibility and a sense of humor in running a law practice. The pandemic kept proving, and is still proving, that plans get disrupted. Consistent with our firm's culture, we make a conscious effort to pivot as necessary and keep our attitudes intact."

On a less positive note, Mark Mulholland, partner at Ruskin Moscou Faltischek, notes that "the lack of physical presence in the office, particularly among senior attorneys, and the corresponding fall-off in mentoring and spontaneous collaboration."

LOCATION, LOCATION, LOCATION

Firms have been embracing the office return slowly as vaccination mandates and news about increasing hospitalizations make togetherness sound more hazardous. The issue is still not resolved in many businesses. A "SmartBrief on Your Career" September poll of readers of the SmartBrief website showed that 52% said their office reopening decision was still in flux, 22% said their opening had been postponed and 22% said they were fully open in person.

As Tracey Daniels, principal at Daniels O'Connell, a real estate boutique, explains, "Real estate closings were happening in person even at the height of the pandemic, so we were in person, as needed, all along. That said, when we didn't need to be in, we were all home as it was of topmost importance that our employees felt and were safe."

George Kontogiannis, trust and estates partner at Tesser, Ryan & Rochman, describes his firm's evolutionary process: "Initially with the unknowns of this new pandemic, we mandated 100% remote working. By July 2020, we started relaxing our protocols, first having just a few attorneys go into the office. [A] couple of months later, we expanded to mandate two-thirds occupancy."

The different attitudes toward the return to the office reflect different perceptions about efficiency and effec-

tiveness of remote work. Opinions are split. Some feel that working from home is more time-efficient because you don't have to commute to work or travel to court. Some see remote work as more efficient because so much time can be wasted by those in-office conversations people miss the most.

Tara Fappiano, partner at Haworth Barber & Gerstman, a boutique trial and litigation firm, says, "I found that the efficiency of an attorney to work remotely is highly dependent on the attorney and their work style, environment, and motivation to be productive. Those who have set up productive situations and want to make it work, do; those who have always had organizational challenges find it harder." Others tied efficiency and effectiveness to age because they saw older attorneys struggling to accommodate to remote work.

Others noted the impact of context: the ability to create an office setup at home. Jim Landau, partner and commercial litigator with McCarthy Fingar, says, "Work is more efficient and effective for those who were able to work at home. Those attorneys with distractions (young children, spouses working in the same room, etc.) did better at the office."

Nancy Schess says, "We do see the value of time together in the office – but also understand that some appreciate remote work as a means of balancing life."

While personal flexibility and health safety are the obvious forces impacting office schedules, a host of other firm-related reasons also enter into the picture:

- "Some of the driving forces behind any decision about our space use model are current and future practice area needs, client needs, and attracting and retaining talent." (Amy Goldsmith)
- "Billing appropriate hours. Maintaining focus. Proper supervision." (George Kontogiannis)
- "Attorney and staff productivity and efficiency." (Jim Landau)
- "Convenience, economics and possible cross-referrals." (Alan J. Schwartz, managing partner, Law Offices of Alan J. Schwartz)
- "Grounded in efficiencies and effectiveness, together with individual preferences." (Nancy Schess)

Asked if they planned to change their office configuration to accommodate the impact of remote work, several attorneys say that their firms plan to reconfigure their space to add multimedia conference rooms, hoteling and/or more meeting space to foster collegial interactions.

From personal observation, Mark Seitelman, managing partner, Mark E. Seitelman Law Offices, a personal injury firm, says, "Many single practitioners have either

given up their downtown/midtown offices or have scaled back. They have elected to save the office rent. This is especially so with transactional attorneys who do the work themselves. They will now use either Manhattan mail drops or a friend's address when needed for a meeting or a deposition."

TECHNOLOGY AS WORKPLACE SAVIOR

Many lawyers have been reluctant to take advantage of the many document management systems, single application apps and other technologies that can mitigate careless errors, tailor invoices, and expediate document preparation. They say they prefer their current approach and are concerned about the impact of faster and better on billable hours.

Come the pandemic, everyone was forced to reconsider their view of technology. For instance, the only way to "see" others was videoconferencing. As Joel Weiss explains: "Video conferencing became the most important technology. This opened new doors to legacy clients that previously didn't exist. But I caution that video conferencing remains an evolving discipline. It is not clear where this will end up."

"Zoom has become a mainstay of my world. From client meetings, mediations, board meetings, committee meetings, and court hearings, my day is spent in front of the multiple computer screens on my desk," says Marilyn Genoa, partner, Genoa and Associates, a mediation and business law firm.

Many of the lawyers were already technology-savvy when the pandemic hit, but most had to buy videoconferencing equipment and its collaterals: lights, camera, microphone, etc. Many had technology that had to be upgraded to support a dispersed system.

Many of the firms already had lawyers using technology. Sarah Gold, Gold Law Firm, a business boutique, says, "I had them all before, but now people actually want to use them."

The pandemic also democratized the use of technology by giving it to everyone. As Amy Goldsmith says, "Most of the technologies that we used the most during the pandemic, including our remote access software, VOIP phone system and video conferencing system, were put in place long before the pandemic. During the pandemic we leveraged our scalable technology structure to expand access to these systems to all of our employees."

Nancy Schess says, "We had some technology and had to invest in others. When it became apparent early on that this remote work was going to go on for a while, the investment just made sense. In hindsight, that technology commitment was one of the factors that helped us pivot so smoothly."

Firms that plan to expand their technology in 2022 plan to upgrade their practice management software, expand their use of cloud storage, add email filing, become paperless, and, for Jim Landau, "Look into employing AI in connection with legal research."

THE RISE AND FALL OF PRACTICE AREAS

Respondents mentioned seven practice areas that grew exponentially because of pandemic behavior.

- *Bankruptcy and restructuring*: "Many businesses faced extraordinary financial challenges requiring counsel on a wide variety of bankruptcy and restructuring issues." (Amy Goldsmith)
- *Criminal defense*: "Many people are acting irrationally, drinking is at an all-time high, leading to a variety of different types of inappropriate behavior. People are driving a lot more instead of relying on car services and municipal transportation when they otherwise would have and should have." (Alan Schwartz)
- *Intellectual property*: "Our intellectual property group saw growth as a result of the expansion of our online sellers practice group and privacy and cyber security practice." (Amy Goldsmith)

  "For trademark, many clients sensed new business opportunities that required them to protect their brands. Some copyright clients had more time to find infringing uses of their works." (Mike Steger, Law Offices of Michael D. Steger)
- *Labor and employment*: Nancy Schess, the compliance lawyer in her firm, says, "Due to the constantly changing rules during the pandemic, coupled with the need to be responsive to employees as in no other time in modern history, we have been very busy."
- *Litigation*: "All sorts of businesses defaulted on obligations due to the pandemic and this created litigation; people died, leading to probate/estate administration/surrogate's court litigation; people's fear of getting sick and dying led to estate planning; people's race to leave the city created real estate litigation." (Jim Landau)
- *Residential real estate* as people moved out of the city, and commercial real estate as businesses tried to renegotiate their leases. "Transactional real estate is CRAZY." (Tracey Daniels)
- *Trust and estate work*: "It's amazing what happens when people face their mortality." (Sarah Gold)

Lawyers involved with the courts or government agencies cited harm to their practice when the courts were closed and calls to understaffed government agencies went unanswered.

- "Grand jury presentations, hearings and trials may never be the same again. Virtual court proceedings deprive litigants of the opportunity to be totally present with judges, adversaries and witnesses, depriving us of the opportunity to read body language and judge the reactions of judges, jurors and adversaries." (Alan Schwartz)
- "Our plaintiffs' personal injury practice did not grow because our intake of new cases diminished. During the height of the lockdown people stayed at home. Therefore, there were much fewer opportunities for clients to get injured." (Mark Seitelman)

One negative impact mentioned by several lawyers is the change in clients' definition of responsiveness. Clients now expect their lawyers to be available 24/7.

Mediator Marilyn Genoa says, "After over 18 months, I am definitely feeling the effects of always being 'on call.' Emails and texts are never ending and seem to be without the boundaries which previously existed."

George Kontogiannis sees this change in expectations as a key effect of the pandemic: "The most important lasting effect is the clients' expectations of always being available from anywhere. Even before COVID-19, clients expected responses to emails as if they were calls. Now being out of the office is no longer an excuse for replying later because you are expected to work from anywhere."

LAST BUT NOT LEAST: CLIENTS

Lawyers made several points about the importance of clients as an influencing factor in their pandemic-related decisions. For Amy Goldsmith, "Our clients and their respective industries all went through the same metamorphosis as we did, adapting to remote and then hybrid work in ways we never anticipated. To that end, we see a lot of alignment with our future plans and those of our clients when it comes to space planning and in-office needs. Nevertheless, providing best in class service to our clients is our number one priority, and their needs will play a central role in our planning."

Elissa Hecker, Law Office of Elissa Hecker, sees the pandemic as reinforcing the "continued value of relationships." "It's good to spend time listening to the big picture of what's happening in our clients' lives and businesses. Sometimes they just need kindness and a good ear."

Many feel that clients don't care how they run their offices or where they work as long as their matters move along:

- "The subject has never come up and I have no reason to believe that any care." (Richard Friedman)
- "I have not heard any clients offer any opinion on this; it makes little difference to them." (Tara Fappiano)

Others feel their clients appreciate their workplace decisions.

- "Most clients are very pleased that we are continuing to offer online legal services, and that they do not have to commute to our office." (Alla Roytberg, Roytberg Traum Law and Mediation)
- "I think our clients appreciate that we have put an emphasis on returning, with caution, to the office. We set up Zoom conference calls so people can see the firm employees walking in the background. I think this increases our credibility as a firm and gives us an appearance of normalcy. Client confidence in the firm is at an all-time high." (Joel Weiss)

For some lawyers, there is a need to meet the safety concerns of clients:

- "Like everything else with the pandemic, every client has a different comfort level, and while many cannot wait to meet with us in person, some simply do not want to leave their homes." (Alan Schwartz)
- Donna Drumm, DrummAdvocacy, represents clients with disabilities, so safety is very important. "Since many of them have comorbidities and a few suffered from COVID aggravating their disabilities, they want to feel safe and prefer to meet virtually."
- "Our clients appear very comfortable with few to no in-person meetings." (Mark Mulholland)

CONCLUDING THOUGHTS

Most lawyers have a positive attitude about future opportunities and their ability to meet future challenges. Andrew Peskoe, managing partner of Golenbock Eiseman Assor Bell & Peskoe, exemplifies this feeling:

> The most important lasting effects will clearly be the necessity of permitting remote work for attorneys and optimizing that business plan on a flexible basis. We have fortunately been able to meet our clients' needs just as effectively and efficiently remotely; it is the needs of our team members that are more challenging to meet. There are so many lessons to be learned; I look forward to having a little break and perhaps a true return to normalcy, before I try to digest and learn from those lessons.

The acceptance of new technology that makes it possible to continue connections with clients and among teams has made it easier for law firms and lawyers to pivot to remote work relationships. Most lawyers want to continue to have the flexibility provided by remote work, thus leading to a hybrid office plan. The conundrum now is how best to structure a combined in-office and remote workforce.

Young Lawyers Debate the Future of the Profession

By David Howard King

A major obstacle looms on the horizon as the pandemic recedes: recruiting and retaining the next generation of superstar lawyers. The key to appealing to that generation is technology, just as it is in securing and engaging clients.

"Firms should have increased confidence that their attorneys are working no matter where they are – in the office or, when necessary, in their homes with their toddlers. Employers need to ensure flexibility and trust that the job will get done," said Viktoriya Liberchuk, a 32-year-old associate who has been practicing law for six years, four of them at Farrell Fritz.

That was the biggest takeaway in our conversation with multiple young lawyers who shared their perspectives on the future of the industry – they see technology and flexible, hybrid work arrangements as integral to their future success. And research in some areas appears to back them up.

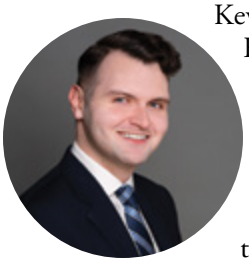
The pandemic was a time of financial strain and cutbacks for most firms, but a LexisNexis study recently found that firms that pivoted quickly to adopt technology for office work, marketing and content management were able to achieve significant financial growth. The results of the May 26 survey speak to the future of a profession in flux and may present a way forward for law firms trying to decide their future.

The study found that high-growth firms had an average annual revenue growth of 11% or more. Mid-growth firms saw 0–10% annual revenue growth and no-growth firms saw further revenue declines.

What made the difference? It appears that the speed and commitment of high-growth firms to expanding their digital presence through marketing, virtual events, webinars, video content and podcasts boosted their ability to earn through the pandemic. Firms at all three levels of growth reported incorporating some or all these technologies, but high-growth firms reported use of video content and podcasts at three times the rate of no-growth firms.

Rather than adapting, no-growth firms tended to favor making cuts to operational costs and reducing attorney earnings.

LOCATION, LOCATION, LOCATION



Kevin Quaratino, who graduated Fordham Law and started at Foley and Lardner this year, said that, besides the flexibility work-from-home arrangements offer, there's also an element of increased productivity. "While there is something not quite right about seeing a judge preside over a screen instead of a courtroom, the time saved by virtual court conferences and oral arguments is undeniable. In fact, one attorney can attend multiple conferences in a day, whereas that may have been unfeasible pre-pandemic because of the courts' locations," he said.

Such practices are all conveniences young lawyers have grown used to during the pandemic, and according to a host of young lawyers we've spoken to for this article, as well as those surveyed by other publications, they want these ways of working to become part of a post-pandemic, hybrid work environment. And it isn't just young people: a survey published by Robert Half on Aug. 16 found that one out of three professionals who worked at home during the pandemic would quit if forced to return to the office full-time.

"It is possible that a person of this generation works better from home, but that remains to be seen," says Anne LaBarbera, chair of NYSBA's Young Lawyers Section, who describes herself as an older young lawyer, having come to law after a career in film. She admits that she didn't grow up with video chats and other tech that has become so commonplace in the office during the pandemic.

She notes that the lack of commute, a reduction in stress and the ability to live where you please may be better for mental health and productivity, but she wants to see hard data about client outcomes and whether virtual hearings extend the legal process before making any judgment.

"Frankly, young lawyers are the future, and firms that had resisted technology and change were forced to deal with it over the past year," said Lauren Sharkey, a 35-year-old partner at Cioffi, Slezak, Wildgrube, who serves on NYSBA's Task Force on the Post-Pandemic Future of the Profession. "I hope firms recognize that technology is making it easier to maintain a healthy work/life balance."

Sharkey, along with a host of other young lawyers we spoke to for this article, acknowledged that there are benefits to being in the office and that is why they favor a hybrid model.

"It is harder to meet colleagues virtually," says Sharkey, who has hosted networking events for young lawyers before and during the pandemic. "You definitely do not get that camaraderie that you do in the office," she said.

Another major part of the hybrid equation is client needs and results. Sharkey says that, in one case, one of her clients joined a court procedure from a work site in Georgia. "He appeared on the side of the road with his hard hat on. If he couldn't have done it virtually, his case simply would not have been heard. We also have immunocompromised clients who do not want to set foot in the office. On the other hand, we have elderly clients who insist on meeting in the physical office, and certainly people without cell phones and laptops are not served by virtual hearings."

LaBarbera says she is concerned that a strictly virtual legal process could be to the detriment of clients. "In a profession like ours that is based on human interaction, something is lost from not being in the room together. It's easier to reach a deal in person."

Her major concern is that any efficiency gained through the ease of virtual hearings could lead to "diminishing returns."

She points to a chatbot Microsoft designed on Twitter that was meant to adapt to social media conversation. It had to be taken offline after it began making racist and anti-Semitic rants.

"There are things said in the digital world that would not be said face-to-face. You could extrapolate from that that without that face-to-face interaction there will be an instinct with counsel to keep proceedings going rather than work together to find a common thread or settlement."

Preetha Chakrabarti, NYSBA's Outstanding Young Lawyer of 2019 and counsel at Crowell & Moring, believes firms should allow lawyers autonomy to decide what is best for them and their clients.

"In my most recent conversations with colleagues, we were discussing the value of firms not making assumptions," says Chakrabarti. "They shouldn't make hard and fast rules based on assuming what is best for people. They shouldn't assume a young mother will want to be home all the time or that young single people will want to be in the office. It is a deeply personal issue so what they should offer is flexibility."

Matt Toporowski, a 35-year-old attorney and former candidate for Albany County District Attorney who recently took a position as senior assistant corporation counsel focused on police accountability for the City of Albany and opened his own practice, warns that young lawyers are realizing they don't need the trappings of bigger law firms. "The legal profession has always been resistant to change, but across industries employees are asking to stay remote or maintain some work from home flexibility and law firms will have to respond. Associates don't need to sit in an office with a suit on to bill hours and wait for the partners to leave first anymore," says Toporowski.

ADAPT OR DIE

Adapting to the evolving demands of the post-pandemic world will require a range of expertise that will not be satisfied exclusively by lawyers. Experts agree that multidisciplinary teams will become critical to the practice of law in the modern world.

Bloomberg Law's 2021 Legal Operations Survey found that 82% of the 429 lawyers surveyed saw a multidisciplinary team as being made up exclusively of lawyers of different seniority and practice specialties. Traditionally, a multidisciplinary team has been made up of professionals in a variety of fields that complement each other.

A Bloomberg Law article from April of this year suggests that modern law offices will need to build these teams out of technology experts, strategic planners, marketing specialists and financial experts to compete successfully. These teams will be able to react to client demands to produce solutions that are easily understood, drawn from data and accompanied by analysis of how they will play beyond the courtroom.

FUTURE SHOCK

Successful integration of a digital approach will mean adopting cybersecurity practices and providing employees with the training they need to work successfully in a digital environment.

"Law firms should train all staff members on the firm's software. In addition, IT staff should be readily available to lawyers and staff to assist with technological glitches," writes Liberchuk, who also advocates that firms provide lawyers with the technology they need to operate at home, technology such as laptops, printers and monitors.

Firms will also need to pay strict attention to cybersecurity. Experts warn that reliance on technology during the pandemic and the increase in cyberattacks, ransomware and spoofing has created a perfect storm. The hack of cybersecurity firm Accellion that counted law firm Jones Day, the state of Washington, Morgan Stanley, and The Reserve Bank of New Zealand among its high-profile clients sent shockwaves through the industry. Brett Callow, a cybersecurity expert with Emsisoft, told Law.com that the hack demonstrates to firms "that it's not only their own security they need worry about, but also that of their vendors and solution providers."

Experts say that having a cybersecurity officer will be critical for law firms. "Just because a company doesn't have a CISO doesn't mean they are not Fort Knox with security. However, it's more likely they are not," Christopher Ballod, an associate managing director in the cyber risk practice at Kroll, told Law.com in an article titled "Neglecting Cybersecurity Isn't Just Risky. It's Reckless."

"While the COVID pandemic has caused courts physically to close, it has enabled courts to continue conducting hearings, trials, and conferences virtually," says Liberchuk.

"Although it is unclear whether courts will go back to the old 'norm' in conducting in-person operations, one thing is clear: technology in light of the pandemic has reshaped the way in which we practice law forever."

David Howard King is NYSBA's content and communications specialist.

Adapting to a New Hybrid Law Firm

By Nancy B. Schess, Michael Dell and Brian Gordon

Nancy B. Schess is a workplace lawyer representing businesses. She is a partner at Klein Zelman Rothermel Jacobs & Schess, a boutique New York City law firm that concentrates in labor, employment and benefits law. Schess manages the firm's compliance practice and provides advice to businesses regarding a full range of employment law issues with a current focus on COVID-19-related counseling.

Michael Dell is a senior associate at Klein Zelman Rothermel Jacobs & Schess. He represents management in labor and employment matters and supports the firm's litigation and compliance practices.

Brian Gordon recently graduated from the Maurice A. Deane School of Law at Hofstra University with cum laude honors and a Certificate of Excellence in Labor and Employment Law courses. Gordon sat for the New York State bar exam in July and is a law clerk at Klein Zelman Rothermel Jacobs & Schess.

Do you look back with fond memories to a pre-pandemic time when law firms maintained a physical office bustling with attorneys and staff, clients stopping by and phones ringing off the hook? Now, more than 18 months into a pandemic, law firms are realizing that their brick-and-mortar workplaces have been turned on their heads. Traditionally gun-shy about remote work, law firms are learning that they may not be able to put the genie back into the post-pandemic bottle.

As a direct result, the term "hybrid office" has officially entered lawyers' daily and seemingly permanent lexicon.[1] While many firms are actively embracing a hybrid concept, others are entering the discussion only because they fear they have no choice. Some surveys show that that a majority of workers prefer to continue performing remote work, albeit in differing degrees, even after all restrictions are lifted.[2] Although hybrid may seem simple at first blush, law firms are finding (and will continue to find) the need to make complicated and nuanced decisions about how to maintain efficiencies in a new workplace while staying compliant with the ever-changing world of employment law.

X & Y LAW FIRM

Imagine a mid-sized law office – X & Y Law Firm – a real estate practice with 25 staff members, including nine attorneys and four paralegals, working from a single New York State office location (before the pandemic, of course).[3] X & Y thrives on its warm culture. Some attorneys and staff commute to the office from out of state. During the height of the pandemic, the entire firm worked remotely and has slowly been reintegrating to the physical office, but admittedly without a fully developed plan. Understanding that opinions vary widely, the firm conducted a survey of its staff to determine their preferences for office work. While the majority preferred at least a partial in-office experience, others preferred to work entirely remotely. Even those who wanted some in-office time were not aligned on how much or when. Only one employee expressed a desire to return to complete in-office work. The firm has decided to implement a formal hybrid model, but in doing so it has many questions to consider and pitfalls to avoid.

While the list of issues for X & Y to consider is long and growing, we examine here three critical employment law issues for any law firm embracing a new hybrid work arrangement.

HIDDEN DISCRIMINATION ISSUES ABOUND

Federal, state and local law all prohibit employers from discriminating against employees because they belong to specifically protected classes, such as race, religion, age or gender. The statutory framework for these prohibitions is vast, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, and the New York City Human Rights Law.[4] Under all of these laws, employers cannot discriminate when taking employment actions, such as hiring, firing, promoting, disciplining and, as discussed below, applying terms of employment such as remote work. Some employment laws also require that employers provide reasonable accommodations to employees for reasons protected by law such as an employee's disability or sincerely held religious belief.[5] While all of these legal concepts predate the pandemic, their application to creating and applying a hybrid work model in a law firm can be complicated.

Partner X wants to implement the firm's hybrid work policy by allowing all employees to choose when and where they want to work. Partner Y, on the other hand, wants to decide which employees will work from the office and when, because she sees increased efficiencies with particular teams in the office together. Both approaches may make business sense but could be treacherous in practice without careful consideration of applicable employment laws.

For example, as X & Y decides which employees will need to return and when, the firm should consider whether its decision-making may adversely impact employees in protected classes.[6] For example, should the firm choose a model where certain employees remain completely remote and those employees skew older, the firm could face a claim of age discrimination, particularly if the remote work turns out to be less beneficial even in ways that may not be immediately apparent.[7] Similarly, if a male employee's work schedule is created so that he is regularly in the office with Partner Y, whose deals in progress turn out to be larger than those of Partner X, a similarly situated female employee may feel she is being deprived of an opportunity to advance her career by working on the more significant projects.

To avoid these pitfalls, once X & Y decides which employees will work remotely and to what degree, the firm should look critically at whether either group, or any particular worker, will be treated more or less favorably in their terms of employment. As demonstrated above, problematic terms may not always be readily apparent. For example, will in-person staff meetings be held, even informally, which exclude the remote workers? How will new case assignments be handled? Will the firm take any steps to replace the informal mentoring that organically occurs when an associate or paralegal walks into a partner's office to ask a question or just to say hello? Consider the broad range of potential employment decisions and opportunities which occur on a day-to-day basis in a law firm that are informed by whether the employee is working in-office or not: distribution of work and assignments, promotions, mentoring, other

career advancement opportunities and more. Discrimination claims often grow from inconsistent treatment, even sometimes when that treatment is unintended.

HANDLING REQUESTS FOR REMOTE WORK

For any number of reasons, some employees may request to continue working remotely.[8] The firm should cautiously approach its decision-making and responses, lest it draw a discrimination claim based on which employee's request is approved or denied. X & Y also needs to be prepared that some of those requests may actually trigger a legal obligation to accommodate the employee's needs.[9] For example, an employee with a disability may be concerned about returning to the office based on a preexisting (or recently developed) health condition. If the employee requests continued remote work based on their health condition, that request would trigger the firm's obligations to engage in an interactive process and determine whether the requested accommodation was reasonable and required under the circumstances.[10]

Only reasons covered by law trigger an obligation to provide a reasonable accommodation. For example, a generalized fear of returning to the office, or a concern about the risk of passing COVID-19 to a family member, are typically not grounds for legally required reasonable accommodations.[11] Similarly, a request to work remotely (or to modify a work schedule) to care for school-age children standing alone typically does not trigger a legal obligation for accommodation, unless, as discussed below, that request also requires consideration, for example, under applicable discrimination laws.[12]

Consequently, it would be wise not to dismiss any accommodation request out of hand. For example, assume the firm decides to grant a request to work remotely to one employee who has school-age children so that she can be home to help with their homework, but then denies the same (or sufficiently similar) request made by a male employee. The male staff member might conclude that his gender played a role in the firm's decision.

Additionally, while a specific obligation to accommodate an employee for caregiver reasons may not exist under current law, some laws do prohibit discrimination on the basis of caregiver or familial status.[13] Consequently, a law firm that grants one employee's request to work remotely for reasons *other* than child care may face a discrimination claim from an employee whose request for accommodation based on child care is denied. Last, a different analysis applies if the care is needed because of a child's (or other family member's) health condition. Here, the employee may be eligible to take family leave and use the benefits provided under the New York State Paid Family Leave program.[14]

IS X & Y LAW FIRM A MULTI-STATE EMPLOYER?

Consider that X & Y has been a New York State employer throughout the course of its existence. Before the pandemic some staff worked remotely on occasion outside of New York, not for any length of time or with any regularity. In the process of developing its hybrid plan, the partners start to think, as they should, about the firm's expanded geographic footprint with employees working regularly in their home states. The firm's plan has, in essence, transformed it into a multi-state employer which now must comply with the applicable laws of its employees' home states – and even municipalities. In doing so, the firm will have to consider a potentially expansive new set of employment laws.

For example, if the firm's chief financial officer will spend most of his time working remotely from Jersey City, New Jersey, then X & Y may need to comply with the New Jersey Law Against Discrimination,[15] the New Jersey Earned Sick Leave Act[16] and other state and local laws. The firm will also need to ensure that it is deducting proper payroll taxes based on the CFO's new work location in Jersey City and that it maintains insurance required under state law, such as workers' compensation.[17]

Multiply these complications if employees are also working remotely from additional states. This now multi-state employer could need to comply with the employment laws in as many states as its employees are working remotely. Consequently, as the firm is constructing its hybrid plan, it may want to take into account the variety of state and local laws that may apply based on these new work locations.

WAGE AND HOUR CONSIDERATIONS IN A HYBRID WORK ENVIRONMENT

Working remotely raises potential issues as to compliance with state and federal wage and hour laws. For example, consider whether the firm will supply, or employees will be required to provide, office supplies for remote work. Wage payment issues can arise under federal and state law if non-exempt employees are compelled to incur certain types of out-of-pocket expenses.[18]

The firm will also want to avoid potential hidden liability for unpaid overtime when employees are working remotely. Federal and New York State law require that non-exempt employees (those eligible for overtime by law) earn overtime at one-and-one-half times their hourly rate for all hours worked over 40 in a workweek.[19] With remote work, keeping track of hours worked can be a challenge. Employees who once arrived at the office at 9 a.m. and left at 5 p.m., and punched a time clock, are no longer necessarily bound by those discrete parameters. With lines blurred between work and home, the workday may naturally start and end at more flexible times.

Law firms must pay for all work that they "suffer or permit" their employees to perform, even if that work was not requested, provided that the firm had actual or constructive knowledge about the work.[20] In a remote environment, it can be difficult for an employer to know what work is being performed and when it may be performed. To avoid potential wage and hour risks, law firms should have protocols in place to track and account for all hours employees are actually working, both in and out of the office. Firms should maintain policies that give clear direction to their non-exempt staff, for example, about the obligation to report, and procedure for reporting, all time worked; the firm's commitment to paying overtime; and any requirements for advance approval of overtime worked.[21]

CONCLUSION

Given the breadth of issues and associated risks driven by a new and largely untested business model, should law firms get cold feet about embracing a hybrid workplace? Hardly. Like anything new, with planning and forethought any law firm considering a formal hybrid model can create a protocol that fits its culture and business needs while keeping within the bounds of employment law. Of course, employment law has proven to be about as volatile as the pandemic itself, so any plan should also build in room for flexibility.[22]

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1. For purposes of this article, a "hybrid office" is a model that supports both in-office and remote work in varying configurations.

2. *See* Nicholas Bloom, *Don't Let Employees Pick Their WFH Days*, Harvard Business Review (May 25, 2021), https://hbr.org/2021/05/dont-let-employees-pick-their-wfh-days (79.2% of workers polled said they would like to remain working remotely for some portion of the week, with 31.7% preferring five days a week).

3. X & Y Law Firm is a hypothetical law firm and is not based on, or intended to depict, any particular lawyer, law firm or workplace.

4. *See* Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e (1991) (applicable to employers with 15 or more employees); Americans with Disabilities Act, *as amended,* 42 U.S.C. § 12112 (2008) (applicable to employers with 15 or more employees); Age Discrimination in Employment Act, *as amended,* 29 U.S.C. § 623 (2015) (applicable to employers with 20 or more employees); New York State Human Rights Law, *as amended*, N.Y. Exec. Law § 296 (2021) (applicable to all New York State employers); *see also* New York City Human Rights Law, *as amended*, N.Y.C. Admin. Code § 8-107 (2020) (applicable to New York City employers with four or more employees).

5. *See, e.g.,* 42 U.S.C. § 2000e(j) (requiring reasonable accommodation based on religion); 42 U.S.C. § 12112(b)(5) (requiring reasonable accommodations for persons with disabilities); N.Y. Exec. Law § 296(3)(a), (10)(a); *see also* N.Y.C. Admin. Code §§ 8-107(3)(b), (7), (15).

6. *See supra* note 4; *see also, e.g.* 42 U.S.C. § 2000e-2(k).

7. While the federal Age Discrimination in Employment Act protects individuals who are 40 years old or over, the New York State Human Rights law protects individuals over the age of 18. *Compare* 29 U.S.C. § 631(a), *and* N.Y. Exec. Law § 296(3-a)(a).

8. *See* Mark Bergen, *Google Approves Most Staff Requests To Relocate or Work Remotely*, Bloomberg (Aug. 3, 2021), https://www.bloomberg.com/news/articles/2021-08-03/google-approves-most-staff-requests-to-relocate-or-work-remotely (Of more than 10,000 requests, 85% were approved); *see also* Jack Kelly, *Apple pushed Back Its Return-To-Office Plans to January 2022 Over Fears of the Delta Variant*, Forbes (Aug. 20, 2021), https://www.forbes.com/sites/jackkelly/2021/08/20/apple-pushed-back-its-return-to-office-plans-to-january-2022-over-fears-of-the-delta-variant (Reporting employees stating they will quit if forced to return in-person).

9. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC at D. 15, D.16, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (noting, for example, that while an employer is not required to automatically grant a request to work remotely as an accommodation, an employee's ability or inability to complete their essential job functions remotely during the pandemic should inform the employer's response to the employee's future accommodation requests to work remotely after the pandemic).

10. On Sept. 7, 2021, the Equal Employment Opportunity Commission filed its first lawsuit alleging that an employer failed to provide a reasonable accommodation to an employee under the Americans with Disabilities Act when it denied an employee' request to work from home and thereafter, fired her. Press Release, EEOC, *EEOC Sues ISS Facility Services for Disability Discrimination* (Sept. 7, 2021) (on file with EEOC Newsroom); *EEOC v. ISS Facility Serv.*, Inc., No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. Filed Sept. 7, 2021).

11. *See supra* note 9, at D.13. Distinguished from an employee with a generalized fear around the pandemic, employees with mental health conditions exacerbated or prompted by the pandemic may be entitled to a reasonable accommodation. *See supra* note 9, at D. 2.

12. *See Guidance on Familial Status Discrimination for Employers in New York State*, N.Y. Division of Human Rights (2016), https://dhr.ny.gov/sites/default/files/pdf/guidance-familial-status-employers.pdf ("[T]he Human Rights Law explicitly states that no new right to reasonable accommodation was created by the addition of familial status protection."); N.Y. Exec. Law § 296(1)(a), 296(3)(c); *see also FAQs for Caregiver Protections*, N.Y.C. Comm. on Human Rights, https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/Caregiver_FAQ.pdf; *cf. Questions & Answers: Association Provision of the ADA*, EEOC at 4 (Oct. 17, 2005), https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada.

13. 42 U.S.C. § 12112(b)(4) ("association" provision protects employees from discrimination based on their relationships or association with an individual with a disability); N.Y. Exec. Law § 296(1)(a); *see also* N.Y.C. Admin. Code § 8-102 (protects caregiver status).

14. 12 N.Y.C.R.R. § 380-2.2 (2020); Paid Family Leave for Family Care, https://paid-familyleave.ny.gov/paid-family-leave-family-care.

15. N.J. Stat. Ann. § 10:5-5. Notably, the New Jersey Law Against Discrimination is applicable to all employers, regardless of size. *Id.*

16. N.J. Stat. Ann. § 34:11D-1.

17. Jersey City, N.J. ordinance ch. 18 § 133 (2018); N.J. Stat. Ann. § 34:15-1 (West).

18. *See* 29 C.F.R. § 531.35 (2021) (If it is a requirement of the employer that the employee must provide tools of the trade, the cost of such tools purchased by the employee cannot cut into the minimum or overtime wages for any workweek); *see also* Minimum Wage Order for Miscellaneous Industries and Occupations, 12 N.Y.C.R.R. § 142-2.10(b) (2017) ("The minimum wage shall not be reduced by expenses incurred by an employee in carrying out duties assigned by an employer.").

19. *See* Fair Labor Standards Act of 1938, *as amended,* 29 U.S.C. § 201 *et seq.* (2011); *Id.* § 207(a)(1); *see also, e.g.,* 12 N.Y.C.R.R. § 142-2.2. Non-exempt employees are those that are legally eligible for overtime because they do not fall into particular exempted categories. *See* 29 U.S.C. § 213; *cf.* 12 N.Y.C.R.R. § 142-2.14.

20. *See* 29 U.S.C. § 203(g); 29 C.F.R. § 785.11-12 (2011); *see also Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 365 (2d Cir. 2011).

21. In August 2020, the U.S. Department of Labor published guidance for employers contending with newly remote workforces and their wage and hour/overtime requirements. Field Assistance Bulletin No. 2020-5 (Aug. 24, 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf.

22. This article is intended to highlight some of the issues relevant to a hybrid workplace and is not intended, nor should it be used, as a substitute for legal advice or opinion, which can be rendered only when related to specific fact situations.

Challenges to State and Local Vaccine Mandates in New York

By Mary Beth Morrissey, Thomas G. Merrill and Christopher C. Palermo

In various places throughout the country, and here in New York, state and local governments have adopted COVID-19 vaccine mandates in hopes of bringing an end to the pandemic, which, as of Oct. 1, 2021, had killed more than 700,000 people in the United States. Many legal organizations have weighed in with their positions on a vaccine mandate, including the New York State Bar Association, whose Executive Committee approved a resolution in August 2021 that health care workers must be vaccinated. The state and local mandates have predictably prompted lawsuits pitting state and local governments seeking to act to protect public health against individuals and organizations asserting constitutional liberties. The Oct. 12th Federal District court order enjoining enforcement of New York's emergency health regulations mandating vaccination for health care workers and eliminating religious exemptions is the most recent development in the vaccine mandate litigation in New York.[1]

The legal landscape regarding vaccine mandates continues to change almost daily, as challenges make their way through the court system and new cases are brought. In addition, the status of vaccines continues to evolve, with the U.S. Food and Drug Administration approving the Pfizer-BioNTech COVID-19 vaccine in late August[2] and expecting to receive Emergency Use Authorization applications for vaccines for children under 12 in the coming months.[3] Various cases have been filed seeking to invalidate New York State and New York City vaccine mandates as of early October, and more developments are expected in the weeks and months ahead.[4]

At the state level, the New York State Department of Health issued a vaccine mandate requiring personnel at general hospitals and nursing homes to receive their first COVID-19 vaccination by Sept. 27, 2021.[5] The state rule exempts persons for whom vaccination poses a documented medical risk of harm, but provides no exemption to those who object to vaccination on religious grounds. The New York State Office of Court Administration has also issued a vaccine mandate for judges and court personnel, which has also been challenged.

In addition, the New York City Department of Health and Mental Hygiene issued an order prohibiting anyone from working in or visiting a New York City school without providing proof that they have received at least one dose of COVID-19 vaccination. The order, which has been revised twice since it was originally issued in August and most recently was approved by the city's board of health on Sept. 17, 2021, currently provides no opportunity to undergo weekly testing in lieu of vaccination, and states that it should not be construed "to prohibit any reasonable accommodations otherwise required by law."[6]

Unions and state and city employees have challenged these state and local mandates on various grounds. The absence of a religious exemption to the mandates has been the focus of several lawsuits. Two cases pending in federal court allege First Amendment violations because the emergency rule does not allow a religious exemption. In *Dr. A v. Hochul*, brought by 17 health care workers in the Northern District of New York, the court granted a temporary restraining order barring enforcement of the mandate against anyone claiming a religious objection.[7] On Oct. 12, 2021, the court issued its Memorandum and Order granting plaintiffs preliminary injunctive relief, enjoining the New York State Department of Health from enforcing the requirement that health care employers deny religious exemptions from COVID-19 vaccination. Balancing the hardships to the plaintiffs and the public interest, the court found that the state's mandate and denial of religious exemptions under the applicable Health Council's emergency regulations is not neutral and conflicts with healthcare workers' federally protected right to seek a religious accommodation.[8] In *We the Patriots USA, Inc. v. Hochul*, the Second Circuit issued a temporary restraining order requiring the state to permit religious exemptions to the COVID-19 vaccine mandate. The Second Circuit is scheduled to hear argument on plaintiff's application for a preliminary injunction on Oct. 14.[9]

A group of New York City Department of Education employees has challenged the city's Department of Education vaccine mandate in *Maniscalco v. New York City Dep't of Educ.*, asserting that it violated their substantive due process and equal protection rights under the 14th Amendment, and was arbitrary and capricious. The district court denied plaintiffs' motion for a preliminary injunction.[10] While a federal appellate judge granted a temporary restraining order to allow a panel of three appellate judges to decide whether to grant plaintiffs' application for an injunction pending the outcome of her suit,[11] the appellate panel denied the preliminary injunction application on Sept. 27, 2021, allowing the city to begin enforcing the vaccine requirement on Sept. 28, only a day after it was originally to take effect.[12] On Oct. 1, 2021, U.S. Supreme Court Associate Justice Sonia Sotomayor denied without explanation or statement an emergency request to enjoin the city Department of Education's vaccine mandate.[13] On Oct. 12, 2021, a Southern District of New York judge similarly rejected claims

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that the city Department of Education's vaccine mandate violated public school teachers' religious rights.[14]

One can anticipate significant further litigation challenging federal and state vaccination mandates, particularly as the Biden administration's recently announced vaccination mandates are implemented.[15] In addition, FDA emergency use authorization of vaccines for children, expected to occur in the coming months, will doubtless result in litigation over religious exemptions and other issues.

Both for those interested in the legality of vaccine mandates and those interested in the United States Supreme Court's First Amendment jurisprudence, the judicial response to state and federal vaccine mandates bears continued watching.

Mandates for other vaccinations have long existed for students. These mandates were similarly challenged by parents of children who, like the current petitioners, believed that they violated their liberty and religious rights. In *Phillips v. City of New York*,[16] the Second Circuit rejected a substantive due process claim brought by several parents whose children were excluded from school because they were unvaccinated, noting that the Supreme Court had, long ago, determined that states in the exercise of their police powers can mandate vaccinations when necessary to protect public health.[17] Most states, but not all,[18] statutorily grant an exemption to students who object to vaccination requirements because of sincerely held religious beliefs. Courts have held that the First Amendment, however, does not require that they do so.[19] In *Phillips*, the Second Circuit also rejected the claims of two families that were based on the free exercise clause, finding the mandates to be neutral and generally applicable to all students. In doing so, it quoted *dicta* from the United States Supreme Court in *Prince v. Massachusetts*[20] commenting that "the right to practice religion freely does not include the liberty to expose the community . . . to communicable disease . . . ."[21]

The religious exemption has emerged as perhaps the most controversial issue in light of the present pandemic environment and actions taken by state and local governments to require vaccination. Although currently "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),'"[22] advocates for religious freedom have been arguing that courts should strictly scrutinize any law that interferes with the practice of a religion. The Supreme Court was asked in *Fulton v. City of Philadelphia*[23] to overturn *Employment Div. v. Smith*,[24] where it held that neutral and generally applicable laws need only be rational. Although it declined to do so, remanding the case for other reasons in a unanimous opinion, three justices in their concurrence stated that *any* infringement of the free exercise of religion needed to be narrowly tailored and justified by a compelling government interest.[25] Given that opinion, and the likelihood of the Supreme Court ultimately hearing one of the cases involving a vaccine mandate, it remains to be seen whether today's court would follow *Smith* when reviewing a rule mandating that everyone, regardless of their religious beliefs, be vaccinated and conclude that such a mandate was constitutional as a rational exercise of power. Alternatively, if the court were to overturn *Smith* and apply a "strict scrutiny" test, it is unclear whether it would find that the goal of containing the COVID-19 virus was a substantial government interest justifying the vaccine mandate.

Both for those interested in the legality of vaccine mandates and those interested in the United States Supreme Court's First Amendment jurisprudence, the judicial response to state and federal vaccine mandates bears continued watching.

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1. *Dr. A v. Hochul*, No. 1:21-CV-1009 (N.D.N.Y. Oct. 12, 2021).
2. https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine (last visited Oct. 6, 2021).
3. https://www.fda.gov/news-events/press-announcements/fda-will-follow-science-covid-19-vaccines-young-children (last visited Oct. 6, 2021).
4. The information contained in this article is current as of Oct. 12, 2021. Given the ever-changing landscape in this area, it is expected that there will be additional developments in pending and new litigation in the upcoming weeks and months.
5. *Prevention of COVID-19 Transmission by Covered Entities*, 10 N.Y.C.R.R. § 2.61.
6. https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe-2.pdf (last visited Oct. 6, 2021).
7. *Dr. A v. Hochul*, No. 1:21-CV-1009, 2021 U.S. Dist. LEXIS 177761 (N.D.N.Y. Sept. 14, 2021).
8. *Dr. A v. Hochul*, No. 1:21-CV-1009 (N.D.N.Y. Oct. 12, 2021).
9. No. 21-2179, ECF No. 65 (Sept. 30, 2021).
10. *Maniscalco v. New York City Dep't of Educ.*, No. 21-cv-5055, 2021 U.S. Dist. LEXIS 184971 (E.D.N.Y. Sept. 23, 2021).
11. No. 21-2343, 2021 U.S. App. LEXIS 29329 (2d Cir. Sept. 24, 2021).
12. No. 21-2343, 2021 U.S. App. LEXIS 29429 (2d Cir. Sept. 27, 2021).
13. Supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a50.html (last visited Oct. 6, 2021).
14. *Kane v. De Blasio*, No. 1:21-CV-07863 (S.D.N.Y. Oct. 12, 2021).
15. https://www.whitehouse.gov/covidplan/ (last visited Oct. 6, 2021).
16. 775 F.3d 538 (2d Cir. 2015).
17. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
18. New York eliminated its religious exemption in 2019. Other states that have expressly repealed religious exemptions include California, Maine, Mississippi and West Virginia.
19. *See, e.g., F.F. ex rel. Y.F. v. State*, 66 Misc.3d 467 (Sup. Ct., Albany Co. 2019).
20. 321 U.S. 158, 166–167 (1944).
21. 775 F.3d at 543.
22. 494 U.S. 872, 879 (1990).
23. 141 S. Ct. 1868 (2021).
24. 494 U.S. 872 (1990).
25. 141 S. Ct. at 1883 (Barrett, J., concurring).

USA v. Holmes: Why Lawyer-Directors Are a Bad Idea

By C. Evan Stewart

I have long cautioned against lawyers serving as directors of public companies.[1] Many of the issues previously flagged have now raised their hand(s) in a long-standing corporate debacle that is culminating in a very prominent criminal trial that began just as this article is being written: *USA v. Holmes*.[2]

A LITTLE BACKGROUND

On Sept. 21, 2018, James B. Stewart published an article in The New York Times entitled "David Boies Pleads Not Guilty."[3] Prompted by a best-selling exposé on the Theranos scandal by John Carreyrou – "Bad Blood: Secrets and Lies in a Silicon Valley Startup"[4] – Stewart (no relation) had interviewed Boies at length about his involvement with Theranos and its CEO, Elizabeth Holmes, as well as his representation of Harvey Weinstein (the now-convicted sexual predator).[5]

As recounted by Stewart, Boies began representing Theranos in 2011, having been very impressed by a presentation Holmes made to him regarding the claim that the company could accurately make medical diagnoses from a single blood prick of a person's finger. Boies was so impressed that he agreed to take half of his firm's fees in Theranos stock (approximately 400,000 shares; worth approximately $7 million at the company's high watermark). That constituted issue one – the wisdom of taking a financial stake in a client; does it affect a lawyer's independent/objective judgment? While there is no hard and fast rule against that practice, many "old line" firms prohibit it (at the same time a number of firms with large venture capital practices, especially in the Silicon Valley area, allow it). Well-known NYU Law Professor of Ethics Stephen Gillers has opined that the practice is "not categorically forbidden, but it has to be monitored closely to protect the client."[6] For his part, Boies was not agnostic: "Anything that gives you an incentive to put the client's interest first is good for the client."[7]

Four years later, Boies agreed to join the Theranos board of directors, having been told that "a difficult period [lay ahead] where both Theranos and Ms. Holmes would need the advice of a seasoned lawyer."[8] This constituted issue two – Boies, as a director, now owed a fiduciary duty to Theranos's stockholders, while also representing the interests of the company and its management. This conflicts problem – highlighted in my earlier article[9] – is not expressly forbidden by the profession's rules of ethics. The ABA, however, has discouraged this practice, warning about the pitfalls of lawyers serving as directors, and many firms prohibit partners from joining public boards for precisely this reason(s).[10]

In that same year (2015), Carreyrou – a Wall Street Journal journalist – had begun his investigative reporting on Theranos. Boies and his law partners took offensive steps to make life difficult for Carreyrou. Besides having his partners send letters to suspected company leakers/sources threatening lawsuits, Boies wrote a 23-page letter to the Wall Street Journal about Carreyrou's investigative work. Boies, who says he has a policy of not suing media companies (or even threatening to sue them), claims that his letter did not threaten to sue the Journal; Carreyrou expressly disagrees. Suffice it to say the letter demanded that the Journal retain any and all materials that "would doubtless be highly relevant in any lawsuit."[11]

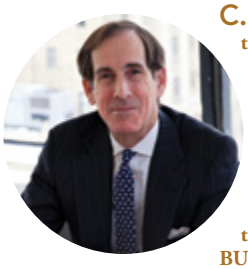
Notwithstanding Boies's efforts, Carreyrou's first article on Theranos – a "bombshell," raising very serious doubt about the efficacy of the finger pricking results, lab research and methodology – was published in October of 2015. Boies, in response, asked Holmes to have an independent third party verify Theranos's technology and work processes. As the new year started, however, there was no progress on that front. In addition, Holmes started looking for counsel beyond Boies's law firm; she also fired the company's general counsel – a former partner at the Boies firm.[12]

By midsummer, Boies felt increasingly isolated and wanted to resign from the board. Not only did other Theranos directors ask him not to, but (according to Stewart) Boies's "own outside lawyer advised that as a director, he couldn't resign in a way that might damage shareholders."[13] That advice, of course, highlights the tricky conflicts problem that Boies embraced by going on the board in the first place.[14]

Then, in August of 2016, Holmes made a rosy presentation to Theranos shareholders without consulting Boies. Boies responded by telling her he could not continue to represent her if she did not follow his advice: "If we are going to risk being at the scene of a serious accident, we want to have the steering wheel in our hands . . . . Because of the very public role we have taken in defense of the company, [my] firm's own credibility is at stake."[15] Within a matter of days thereafter, Boies resigned as counsel. He nonetheless remained as a Theranos director until February of 2017, a month before the SEC charged both Holmes and Theranos with a fraud on shareholders costing more than $700 million.

NO PRIVILEGE IN THE CRIMINAL TRIAL

The SEC was just the beginning for Holmes;[16] as indicated above, she was subsequently indicted for the same



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alleged conduct. A pretrial ruling on Holmes's right to assert attorney-client privilege in the criminal trial highlights another problem inherent in Boies wearing two hats.

But even before we get to that ruling, Boies's director hat had already caused a privilege problem. As numerous courts have held, because of a lawyer/director's fiduciary duties to shareholders, there is no privilege as to certain communications between the lawyer, his firm and the corporation.[17] As such, a fair amount of the "advice of a seasoned lawyer" was already fair game, and Boies was always going to be a factual witness based upon his director status.

This problem became further complicated when the government made a pretrial motion to have 13 Theranos corporate documents be deemed admissible for trial against Holmes. She opposed the motion on the ground that the materials were confidential, subject to her individual attorney-client privilege. On June 3, 2021, a federal magistrate judge granted the government's motion, with the 13 documents admitted for trial.

As recounted by the magistrate judge, the Boies firm began its representation in 2011 of both Holmes and Theranos in an intellectual property dispute. Thereafter, the Boies firm broadened that dual representation to "a variety of legal services in relation to Theranos' patent portfolio, press interactions, and inquiries from government agencies and departments." Notwithstanding, there was never an engagement letter executed between Holmes and the Boies firm, nor were there "any formal guidelines describing the scope of [the firm's] legal representation" of Holmes.[18] The magistrate judge then noted that "Holmes believed that [Boies and his firm] were her attorneys up to the point when she retained separate counsel to represent her in the Securities and Exchange Commission and Department of Justice investigations into Theranos in 2016."

The legal issue before the magistrate judge was whether to apply a subjective belief test (i.e., what did Holmes believe) or a test enunciated by the Ninth Circuit in *Graf*.[19] The magistrate judge opted to follow the *Graf* test.[20] Having decided to go that route, the outcome was a foregone conclusion because the *Graf* test is virtually impossible for a corporate insider to meet.

The magistrate judge ruled that, out of the five *Graf* prongs, Holmes failed on the second, fourth and fifth. The second prong is that Holmes could not demonstrate that she made it clear to Boies that she was seeking his legal advice as an individual rather than as the CEO of Theranos. Key to the magistrate judge's determination

was the fact that there was no Holmes-Boies engagement letter.[21] The fourth prong is that Holmes could not demonstrate that her communications with Boies were confidential because the 13 documents reflect communications "between Holmes or other senior Theranos employees, Theranos in-house attorneys, and [the Boies law firm]." And the fifth prong is that Holmes could not demonstrate that the communications "did not concern matters within . . . the general affairs of the company." Based upon those determinations, and the fact that the entity now in charge of Theranos (the "Assignee") was waiving the corporate privilege,[22] the documents were ruled admissible.

As noted above, once the *Graf* test was ruled to be applicable, the outcome was not in doubt. And this author takes no issue with the magistrate judge's determination on the fourth and fifth *Graf* prongs. As to the second, however, especially as it ties into the third *Graf* prong – unanalyzed by the magistrate judge – the author does take issue; moreover, it highlights yet another ethical issue made complicated by the two hats worn by Boies.

The third prong is whether Boies communicated with Holmes in her individual capacity, knowing that a possible conflict could arise. Missing completely from the magistrate judge's decision is whether Boies in any way met his ethical duty to inform Holmes that Theranos – and not she – was his only client and that any privilege that would attach to their communications would be owned by Theranos, not her. This ethical duty, mandated by Rule 1.13, is properly known as the Corporate Miranda Warning.[23] Such a warning would have been particularly important (i) given that Holmes, in light of her CEO position and her total control of Theranos stock, really *was* the company, and (ii) given that this warning has been the subject of well-publicized litigation in the Ninth Circuit (case law which was even cited by the magistrate judge).[24] The absence of any record of Holmes being given this warning at any time between 2011 and 2016 is (at a minimum) problematic and gives pause as to whether the magistrate judge was right in not giving sufficient weight to Holmes's subjective belief (in the absence of the Rule 1.13 warning).[25]

CONCLUSION

Many (but not all) of the foregoing miscues (ethical and otherwise) could have been avoided if Boies had not put on a director hat. But he did, and now he is one of the government's key witnesses against the former CEO of his client (who thought he was her lawyer). We will find out if the trial reveals what benefit(s) accrued to Theranos and Holmes from the "advice of a seasoned lawyer."

1. *See Ethical Issue for Business Lawyers: Lawyers-Directors: Just a Bad Idea*, N.Y. Business Law Journal (Spring 2009).

2. Case No. 18-cr-00258-EDJ-1 (N.D. Cal). Ms. Holmes's trial began on Aug. 31, 2021. *See* C. Weaver & S. Randazzo, *Theranos Patients at Core of Fraud Case*, Wall Street Journal, Aug. 8, 2021.

3. *See* The New York Times, Sept. 21, 2018.

4. Published by Alfred A. Knopf (May 21, 2018).

5. This article will focus only upon the issues arising from Boies's representation of and involvement with Theranos and Ms. Holmes.

6. *See supra* note 3.

7. *Id*. How this response addresses Gillers's point is not self-evident (at least to this author).

8. *Id.*

9. *See supra* note 1.

10. The American Law Institute has also issued similar warnings. *See supra* note 1, notes 2, 3 & 4.

11. *See supra* note 3.

12. Whenever this happens (not unlike the firing of an outside auditor), outside counsel for a company should be careful because, if not a per se "red flag," it surely is a very dark, yellow flag.

13. *See supra* note 3.

14. *See supra* note 1.

15. *See supra* note 3.

16. Theranos settled with the SEC on March 14, 2018. Holmes separately settled with the Commission on the same day, paying $500,000 without admitting or denying the fraud allegations; she also agreed to be banned from public company roles for 10 years, return 18.9 million Theranos shares, and relinquish voting control of Theranos.

17. *See, e.g., AOC Ltd. Partnership v. Horsham Corp*., 1992 Del. Ch. LEXIS 110 (Del. Ch. 1992); *Deutsch v. Logan*, 580 A.2d 100 (Del. Ch. 1990); *S.E.C. v. Gulf & Western Ind., Inc*., 518 F. Supp. 675 (D.D.C. 1981); *Valente v. PepsiCo, Inc*., 68 F.R.D. 361 (D. Del. 1975); *U.S. v. Vehicular Parking Ltd*., 52 F. Supp. 749 (D. Del. 1949).

18. Presumably there was an engagement letter between the Boies firm and Theranos (i) because New York requires one (22 N.Y.C.R.R. Part 1215) (although California does not); and (ii) Theranos consented to the stock-fee arrangement in writing, which should have been encapsulated in the engagement letter. *See supra* note 3. The magistrate judge, however, did not reference any Theranos-Boies engagement letter.

19. *U.S. v. Graf*, 610 F. 3d 1148 (9th Cir. 2010).

20. *Graf* requires the person seeking to assert individual privilege to satisfy all of the following factors to establish a joint representation: First, they must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company. 610 F. 3d at 1160.

21. The magistrate judge also pointed to the fact that Holmes did not separately compensate the Boies firm, although he did take note (in a footnote) that Theranos had a corporate obligation to pay Holmes's "legal fees in connection with joint representation."

22. *See Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343, 349 (1985).

23. *See* C. E. Stewart, *Thus Spake Zarathustra (and Other Cautionary Tales for Lawyers)*, N.Y. Business Law Journal (Winter 2010). This warning is sometimes called an *Upjohn* warning, purportedly derived from the Supreme Court's ruling in *U.S. v. Upjohn Co*., 559 U.S. 383 (1981). In my view, this represents a misunderstanding of *Upjohn*, which (i) has nothing to do with lawyers' ethical duties, and (ii) stands for the proposition that all corporate employees are covered by the corporation's attorney-client privilege (i.e., the opposite message of the Rule 1.13 ethical warning).

24. *See U.S. v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal.), *rev'd sub nom., U.S. v. Ruehle*, 583 F. 3d 600 (9th Cir. 2009). This decision was at the center of my prior article on the Corporate Miranda Warning. *See supra* note 23.

25. In *Ruehle,* the CFO's subjective belief – in the absence of a Corporate Miranda Warning – was a critical factor in the district court's decision as to the law firm's ethical failure (an issue which was not part of the appeal to the Ninth Circuit). Given that "an interlocutory appeal . . . is not available in attorney-client privilege cases" (*In re Kellogg Brown & Root*, 756 F. 3d 754, 761 (D.C. Cir. 2014)), maybe this issue will be revisited on appeal if Holmes is convicted at trial. *See* C. E. Stewart, *The D. C. Circuit: Wrong and Wronger*, NY Business Law Journal (Winter 2015).

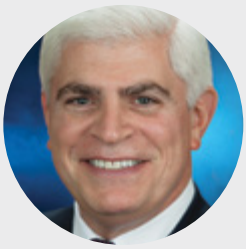
Judge Fahey Reflects on His Career and Life

By Michael Miller

On Dec. 31, 2021, Associate Judge of the Court of Appeals Eugene M. Fahey's 27-year career on the bench will end due to his attaining mandatory retirement age. His will be the third vacancy to occur on the seven-judge bench of New York's highest court since Judge Paul Feinman's untimely death on March 31, 2021 and Judge Leslie Stein's retirement on June 4, 2021.

The following are excerpts from a wide-ranging interview with Judge Fahey at the beginning of the summer. We discussed some of the decisions he authored that he felt were particularly important, his background, reflections on his extensive political and judicial careers and his future. It was interesting to learn that, before going on the bench, Judge Fahey was very active in local politics, having first become interested in politics when he was 14 years old after meeting Robert Kennedy and then a few years later working on George McGovern's presidential campaign. Over the course of his political and judicial careers, Judge Fahey won 14 of 16 elections.

We discussed a few of the consequential decisions and dissents Judge Fahey has authored, including on same-sex marriage, the nuances concerning certain types of DNA evidence, the care required in cross-racial identification and the standard for cross-examination of police officers. Judge Fahey discussed the role of his occasional dissents in sometimes preparing the groundwork for the future – a future in which he hopes the minority position and his dissent will become the court's prevailing position. For example, in his passionate and extensive dissent in *Williams v. Beemiller,*[1] discussed below, Judge Fahey argued that the case was an important opportunity to apply New York's long-arm statute to hold out-of-state gun dealers liable where the facts would lead any reasonable gun dealer to assume that guns they sold were likely to be sold illegally and land on the street in New York. In another example, Judge Fahey was ahead of his time when it came to holding police accountable, which is notable given that he comes from a family with a long history of members serving in law enforcement. But in *People v. Rouse*, decided



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With wife Colleen Maroney-Fahey and daughter Ann Fahey at the Court of Appeals at his swearing-in in February 2015; Chief Judge Jonathan Lippman swears in Judge Fahey in February 2015; with presidential primary candidate Al Gore in 1988.

in 2019, a year before the national protests demanding police reforms in the wake of the George Floyd murder, Judge Fahey wrote that police officers should be held to the same cross-examination standard as everyone else.

Judge Fahey also discussed the benefits as an appellate judge of having spent time on the trial bench and how the experience of coming through the court system as a trial and intermediate appellate judge prepared him to be a judge on the Court of Appeals. His comments were thoughtful, sensitive and genuinely self-effacing. And sometimes, they were surprising, as when Judge Fahey referenced "Rumpole of the Bailey" and Dante's "Inferno" as sources of inspiration, and the joy he gets from occasionally playing in bands with friends.

MILLER: Judge Fahey, thanks for agreeing to this interview. My hope is that we will get a personalized portrait of you. So, let's talk a little bit about your background and experience. What led you to a career on the bench?

FAHEY: I was always interested in government, and even as a young kid I thought I might become a lawyer. First, what really drew me into public life, into politics, was involvement in the campaign of George McGovern for president. I held elective offices for about 13 years before I ran for judge, and I've been a judge for almost 30 years. The initial excitement was ignited when I was 14 years old. Robert Kennedy came to the University of Buffalo to speak during his campaign for senator. As he was leaving after speaking, one of the guards, a police officer who was a good friend of my dad's, stopped Robert Kennedy and said, "Here, shake this kid's hand." I was standing on a bike. There weren't a lot of people there, maybe around 70 people, and he reached over and shook my hand and said, "Hi there." I was hooked from then on.

The anti-war protests drew me into politics and public life, and then an older friend of mine, Bill Price, was running locally for the Buffalo Common Council and drew me in to work on his campaign after the McGovern campaign. Then when Bill moved on, Bill supported me, and I was elected to the Common Council at 25 years of age. I turned 26 right before I took office. Because of George McGovern, Robert Kennedy and Bill Price more than anyone, I was drawn into politics.

My legal career began as a law clerk to Court of Claims Judge Edgar NeMoyer. He was a fine lawyer who taught me a great deal.

So, I was involved in politics for about 13 years. When I count my judgeships, primaries and general elections, I ran for office 16 times. I lost two elections and won 14. The last one that I lost was in a Democratic primary for mayor of Buffalo in 1993 against Tony Masiello, who had been a state senator. The year after that primary loss, I was elected to Buffalo City Court. Tony is a very decent guy and was a good mayor. He has helped me throughout my judicial career.

Early in my judicial career, my wife Colleen and I adopted our daughter Ann. Life was good. In 1996, I was elected to the state Supreme Court and served there for 10 years, after which I was appointed to the Appellate Division by Governor Pataki. I was there for eight years and then I was nominated by Governor Andrew Cuomo for this job.

MILLER: So, you started out having political ambitions that led you to the court. It's interesting that you worked in the campaigns for McGovern and Kennedy, and then Governor Pataki, a Republican, appointed you to the Appellate Division.

FAHEY: Well, I had supporters and some experience. I put my application in, and I was surprised but very gratified. It was right at the end [of Governor Pataki's last term as governor in 2006]. I respect former Governor Pataki and will always appreciate him giving me the opportunity.

MILLER: You mentioned that your father was a police officer.

FAHEY: Yes, he was a captain in the Buffalo police department. My mom was an account clerk in the Board of Education. I'm the oldest of six kids. My family is originally from the old First Ward in South Buffalo, and we moved to the northern part of the city near the University of Buffalo when I was about 11 or 12 years old. My first elected job was as a councilman in that area. If you look at a map of Buffalo from the sky, you will see grain mills. The old First Ward is the area around the grain mills. When the Irish laborers came over, they came right to that spot. That's where they first lived in the city.



Holding his best friend, Tiger; with wife Colleen and daughter Ann after his unanimous confirmation on Feb. 9, 2015; playing his mandolin incognito.

My paternal grandmother's family name was Donohue. Her grandfather, John Donohue, actually fought in the Union Army during the Civil War and was wounded at the Battle of Cold Harbor [Va.]. I have his picture in my office in Albany.

MILLER: Let's talk a little bit about your work as a trial judge versus intermediate appellate versus the High Court. What's the common thread and what were the differences that surprised you?

FAHEY: Take a step back. I think the best preparation I had for the work as a judge on this level was probably Buffalo City Court. Things are fast there. You must make decisions based on your instincts, you have to know the law and you have to have a good feel for the people that are appearing in front of you, specifically what they need for a just resolution. I learned the most about how to be a judge when I was in city court. I was only there a couple of years, but it prepared me for the human part of the law.

MILLER: What do you mean the human part?

FAHEY: Well, you can never forget as a judge that the decisions you make aren't simply about abstract legal theories, but they're fundamentally about the people in front of you – the litigants. But also, those decisions will affect everyone else who is touched by this particular part of the law. That human element is essential if you're going to be a decent judge. And in a place like city court, you learn that. You learn to be patient, to listen to the people in front of you, not to jump to a conclusion based on two or three words. And if you don't know the answer, don't guess – go back and look it up, don't make a mistake.

I went from there (city court) to become a trial judge in state Supreme Court. State Supreme Court is a great job for a judge. Usually after a while you tend to hone in on a particular area. I did a lot of negligence. I had been house counsel to Kemper Insurance Company for about eight years, and so I was comfortable with that. I also spent a few years as a commercial judge in Western New York. That part was particularly good preparation for an appellate court. The quality of the advocates is high. The issues are more complex than purely fact-based cases. It was challenging, and I learned a lot.

The biggest leap, and the most difficult transition, was from the trial bench to the Appellate Division. It took a while before I really felt comfortable. The volume of work in the Appellate Divisions is high. You have to move along and make a decision. It's a whole new way of working from what you're used to. As a trial judge, you make your decision. You write your decision, or you make a decision from the bench and you move on. In the Appellate Division, it's a negotiation. It was a big transition from a court where you had people in front of you, made a record and could sometimes deliver decisions orally, to a court where everything is in writing and everything is a result of joint decision-making, rather than decisions made solely by yourself. And, of course, you're working with different personalities with different life experiences.

Going from the Appellate Division to the Court of Appeals is a big jump, but the work is similar. You're working in a group; it's primarily about your writings, your interactions within the group and your preparation. The biggest difference, of course, is the stage that you're on and the respect that the history of the court demands, not just in our state but throughout the country. You have to be aware of that and tread lightly.

In my time at the Appellate Division, probably the most significant writing I did in the eight years I was there was on the appeal of the same-sex marriage case, *New Yorkers for Constitutional Freedoms v. The New York State Senate.*[2] Basically, we upheld the law that established same-sex marriage in New York that had been passed by the Senate and challenged in the Fourth Department. I think the Court of Appeals didn't even take the case; they just denied leave on it. So, that decision ended up being the law of the state.

MILLER: Several people have commented that you take your position on the court and the matters before you very seriously, but that you don't take yourself too seriously, and you're known to be rather self-effacing. How do you keep that balance?

FAHEY: Did you ever watch the television show or read "Rumpole of the Bailey"? They used to refer to pompous judges as suffering from "judge-itis." They'd say, "Oh, he's got it bad. Another case of judge-itis." I talk with friends who are judges about how people laugh much more at our

jokes and that we never hear the negatives about ourselves, only the positives. My family and friends are not hesitant to let me know of any of my failings. What's serious is our job and what we do. I have no illusions about this job; I'm very lucky to have it, and it's a privilege and a great responsibility, and I take it seriously, but I think it would undermine my effectiveness if I took myself too seriously.

MILLER: Having read a number of your decisions, it's clear that you take your job very seriously.

FAHEY: There are some decisions that are more noteworthy than others. I look at the decisions I wrote when I first came on the Court [of Appeals] in 2015. It's not that long ago. I've worked at becoming a better writer. I get to the point more quickly with less judicial verbiage. I aim to grab the reader's attention and then build on that. At the Court of Appeals we have a larger audience than just the litigants; although they may be the most important part of the audience, they are not the only part of the audience. I'm sometimes a little jealous of the Appellate Division. Primarily I wish we had "interest of justice" jurisdiction, as they do.

MILLER: Let's talk a little bit about some of the decisions you've written. Gun regulation is a hot button issue. Your dissent in *Williams v. Beemiller, Inc.*[3] was compelling. In a case of mistaken identity in a gang dispute, a young man was critically shot and severely wounded while he played basketball in front of a neighbor's house in Buffalo in August 2003, and those injuries sidelined a basketball career that included the young man's consideration as an NCAA Division I prospect. By 4 to 3, the majority found that an Ohio gun dealer couldn't be held liable in New York for the shooting of the innocent young man with one of the thousands of guns that had been purchased from the defendant and illegally sold on the street in Buffalo. You passionately dissented from the majority's position that New York cannot exercise long-arm jurisdiction over out-of-state gun merchants who place firearms in the stream of commerce knowing that such weapons are likely to be resold for illegal purposes in New York.

FAHEY: It was estimated that this dealer sold over 10,000 guns, which the ATF said were moved out of state. They call the movement of guns the "iron pipeline," where illegal guns come from Ohio to New York. Usually, in a dissent I just say my piece and move on. I went into greater detail because I wanted to establish the groundwork for someone who addresses the issue in the future. I felt emotionally about *Williams v. Beemiller*. It was a heartbreaking case, and I think the court made a great mistake there. While I am not shy about dissenting, I have a great deal of respect for my colleagues, both for their motives and for their abilities. I try to avoid any rhetoric that is personal.

MILLER: Despite having an insurance background as house counsel at a major insurance carrier, you nevertheless expanded the "zone of danger" for purposes of liability in *Green v. Esplanade Venture Partnership*.[4]

FAHEY: As you know, the issue in *Green* was who is part of the "immediate family." We held that "immediate family" included the grandmother of a deceased child. My experience with Kemper [Insurance Company] was that they were not unreasonable; they were not out to get anyone. They'd fight their cases like everyone else, but if I came in and told them that they had to cover the grandmother because she was in the zone of danger, as I wrote in *Green,* they would just say, "Okay, that's what we will do if that's what the law is."

MILLER: I found it interesting, since your father was a police captain, that you didn't hesitate to suppress evidence in *People v. Holz.*[5] I wouldn't expect that from a police captain's kid.

FAHEY: You don't know enough cops. My dad was a police officer and so were two of my uncles, and my brother-in-law was a homicide detective. I have a lot of family still in the Buffalo Police Department, and I think that the cops right now are getting a bad rap because they're bearing the burden for malfeasance that cuts across many institutions, not just the police department. A good police department is essential to the effective operation of justice. The court's job is to say, "Do it right." I had a case earlier, *People v. Boone,*[6] that was about cross-racial identification. It was the first time we said that a trial court must caution a jury about the potential fallibility of an identification of a defendant by a person of a different race when the defendant asks for such an instruction. That requirement does not undermine the police department. It just helps to ensure that the result is a fair result.

MILLER: I'm not so sure that law enforcement officers uniformly would be comfortable with your decision in *People v. Rouse*,[7] where you reverse on the basis that cops may be cross-examined like everybody else.

FAHEY: Well, I'm sorry if they feel that way, but that's what I think the law is in New York. Equality before the law applies to everyone.

MILLER: In *People v. Williams*,[8] while affirming a murder conviction, you were nevertheless critical of the court below. You held that while the court below had abused its discretion by failing to hold a *Frye* hearing before admitting microscopic amounts of DNA, known as Low Copy Number DNA, it was harmless error because the other evidence was overwhelming.

FAHEY: In that case, the evidence was so overwhelming that the error of failing to have a *Frye* hearing on LCN DNA didn't require us to throw out the verdict. What we are saying is that Low Copy Number DNA is, in and of itself, not reliable in the absence of a *Frye* hearing that verifies the methods relied on. It is a very nuanced and

important decision. DNA is considered the gold standard of evidence. Generally, a trier of fact will place complete confidence in it. That requires us to look hard at how that evidence is obtained because it appears to be dispositive in and of itself. The *Frye* hearing must act as our truth certification test. I think we need to do more of them, not less, with this kind of evidence.

MILLER: I suspect that the court below wasn't terribly happy with that.

FAHEY: I always feel bad about that, to be honest.

MILLER: That's very thoughtful of you to consider the perspective and sensitivities of the trial court.

FAHEY: There's an advantage of coming up through the system the way I did. I know how hard they work on these cases, and I know how personally the judges take reversals or criticism. It's a normal human reaction.

MILLER: Let's talk a little bit about the impact your career has had on your personal life. Your background is especially interesting because you really came from the political universe, which includes a good deal of back slapping and social relationships. When you go to the bench, you have to be more reserved, more circumspect. How did that play out for you?

FAHEY: If I hadn't been involved in politics, I think I might have been either a history teacher[9] or, at one point in my early 30s, I thought of the FBI. Each of those jobs demands a different kind of personality. I think that becoming a judge at the point in my life when I went on the bench, in my mid-40s, was the right time of life for me. After that I was able to have the time to be with Colleen and Ann that I wouldn't have in a political life. My life didn't really become calmer or less busy after I left politics and moved to the judiciary, it just became different. It was just as full, but it was different. I enjoy the intellectual side of public life. In many ways the law personifies that. In our society the common arbiter of all our decisions ultimately is the courts. I don't know if that's good or bad, but in point of fact, it is. That being the case, the people that are making those decisions better be humans who've had a broad range of experience.

MILLER: What non-legal works do you read?

FAHEY: My reading habits have changed. Right now, I'm caught up in Dante's "The Divine Comedy," specifically a translation of "The Inferno" by Robert Hollander. I've read other translations. My favorite was John Ciardi. I found it the most accessible. Anyway, it's all there, Michael, every variety of human nature is in it. W.S. Merwin, the poet, did a translation just of "Purgatory" but not of "The Inferno." My plan is to read Hollander and then read Merwin's "Purgatory" this summer. I described my plan to my wife and she rolled her eyes and said, "I liked it better when you were reading mysteries and science fiction."

MILLER: Tell me a little about your wife and your outside interests.

FAHEY: My wife is Colleen Maroney. She and I were in the same kindergarten class at St. Thomas Aquinas Grammar School in South Buffalo. We met again years later at a bar near Lake Erie when we were about 19 years old. For many years she was the managing director of Theater of Youth, a children's theatrical company in Buffalo. While there, she spearheaded the creation of a permanent facility for children's theater in the Allentown neighborhood. It involved the rehabilitation of the 100-year-old Allendale Theater. In 2001, The Buffalo News named Colleen "Citizen of the Year" for her work on the project. Obviously, I love her very much and am proud of her accomplishments.

I'm sort of a half-baked musician; I thought about studying music at one point, and I love music. Occasionally I will play in bands with my friends. I play guitar, mandolin and a little violin and piano.

MILLER: Aside from catching up on your Dante, do you have any plans for life after the bench?

FAHEY: Well, I may teach in an amicus brief clinic at the University of Buffalo Law School. I've discussed that with them. We haven't finalized it, but I've been preparing the syllabus. Beyond that, do you remember what Leslie [Stein] said, which I thought was very good. She said, "I want to get up in the morning and not worry about what I have to do each day." To some degree I want to feel that way too. I thought that Leslie said that very well.

MILLER: How do you feel about your approaching retirement?

FAHEY: It's like I'm falling down a hill and I keep on accelerating. I haven't thought about what I'm going to do when I fall off the cliff. I don't think I'm fully prepared for it. However, I do like the idea of helping law students get started. The University of Buffalo gave me my start, so, if I can do that for someone else, I'd like to.

MILLER: Thanks again, Judge Fahey, for agreeing to this interview. I've enjoyed our conversation very much. And thank you for your service to the profession and our legal system.

FAHEY: Thanks, Mike. Thanks for taking the time.

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1. 33 N.Y.3d 24 (2019, dissent).
2. 98 A.D.3d 285 (4th Dep't 2012).
3. 33 N.Y.3d 24 (2019, dissent).
4. 36 N.Y.3d 513 (2021).
5. 35 N.Y.3d 55 (2020).
6. 30 N.Y.3d 521 (2017).
7. 34 N.Y.3d 269 (2019).
8. 35 N.Y.3d 24 (2020).
9. Judge Fahey obtained a master's degree in European history in 1998 while a justice of the Supreme Court.

The Surfside Condo Collapse: Lessons for New York

By Adam Leitman Bailey and John M. Desiderio

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The disastrous collapse in Surfside, Florida of the 40-year-old Champlain Towers South condominium tower should set off alarm bells in New York City, wherein it is estimated there presently are more than 1 million buildings, many of which are more than 100 years old, including several in Manhattan that were converted to cooperative apartment buildings in the 1970s and 1980s, in addition to the hundreds of high-rise condominium buildings built more recently, in the 1990s and 2000s, primarily in Manhattan, Brooklyn and Queens.

NEW YORK LAWS

Overall, New York has a much better governance system of the exterior (and a few interior items) of tall buildings than does Florida. At the same time, although we will not have buildings collapsing into the ocean, we do have major potential problems that need to be addressed. Since 1980, New York City, unlike Florida, has had laws in place requiring mandatory inspection and repair of building facades. The latest iteration of the law, the Façade Inspection and Safety Program (FISP) (formerly known as Local Law 1), RCNY § 103-04 ("Periodic Inspection of Exterior Walls and Appurtenances of Buildings") was updated in February 2020, to include additional inspection items, increased levels of inspection and more comprehensive documentation. The law requires that all buildings in New York City higher than six stories have all of their exterior walls and appurtenances (including, among other things, fire escapes, exterior fixtures, ladders to rooftops, parapets, copings, balcony and terrace enclosures, greenhouses and solariums, and any other equipment attached to or protruding from the façade) inspected in five-year cycles. The current cycle 9 (Feb. 21, 2020 to Feb. 21, 2025) requires that all buildings be inspected, on a staggered schedule, in one of three sub-cycles: 2020–2022, 2021–2023, and 2022–2024. Inspections must be conducted by Qualified Exterior Wall Inspectors (QEWI) with at least seven years of relevant experience to be qualified.

However, while FISP scaffolds or other observation platforms are a routine fact of life on the streets of New York, there is currently no law, in either New York City or anywhere else in New York State, that mandates inspection and repair of the interior structural elements of any building whatever its size. FISP provides no assurance that the type of structural defects that led to the Champlain Towers collapse will be detected unless the structural elements of all buildings are subject to regular routine inspection. Indeed, the mandatory evacuation of a 70-year-old three-story building, a few blocks away from the Champlain Tower site, one month after the headline-grabbing event,[1] evidences the need for mandated, comprehensive and regularly scheduled inspections of both interior and exterior structural elements of buildings of all sizes. The FISP law needs to be expanded to cover major components and the ability to identify interior of buildings as well as their exteriors.

CONSIDERATIONS REGARDING BUILDING STRUCTURAL INTEGRITY AND REPAIRS

In the meantime, in the absence of mandated governmental requirements for interior structural inspections (other than for elevators, boilers and gas piping, which are subject to regularly scheduled inspections) building owners (including both commercial and private landlords, cooperative apartment corporations and condominium boards) must themselves assume the burden and responsibility of implementing the prudential actions necessary to ensure the continuing structural stability of their buildings.

However, the cost of maintaining and repairing interior structural building elements, for both old and new structures, can be daunting. Nevertheless, landlords (whether commercial or residential, including cooperatives and condominiums), as a matter of prudent management, and/or pursuant to any applicable statutory or contractual lease obligations, need to maintain sufficient reserve funds to address capital repairs, improvements and replacements required for their existing tenants' health and safety.

Similarly, sponsors seeking to convert buildings with residential tenants to condominium ownership must comply with New York City's Reserve Fund Law,[2] which mandates that they provide sufficient funds to create the reserves that will be necessary for capital repairs, improvements and health and safety items required in the future operation of the condominium. The law requires that sponsor-created reserve funds be at least equal to a statutorily calculated minimum of no less than 3% of the total price that was offered to tenants in occupancy prior to the effective date of the conversion plan regardless of the number of sales made. This law should be expanded to all cooperatives and condominiums and not only buildings converting to condominium, as too many buildings do not carry enough reserves or refuse to spend money to repair buildings, putting its residents in danger.

Nevertheless, aside from normal maintenance costs, which either rent, maintenance payments or common charges are expected to cover, the potential costs, which could be incurred in repairing the kind of structural damage that would cause a similar Champlain Towers-like disaster, are formidable and most likely would be well in excess of whatever amount of reserve funds a building's management is likely to accrue, even over several years. This is especially true of buildings with residents and board members who have fixed incomes and are reluctant to assess unit owners for the kind of sums necessary to do any extraordinary structural repairs. It is

reported that the Champlain Towers president had told residents in April, when there was only $700,000 in the building's reserve fund, that the building was in desperate need of repair and that $15 million in assessments were needed for the work that was required.[3]

Overall, New York has a much better governance system of the exterior (and a few interior items) of tall buildings than does Florida.

Apparently, there was unit owner resistance to any assessment of that size at Champlain Towers, and such resistance to assessments of any size is often found in any number of condos and co-ops in New York City. Bylaws often include provisions requiring a 66–2/3 (or higher) percentage of owners or shareholders to approve costs for necessary repairs or renovations above specified limited amounts. The Champlain Tower experience should spur condo and co-op boards to revisit their bylaws and consider amending them to be less restrictive. There should be minimum approval required when there is evidence certified by independent engineers and architects that more than "Band-Aid" repairs are necessary to protect the structural integrity of the building. Moreover, assessments are likely to be less burdensome at the early stages of a detectible structural defect than later when, after the situation has been left to fester for several years, the defective condition has reached a critical level.

It is therefore incumbent on building owners to seek ways of accumulating the reserve funds needed to address the kind of extraordinary structural repairs without which a Champlain Towers-like disaster could occur. However, in the event that the likely causes of such a tragedy go undetected and the unthinkable does occur, building owners need to be prepared for the aftermath and have protection, not only against the property losses and damages that they will suffer, but also respecting the personal and property damages for which they could be held liable by their residents and other third parties. The actions building owners should implement are similar to those prudential steps that many building owners have taken in the aftermath of terrorist acts, catastrophic hurricanes, and other severe weather events.[4]

LITIGATION CONSIDERATIONS IN BUILDING DISASTER CASES

In any litigation arising from a Champlain Towers-like disaster, a court is likely to consider all of the above factors in assessing the various liability issues that will affect the owners and lessees of the real estate (landowners as individuals and ground lessors, landlords, cooperative apartment corporations and incorporated condominiums), officers of landlords, board members of cooperative apartment corporations and condominiums, officers and property managers of managing agencies, contractors who constructed the building, architects and engineers who designed or certified the project, building inspectors who signed off on the project and all of the respective insurance companies of each of them.

The primary liability issues for each potential plaintiff and defendant will be the foreseeability of the event and what actions the particular party defendant, third-party defendant or cross-claim defendant did or failed to do when apprised of evidence of the structural defects that likely caused the resulting building disaster. Such issues are not unlike those the court examined in connection with the duties of the owners of buildings and the duties of other defendants involved in the 1993 World Trade Center terrorist bombing.[5] In addition, New York's Multiple Dwelling Law § 78 (Repairs) mandates that "[e]very multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair," and that the "owner shall be responsible for compliance with the provisions of this section, but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence . . . ."

A CASE ILLUSTRATING THE VARIOUS LIABILITIES

The case of *Fitzgerald v. 667 Hotel Corp.*[6] provides a useful example of how the liabilities of the various parties involved in a building collapse are likely to be determined by the courts. This also, most likely, would determine the liabilities of the parties' respective insurance carriers. In *667 Hotel Corp.*, 43 consolidated actions arose out of the collapse on Aug. 3, 1973 of the Broadway Central Hotel, located at 673 Broadway – a building constructed in the 1850s, which had undergone various alterations over the years. Four persons were killed in the wreckage, many others injured and a number of businesses incurred substantial property damage. The defendants were, among others, the owners of the building, the net lessee, the mortgagee, a tenant who was having structural renovation done on its portion of the premises, and the contractor the tenant employed for that purpose. The City of New York was also named as a defendant,

as the Department of Buildings had been made aware of the hazardous state of the building and had failed to act to cause the defect to be remedied or the building to be vacated.

Extensive renovations had been done to the building by the net lessee. In January 1973, the president of the net lessee called the attention of the managing engineer of the building to cracks that were extending through the interior bearing wall and buckling the frames of the double doors going through it. The lessee's own contractor and architect, who inspected the cracks, concluded that the cracking was a structural danger. The chief building inspector for the Borough of Manhattan then personally inspected the premises on Jan. 29, 1973. He agreed that the bulging of the exterior wall and the diagonal crack through the weight-bearing wall was a serious defect in the bearing wall and that an architect or engineer should take immediate remedial action. He opined that the building was not in imminent danger of collapse, but that, if the condition were not remedied, it would gradually become more dangerous. However, the inspector failed to observe that the crack extended all the way up to the eighth floor. He did not issue any violation respecting the crack in the weight-bearing wall and made no personal effort to follow up. A violation was issued only for the bulging front façade and made no mention of the cracked weight-bearing wall. A consulting architect proposed several plans for correcting the bulge and crack in the front wall, but the lessees of the hotel opted for the cheapest solution. Nevertheless, no plan had been approved by the Department of Buildings by the date of the collapse.

At trial, the Kings County borough superintendent of the Department of Buildings testified that the failure of the city building inspectors to write a comprehensive building order on the day the bearing wall cracks were observed, and to have made no explicit mention of it in the violation order, was a departure from proper procedure. As a result, a hazardous building violation was not issued and a court order was not obtained for immediate vacating of the building and repair within 10 days. By July, the conditions were observably worsening and, on Aug. 3, the need for an immediate building evacuation was clear, as there was pressure on the sprinklers, cracking sounds within the building and rumbling noises that continued until 5:10 p.m. when there was an explosive sound, the lights went out, the sprinklers broke and the building collapsed.

The Supreme Court held the owners of the building 25% liable, the net lessee 45% liable and the City of New York 30% liable. Although the premises were under a net lease, the owners had a right to enter and inspect the premises and make repairs, and the court held them liable (citing *Appell v. Muller*[7]), for failing in the duties imposed upon them under Multiple Dwelling Law § 78. The net lessee, 667 Hotel Corporation, was held liable because simply retaining an architect after the building inspection did not satisfy its duties. No repairs were undertaken, and such plans as were filed with the building department, even if they had been implemented, would not have prevented the collapse. The mortgagee defendant was not held liable because it never became a mortgagee in possession, nor assumed possession or control over the premises, and, therefore, never assumed any obligation under Multiple Dwelling Law § 78 for the necessary repairs that were required. The court held the city liable for "its total lack of action in the face of danger" that would have prevented the collapse, and its failure "[gave] rise to tort recovery." On appeal the Appellate Division affirmed, but modified the judgment, holding that the city was entitled to be indemnified by the owners. However, the Court of Appeals held that the city should not have been held liable, explaining that "in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation . . . even though [the building inspectors] knew of the dangerous structural conditions in the building."[8]

INSURANCE ISSUES

Cases against insurance carriers by property owners are determined primarily by the language of the insurance contracts. In *Rector St. Food Enters., Ltd. v. Fire & Cas. Ins. Co. of Connecticut,*[9] the subject policy specifically defined its additional collapse coverage for collapse with respect to buildings as meaning "an abrupt falling down or caving in" and provided that "[a] building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, leaning, settling, shrinkage or expansion." The court held that, although the building was demolished by its owner after the city declared an immediate emergency and "even though the building required demolition, the event resulting in the loss was not covered by the provision of defendant insurer's policy insuring against loss attributable to 'abrupt' collapse."[10]

The Champlain Towers building disaster clearly raises issues for New York property owners and lessees because of the many buildings of advanced age within the five boroughs.

In contrast, in *Hudson 500 LLC v. Tower Ins. Co. of New York*,[11] the policy did not expressly require that there be an "abrupt falling down or caving in." The carrier nevertheless contended that the insured did not suffer a compensable "collapse," as that term was used in the policy "because no part of the building ever fell down." Nevertheless, the court held that the term "collapse" "does not require the total destruction of the building, but, rather, only a substantial impairment of the structural integrity of a building," citing *Royal Indemnity Company v. Grunberg*,[12] and noting that "where a collapse has occurred, the fact that cracking and bulging also occur should not prevent coverage for collapse since it would be hard to imagine a collapse that did not include some cracking or bulging of walls."[13]

In *D'Agostino Excavators, Inc. v. Globe Indemnity Company*,[14] where an insured excavator sought to recover from its liability carrier, because of a judgment against the excavator for damages to walls and structure following negligent operation of insured's bulldozer, the court held that the policy rider was limited to coverage for collapse or injury to any building structure directly due solely to excavation or filling or backfilling and did not include injury due to impact between the insured's bulldozer and the affected property.

In *Burack v. Tower Insurance Company of New York*,[15] the court held that genuine issues of fact existed as to whether the insured's building collapsed because of the shifting of earth by actions of third parties on the adjoining property's construction site, which would fall within the policy's exclusion provisions, and not because of the movement of earth from natural phenomena, which was the hazard covered by the policy.

These cases show that property owners need to scrutinize the exclusion provisions of the policies they purchase to ensure that they are covered for conditions that may lead to collapses, so as to be able to recover the cost of repairing such conditions before an "abrupt falling down or caving in" actually occurs.

CONCLUSION

The above discussion shows that the Champlain Towers building disaster clearly raises issues for New York property owners and lessees because of the many buildings of advanced age within the five boroughs. Although many protections are in place in New York, the additional protections proposed would greatly fortify our state. It is also important, therefore, that all parties subject to potential liabilities that could arise from either complete or partial building collapses take prudential action to maintain their buildings "in good repair" and to obtain insurance policies that will provide the coverage required for all possible forms of structural building defects, to ensure that there will be sufficient funding available to remedy hazardous conditions before they reach critical stages and to protect against the liabilities that will follow if a disaster that could have been avoided should ever occur.

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1. Deborah Acosta and Jon Kamp, *Another Surfside, Fla., Condo Is Evacuated After Building Deemed Unsafe*, Wall St. J., July 21, 2021, https://www.wsj.com/articles/another-surfside-fla-condo-is-evacuated-after-building-deemed-unsafe-11626895331.
2. Local Law 70 of 1982, Title 26, Chapter 8 of the New York City Administrative Code, 26-701 *et seq*.
3. Alex Leary, *Miami-Area Condo Collapse Sparks Calls for Tighter Laws*, Wall St. J., July 10, 2021, https://www.wsj.com/articles/miami-area-condo-collapse-sparks-calls-for-tighter-laws-11625922002.
4. *See* Adam Leitman Bailey and John M. Desiderio, *Preparing Practitioners for the Next Disaster*, https://www.alblawfirm.com/articles/preparing-practitioners.
5. *See In re World Trade Center Bombing Litig.*, 3 Misc. 3d 440 (Sup. Ct., N.Y. Co. 2004).
6. 103 Misc. 2d 89 (Sup. Ct., N.Y. Co. 1980), *aff'd sub nom. Worth Distributors, Inc. v. Latham*, 88 A.D.2d 814 (1st Dep't 1982), *aff'd as modified*, 59 N.Y.2d 231 (1983).
7. 262 N.Y. 278 (1933).
8. *Worth Distributors, Inc.*, 59 N.Y.2d at 237.
9. 35 A.D.3d 177 (1st Dep't 2006).
10. *Id.* at 178.
11. 22 Misc. 3d 878 (Sup. Ct., N.Y. Co. 2008).
12. 155 A.D.2d 187, 189 (3d Dep't 1990).
13. *Hudson 500, LLC*, 22 Misc. 3d at 885.
14. 7 A.D.2d 483 (1st Dep't 1959).
15. 12 A.D.3d 167 (1st Dep't 2004).

Refugees in Upstate New York: A Little-Known Success Story

By Scott Fein

Scott Fein is a partner at Whiteman Osterman and Hanna, senior adviser and fellow at the Rockefeller Institute of Government's Center for Law and Policy Solutions and editor-in-chief of "Immigration: Key to the Future" (NYSBA, 2021).

As the national debate over immigration continues and intensifies, the question of whether refugees contribute to a community's vitality or drain the community's resources continues to be debated. The more than 1,000 Afghani refugees likely to be resettled in upstate New York has again brought the issue to the fore.

Recognizing the challenges posed to upstate New York, several years ago the New York State Bar Association considered initiatives that might strengthen our upstate communities. Beginning with its Task Force on Rural Justice, followed by its examination of immigrant rights in its book "Is America Fulfilling Its Promise? Safeguarding Legal Protection for Immigrants," it became increasingly apparent that the declining population in upstate New York was imperiling the region's economic recovery and capacity to maintain basic infrastructure services in academia, health care and programs for retired adults.

Reversing the population decline seemed daunting but, to our surprise, it appeared the resettlement of refugees had increasingly become the means to strengthen and often grow these communities, demographically, economically and culturally. And so, we turned our attention to the question of the impact of refugees in upstate New York and to what extent have they contributed to the region's vitality.

The New York State Bar Association joined with the Government Law Center at Albany Law School and Rockefeller Institute of Government to tackle the question and invited 30 authorities to assemble data and provide perspectives. Their findings have been collected in a new book, "Immigration: Key to the Future – The Benefits of Resettlement to Upstate New York."

Drawn from academia, the business community, service organizations and the community of statisticians and demographers largely using economic and statistical analysis, our contributors' findings were consistent. Offsetting the demographic and economic decline in upstate New York communities, refugees pay taxes, rebuild housing stock, open stores, take unfilled jobs and more. Their contributions are so important that an increasing number of localities are seeking to lure refugees who have settled in other parts of the country. As the authors noted, it takes time, support, and patience, but refugees are helping to rejuvenate upstate communities.

Here are some of the more compelling findings in the book.

It begins with what appears to be an anomaly. New York is a cultural and political mosaic. Downstate is culturally left of center, while less-populated upstate is often more conservative. Against this backdrop, the federal government, which determines where resettlement occurs, directed that on the average, 6% of the refugees admitted to the U.S. since 2000 be resettled in New York State (third in the nation, only slightly behind California and Arizona) and of that number 90% be resettled in upstate New York.

Cynics said that introducing thousands of refugees into upstate communities would be a combustible combination. Indeed, they were correct; combustion followed, but in a form that appeared to release an energy that buoyed these localities.

Offsetting the demographic and economic decline in upstate New York communities, refugees pay taxes, rebuild housing stock, open stores, take unfilled jobs and more.

Yet, cynicism lingered, voiced by some less familiar with the host communities and those in Washington who struggled to understand the benefits of refugee resettlement. How could small cities and communities in upstate New York, and not in one community or two, but in well more than half the upstate counties, benefit from the Bengalis, Bhutanese, Bosnians, Burmese, Guyanese, Jamaicans, Vietnamese, Syrians, Iraqis, Somalians, Asians, South and Central Americans, and of course, the Afghan community, which will likely materially increase in the short term?

THE LAW

Immigration and tax law appear to be distinguished by the same quality – complexity – and, in each, confusion often abounds. As the national debate over immigration intensified, immigration concepts blurred and the public debate at times became untethered to the law. In brief, migrants and refugees are two of the terms used to describe people who are seeking new homes in other countries. The principal difference is choice. A migrant is someone who theoretically chooses to move to a new country for economic reasons or family ties, and a

refugee is unable or unwilling to return their country of origin owing to a "well-founded fear of being persecuted by reasons of race, religion, nationality, membership in a particular social group or political opinion." The distinction can be porous but key differences remain. Refugees are protected by international law and subject to asylum procedures that include demonstrating evidence of their concern and a long pre-admissions process.

Those who seek refugee status may apply outside of the United States (§ 207 INA) or may apply if they already are in the United States (§ 297 INA). Each refugee is subject to multiple interviews, extensive medical and security clearances, including biometric and biographic checks. The length of the asylum process typically takes between six months and several years. While awaiting approval an asylum seeker may receive work authorization.

Unlike migrants, the federal government chooses where refugees will be resettled. After a refugee has been conditionally accepted, the federal government, in coordination with nine national refugee resettlement agencies, chooses the resettlement location. As noted earlier, in New York State about 90% of refugees are settled upstate; in comparison, 87% of migrants choose to settle in New York City and its environs.

DEMOGRAPHIC IMPACT OF REFUGEES UPSTATE

Demographic changes over the past decade have pushed U.S. population growth, and growth in many industrialized nations, to its slowest pace since the Great Depression. In half of the states in the U.S., more people died than were born. Compounding the concern is the rapid aging of the population that has pushed the senior population to historic heights. The population of those age 65 and over is projected to move from 13% in 2007 to 20% in 2027. In short, there will be fewer workers supporting services for a greater number of older residents.

Demographic challenges are not distributed evenly across the United States. Some parts of the country added people at a healthy pace, particularly in the southern and western regions of the nation. The 2020 census reflects, however, that New York was only one of seven states to lose a congressional seat based upon the slower growth in population.

For upstate New York, the demographic impact has been particularly pronounced. Forty-two of 50 upstate counties recorded a loss of population of 107,707 between 2010 and 2018. One measure of the demographic health region is the old-age inverse, the number of people at working age required to provide for one retired person or child. A high ratio means that the economy can easily provide for its youths and older population. A low ratio means conversely that a greater burden is placed on its working population and the economy. In upstate New York on balance, the ratio is approaching 3:1, a number which will make it increasingly challenging to sustain services and attract businesses.

On the other side of the ledger, the resettlement of refugees has demonstrably slowed population decline in many upstate areas. Since 2002, more than 50,000 refugees have been resettled in towns and cities throughout upstate. For example, from 1910 to 2000, Utica, a small industrial city northwest of Albany, lost almost half its population. Since 1981, the city has resettled over 16,500 refugees from Bosnia and 30 other nations, which has demographically and economically helped stabilize the city and reverse its population decline. Today 40 languages are spoken in the Utica City School District and 19.4% of the population are foreign-born residents. Utica is not alone; today, three of New York's upstate city areas are in the top 50 metro areas in the nation for refugee resettlement: Buffalo (#13), Syracuse (#20) and Rochester (#32). In more rural areas, immigrants continue to play a central role in the agricultural economy.

THE ECONOMIC IMPACT

While offsetting demographic decline is important, it is fair to ask about the tangible contributions made by the resettled refugee population, and our authors did just that. Some of their findings:

- In upstate New York, immigrants (the vast majority are refugees) in 2018 made up 6.5% of the population but contributed 8% of the GDP, provided 7.7% of the spending power and made up 8.6% of all entrepreneurs.
- Similarly, in 2018, immigrants upstate had an aggregate annual income of $15.2 billion, paid $3 billion in federal income taxes, $1.9 billion in state and local taxes, $1.4 billion in Social Security and $379 million in Medicare.
- Immigrants have had a favorable impact on housing, particularly the renovation of depressed real estate. In Utica, for every 1,000 immigrants who moved into the city, housing prices went up by $116. It is estimated that in Syracuse, immigrants raised housing values by $406.5 million between 2000 and 2014.
- Generally, immigrants fill both low-skilled and higher-skilled jobs. In 2014 alone, immigrants helped create or save 5,000 manufacturing jobs between Buffalo and Syracuse. In 2018, immigrants accounted for 34% of all self-employed New York residents, generating $7.8 billion in business income. In New York State, immigrants make up 9.1% of agricultural jobs, 8.2% of social service and health care jobs and 8.2% of professional service jobs.

- In upstate New York, foreign-born students make up 50% or more of all recent recipients of engineering, mathematics, computer science and economic doctorates. In 2018 and 2019, there were more than 36,000 international students attending colleges and universities in upstate New York, and they added more than $1.3 billion in consumer spending and supported 16,000 local jobs.

While their economic trajectory is, as with immigrant groups since the inception of our nation, upward, success can be quick or can take years.

- When refugees arrive, they often have no meaningful independent financial support and rely on public benefit programs. While some programs are funded by the federal government, counties typically advance 25% of the cost of such programs, including Temporary Assistance for Needy Families and Medicaid. The single largest cost for the host counties is English-language training.

The success of refugees and migrants upstate is not without its issues. While their economic trajectory is, as with immigrant groups since the inception of our nation, upward, success can be quick or can take years. Our authors have identified programmatic and regulatory reforms that should promote successful resettlement and accelerate the contribution of new residents including:

AT THE STATE LEVEL

(i) Expand its current workforce development programs and, for employers, the Work Opportunity Tax Credit;

(ii) Allow regional development councils to embrace refugee resettlement as an economic development tool and provide the requisite funding;

(iii) Enhance linguistic assistance for communities;

(iv) Reduce barriers to re-credentialing and facilitate the acquisition of new licenses and credentials;

(v) Encourage resettlement of additional refugees and those who may have initially resettled in other states;

(vi) Enhance regional mentoring networks; and

(vii) Take measures to promote naturalization (thousands of immigrants in upstate New York are potentially eligible to be naturalized).

AT THE FEDERAL LEVEL

(i) Increase the number of refugees and Special Immigrant Visa holders for resettlement in upstate New York;

(ii) Adopt a system of state-sponsored, placed-based visas to attract workers to communities;

(iii) Provide an agriculturally based refugee category;

(iv) Increase funding for resettlement programs;

(v) Expand the Small Business Administration's mentoring program, and

(vi) Expand the Work Opportunity Tax Credit for employers.

CONCLUSION

Perspectives and myths abound about refugees and migrants. They are powerful because, on one hand, they tap into fears about jobs and changing communities and, on the other, promoting resettlement of refugees is key to our nation's future growth and gives voice to our essential compassion. For the book, we asked our experts to premise their analysis on readily accessible data. If anyone takes issue with the underlying data or its interpretation, we welcome your views. In the end, we hope that "Immigration: Key to the Future" stands as an important statement on the contributions made by refugees to their adopted communities. Ideally, it provides adequate data to replace myths and suppositions with an array of facts that are compelling, persuasive and positive.

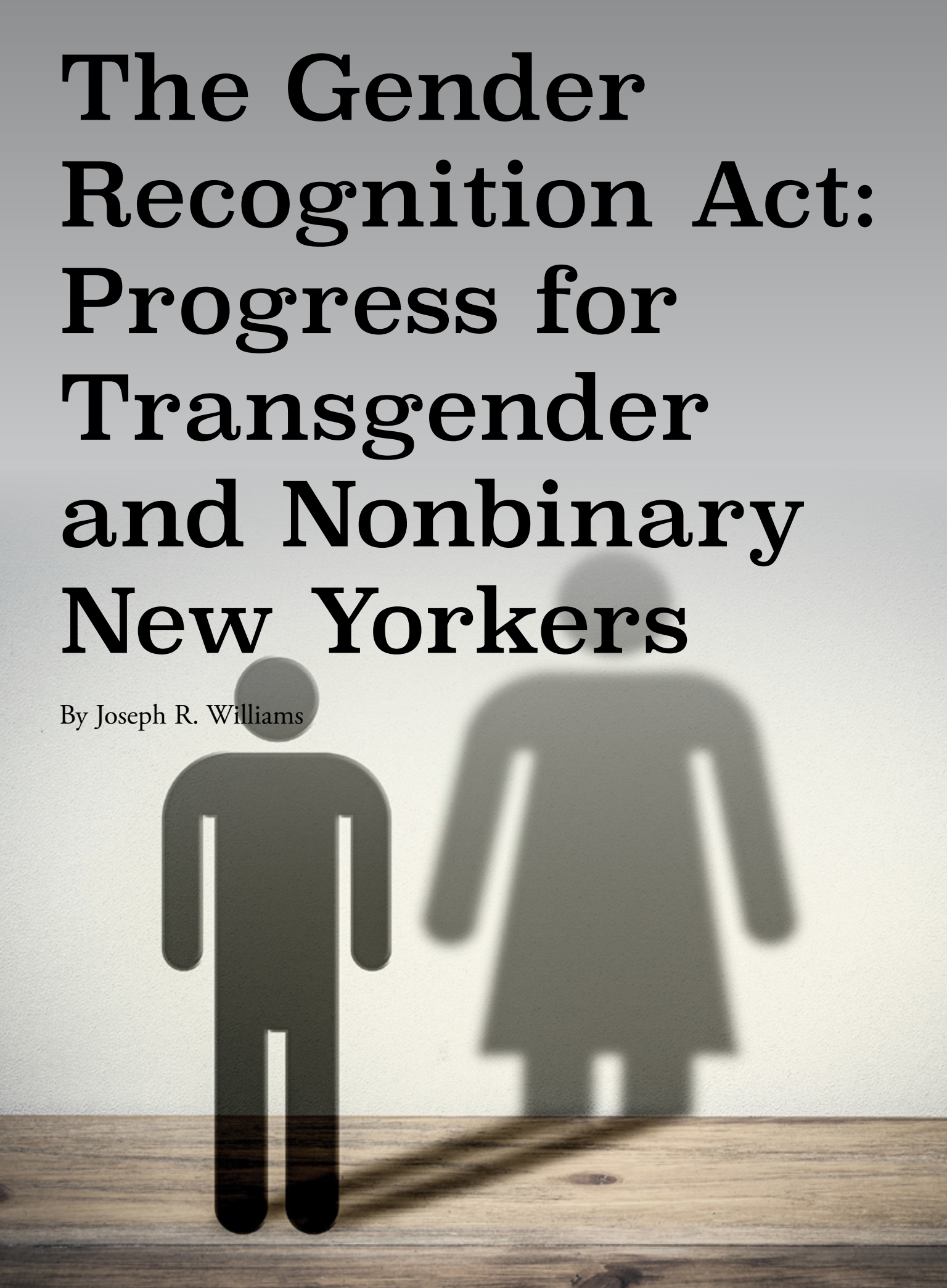
Sources

As mentioned, the data referenced in this article is drawn from the articles in "Immigration: Key to the Future." The contributors to that publication are: Jonathan P. Alba, Bilge Avci, Ava Ayers, Patrick Benjamin, Shelly Callahan, Camilla Campisi, Elizabeth G. Carrature, Matt DeLaus, Kyle Farbry, Scott Fein, Matthew K. Geiling, Laura Gonzalez-Murphy, Paul Hagstrom, Matthew Hall, James E. Jarrett, David Dyssegaard Kallick, Matt Kammer-Kerwick, J. Bruce Kellison, Rey Koslowski, Andrew Lim, Camille J. Mackler, Arthur B. Markman, Anna Mongo, Jenny M. Munoz, Faith Nibbs, Tattiana Padilla, Gregory P. Pogue, Ken Pokalsky, Dina Refki, Richard Rifkin, Sarah Rogerson, Julieta Schiffino, Laura Schultz, Rex Smith, Rhiannon Snide, Hourie Tafech, Jan Vink, Nan Wu, and Katia Yagnik.

For more information and to purchase the book, please visit: nysba.org/products/immigration-key-to-the-future/.

The Gender Recognition Act: Progress for Transgender and Nonbinary New Yorkers

By Joseph R. Williams



Come December 2021, those seeking to legally change their name and gender designation will no longer be subject to an antiquated requirement that has left many individuals reluctant to come forward for fear of inviting public ridicule, scorn and even physical violence.

The Gender Recognition Act (GRA), sponsored by Senator Brad Hoylman and Assemblymember Danny O'Donnell, amends the New York State Civil Rights Law, Public Health Law and Vehicle and Traffic Law to streamline the process for New Yorkers to obtain name change orders and to allow transgender and nonbinary New Yorkers to change the sex designation on their identifying documents, including adding a new sex designation "X" for nonbinary individuals.

NAME CHANGES FOR TRANSGENDER NEW YORKERS

Under existing New York law, individuals can change their name by filing a name change petition.[1] Once the court approves the name change, an order is issued, authorizing the petitioner to assume their "new" name. The name change papers (including the order and the petition) are entered with the county clerk's office and are thereafter available to the public.[2]

In most cases, the court also requires applicants to publish a notice of the name change in a newspaper in the county where they reside. This notice includes the person's "new" name, address, date of birth, place of birth, and current legal name.[3] For transgender individuals, this legal name is oftentimes a "dead name" – a name given to the person at birth that is not consistent with their gender identity.

There are a host of issues created by requiring transgender individuals to publish notice of their name changes, including, most obviously, that publication would "out" that person as transgender to the rest of the world. Given the prevalence of violence and hate crimes targeted at transgender individuals, "outing" someone as transgender can not only be embarrassing but could also expose the individual to the risk of violence. Moreover, since the documents are made available to the public, it creates a permanent public record of the individual's transgender status.

Joseph R. Williams, an attorney with the Albany law firm Copps DiPaola Silverman, practices primarily in adoption, assisted reproduction and surrogacy law, as well as representing adults and minors in name change proceedings and assisting them with updating their gender designations on identifying documents. He is also the cofounder and director of surrogate services for the New York Surrogacy Center, a surrogacy matching program.

The current law provides only one exception to this publication requirement in that the court may waive publication if the court finds that it would jeopardize the applicant's personal safety. If the court makes this finding, it can also order that the record of the proceeding be sealed – meaning, it would not be accessible to the public.[4]

While many trial courts have recognized the dangers of requiring transgender individuals to publish notice of their name changes and have waived the publication requirement,[5] this determination is discretionary, left to the opinion of each individual trial judge. It is certainly conceivable that a judge (especially one who is not familiar with or is hostile to transgender issues) may decline to exercise his or her discretion to allow the applicant to avoid "outing" themselves through publication.

The GRA addresses this issue by removing the publication requirement altogether, meaning that it is no longer required that applicants publish notice of their name changes.[6] With the removal of this publication requirement, transgender individuals are no longer required to broadcast their private, personal decision to legally change their name to match their gender identity.

The GRA also expands upon the current exemption to the public records requirement, providing that the records may be sealed if an open record would jeopardize the applicant's personal safety, and specifies that the court must consider an applicant's status as transgender and the risk of violence or discrimination against the applicant as a result of their transgender status. The GRA also provides that applicants shall not be required to demonstrate a specific instance or history of threats to their safety in order to seal the records.[7] This removes the possibility that an anti-LGBTQ judge may deny transgender applicants their right to privacy and confidentiality.

SEX DESIGNATION CHANGES

In addition to streamlining the name change process, the GRA also creates a brand new mechanism for legally changing an individual's sex designation, allowing individuals to change their sex designation from "Male" to "Female" (or vice versa) to match their gender identity. The GRA also allows for a third sex designation, "X," for nonbinary individuals.

Currently, if individuals wish to change the sex designation on their identifying documents (birth certificate, driver's license, social security card, etc.), they are required to submit a certification from a physician that the individual is transgender and that they have received appropriate clinical treatment for gender transition.[8] Obviously this can be an arduous, embarrassing, time-consuming, and potentially expensive process. This can also be a significant barrier for those who have not sought or do not have access to gender-affirming medical care,

including those without insurance. And, with the only choices being "Male" or "Female," nonbinary individuals were left without an adequate option.

The GRA solved these issues by adding a new article (Article 6-A) to the Civil Rights Law, authorizing applicants to file a petition to change their sex designation.[9] Now, the applicants must simply submit an affidavit attesting to their gender identity or their reason for seeking the change, and the court shall issue an order permitting the individual to change their sex designation on their identifying document(s). The GRA specifically provides that applicants shall not be required to provide any medical evidence to support their application, relieving individuals from the burden on obtaining medical documentation in order to update their records. A petition to change sex designation may be made simultaneously with a name change petition or on its own, and the record of such proceeding is automatically sealed.

Importantly, for any documents issued within New York State (i.e., a New York birth certificate or driver's license), a court order is not required to change an individual's sex designation. In fact, the GRA specifically amended the Public Health Law and Vehicle and Traffic Law to provide that applicants may update their sex designation (including selecting "X") simply by making the request to the Department of Health[10] or Department of Motor Vehicles,[11] without needing to provide any type of supporting evidence.[12]

New York is now the 21st state to create "X" gender marker designations for its residents.[13]

CONCLUSION

As was set forth in the Governor's Approval Memorandum for the bill, "[t]he GRA removes longstanding barriers to equality under the law and ensures expanded protections for transgender and nonbinary New Yorkers. . . . It also ensures that New Yorkers will be able to have their gender identity on official documents and provides protections to reduce discrimination against nonbinary and transgender New Yorkers by permitting name change and sex designation changes to be sealed more easily."

Teri Wilhelm, transgender rights advocate and chair of TGNCNBI Policy Committee for Equality New York, calls the GRA "important progress for gender expansive New Yorkers":

> Relieved of the requirement to publish one's dead name, birthdate and address in local papers – with the obvious connotation that one has transitioned their gender – preserves dignity and abates the public harm so often sanctioned under the ruse of legal process. This huge, multi-organization effort to preserve our safety, will, at long last, allow for personal attestation to one's gender without certification from scarcely available and expensive medical support, and use the gender marker "X" on all identity documentation inclusive of housing, utilities, education and health matters. The Gender Recognition Act is a wildly progressive effort for New York and a lifeline to those who so desperately deserve affirmation.

New York is now the 21st state to create "X" gender marker designations for its residents.

The Gender Recognition Act was signed into law during Pride Month, on June 24, 2021. The law becomes effective Dec. 21, 2021.

To join NYSBA's LGBTQ Law Section, visit NYSBA.ORG/LGBTQ.

1. N.Y. Civil Rights Law § 60 (CVR). If the applicant is a minor, the petition may be filed by the applicant's parent or legal guardian. *Id.*
2. CVR § 63.
3. *Id.*
4. CVR § 64-a.
5. *See e.g., In re E.P.L.*, 26 Misc. 3d 336, 339 (Sup. Ct., Westchester Co. 2009); *In re J.A.L.*, 53 Misc. 3d 1220(A) (Sup. Ct., Suffolk Co. 2016).
6. CVR § 63. Notably, this applies to all name change proceedings (minor or infant), regardless of whether the applicant is transgender.
7. CVR § 64-a.
8. In March 2020, the Bureau of Vital Statics changed its internal policy to no longer require physician's certifications to amend birth certificates; however, this was only a policy change (not legislative), and other entities (including the Department of Motor Vehicles) did not adopt such a policy.
9. CVR § 67.
10. PHL §§ 4138(1)(f).
11. VTL §§ 490(2), 502(1).
12. *See* VTL §§ 490(2), 502(1); PHL § 4138(1)(f).
13. Allie Bohm, *New York Will Offer X Gender Markers on IDs*, NYCLU, July 8, 2021, https://www.nyclu.org/en/news/new-york-will-offer-x-gender-markers-ids.

Annual Review of New Criminal Justice Legislation

By Barry Kamins

Barry Kamins is a partner in the law firm of Aidala, Bertuna & Kamins, where his practice focuses primarily on appellate matters and professional discipline. Prior to joining the firm, he was the administrative judge of the New York City Criminal Court and chief of policy and planning for the New York court system. Judge Kamins is an adjunct professor at Brooklyn Law School, where he teaches New York criminal practice. He is the author of *New York Search and Seizure* and writes the Criminal Law and Practice column for the New York Law Journal.

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

CANNABIS LEGISLATION

Among the many bills enacted by the Legislature in the last session, there were three substantive pieces of legislation. The first was the Marijuana Regulation and Taxation Act (MRTA).[1] This legislation enabled New York to join 14 other states in which the recreational use of small amounts of cannabis has already been legalized. In changing existing marijuana laws, the Legislature attempted to correct what it viewed as a wasteful use of law enforcement resources that disproportionately had an impact on the lives of minority communities.

The MRTA establishes the Office of Cannabis Management, the Cannabis Control Board, and a 13-member advisory board; all of these entities will regulate, control, license and eventually oversee the retail marijuana industry in New York. This article, however, will review aspects of the new law that relate to the criminal justice system: changes in criminal penalties, automatic expungement and sealing of certain convictions; the vacatur of other convictions; the impact on searches of automobiles; and the effect on impaired driving cases.

With respect to criminal penalties, the new law repeals Article 221 (Offenses Involving Marijuana) and replaces it with Article 222, entitled "Cannabis." Thus, all penalties will now relate to the unlawful possession or criminal sale of "cannabis" rather than "marijuana." In addition, marijuana has been removed from the schedule of controlled substances under Public Health Law § 3306, where it was listed as an hallucinogenic substance. Under the Vehicle and Traffic Law, however, cannabis has been added as a "drug" (VTL § 114-a).

One of the unusual aspects of Article 222 is that there is no definition of "unlawfully" in the definitional section at the beginning of the statute. What constitutes unlawful possession, therefore, must be gleaned from each individual section and inferentially from other sections, e.g., Penal Law § 222.05 and § 222.15. It should be noted that the possession amounts discussed below pertain to possession outside one's private residence. Inside a private residence, a person can lawfully possess up to five pounds of cannabis.

Under the prior law, possession of more than an ounce (and up to two ounces) was a violation, while under the new law, a person over 21 years of age can lawfully possess up to three ounces of cannabis and is guilty only of a violation if he or she possesses between 3 and 16 ounces of cannabis.

An additional penalty applies to individuals who are under the age of 21 and who possess up to 3 ounces of cannabis. This penalty can be found in another statute, i.e., the Cannabis Law (Chapter 7-A of the Consolidated Laws) that was enacted under the MRTA. Under the Cannabis Law, an individual who is under 21 years of age (and above the age of 18) and possesses less than 3 ounces of cannabis is subject to a civil penalty of not more than $50. A person who is less than 21 years of age and possesses more than 3 ounces can be prosecuted under the Penal Law.

A person is now guilty of an A misdemeanor if he or she possesses more than 16 ounces of cannabis (rather than 2 ounces under the old law). To be now guilty of a class E felony, a person must possess more than 5 pounds of cannabis rather than 8 ounces under the prior law. The maximum penalty for possession of cannabis is a class D felony (rather than a C felony previously).

Separate penalties have been formulated for the possession of "concentrated cannabis," which can contain very high levels of THC, the psychotropic ingredient in marijuana. Thus, the threshold amounts for possession or sale of concentrated cannabis are generally lower than for cannabis.

Regarding the unlawful sale of cannabis, the definition of "sale" (unlike the definition of "sale" for controlled substances) is "to sell, exchange or dispose of *for compensation*" (§§ 222.00(3) and 222.05(1)(b), emphasis added). Selling any amount up to ounces constitutes only a violation, while under the old law, selling any amount up to 2 grams constituted a violation.

A person now is guilty of an A misdemeanor if he or she sells between 3 ounces and up to 16 ounces of cannabis. If the seller is more than 21 years of age, he or she is guilty of a class E felony if he or she sells more than 3 ounces to someone less than 21 years of age. It is a defense, however, that the seller was fewer than three years older than the person who is under 21 years of age.

A person is guilty of a class E felony if he or she sells more than 16 ounces of cannabis. The maximum penalty for selling cannabis is a class C felony and is imposed for selling more than 100 pounds of cannabis. Under the prior law, the maximum penalty was imposed for selling only 16 ounces, which constituted a class C felony. There are also separate penalties for the criminal sale of concentrated cannabis.

Under "Restriction on Cannabis Use" (§ 222.10), smoking cannabis is prohibited in any location in which cigarette smoking is prohibited, e.g., restaurants, bars, subways, places of employment, etc. Smoking cannabis is also unlawful in an automobile under a series of amendments to the public health law. Although this provision

is contained in a penal law section, violations of the section are only subject to a "civil penalty not exceeding twenty-five dollars or an amount of community service not exceeding twenty hours." It appears, therefore, that this is not an "offense" under Penal Law § 5.10(3) and it cannot be readily enforced by the provisions of the criminal procedure law. The Office of Court Administration is exploring whether the civil penalty can be adjudicated in the New York City Criminal Court.

Finally, it should be noted that, under the cannabis law, there are separate penalties for licensed individuals who possess or sell cannabis in violation of the specific tax requirements of that law.

The MRTA also amends CPL § 170.56, which provides for an adjournment in contemplation of dismissal (ACD) in cases involving marijuana. When originally enacted, this section differed from the general ACD section in a number of ways. Most notably, under this section, an ACD can be granted without the consent of the people and the court can order an immediate dismissal in furtherance of justice. The MRTA has added an additional nuance to this section. A court can now "order that all proceedings be suspended and the action adjourned based upon a finding of exceptional circumstances." The statute defines "exceptional circumstances" as including "potential or actual immigration consequences."

If a police officer is investigating whether a driver is operating a vehicle while impaired by drugs and/or alcohol, the search of an area readily accessible to the driver will be permitted. The search of the trunk, however, would still not be permitted based solely on the odor of marijuana.

As noted above, there are provisions in the new Cannabis Law that refer to the new section of the Penal Law (Article 222). Some of these provisions raise questions that are not easily answered. For example, under Cannabis Law § 132(2), when a person sells marijuana after the license to sell is suspended, he or she "shall be subject to prosecution as provided in Article 222 of the Penal Law, and upon conviction thereof under this section may be subject to a civil penalty of not more than five thousand dollars."

It is not clear, therefore, whether a penal law conviction is limited to only a civil penalty or whether the civil penalty is available in addition to a sentence under the penal law.

The MRTA permits a person to make a motion for resentence that would result in the vacatur or reduction of former marijuana offenses. Under a new section of the Criminal Procedure Law (CPL § 440.46-a), if a person's conduct would not have been in violation of Article 222 had that section been in effect at the time of the offense, the Chief Administrative Judge must "automatically" vacate, dismiss and expunge that conviction. Such expungement must take place within two years of the effective date of the MRTA, i.e., March 31, 2023.

A person who is serving a sentence, or has completed a sentence for conduct that would have constituted a "lesser or potentially less onerous offense" under Penal Law Article 222, can petition a court for relief. A court is then authorized to vacate the conviction or substitute an "appropriate lesser offense." If a lesser offense is substituted, the sentence cannot be "in any way either harsher than the original sentence or harsher than the sentence authorized for any substituted lesser offense."

The new law contains provisions that will have an impact on searches of automobiles by police officers. Almost 50 years ago, the Court of Appeals held that, when making a motor vehicle stop for a traffic infraction, and a police officer smells the odor of marijuana emanating from the stopped vehicle, the officer may search the vehicle pursuant to the automobile exception to the Fourth Amendment.[2] That is about to change.

Under § 222.05(3) of the Penal Law, probable cause to believe a crime has been committed cannot be based solely on the odor of cannabis or burnt cannabis, even in combination with the presence of currency in proximity to the cannabis. Therefore, a police officer will no longer be able to conduct a search of an automobile based solely on the fact that the odor of marijuana emanates from inside a vehicle.

In a related court decision, the Appellate Division, First Department, has revisited this issue. The court held that the odor of marijuana, plus the presence of a small amount of marijuana (seen in the center console of the car), consistent with personal use, does not provide probable cause and a nexus to justify a search of the trunk of an automobile.[3] The decision did not, however, address whether the odor of marijuana alone can justify the search of the passenger compartment or even an area accessible to the driver.

The statute does provide one exception to the above new rule. If a police officer is investigating whether a driver is operating a vehicle while impaired by drugs and/or alcohol, the search of an area readily accessible to the driver will be permitted. The search of the trunk, however, would still not be permitted based solely on the odor of marijuana.

In enacting the above provision and in limiting the scope of vehicular searches, the Legislature has granted more protection to New York citizens than that provided by the federal and state constitutions. An argument could be made, however, that, in doing so, the section violates the separation of powers provision of the state constitution.[4] Interpretation of the federal and state constitutions is left to the courts and one can argue that the Legislature cannot impose restrictions on a court's interpretation of a Fourth Amendment principle, i.e., probable cause. It remains to be determined whether this statute will abrogate decisional law that permitted a wider search of a vehicle.

Finally, the MRTA contains provisions that will change provisions of the Vehicle and Traffic Law. Under VTL § 1227, the consumption of cannabis by a driver or passenger is prohibited inside an automobile that is on a "public highway." This constitutes a traffic infraction and would justify the stop of an automobile but would not, under the above provision, permit a search of the vehicle.

Although marijuana has been removed as a prohibited substance under Public Health Law § 3306, "cannabis" has been included as a "drug" under the Vehicle and Traffic Law (VTL § 114(a)). As a result, a police officer can continue to arrest an impaired driver pursuant to VTL § 1192(4) and VTL § 1192(4-a) for driving while under the influence of cannabis (an unclassified misdemeanor). These sections prohibit the operation of a vehicle when the driver's ability to drive is impaired by "the combined influence of drugs or of alcohol and any drug or drugs." A driver who has smoked cannabis cannot, however, be charged under the driving-while-intoxicated statute. The statute also requires New York State to conduct an independent study to research potential technologies to assist in detecting the use of cannabis by motorists.

One commentator has noted that, unlike roadside testing for the presence of alcohol, there is a lack of sufficient reliability in the current tests for the presence of marijuana.[5] Some tests have shown some promise, however, including certain saliva tests that are now being developed.

COMMISSION ON PROSECUTORIAL CONDUCT

A second substantive bill contains a number of amendments that will change the structure and function of the Commission on Prosecutorial Conduct. The statute creating the commission was first enacted in 2018, but amendments to the law were enacted in 2019 based, in part, on comments submitted by the Office of the New York Attorney General.

Subsequently, however, the statute was held to be unconstitutional in that it vested Appellate Division judges with certain authority that is not authorized by the New York State Constitution.[6] As a result, this year the Legislature has enacted amendments to address those challenges.

The third iteration of the commission[7] narrows the commission's function. It now will serve as a fact-finding entity that will merely assist attorney grievance committees by reviewing complaints of prosecutorial misconduct and producing a factual record and recommendations. Those recommendations will then be transmitted to the various attorney grievance committees which can then accept or reject a recommended sanction, impose a different sanction, or impose no sanction.

It remains to be seen whether this latest version of the commission will improve its ability to address prosecutorial misconduct. It should be noted that the District Attorneys Association of the State of New York urged former Governor Cuomo not to sign the legislation for a number of reasons.

In a letter to the governor on June 14, 2021, the association president noted that the latest iteration of the commission would delay the discipline of those prosecutors who act improperly: "Rather than ensure the swift investigation of ethical violations resulting in public discipline for an offender, the Commission's initial investigation, followed by a referral and a second, then constitutionally required investigation by the existing grievance structure, will only *delay* the discipline of those who offend" (emphasis added).

PAROLE

The third substantive piece of legislation that was enacted in the last session will have a significant impact on New York's parole system. With the exception of Illinois, New York re-incarcerates more people on parole for technical violations (e.g., missing an appointment with a parole office, testing positive for alcohol) than any state in the country.

The new legislation, known as the Less Is More Act, will make a number of significant changes: (1) limit the types of technical parole violations for which incarceration will be permitted; (2) limit the length of incarceration for technical parole violations; and (3) provide a hearing in court before a parolee can be detained in jail pending adjudication of a non-technical parole violation.

Finally, in order to accelerate a person's discharge from parole, or post release supervision, the new law provides for "earned time credits." Under this provision, when an individual on parole completes 30 days of parole without any violations, the parolee earns 30 days off his parole time. Thus, for example, if a parolee is subject to two years of post-release supervision, and does not get into any difficulty after one year, he or she will then have completed the supervision.[8]

OTHER LEGISLATION

In other legislation, one new crime bill was enacted in the last session, i.e., criminal sale of an unfinished frame or receiver.[9] Unfinished receivers, also called "lowers' or "blanks," are used to form the lower part of a firearm and the weapon is sometimes referred to as a "ghost gun." By drilling holes in an unfinished receiver and combining it with other necessary pieces, an individual can assemble an operational semi-automatic firearm in a short period of time. These weapons are not traceable, as they can be made at home without any serial numbers. The new crime is both a class D and E felony. The second-degree crime, a class E felony, criminalizes the sale of up to nine unfinished receivers, while the sale of 10 or more unfinished receivers in less than one year constitutes a class D felony. A person who possesses an unfinished receiver is guilty of a class A misdemeanor. Individuals can avoid prosecution for any of the above crimes; however, if, within six months after the effective date of the legislation, an individual either surrenders the unfinished frames to law enforcement, or gives or sells them to a licensed gunsmith.

Each year the Legislature expands the definition of existing crimes and this year was no exception; in the last session this happened most frequently with weapons-related crimes. For example, one bill makes it a misdemeanor to possess a weapon if a person is subject to a temporary or final extreme risk protection order, or if a person is prohibited from possessing a weapon pursuant to 18 U.S.C. 922(g).[10] That section lists nine predicates for the unlawful possession of a weapon including one in which an individual is a "fugitive from justice," and one in which an individual has been convicted of a misdemeanor for the crime of domestic violence.

In other weapons-related legislation, it is now a class D felony to purchase a firearm when a person has an outstanding bench warrant[11] or to manufacture a weapon that is designed to appear to be a toy gun.[12]

The crimes of extortion and coercion now include a threat to bring deportation proceedings and instilling a fear that a person's immigration status will be reported.[13] The crime of coercion can now also be committed by forcing an individual to produce or share images depicting nudity or sexual conduct.[14] Finally, the crime of criminal impersonation now includes using another person's electronic signature.[15]

Two crimes have been repealed by the Legislature. First, loitering for the purpose of engaging in a prostitution offense, a class A misdemeanor, was repealed.[16] The Legislature's action was based on its recognition that the law was no longer necessary or relevant, and that its vagueness had led to arbitrary and discriminatory enforcement against women, particularly transgender women of color who had previously been arrested for prostitution offenses. Many of these women had been unlawfully targeted by the police during "sweeps" or "operations" where officers arrest large numbers of women in a given area at the same time.

The Legislature also repealed criminally possessing a hypodermic instrument, a class A misdemeanor.[17] The decriminalization of hypodermic needles strengthens and expands syringe access by allowing pharmacies and health care agencies to provide syringes without a cap. This will prove highly effective in helping to reduce the rate of HIV and hepatitis transmissions.

A number of procedural changes were enacted in the last legislative session. One of the more significant bills provides a jury trial in New York City to a defendant charged with any level of misdemeanor.[18] Previously, a jury trial had been granted to anyone charged with any misdemeanor outside New York City or a noncitizen in New York City charged with an A, B or unclassified misdemeanor.[19]

Two new procedural changes will assist appellate counsel. First, the Legislature has made it possible for ineffective assistance claims to be filed collaterally, i.e., by a CPL § 440 motion, without running into several procedural bars that had previously existed. Under CPL § 440.10(2), a defendant was prohibited from collaterally raising an ineffective assistance claim that potentially fell within the narrow class of directly appealable ineffectiveness claims. Those procedural bars have now been removed.[20] A second bill streamlines the assignment of appellate counsel for indigent defendants in criminal cases.[21]

The Legislature has afforded those defendants who were not granted youthful offender status a second chance to receive that benefit. Under the bill, a person who was initially denied youthful offender treatment, and who has not been convicted of a crime for at least five years since his or her sentence, would have the opportunity to apply to the sentencing court for a new determination.[22]

A new term has been added to the Penal Law: "opioid antagonist," which are substances such as naloxone, that have helped prevent drug overdoses. Under the new law, evidence that a person was in possession of an opioid antagonist may not be admitted at a trial or at a hearing in order to establish probable cause for an arrest.[23]

A number of procedural amendments will have an impact on certain classes of defendants: adolescent offenders; veterans; substance abusers; and victims of sex trafficking. Regarding adolescent offenders, one measure clarifies that where a misdemeanor plea is taken in Supreme Court by an adolescent offender, the matter must be removed to the family court for disposition. In removing an adolescent offender to family court, where the offender is statutorily eligible for diversion (adjustment), the youth part judge must direct the youth to the intake office of the local probation department for an assessment of adjustment suitability without an actual family court juvenile delinquency case being commenced.[24]

Judicial diversion has now been expanded to include individuals who commit certain non-violent crimes, e.g., auto stripping and identity theft, to support their use of substances. The term "substance abuse disorder" has been changed to "substance use disorder" to conform to terminology in the current Diagnostic and Statistical Manual of Mental Disorder (DSM-5).[25]

The Legislature has also broadened the availability of veteran treatment courts by authorizing the transfer of a criminal case against a veteran where the charges are pending in criminal court in a county that does not have a veteran treatment court, to a veteran court in an adjoining county.[26]

Defendants who are, or have been, victims of sex trafficking have been given several benefits under new legislative measures. First, defendants in this category who have been convicted of certain crimes will not be required to provide DNA samples to be included in the state DNA identification database. This includes a person convicted of prostitution or a person whose participation in an offense the court determines was a result of having been a sex trafficking victim under federal or New York law.[27]

Second, victims of sex trafficking who have been convicted of crimes other than prostitution-related offenses can now move to vacate the conviction. Thus, those convicted of any offenses related to trafficking can seek relief; any such motions are also deemed confidential and are not available to the public.[28]

Other procedural changes will affect public defenders and assigned counsel as well as Supreme Court judges. Under a new measure, public defenders will have the same access to criminal history records as prosecutors and judges.[29] The Legislature has also mandated that a Supreme Court judge must be certificated for an additional two-year term as long as he or she has the mental and physical capacity to perform the duties of that position. Thus, the administrative board's discretion to deny certification has been diminished.[30]

A number of new laws will have an impact on prisoners. One such measure automatically restores voting rights to a person upon release from custody. Under prior law, a prisoner had to wait until the underlying maximum sentence had expired or until formal community supervision ended before being able to vote. It should be noted that, under this new law, before a court can accept a guilty plea where a prison sentence will be imposed, the court must advise the defendant, on the record, that a conviction will result in a loss of the right to vote while the defendant remains in custody.[31]

Another new law that will have an impact on prisoners is the Humane Alternative to Long-Term Solitary Confinement Act.[32] Under this measure, inmates cannot be placed in segregated confinement for more than 15 consecutive days or 20 days within any 60-day period. In addition, the legislation prohibits segregated confinement for people age 21 or younger; those who are age 55 or older; or inmates who are pregnant. The legislation also provides for more humane and effective alternatives to segregated confinement.

Finally, victims of crimes will benefit from several new laws. Under one measure, the Department of Corrections and Community Supervision can now notify a crime victim electronically when his or her assailant is paroled, conditionally released or released from confinement.[33]

Victims of domestic violence will specifically benefit from two new measures. First, the Legislature has created a domestic violence advocate-victim privilege, similar to the rape crisis counselor-victim privilege. As a result, advocates shall not be required to disclose confidential communication made by a domestic violence victim, except where the communications reveal an intent to commit a crime or the privilege is waived by the victim.[34]

Victims of domestic violence can also have their voting records kept confidential by filing an affidavit with the Board of Elections attesting to the fact that, because of the threat of harm, they wish their registration record (which contains their place of residence) to remain confidential.[35]

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1. 2021 N.Y. Laws, Ch. 92 (adding Penal Law Article 222), eff. March 31, 2021.
2. *People v. Chestnut*, 36 N.Y.2d 971 (1975).
3. *People v. Ponder*, 195 A.D.3d 123 (1st Dep't 2021).
4. *See generally People ex rel. Burby v. Howland*, 155 N.Y. 270 (1898).
5. Steven Epstein and Alexander Klein, *Treating Marijuana Worse Than Alcohol Under DUI Regime Is a Mistake*, NYLJ. April 7, 2021, https://www/law.com/newyorklawjournal/2021/04/07/treating-marijuana-worse-than-alcohol-under-dui-regime-is-a-mistake.
6. *Soares v. State of New York,* 68 Misc. 3d 249 (Sup. Ct. Albany County 2020).
7. 2021 N.Y. Laws, Ch. 153 (amending Judiciary Law 499-a), eff. June 17, 2021.
8. 2021 N.Y. Laws, Ch. 427 (amending Executive Law 259), eff. March 1, 2022.
9. S 13-A, awaiting the governor's signature.
10. S 13-A, awaiting the governor's signature.
11. 2021 N.Y. Laws, Ch. 236 (amending Penal Law 265.17), eff. July 6, 2021).
12. A 6522, awaiting the governor's signature.
13. S 343-A, awaiting the governor's signature.
14. S 2986, awaiting the governor's signature.
15. A 6015, awaiting the governor's signature.
16. 2021 N.Y. Laws, Ch. 23 (repealing Penal Law 240.37), eff. Feb. 2, 2021.
17. A 868, awaiting the governor's signature.
18. A 4319, awaiting the governor's signature.
19. *See People v. Suazo*, 32 N.Y.3d 491 (2018).
20. A 2653, awaiting the governor's signature.
21. A 5689, awaiting the governor's signature.
22. A 6789, awaiting the governor's signature.
23. 2021 N.Y. Laws, Ch. 431 (adding Penal Law 60.49) eff. Dec. 7, 2021.
24. A 7713, awaiting the governor's signature.
25. A 5511-A, awaiting the governor's signature.
26. A 5719-A, awaiting the governor's signature.
27. A 118-B, awaiting the governor's signature.
28. A 459, awaiting the governor's signature.
29. A 7729, awaiting the governor's signature.
30. A 6044, awaiting the governor's signature.
31. 2021 N.Y. Laws, Ch. 103 (amending Election Law 5-106), eff. Sept. 2, 2021.
32. 2021 N.Y. Laws, Ch. 93 (amending Correction Law 2(23), 137(6), 138, 401, 45), eff. March 31, 2021.
33. 2021 N.Y. Laws, Ch. 210 (amending CPL 380.50), eff. July 31, 2021.
34. S 1789, awaiting the governor's signature.
35. A 465-A, awaiting the governor's signature.

Unfulfilled Promises for Right to Counsel

By Cheyenne Burke

In Albany, there is no shortage of legislation calling for expanded rights to counsel across a broad range of practice areas. Access to the courts through an attorney is an undeniably important and laudable goal fully supported by the New York State Bar Association. However, before lawmakers look to expand rights to counsel, they must make sure the current guarantees of legal representation are being honored.

Assigned counsel rates for attorneys representing children and indigent clients in New York have remained stagnant for nearly two decades. The woefully inadequate rates have resulted in a mass exodus of attorneys from assigned counsel panels and, more importantly, are argued to be the reason for continuous constitutional violations of our state's most vulnerable populations.

Cheyenne Burke is an associate in NYSBA's Department of Governmental Relations advocating for policy changes on behalf of the membership. Prior to joining NYSBA, she served as counsel for the Codes and Corrections committees in the New York State Assembly drafting, analyzing, and negotiating legislation. She is a graduate of Pace University and Albany Law School.

In June of 2021, a lawsuit was brought by several bar associations seeking injunctive relief forcing the state and city to raise assigned counsel rates and establish a mechanism for continuous review and adjustment. The heart of the plaintiff's argument is that the constitutional promise of an individual's right to meaningful and effective legal representation simply cannot be realized because of the abysmal assigned counsel rates. If this lawsuit sounds familiar, it is because the courts already addressed this issue 17 years ago in *New York County Lawyers' Assn. v State of New York.*[1]

In 2001, a nearly identical complaint was filed by the New York County Lawyers' Association seeking an increase to the assigned counsel rates which had not been increased since 1985. In 2003, the Supreme Court, New York County, issued a scathing decision admonishing lawmakers for ignoring the constitutional obligations to those entitled to counsel, and granted a permanent injunction raising the assigned counsel rates until the Legislature could act. The court recognized

> indigent citizens do not represent a substantial lobby in Albany. However, at the cornerstone of our system of justice is the precept that all citizens will be treated equally under the law. This court has shown substantial deference to the Legislature, awaiting legislation. Under these circumstances, equity can only be served by intervention to protect the fundamental constitutional rights of children and indigent adults who face present and future irreparable deprivations of these rights if injunctive relief is denied.[2]

The court ultimately held that the assigned counsel rates set forth in § 722-b of the County Law, § 245 of the Family Court Act and § 35 of the Judiciary Law were unconstitutional as applied. The court issued an order removing compensation caps and setting the assigned counsel rate at $90 per hour, a rate comparable with federal assigned counsel at that time.

In response to this case, the 2003 legislative session was dominated by a contentious budget battle between the Legislature and then-Governor Pataki. Legislators passed a budget bill providing for increases to the assigned counsel rates effective Jan. 1, 2004, but found themselves on the other side of a veto by the governor. In a historic vote, legislators on both sides of the aisle voted to override the governor's veto, thereby increasing the rates for Attorneys for the Children (AFC) and 18B assigned counsel for the first time since the mid-1980s.

So where does that leave us now as history seemingly repeats itself? Almost in the same position that we were in in 2001: 17 years since an increase in the rate, cries for reform coming from every corner of the legal community, and the courts considering if they need to intervene once again to ensure children and indigent individuals have access to counsel.

Over the years, Chief Judge Janet DiFiore has sounded the alarm over the increasing scarcity of assigned counsel available to take on cases; however, her tone has grown more urgent calling on leadership in Albany to take action to address "a crisis that cannot be ignored." Countless organizations, including the New York State Bar Association, are advocating at the state capitol for increased rates. Hearings are being held to raise awareness and underscore that an already existing crisis will become a catastrophe as the courts reopen and administrators search high and low for attorneys that simply are not there.

Since the 2004 increase, assigned counsel rates have remained at $75 per hour for AFC and 18B counsel representing individuals in felonies; the rate is even lower for misdemeanors. Conversely, during that same time period, assigned counsel rates on the federal level have increased 14 times and now stand at $155 per hour, more than double the highest per hour rate in New York.[3]

Under current New York State law, there is no mechanism for assigned counsel rates to be increased without legislative action. This, however, is not the case across the board. District attorneys' salaries, for example, are adjusted annually according to any judicial salary comparability. Similar concepts should be applied to assigned counsel rates and would eliminate the need for annual legislative action and, most importantly, would make certain clients do not suffer at the hands of a flawed system.

As lawmakers approach the 2022 legislative session and budget season, they will undoubtedly be called on by the courts, advocates, and judges alike to address the grim reality of the assigned counsel rates in New York. The New York State Bar Association's Committee on Mandated Representation[4] and Task Force on Rural Justice[5] have both issued reports underscoring how stagnant assigned counsel rates have compromised meaningful access to legal representation. The New York State Bar Association proudly lends its voice in support of reforms that will ensure equal access to legal representation and the courts, regardless of one's ability to pay.

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1. 196 Misc. 2d 761 (2003).
2. *Id.* at 784.
3. https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_20.
4. https://nysba.org/app/uploads/2021/09/18B-rates-HOD-report-June-2018-004.pdf.
5. https://nysba.org/app/uploads/2020/04/Report-Task-Force-on-Rural-Justice-April-2020-.pdf.

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 commercial litigator who recently relocated from Georgia to New York. In my nearly 25 years of practice, I have counseled clients on a wide variety of matters related to business and personal needs. Recently, however, many clients have sought my counsel on issues related to recreational marijuana use and sales in an effort to comply with the recent improvements in state law. When practicing in Georgia, we were warned not to advise clients on this issue as it violated federal narcotics law.

A new and valuable client of mine in my New York practice recently sought my counsel on establishing a recreational marijuana business. In exchange for my advisement, the client offered me a 5% equity ownership interest in his cannabis business in lieu of payment for my legal fees. In addition, the client recommended that I sample the product prior to agreeing to the deal to ensure that I am fully informed and adequately invested. As I am new to this area of practice, I am hoping you can opine as to my ethical obligations with respect to this potential business venture to ensure that I do not run afoul of any of my obligations.

Sincerely,
Mary Jane Dazzled

DEAR MARY JANE DAZZLED,

We have previously attempted to help lawyers navigate through the minefield of the various applicable ethical rules and cannabis-related conflicting provisions of state and federal law in one of our prior Forums. *See* Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann, and Alexandrea Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J. July/August 2018, Vol. 90, No. 6. We cautioned at the time that this was a rapidly evolving area of the law. At the time that Forum was published, New York's Compassionate Care Act was relatively new and the legal landscape surrounding cannabis was uncertain. For example, in 2018, the only available ethical guidance regarding cannabis was the New York State Bar Association's (NYSBA) Committee on Professional Ethics Opinion 1024, which principally addressed whether the New York Rules of Professional Conduct (RPC) permitted lawyers to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others to aid in their compliance with the Compassionate Care Act and the federal enforcement policy. *See* NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014). Citing heavily to the U.S. Deputy Attorney General's Aug. 29, 2013 memorandum titled, "Guidance Regarding Marijuana Enforcement," the Ethics Committee concluded in Opinion 1024 that in light of the federal government's policy of *not* prosecuting cannabis-related crimes, the RPC permitted a lawyer to counsel clients with respect to conduct designed to comply with state *medical* marijuana law *only*, notwithstanding that federal narcotics laws prohibited the delivery, sale, possession and use of marijuana and made no exception for medical marijuana. *See id.*

The Ethics Committee's earlier opinion was confirmed in 2018. NYSBA Comm. on Prof'l Ethics, Op. 1177 (2018), opined that the continued prohibition on the use of DOJ funds to prevent states from implementing their own state medical marijuana laws meant that lawyers were permitted to counsel clients on New York's medical marijuana laws. *See* Vincent J. Syracuse, Carl F. Regelmann, and Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B. J. January/February 2019, Vol. 91, No.1.

Some of you may remember the classic "Dragnet" episode where Sergeant Joe Friday arrests a young marijuana user, who then predicts that legalization was only a matter of time. That prediction has proven to be true – at least in many states, including New York. Over the years, the public has grown increasingly accepting of the use, cultivation and sale of cannabis (both medical and general adult use), state governments have seen tax benefits from permitting cannabis to be commercialized, and state governments have grown increasingly concerned about how marijuana criminalization disproportionately

impacts minority communities. Notably, New York has now legalized use of cannabis and with the March 31, 2021 passage of the Marijuana Reform and Taxation Act (MRTA), has provided a legislative framework for businesses to cultivate, process, deliver and sell cannabis at the retail level. Moreover, the governor has appointed the executive director of the Office of Cannabis Management and the governor and Legislature have now appointed the five members of the Cannabis Control Board, so regulations for commercial cannabis will be promulgated in the next few months, followed by applications for the various types of licenses for cultivation, processing, delivery and sale (among others) that the MRTA authorizes.

With MRTA's passage, the State Bar reconsidered its prior ethical guidance that restricted an attorney's ability to counsel clients as to the use and sale of *medical* marijuana as permitted by the Compassionate Care Act. To that end, the Ethics Committee recently issued Ethics Opinion 1225, which expressed a strong affirmation of New York's commitment to the newly authorized commercial cannabis industry. *See* NYSBA Comm. on Prof'l Ethics, Op. 1225 (2021). The rationale of Opinion 1225 appears to support counseling and representing adult-use cannabis companies to comply with the recently enacted Marijuana Regulation and Taxation Act, thereby giving lawyers the green light to counsel clients on virtually all issues related to commercial cannabis, including its use, growth, processing, delivery, and sale. *See id.*

Prior to Ethics Opinion 1225, the NYSBA Ethics Committee had not dealt squarely with the issue of adult use as opposed to medical use. Now, however, taking into consideration the Marijuana Regulation and Taxation Act, the RPC permits attorneys to advise clients as to what conduct complies with the Marijuana Regulation and Taxation Act and even permits attorneys to use marijuana for recreational purposes, as well as grow marijuana at home (when such activity is allowed for all New Yorkers) without running afoul of their ethical obligations under the RPC.

As in many prior ethics opinions, the Ethics Committee in Opinion 1225 focused on the ongoing federal non-enforcement policy in its new guidance, except this time viewing the issue under a wider lens. While the use, sale and cultivation of cannabis is still largely illegal under federal law, the federal government (as a matter of Department of Justice policy and pursuant to Congressional funding restrictions) does not prosecute cannabis businesses for violations of the federal Controlled Substances Act so long as such violations are deemed compliant with an established state legislative and regulatory scheme such as those authorizing the growth, processing, distribution, sale and consumption of medical marijuana. Although the federal restrictions are formally focused on medical marijuana businesses rather than adult use, the Ethics Committee noted:

> . . . the Department of Justice has not, to our knowledge, taken any public position on federal enforcement that distinguishes between medical and recreational marijuana laws in the states . . . . [I]t seems fair to say that for nearly a decade federal forbearance in the enforcement of federal narcotics laws has been equally applied to state laws legalizing recreational marijuana and to state laws legalizing medical marijuana.

See NYSBA Comm. on Prof'l Ethics, Op. 1225 (2021).

Next, the committee noted that the Marijuana Regulation and Taxation Act's comprehensive licensing and regulatory system is the type of broad state enforcement system to which the federal government has given deference. *See id.* The committee further noted that without the aid of lawyers assisting clients with license applications and with the "complex regulatory system" for cultivation, distribution, possession, sale and use, "the recreational marijuana regulatory system would, in our view, likely break down or grind to a halt. The participation of attorneys thus secures the benefits of the

[Marijuana Regulation and Taxation Act] for the public at large, as well as it promotes the interests of the private and public sector clients more directly involved in the law's implementation." *Id.*

Another significant facet of Ethics Opinion 1225 as it relates to lawyers' representation of cannabis companies – specifically, the number of start-up entities anticipated to be applying for licenses under the Marijuana Regulation and Taxation Act in the coming months – is that the Ethics Committee clearly authorized attorneys taking equity interests in cannabis companies as payment for legal services without abridging their obligations under RPC 1.8(a), which applies to the "negotiation of a fee in which a lawyer is to receive an equity interest in a client or the client's company." *See* RPC 1.8(a). RPC 1.8(a) specifically notes that a "lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client . . ." However, following the rationale of Ethics Opinion 1225, such equity payments may be permissible under the RPC so long as: (1) the terms of the transaction are fair and reasonable to the client, with the client being advised of the desirability of seeking independent legal advice; (2) the client signs in writing that describes the transaction and the lawyer's role in the deal; and (3) the lawyer also considers whether acquiring or possessing an equity interest in the client's cannabis business will give rise to a conflict of interest, and whether informed consent, confirmed in writing, as to the potential conflict needs to be obtained. *See* RPC 1.8(a); *see also* NYSBA Comm. on Prof'l Ethics, Op. 1225 (2021).

Finally, as the use and sale of both medical and adult use cannabis continues to develop in many states across the country, the ability to counsel businesses considering entering into this novel arena is an exciting and potentially lucrative opportunity for lawyers. However, it is important to note that not all states stand on equal footing when it comes to a lawyer's ability to advise clients on the legalities of the consumption, cultivation and/or sale of cannabis. For example, in Georgia, the Supreme Court ruled that lawyers providing legal counsel to cannabis companies would be in violation of their ethical obligation not to counsel clients on federally illegal activities, even though the activity was permitted under Georgia state law.

As such, the Ethics Committee notes that its guidance is limited to interpretation of the New York law and the RPC and does not offer any predictions as to how law enforcement authorities may view any particular conduct. As with all matters of ethical compliance, lawyers should carefully review their specific state's ethical rules and statutes regarding cannabis to ensure they do not run afoul of their ethical obligations. New Yorkers looking to enter this new industry should have comfort in knowing that they will be supported in navigating the complex regulatory scheme being developed from New York attorneys and New York attorneys should similarly find comfort from Ethics Opinion 1225. The rules are evolving so, as we have said in earlier Forums, stay tuned!

Sincerely,
The Forum by
Vincent J. Syracuse
(syracuse@thsh.com)
Paul D. Sarkozi
(sarkozi@thsh.com)
Alyssa C. Goldrich
(goldrich@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT FORUM TO THE FORUM:

A few months ago I appeared before a judge in a matter that has become highly contentious over the years with a lot of bad blood between counsel and the parties. As a result, over the course of the last year we have appeared before the judge numerous times to argue various discovery and sanction motions. Although we are in the process of settling the case and have not appeared before the judge in a few months, the case is still active. However, the particular judge whom the case is before is well known for her strong online social media presence. The judge posts weekly videos on YouTube opining on courtroom etiquette and the dos and don'ts of practice. In doing so, she uses real-life anecdotes of attorneys and cases before her and changes any personal identifying information in order to preserve the privacy of the parties and attorneys involved.

Yesterday, I was extremely displeased to hear from my colleagues that the judge had recently posted a video discussing the importance of civility between counsel and apparently used facts and circumstances of my case as an example. Despite her attempt at disguising the identity of the parties and counsel, it was abundantly clear to me and my colleagues that she was referencing our case. To make matters worse, it seemed as though she indicated that my client had the weaker position in the matter, which I fear, if seen by opposing counsel, may hurt our chances of settlement. Are the judge's social media posts ethical? Is there anything that I can do to salvage my reputation and settlement at this point?

Sincerely,
Mads Tagram

NYSBA Task Force To Address Racism, Social Equity and the Law

By Christian Nolan

The New York State Bar Association has launched a comprehensive new task force that will examine how structural racism permeates and influences all aspects of daily life leading to injustice and inequality among New Yorkers.

"As a Black man, many times I have felt the weight of societal prejudices and injustice acutely and personally," said NYSBA President T. Andrew Brown. "The only way to effectuate meaningful change is to address these long-standing and deep-seated issues directly.

"Our effort will extend beyond race to also include individuals who suffer stigma and abuse as a result of their sexual or gender orientation," continued Brown. "The Task Force on Racism, Social Equity and the Law will examine some of the most intransigent regulations, laws and structures that are collectively holding us back as a society from achieving true equality."

The task force will include six committees – Criminal Justice, Economic Opportunity, Education, Environmental Justice, Health, and Housing – that will examine why structural racism is entrenched and persistent. These committees will enable the task force to explore changes in the law and public policy and deliver a report with measures that can be taken to attack structural racism and effectuate meaningful societal transformation.

The new task force builds off the momentum of NYSBA's Task Force on Racial Injustice and Police Reform, which President Brown co-chaired. That task force released a groundbreaking 114-page report earlier this year.

Taa Grays, vice president and associate general counsel of information governance, MetLife, and Lillian M. Moy, executive director, Legal Aid Society of Northeastern New York, will co-chair the task force.

The members of the Task Force on Racism, Social Equity and the Law include:

- Jose A. Almanzar, Beveridge & Diamond, New York, NY
- Rosemary Martinez-Borges, deputy chief of staff, NYS Unified Court System's Office for Justice Initiatives, New York, NY
- Robert E. Brown, Law Offices of Robert E. Brown, New York, NY
- Robert E. Brown, ESOP Plus: Schatz Brown Glassman, Rochester, NY
- Timothy P. Donaher, Monroe County Public Defender, Penfield, NY
- Clotelle Lavon Drakeford, Legal Aid Society of Westchester County, White Plains, NY
- Bryan Hetherington, Hetherington Consulting, Rochester, NY
- Adriene L. Holder, The Legal Aid Society, New York, NY
- Seymour W. James, Jr., Barket Epstein Kearon Aldea & LoTurco, New York, NY
- Kavitha Janardhan, Bousquet Holstein, Syracuse, NY
- Lucy Lang, former director of the Institute for Innovation in Prosecution at John Jay College of Criminal Justice, New York, NY
- Nelson Mar, Legal Services NYC, Bronx, NY
- Rodrigo Sanchez-Camus, director of legal, organizing and advocacy services at NMIC, New York, NY
- Mirna M. Santiago, Girls Rule the Law, Pawling, NY
- Michelle Smith, chief of staff, NYS Unified Court System's Office for Justice Initiatives, New York, NY
- Vivian D. Wesson, Marsh & McLennan Companies, Weston, CT
- Keisha A. Williams, Western New York Law Center, Buffalo, NY
- Mishka Woodley, Dowling Law, Albany, NY
- Oliver C. Young, Barclay Damon, Buffalo, NY

NYSBA Launches Task Force To Help Shape the Future of the Legal Profession

By Susan DeSantis

The New York State Bar Association is launching a Task Force on the Post-Pandemic Future of the Profession to study how the practice of law has changed dramatically as a result of COVID-19 and to suggest new ways of doing business that would benefit the entire legal community – from law school students and new attorneys to experienced practitioners and clients.

"The pandemic has impacted every aspect of our lives and as all the science appears to indicate that COVID will be with us for some time – perhaps forever – we must adjust to this new reality," said T. Andrew Brown, president of the New York State Bar Association. "We cannot sit idly by and wait for things to change, but instead must determine the best course forward. It's up to us as the largest voluntary statewide bar association, with members across the nation and the globe, to learn from this experience and help determine how the legal profession can successfully operate in the future."

The task force will be divided into four working groups: New Lawyers and Law Students, Attorney-Client Relations, Access to Justice, and Law Practice Management and Technology. The working groups will study how the practice of law has already changed and try to envision what the future might hold.

"The pandemic has upended how we manage our practices, interact with clients and deliver legal services," said John Gross, co-chair of the task force and a partner at Ingerman Smith. "It has also touched every aspect of our professional development from education to training to mentorship. But now we must decide if the changes in how we practiced law during the pandemic enhanced the delivery of quality services to our clients, or are we and our clients better off leaving those changes behind."

"It is up to us to systematically review both the short-term and long-term effects of COVID-19 on the legal profession and the practice of law," said Mark Berman, co-chair of the task force and a partner at Ganfer Shore Leeds & Zauderer. "We will study how effective virtual courts have been, how well the technology has performed and how best in the future to serve clients remotely with an emphasis on making recommendations to safeguard and strengthen the future of the legal profession."

Each working group will hold a public forum to gather information on its area of expertise:

- New Lawyers and Law Students, 6:30 p.m. to 8:30 p.m. Nov. 3.
- Law Practice Management and Technology, 5:30 p.m. to 7:30 p.m. Nov. 9.
- Attorney-Client Relations, 5:30 p.m. to 7:30 p.m. Dec. 8.
- Access to Justice, 5:30 p.m. to 7:30 p.m. Dec. 14.

Eileen D. Millett, counsel at the state Office of Court Administration, and Susan L. Harper, managing director for New York and New Jersey for the Bates Group, will chair the Attorney-Client Relations Working Group. Frederick K. Brewington, a solo practitioner, and Joseph A. Rosenberg, professor of law at the CUNY School of Law, supervising attorney, Main Street Legal Services and co-director of the Disability & Aging Justice Center, will chair the Access to Justice Working Group.

Karen Greve Milton, executive deputy inspector general and chief of staff for the MTA Inspector General, and Anne B. Sekel, a partner at Foley & Lardner, will chair the Law Practice Management and Technology Working Group. James R. Barnes, a shareholder at Burke & Casserly, and Leslie Garfield Tenzer, James D. Hopkins Professor of Law at the Elisabeth Haub School of Law, Pace University, will chair the New Lawyers and Law Students Working Group.

Other members of the task force are:

- Harvey B. Besunder, a named partner at Margolin Besunder
- Hon. Cheryl E. Chambers, a judge on the Appellate Division, Second Department
- Clare Degnan, executive director of the Legal Aid Society of Westchester County
- Veronica Nechele Dunlap, director of New York Programs at Pro Bono Net
- Timothy J. Fennell, a senior partner at Amdursky, Pelky, Fennell and Wallen
- Evan Maurice Goldstick, an associate at Steptoe and Johnson
- Lindsay V. Heckler, supervising attorney at the Center for Elder Law & Justice

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NYSBA To Examine Laws Banning and Limiting Participation of Transgender Youth in Sports

By Susan DeSantis

The New York State Bar Association has launched a Task Force on the Treatment of Transgender Youth in Sports to examine the constitutional, scientific and social justice implications of laws passed around the country that ban or severely limit the participation of transgender athletes in school sports.

Many of these laws – mostly aimed at K-12 students – are now before state, district and U.S. appellate courts. New York, by contrast, has passed new laws protecting transgender athletes while ensuring a level playing field for all competitors. But it is likely that these safeguards, too, will be challenged in the courts.

"Lawmakers in 27 states have proposed banning children and teens who are transgender from participating in school sports programs that are consistent with their gender identity," said T. Andrew Brown, president of the New York State Bar Association. "These laws are truly traumatic for our transgender youth and, as a nation, we should be able to find a way to protect this vulnerable population."

The task force's mission is to provide educational programming and hold mutually respectful discussions on the topic. In its fact-finding role, the panel will host a public forum on the legal and policy issues it's studying at 5:30 p.m. on Nov. 15. The discussion is free to attend, but preregistration is required.

"The task force will also address efforts made to integrate transgender athletes in collegiate, Olympic and elite competition while ensuring fairness," said Jacqueline J. Drohan, chair of the task force and a partner at Drohan Lee. "After completing our study, we will make recommendations for new laws, policies and lobbying efforts to the association's governing body, the House of Delegates."

The task force is still seeking more members but has started its work with a core group. The initial members are:

- Sasha Buchert, a senior attorney in the Washington, D.C., offices of Lambda Legal
- Tara L. Moffett, a partner at Girvin & Ferlazzo
- Theresa Rusnak, an associate at Bond, Schoeneck and King
- Sruti Swaminathan, a staff attorney at Lambda Legal and co-chair of Legal Services NYC Pro Bono Associate Advisory Board

Christopher Riano, who is chair of NYSBA's LGBTQ Law Section, a member of the association's Executive Committee and president of the Center for Civic Education, will be the task force's liaison to the Executive Committee.

NYSBA LAUNCHES TASK FORCE TO HELP SHAPE THE FUTURE OF THE LEGAL PROFESSION

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- Evan H. Krinick, the managing partner for Rivkin Radler
- Erica L. Ludwick, managing attorney for the Legal Aid Society of Northeastern New York
- Thomas Maligno, director of pro bono at Touro Law School and executive director of the W. Randolph Hearst Public Advocacy Center
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- Kimberly Wolf Price, attorney professional development director and diversity officer at Bond, Schoeneck & King
- Kevin Joseph Quaratino, an associate at Foley & Lardner
- Lauren E. Sharkey, a partner at Cioffi Slezak Wildgrube
- Natasha Shishov, principal law clerk to the Hon. Tanya R. Kennedy, Appellate Division, First Department
- Ryan M. Torino, a named partner in Torino & Bernstein
- New York City Civil Court Judge Kathleen C. Waterman
- Jeffrey T. Zaino, vice president Commercial Division at the American Arbitration Association
- Simeon H. Baum, president of Resolve Mediation Services, will assist the task force.

NYSBA Forges Alliance With Georgian Bar Association

By David Howard King

As part of its mission to forge relationships, advance justice and strengthen the legal profession across the world, the New York State Bar Association recently entered a collaboration with the Georgian Bar Association.

Two representatives from each bar association met at the Bar Center on Elk Street in Albany on Sept. 16 to sign an official MOU, or memorandum of understanding. As part of the agreement, NYSBA's International Section established a Georgian chapter that will begin to meet digitally in the coming months.

"The mission of our association is in part to shape the development of law, to educate and inform the public and respond to the demands of the diverse and ever-changing legal profession. Our members are all over the world," said NYSBA President T. Andrew Brown in opening the MOU signing ceremony. "One of the aspects of our association that I am most proud of is our tireless commitment to promote equal justice for all. That is what makes us special as lawyers. That's what makes us special as a bar association, and the Georgian Bar Association shares many of our collective ideals and values."

Brown noted that the establishment of the Georgian chapter of the NYSBA International Section is a testament to both organization's "ability to build bridges."

David Asatiani, president of the Georgian Bar Association, elicited laughter from the crowd watching the ceremony by noting that while Brown was the 144th president of NYSBA, he is only the fourth in the history of the Georgian Bar Association.

Asatiani described his country's long struggle for independence and the pushback the Georgian bar faced for being independent from the government. He noted that the USAID and the American embassy in Georgia helped the association win a fully independent bar.

Asatiani touted the way his organization successfully advocated for the establishment of jury trials in 2011, following the American model, and how its members continue to work toward a fully independent judiciary.

Founded in 2005, the Georgian Bar Association quickly faced challenges from critics who didn't believe the association should exist as an independent body. The association forged ahead with the help of international partners and has established a code of ethics, vibrant committees that debate the intricacies of various practice areas and a practice of providing essential resources to lawyers across Georgia.

"We have long seen the United States as a key partner for Georgia," said Asatiani. "And our aspiration is close cooperation with the European Union and the West. We hope to continue this integration with European structures, and we fully realize and acknowledge that without the protection and the establishment of the rule of law and empowering of the independent and qualified legal professions that it's impossible to develop our democracy."

NYSBA International Section Chair Edward Lenci said he is looking forward to working with the new Georgian chapter.

"We started talks about signing this memorandum of understanding about two months ago, and I wasn't sure that it could happen so quickly," said Giorgi Tshekhani, executive director of the Georgian Bar Association. "But apparently, we did it, and I want to thank Edward for all the work you've done. . . . And, of course, President Brown for his support throughout this process."

Gifts were exchanged between the two organizations, including Georgian wine and books about NYSBA's history. That will only be the start of the exchange, as the agreement stipulates that the two bar associations will exchange legal publications, materials and information, as well as lawyer visits at educational events and programs, especially those pertaining to international legal issues.

NYSBA has now entered numerous MOUs with bar associations around the world, including other recent collaborations with the Nigerian Bar Association, Seoul Bar Association in Korea, the Dai-Ichi Tokyo Bar Association in Japan and the Bucharest Bar Association in Romania.

NYSBA has members in all 50 states and in over 100 countries worldwide.

Member Spotlight: Helen Naves

WHY DID YOU BECOME A LAWYER?

I became a lawyer because I have always enjoyed reading and writing, and I knew that I could have a career in the international area. I spent my senior year in high school in the U.S. as an exchange student, and after that experience I decided to go to law school and learn more about the different types of legal systems in the world. I made plans to go back to the U.S., continue my studies in law and have a career in the international field.

YOU LIVE AND PRACTICE IN BRAZIL BUT YOU ARE ALSO ADMITTED IN NEW YORK. WHY DID YOU CHOOSE NEW YORK?

I chose New York because, in my experience as a banking and finance lawyer, most of the cross-border contracts are governed by New York law. I've learned that New York, as a major financial center, has developed laws and case law friendly to cross-border matters and international agreements. Also, much of the history in finance matters happened in New York and various rules and regulations in Brazil were developed based on the U.S. legal system. When I worked as in-house counsel for banks in Brazil, I had a close contact with law firms in New York and I felt that, having an education in New York, would give me the necessary skills to continue to work in the area.

HOW DID YOU DECIDE ON YOUR PRACTICE AREA?

My first work experience was as an intern student in a Brazilian bank doing international matters. As a very young law student, I had the opportunity to work with very complex finance and investment matters and cross-border transactions which gave me such a specific knowledge and experience that most of my friends from law school didn't have. I believe that this experience gave me a practical incentive to work in this area. Also, having English as a second language was a key factor, which allowed me to do international work.

WHY DID YOU BECOME SO ACTIVELY INVOLVED WITH NYSBA INTERNATIONAL SECTION'S BRAZIL CHAPTER?

I lived in New York City in 2007 when I had my first work experience as a summer associate in a U.S. law firm. In 2008–2009 I did my LL.M. also in New York City, and after, I worked as international associate at another top U.S. law firm. I joined NYSBA during that time, but when I moved back to São Paulo in 2010, my friend, Rafael Villac, told me about the Brazil chapter. I joined the group and became more active because I wanted to stay connected to New York and meet new people who have had the same experience abroad as I did.

WHAT IS THE BEST LIFE LESSON THAT YOU HAVE LEARNED?

The best lesson I've learned is definitely to prize and nourish friendships and professional contacts. Since my experience as a young exchange student, I've learned to keep in touch with friends and contacts throughout the years. Today, I am confident that part of my achievements as a lawyer comes from my relationships with friends and colleagues that I've met during the past 20 years. I have made precious friends and business contacts

Naves, of HNaves Advogados, a São Paulo-based banking, finance and capital markets boutique, is admitted to practice in New York. She is co-chair of NYSBA's chapter in Brazil and is a member of the association's International Section.

at NYSBA and it's been such a pleasure to be part of the Brazil chapter. Clients choose better lawyers when they know and trust the person. Fertile client-attorney relationships are built over time and the element of trust and admiration is essential, in my opinion.

LAWYERS SHOULD JOIN THE NEW YORK STATE BAR ASSOCIATION BECAUSE . . .

NYSBA is such a diverse and friendly community open to lawyers from all over the world who want to be integrated and connected to their peers. It's a place to learn about the law, which is constantly evolving, and to share professional experiences. NYSBA is also an environment to feel welcomed and valued no matter where you come from and the type of law you practice.

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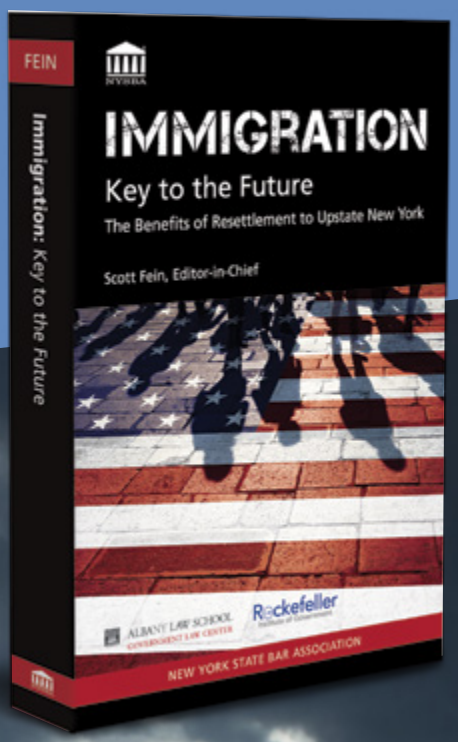

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