



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

January 21, 2020

To: Members of the House of Delegates

Enclosed are the agenda and background materials for the General Assembly on Friday, January 31, 2020, commencing at 9:00 a.m. The program includes the Annual Meetings of The New York Bar Foundation and the New York State Bar Association, as well as the regular business meeting of the House of Delegates.

We look forward to seeing you at the Annual Meeting.

Henry M. Greenberg
President

Scott M. Karson
President-Elect



NEW YORK STATE
BAR ASSOCIATION



**GENERAL ASSEMBLY
FRIDAY, JANUARY 31, 2020 – 9:00 A.M.
TRIANON BALLROOM, THIRD FLOOR
NEW YORK HILTON MIDTOWN**

AGENDA

THE NEW YORK BAR FOUNDATION ANNUAL MEETING

9:00 a.m.

(The members of the House of Delegates also serve as members of
The New York Bar Foundation)

**Ms. Lesley Rosenthal
President, presiding**

1. Approval of the minutes of the January 18, 2019 Annual Meeting
2. Report of the officers, ratification and confirmation of the actions of the Board of Directors since the 2019 Annual Meeting – Ms. Lesley Rosenthal
3. Report of the Nominating Committee – Mr. David M. Schraven
4. Presentation of The New York Bar Foundation Lifetime Achievement Award to Mr. Robert L. Haig – Ms. Lesley Rosenthal
5. Other matters
6. Adjournment

ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION

9:15 a.m.

**Mr. Henry M. Greenberg
President, presiding**

1. Call to order and National Anthem
2. Approval of the minutes of the January 18, 2019 Annual Meeting
3. Report of Nominating Committee and election of elected delegates to the House of Delegates – Ms. Claire P. Gutekunst
4. Report of Treasurer – Mr. Domenick Napoletano
5. Report and recommendations of Committee on Bylaws – Mr. Robert T. Schofield, IV
6. Adjournment

HOUSE OF DELEGATES MEETING**9:30 a.m.****Mr. Scott M. Karson
Chair, presiding**

1. Approval of minutes of November 2, 2019 meeting 9:30 a.m.
2. Report of Treasurer – Mr. Domenick Napoletano 9:33 a.m.
3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee – Ms. Claire P. Gutekunst 9:35 a.m.
4. Report of President – Mr. Henry M. Greenberg 9:45 a.m.
5. Report of Task Force on Free Expression in the Digital Age – Ms. Cynthia Arato and Mr. David E. McCraw 10:00 a.m.
6. Report and recommendations of New York County Lawyers’ Association – Hon. Jed S. Rakoff and Mr. Lewis F. Tesser 10:10 a.m.
7. Report of Task Force on Autonomous Vehicles and the Law – Dean Aviva Abramovsky 10:30 a.m.
8. Report and recommendations of Committee on Cannabis Law – Ms. Aleece E. Burgio and Mr. Brian J. Malkin 10:40 a.m.
9. Address by Hon. Janet DiFiore, Chief Judge of the State of New York 11:00 a.m.
10. Presentation of Ruth G. Schapiro Award – Mr. Henry M. Greenberg 11:15 a.m.
11. Report and recommendations of Committee on Diversity and Inclusion – Ms. Mirna M. Santiago 11:30 a.m.
12. Report of Task Force on the NYS Bar Examination – Hon. Alan D. Scheinkman 11:40 a.m.
13. Report of Task Force on Rural Justice – Hon. Stanley L. Pritzker and Ms. Taier Perlman 11:50 a.m.
14. Report of Task Force on Domestic Terrorism and Hate Crimes – Ms. Carrie H. Cohen 12:00 p.m.
15. Report of Task Force on Mass Shootings and Assault Weapons – Ms. Margaret J., Finerty and Mr. David M. Schrauer 12:10 p.m.
16. Report and recommendations of Committee on Standards of Attorney Conduct – Prof. Roy D. Simon, Jr. 12:20 p.m.
17. Administrative items – Mr. Scott M. Karson 12:40 p.m.
18. New business 12:45 p.m.
19. Date and place of next meeting:
Saturday, April 4, 2020
Bar Center, Albany

**The New York Bar Foundation
Annual Meeting
MINUTES**

**January 18, 2019
New York Hilton Midtown, New York City**

PRESENT: Aaron; Alcott; Barclay; Baum; Belowich; Ben-Asher; Bennett; Berman; Billings; Block; Bonina; Briwn Spitzmueller; Brown, E.; Brown, T.A.; Buholtz; Burke; Castellano; Chambers; Christensen; Cilenti; Coffey; Cohen, D.; Cohen, O.; Connery; Dean; Di Pietro; Doerr; Doxey; Effman; Eng; England; Entin Maroney; Fernandez; Ferrara; Finerty; Fishberg; Flood; Foley; Freenman, H.; Friedman; Frumkin; Genoa; Gerstman; Gold; Goldschmidt; Grays; Greenberg; Grimaldi; Grogan; Gutekunst; Gutenberger Grossman; Gutierrez; Hage; Haig; Heath; Heller; Hines; Hurteau; Hyer; Jaglom; James; Kamins; Karson; Kean; Kelly; Kobak; Lau-Kee; Lawrence; Leber; Levin Wallach; Levin; Levy; Lewis; Lindenauer; MacLean; Madden; Madigan; Maldonado; Mancuso; Mandell; Margolin; Marinaccio; Markowitz; Maroney; Matos; May; McCann; McGinn; McNamara, C.; McNamara, M.; Meisenheimer; Meyer; Miller, C.; Miller, M.; Millett; Millon; Minkoff; Miranda; Mohun; Moore; Moretti; Moskowitz; Murphy; Napoletano; Nowotarski; Nussbaum; O'Connell; O'Donnell; Onderdonk; Owens; Palermo, C.; Perlman; Pessala; Pitegoff; Pleat; Poster-Zimmerman; Radick; Richman; Richter; Rodriguez; Rosner; Russell; Ryan; Ryba; Safer; Santiago; Scheinkman; Schofield; Schrauer; Schreiber; Schub; Scott; Sen; Shafer; Shamoon; Shishov; Shoemaker; Sigmond; Silkenat; Singer; Skidelsky; Slavit; Spirer; Stanclift; Standard; Steiglitz; Strenger; Sweet; Taylor; Teff; Tennant; Tully; Udell; van der Meulen; Vecchio; Vigdor; Weathers; Weiss; Westlake; Weston; Whiting; Whittingham; Young; Younger.

President Lesley F. Rosenthal called the meeting to order at 8:50 a.m.

Approval of minutes: On a motion duly made and carried, the minutes of the Annual Meeting of the New York Bar Foundation on January 26, 2018 were approved.

Report of officers: Lesley F. Rosenthal, President presented the 2018 Annual Report of the New York Bar Foundation, copies of which were distributed. The Annual Report sets forth in detail the operations and activities of the Foundation during 2018. Ms. Rosenthal shared highlights including:

1. The Foundation awarded a record number of grants in 2018 to 105 legal services providers across New York State. 62% of these grants were for facilitating the delivery of legal services. More than \$700,000 was distributed via the grant program and 3 special campaigns including those needing legal assistance after hurricane Florence, the annual NY Lawyers Love Veterans campaign, and a special campaign that provided emergency support to families separated at the border.
2. Through partnerships with NYSBA sections and administering the Catalyst Public Service Fellowship program, the Foundation presented more than \$215,000 in fellowships and scholarships including the Honorable Judith S. Kaye Children and the Law Committee Scholarships. These scholarships are presented to students who have aged out of foster care and are enrolled in an accredited undergraduate or post-high school certificate program.

3. The Foundation now has partnerships with three NYSBA Sections that have established funds through the Foundation designated for the grant program. The Business Law, Family Law, and General Practice sections give gifts to assist programs that align with their missions.

Ms. Rosenthal closed her report by reminding attendees that the Foundation is holding its annual meeting week appeal.

Ratification and confirmation of actions of the Board: A motion was adopted ratifying, confirming and approving the actions of the Board of Directors since the 2018 Annual Meeting.

Report of the Bylaws and Governance Committee: Justice Chambers, Co-chair of the Bylaws and Governance committee, presented for ratification amendments made by the Board to the Bylaws. The proposed amendments:

- Increases the size of the Nominating Committee from 3 to 5; [Section 2.02]
- Changes the size of the Board from 25 to a variable range of 15 to 35; [Section 2.01.a]
- Designates a Director position for a Young Lawyer; [Section 2.01.b]
- Grants voting rights to Chair and Vice Chair of the Fellows of the NY Bar Foundation; [Section 2.01.c]
- Clarifies that ex officio members of the Board have voting rights (including the Immediate Past President of the Foundation and the Executive Director of NYSBA) and [Section 2.01.d]
- Clarifies that Board members may serve no more than three, three-year consecutive terms excluding officer service. [Section 2.03 and Section 3.01]

On a motion duly made and carried, the amended bylaws were approved.

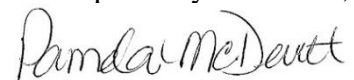
Report of Nominating Committee: Reporting on behalf of the Nominating Committee, committee chair David M. Schrauer placed in nomination the following slate of nominees presented by the Committee for the position of Director for terms commencing June 1, 2019 for term ending May 31, 2022:

- John P. Christopher of Glen Head
- C. Bruce Lawrence of Rochester
- David C. Singer of New York City

A motion was adopted electing said Directors.

Adjournment: There being no further business, the meeting was thereupon adjourned.

Respectfully submitted,



Pamela McDevitt
Secretary



TO: Members of The New York Bar Foundation

FROM: Nominating Committee of The New York Bar Foundation
David M. Schraver, Chair
Hon. Cheryl E. Chambers
Christine Cioffi
John H. Gross
Lucia Whisenand

DATE: January 31, 2020

RE: Report of the Nominating Committee

The Nominating Committee of The New York Bar Foundation is pleased to submit the following slate of nominations as Directors of The Foundation Board of Directors commencing June 1, 2020.

For a term ending May 31, 2023

New directors for a term commencing June 1, 2020 and concluding May 31, 2023

- **William Russell, New York City**
- **Mirna Santiago, Pawling**

William T. Russell, Jr.

425 Lexington Ave
New York, NY 10017
(212) 455-3979
wrussell@stblaw.com

LEGAL EXPERIENCE

SIMPSON THACHER & BARTLETT LLP

New York, New York

Partner, Litigation 1999-Present

Associate, Litigation 1990-1998

- Represents financial institutions, private equity sponsors, corporations and other businesses in a wide variety of commercial disputes, including: banking litigation, bankruptcy and reorganization matters, securities litigation, and contractual and transactional disputes.
- Co-author of the monthly column, "New York Court of Appeals Roundup," appearing in the *New York Law Journal*. Featured speaker at the 2012 and 2014 Southeastern Bankruptcy Law Institutes.
- Maintains an active pro bono practice and served as Co-Chair of the Firm's Pro Bono Committee for almost 10 years.

Representative Matters:

- Obtained a \$168 million trial judgment on behalf of Merrill Lynch/Bank of America in an interest rate derivatives case against a Brazilian counterparty
- Represented the Creditors Committee in the Gawker Media Chapter 11 Proceedings
- Lead the defense group in Adelpia Recovery Trust v. Bank of America, et al. in negotiations that resulted in a settlement of that litigation for a small fraction of the claimed damages
- Represented one of the lead creditors in the In re Jefferson County Chapter 9 proceedings that, at the time, were the largest municipal bankruptcy proceedings in U.S. history
- Represents a number of leading financial institutions in actions relating to the issuance of residential mortgage backed securities
- Defended a major financial institution in a securities litigation jury trial in Texas state court arising out of the collapse of the auction rate securities market
- Represented the Chapter 11 trustee in In re Bennett Funding Group, Inc., et al. and obtained in excess of \$200 million in litigation recoveries on behalf of creditors
- Represented the Campaign for Fiscal Equity in its historic constitutional challenge to the public education funding system in New York State
- Represented the former members of the Board of Directors of BearingPoint Inc. against a U.S. bankruptcy court-appointed trustee in charge of winding down BearingPoint's business

AWARDS/ACCOLADES

- David Rockefeller Fellow (2000-2001)
- *The Legal 500 United States*
- Euromoney's *Benchmark Litigation Survey*: "Litigation Star"
- *New York Super Lawyers*
- Legal Aid Society Award for Outstanding *Pro Bono* Service
- Manhattan Legal Services Visionary Leadership Award

ASSOCIATIONS

- New York State Bar Association Executive Committee
- Former Panel Chair, First Department Disciplinary Committee
- American Law Institute
- Former Co-Chair, New York State Bar Association's President's Committee on Access to Justice
- Legal Services NYC, Vice Chair, Board of Directors
- Manhattan Legal Services, Chair, Board of Directors (2007-2011)

- National Center for Access to Justice, Board of Directors
- Association of the Bar of the City of New York, Chair, Special Committee on Legal Services Awards
- Association of the Bar of the City of New York, Former Chair, Pro Bono and Legal Services Committee
- American Bar Association
- Chief Judge's Attorney Emeritus Advisory Council
- Center for Public Resources, Banking and Financial Services Committee (2010–2018)
- Lawyers Alliance for New York, Board of Directors (1999–2005)
- Legal Outreach, Inc. Advisory Board

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW

New York, New York

Juris Doctor, 1990

PRINCETON UNIVERSITY

Princeton, New Jersey

A.B., magna cum laude, 1987

EDUCATION & TRAINING

NEW YORK UNIVERSITY

Bachelor of Arts: English Literature 1992

Recipient of the College of Arts & Sciences Scholarship

STATE UNIVERSITY OF NEW YORK SCHOOL OF LAW

Juris Doctor 1995

Recipient of the Robert J. Connelly Award for Excellence in Trial Advocacy

COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM

Certificate in Magazine and Book Publishing 2001

EMPLOYMENT HISTORY

Executive Leadership

President and CEO, Girls Rule the Law, Inc., 2018 – Present

Founded Girls Rule the Law, Inc. in 2018 to introduce middle and high school girls to the law (e.g. the legal field, the judiciary and the legislature). Create curricula and programming for girls, including debate, public speaking and mock trial. Originated *the Law Suits You* program to provide professional attire to underprivileged young ladies for internships, mock trial and debate competitions and job interviews. Hold day-long youth conferences where girls participate in law school lectures, speed mentoring, etiquette workshops, networking breakfasts and lunches and hear prominent women speak about their career paths.

In House Counsel

Senior Deputy Counsel, Acacia Network, 2016 – 2019

Manage large caseload of matters, including supervision of outside counsel. Respond to Division/Commission on Human Rights, EEOC and other discrimination complaints in employment and housing. Assess risks and provide training to the Organization on how to manage them. Assess insurance needs and collaborate with broker to ensure proper insurance coverage and risk transfer. Analyze legal and factual issues affecting the Organization and report on emerging risks and trends to Chief Legal Officer, Chief Operating Officer and Chief Executive Officer. Oversee Collective Bargaining/Union negotiations.

Regional Assistant General Counsel, Nationwide Insurance Company, 2006 – 2010

Involved in all claims and regulatory aspects of Fortune 100 Company. Reviewed and responded to Department of Financial Services (formerly, Department of Insurance) complaints. Assisted with creation, revision and editing of policy documents/products for both Personal Lines and Commercial. Met with State legislators to discuss relevant pending legislation and potential impact on the Company and the insurance industry in general. Oversaw and managed Preferred Panel counsel utilized by the Claims Organization. Created risk management curricula and presented such to Claims Management and personnel on a monthly basis.

Private Practice

Of Counsel, Insurance Coverage and Litigation, White, Fleischer & Fino, LLP, 2010 – 2016

Senior Associate Attorney, Litigation, Hodgson Russ, 1998 – 2001

Summer Associate and Associate, Commercial and Corporate Litigation, Phillips, Lytle, Hitchcock, Blaine and Huber, 1994, 1995 – 1997

Responsible for insurance coverage and litigation cases from inception through resolution. Prepared coverage opinions. Prepared pleadings in all types of insurance disputes arising out of, among other things, Commercial General Liability, Premises Liability (Residential and Commercial), Auto Liability and Professional Liability policies. Insurance and Claims

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Senior Claims Specialist, Professional Liability Group, Liberty International Underwriters, Inc., 2004 – 2006

Claims Counsel, Errors and Omissions, Zurich North America Insurance Company, 2002 – 2004

Directed errors and omissions claims for lawyers, insurance agents, staffing agencies, specified professions and excess liability. Prepared and presented reports to underwriters and actuaries, analyzing company's potential exposure and risks posed by certain accounts and claims. Monitored outside defense counsel. Responded to claims, set appropriate reserves, negotiated resolution of claims and analyzed coverage under various professional liability policies.

Government

Assistant Attorney General, Habeas Corpus and Appeals, New York Attorney General's Office, 1997 – 1998

Responded to *habeas corpus* petitions and appeals by prisoners throughout the State. Handled Rikers Island calendar and defended the State in administrative proceedings brought by inmates.

TEACHING EXPERIENCE

New York State Bar Association/Law Line/New York State Judicial Institute and other organizations

Presenter, 2008 - Present

Create curricula in the areas of torts, insurance, trial practice and diversity and inclusion. Present Continuing Legal Education topics to the judiciary and members of the Bar. (List of speaking engagements and CLE presentations is attached.)

Lehman College, City University of New York

Adjunct Professor, 2007-2008

Taught Business Law (a required course) to students majoring in Business Administration.

EXPERIENCE HIGHLIGHTS

Leadership

- Proven leadership in the New York State Bar Association (NYSBA) as: **Chair** of the Diversity and Inclusion Committee; Second District **Delegate** to the House of Delegates; **Chair** of the Torts, Insurance and Compensation Law Section for the 2015/2016 term; and as **Chair** of Diversity and Inclusion Sub-Committees for the Membership and Continuing Legal Education (CLE) Committees.

Diversity

- Chair of the Diversity and Inclusion Sub-Committee of the New York State Bar Association's CLE Committee.
 - Spearheaded the Bar Association's review of the American Bar Association's proposal that Diversity and Inclusion be made a mandatory part of attorney CLE in New York and

helped prepare NYSBA's position paper in support of the proposal and presented such to the House of Delegates.

- Acted as Chair of the Employee-run Diversity Committee at Nationwide Insurance Company.
 - Created innovative diversity exercises for use by the Northeastern Regional Practice Group in order to enhance customer service by the legal team and claims organization.
- Member of the Planning Committee of the Defense Association of New York's Diversity Initiative.
 - Planned yearly curricula for award-winning Diversity Initiative Program that provides leadership training to women and diverse attorneys for optimal career advancement.

PROFESSIONAL ASSOCIATIONS & ACTIVITIES

New York State Bar Association

Puerto Rican Bar Association: (Member: Judicial Screening Committee)

LEGAL PUBLICATIONS

Handbook on Additional Insureds, "Subrogation and Anti-Subrogation," American Bar Association Treatise, Second Edition, 2018 (Chapters 8 and 15E – *Subrogation and Anti-Subrogation* and *Commercial Auto*, respectively)

"Handling your first deposition as a new lawyer," *New York Law Journal*, January 2016

"Avoiding the Pitfalls in the Tripartite Relationship between the Carrier, the Insured and Counsel," *New York State Bar News*, July 2015

Handbook on Additional Insureds, Chapter 8, "Subrogation and Anti-Subrogation" and Chapter 17(E), "Commercial Auto," American Bar Association Treatise, October 2011

"New York's Anti-Subrogation Law Update," *Torts, Insurance & Compensation Law Section Journal*, Spring 2011

"The Case for Diversity," *Torts, Insurance & Compensation Law Section Journal*, Winter 2009

"The Defense Attorney's Guide to Maintaining a Relationship with an Insurance Carrier," *Torts, Insurance & Compensation Law Section Newsletter*, May 2008

PROFESSIONAL HONORS

- 2019: Selected to be one of fourteen participants in the Hispanic National Bar Association's Latina Executive Leadership Program
- 2019: Chair: Diversity and Inclusion Committee, New York State Bar Association
- 2017: Appointed a Delegate to the New York State Bar Association's House of Delegates
- 2015 – 2016: Chair: Torts, Insurance and Compensation Law Section of the New York State Bar Association
- 2014 – 2016: Defense Association of New York Diversity Initiative, Planning Committee
- 2012: New York State Bar Association: Torts, Insurance & Compensation Law Section Award for Outstanding Chair (Diversity)
- 2010: New York State Bar Association: Sheldon Hurtwitz Young Lawyer Award for Outstanding Contribution to the Practice of Law in the Field of Insurance

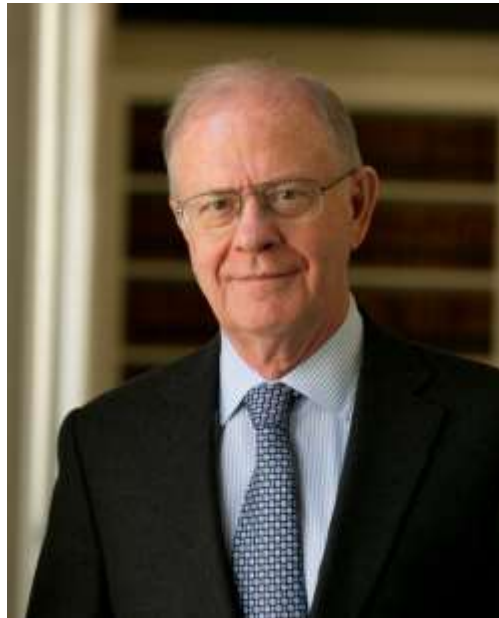
LANGUAGE SKILLS

- Spanish – Native speaker; fluently written
- Garifuna – Fluently spoken; proficiently written

For Release: Immediate
January 13, 2020

Contact: Deborah Auspelmyer
Foundation Executive
dauspelmyer@tnybf.org
518-487-5650

**Former New York Bar Foundation President Robert L. Haig
Receives Lifetime Achievement Award**



Robert L. Haig

The New York Bar Foundation will present its Lifetime Achievement Award to attorney Robert L. Haig later this month at the New York State Bar Association (NYSBA) Annual Meeting in New York City.

Haig, a partner at Kelley Drye, has been an extraordinary supporter of the foundation and served as its president from 2003 to 2006. The award will be presented by Foundation President Lesley Rosenthal at the 2020 Annual Meeting of the Foundation, as part of the NYSBA House of Delegates meeting on Friday, January 31.

The New York Bar Foundation's Lifetime Achievement Award recognizes extraordinary fellows of the foundation. The award is bestowed upon a fellow who demonstrates outstanding professional achievement, dedication to the legal profession, exemplary service to the public good, and commitment to the ideals of the foundation.

The selection was made by the Lifetime Achievement Award Committee of the foundation board and was enthusiastically ratified by the full board of directors. “Bob Haig epitomizes the values of this award,” stated Committee Chair and Chair of the Fellows Emily F. Franchina. “His leadership of the foundation sparked monumental change and growth. He urged us to aim higher, and we did.”

“To the legal world at large, Bob Haig is known as one of New York’s and the nation’s foremost litigators and authors focusing on business and commercial litigation,” said Foundation Board Member Susan B. Lindenauer. “What is not as well-known is the role that Bob Haig has played in expanding the mission and effectiveness of the New York Bar Foundation.” Bob stated that his goal as president was to expand the impact and influence of The New York Bar Foundation. He felt that the foundation was underutilized and undercapitalized and had to improve its fundraising capacity.

“Among many efforts that Bob initiated or expanded, he made a point to reach out to NYSBA sections and section members,” Lindenauer continued. “These efforts resulted in a number of specific programs, such as section fellowships and scholarships, as well as new relationships with section leaders and members as prospective fellows and other supporters.”

Haig also played a major role in creating and expanding the Foundation Fellows Circles of Giving, which provide further recognition for fellows who continue to provide financial support after they fulfill their initial fellows pledge.

The creation of the foundation’s Cy Pres and Restricted Gifts Committee, which promotes funding and visibility for the foundation was another initiative promoted by Bob.

“Bob’s contributions to the long-term health and visibility of the foundation also included strengthening the foundation’s governance and planning capacity as well as the professionalism of its staff,” Lindenauer added.

“Through extraordinary personal outreach efforts, Bob connected hundreds of individuals and law firms to the foundation, inspiring them through shared values of access to justice, devotion to the state of New York, and love of the law,” said New York Bar Foundation President Lesley Rosenthal. “Bob’s vision and his efforts have fueled the Foundation’s good works, for decades and in perpetuity.”

“To Bob, the goals that the foundation has set for itself through its board are of great value to the standing of the legal profession and of benefit to society,” Rosenthal added. “Bob Haig views the work of the foundation as a great work in progress, in which he assuredly remains involved. And for that we are eternally grateful.”

The New York Bar Foundation is a non-profit 501(c) (3) organization that is the charitable arm of the New York State Bar Association. For more information regarding The New York Bar Foundation, visit www.tnybf.org

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**NEW YORK STATE BAR ASSOCIATION
MINUTES OF ANNUAL MEETING
NEW YORK HILTON MIDTOWN, NEW YORK CITY
JANUARY 18, 2019**

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PRESENT: Aaron; Alcott; Barclay; Baum; Belowich; Ben-Asher; Bennett; Berman; Billings; Block; Bonina; Briwn Spitzmueller; Brown, E.; Brown, T.A.; Buholtz; Burke; Castellano; Chambers; Christensen; Cilenti; Coffey; Cohen, D.; Cohen, O.; Connery; Dean; Di Pietro; Doerr; Doxey; Effman; Eng; England; Entin Maroney; Fernandez; Ferrara; Finerty; Fishberg; Flood; Foley; Freenman, H.; Friedman; Frumkin; Genoa; Gerstman; Gold; Goldschmidt; Grays; Greenberg; Grimaldi; Grogan; Gutekunst; Gutenberger Grossman; Gutierrez; ack; Hage; Haig; Heath; Heller; Hines; Hurteau; Hyer; Jaglom; James; Kamins; Karson; Kean; Kelly; Kobak; Lau-Kee; Lawrence; Leber; Levin Wallach; Levin; Levy; Lewis; Lindenauer; MacLean; Madden; Madigan; Maldonado; Mancuso; Mandell; Margolin; Marinaccio; Markowitz; Maroney; Matos; May; McCann; McGinn; McNamara, C.; McNamara, M.; Meisenheimer; Meyer; Miller, C.; Miller, M.; Millett; Millon; Minkoff; Miranda; Mohun; Moore; Moretti; Moskowitz; Murphy; Napoletano; Nowotarski; Nussbaum; O’Connell; O’Donnell; Onderdonk; Owens; Palermo, C.; Perlman; Pessala; Pitegoff; Pleat; Poster-Zimmerman; Radick; Richman; Richter; Rodriguez; Rosner; Russell; Ryan; Ryba; Safer; Santiago; Scheinkman; Schofield; Schraver; Schreiber; Schub; Scott; Sen; Shafer; Shamoon; Shishov; Shoemaker; Sigmond; Silkenat; Singer; Skidelsky; Slavit; Spirer; Stanclift; Standard; Steiglitz; Strenger; Sweet; Taylor; Teff; Tennant; Tully; Udell; van der Meulen; Vecchio; Vigdor; Weathers; Weiss; Westlake; Weston; Whiting; Whittingham; Young; Younger.

Mr. Miller presided over the meeting as President of the Association.

1. The meeting was called to order and the Pledge of Allegiance recited, with the presentation of colors by the New York State Courts Ceremonial Unit and an invocation by Hon. Milton Tingling.
2. Approval of minutes of the January 27, 2018 meeting. The minutes, as previously distributed, were accepted.
3. Report of the Nominating Committee and election of elected delegates to the House of Delegates. David P. Miranda, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election as elected delegates to the House of Delegates for the 2019-2020 Association year:

First District: Susan B. Lindenauer, Stewart Aaron, and Peter Harvey, all of New York City;

Second District: Andrew M. Fallek, Michelle Weston, and Pauline Yeung-Ha, all of Brooklyn;

Third District: Hermes Fernandez Elena DeFio Kean, and Sandra Rivera, all of Albany;

Fourth District: Margaret E. Gilmartin of Saratoga Springs, Matthew R. Coseo of Ballston Spa, and Peter V. Coffey of Schenectady;

Fifth District: Courtney S. Radick of Oswego, Donald C. Doerr of Syracuse, and and L. Graeme Spicer of Syracuse;

Sixth District: Patrick J. Flanagan of Norwich, Robert M. Shafer of Tully, and Michael R. May of Ithaca;

Seventh District: LaMarr J. Jackson of Rochester, June M. Castellano of Rochester, and Amy L. Christenson of Bath;

Eighth District: Kathleen Sweet of Buffalo, Michael M. Mohun of Warsaw, and Oliver C. Young of Buffalo;

Ninth District: John A. Pappalardo of White Plains, Andrew P. Schriever of White Plains, and Joseph J. Ranni of Florida;

Tenth District: Steven G. Leventhal of Roslyn, Peter H. Levy of Jericho, and A. Craig Purcell of Stony Brook;

Eleventh District: Lourdes M. Ventura of Albertson, Steven Wimpfheimer of Whitestone, and Guy R. Vitacco, Jr. of Elmhurst;

Twelfth District: Steven E. Millon of New York City, Carlos M. Calderón of Scarsdale, and Daniel D. Cassidy of the Bronx;

Thirteenth District: Orin J. Cohen, Edwina Frances Martin, and Claire Cody Miller, all of Staten Island.

There being no further nominations, a motion was made and carried for the Secretary to cast a single ballot for the elected delegates to the House of Delegates.

4. Report of Treasurer. Scott M. Karson, Treasurer, reported on the 2018 operating budget through November 30, 2018. He reported that through November 30, 2018, the Association's total revenue was \$21.5 million, an increase of approximately \$219,000 from the previous year, and total expenses were \$19.5 million, a decrease of approximately \$1 million from the previous year. The operating surplus prior to audit was approximately \$2 million. Mr. Karson also reviewed selected revenue and expense items, with a focus on membership dues revenue. The report was received with thanks.
5. Report and recommendations of Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, presented the Committee's proposals to amend the Bylaws to remove the requirement that candidates for member-at-large of the Executive Committee be "members of the House of Delegates or section or committee chairpersons" at the time of selection or within three years preceding selection and replace it with a requirement that candidates be "Active members of the Association." After discussion, a motion was adopted to approve the bylaws amendment.

6. Adjournment. There being no further business, the Annual Meeting of the Association was adjourned.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Sherry', followed by a long horizontal line extending to the right.

Sherry Levin Wallach
Secretary

**ANNUAL MEETING
Agenda Item #3**

**Election of
2020-2021 Elected Delegates to the
House of Delegates**

- 1st District Susan B. Lindenauer, New York
Hon. Cheryl Chambers, New York
Peter Harvey, New York
- 2nd District Andrew M. Fallek, Brooklyn
Anthony W. Vaughn, Brooklyn
Pauline Yeung-Ha, Brooklyn
- 3rd District Hermes Fernandez, Albany
Elena DeFio Kean, Albany
Sandra Rivera, Albany
- 4th District Margaret E. Gilmartin, Saratoga Springs
Matthew R. Coseo, Ballston Spa
Peter V. Coffey, Schenectady
- 5th District Courtney S. Radick, Oswego
Donald C. Doerr, Syracuse
Stuart LaRose, Syracuse
- 6th District Andria R. Adigwe, Binghamton
Robert M. Shafer, Tully
Michael R. May, Ithaca
- 7th District Duwaine T. Bascoe, Penfield
Stephen M. Kelley, Geneseo
Amy E. Schwartz-Wallace, Rochester
- 8th District Kathleen Sweet, Buffalo
Michael M. Mohun, Warsaw
Ericka N. Bennett, Buffalo
- 9th District John A. Pappalardo, White Plains
Andrew P. Schriever, White Plains
Joseph J. Ranni, Florida
- 10th District Steven G. Leventhal, Roslyn
Peter H. Levy, Jericho
A. Craig Purcell, Stony Brook

11th District Hon. Lourdes M. Ventura, Albertson
Steven Wimpfheimer, Whitestone
Hon. Karina E. Alomar, Kew Gardens

12th District Steven E. Millon, Bronx
Carlos A. Calderón, Scarsdale
Adam J. Sheldon, New York City

13th District Allyn J. Crawford, Staten Island
Orin J. Cohen, Staten Island
Sheila T. McGinn, Staten Island



Staff Memorandum

ANNUAL MEETING Agenda Item #5

REQUESTED ACTION: Approval of a Bylaws amendment proposed by the Committee on Bylaws.

At its June 2019 meeting, the House of Delegates approved the report and recommendations of the Task Force on the Role of the Paralegal. Among the recommendations approved was that the Association create a membership category for paralegals. The Committee on Bylaws was charged with developing appropriate Bylaws amendments to implement this recommendation, and the committee's report with proposed amendments is attached.

The committee recommends that Article III of the Bylaws be restructured to provide for a class of Non-Attorney Affiliates, which would include paralegals as well as the current law school graduates who are not admitted to practice in any jurisdiction and who are employed by a law school or bar association. The committee also recommends that for purposes of the Bylaws, "paralegal" be defined in accordance with the definition contained in the Association's Guidelines for the Utilization by Lawyers of the Services of Paralegals.

The committee's report also contains several recommendations related to the Non-Attorney Affiliate category:

- Sections that involve Non-Attorney Affiliates in section activities should consider what rights, if any, such affiliates should have within the section.
- Membership applications for Non-Attorney affiliates should contain a disclaimer that status as an affiliate does not entitle a person to engage in the practice of law.
- The application should include a question as to whether the applicant has been convicted of a felony or misdemeanor; if so, the application should request an attestation from an attorney regarding the applicant's character and fitness.
- Any identification card issued to a Non-Attorney Affiliate should be distinguishable from cards issued to members.

- The Membership Committee should be tasked with recommending dues and benefits for Non-Attorney Affiliates.

Under procedures established in the Bylaws, the proposed amendments were subscribed to by a majority of all members of the House of Delegates in order to be considered at this meeting.

The report will be presented at the January 31 meeting by Robert T. Schofield, IV, Chair of the Committee on Bylaws.



COMMITTEE ON BYLAWS

ROBERT T. SCHOFIELD, IV
Chair
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
518/487-7616
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rschofield@woh.com

September 23, 2019

To: Members of the House of Delegates

**Re: Report on Proposed Bylaws Amendment to include Paralegals as Non-voting
Affiliates of the Association**

INTRODUCTION

At its June 15, 2019 meeting, the House of Delegates approved a recommendation from the Task Force on the Role of Paralegals that the Association create a category of membership for paralegals. The Task Force's recommendation is attached as Exhibit "A." As envisioned by the Task Force, paralegals would be able to participate in Association activities, particularly programs aimed at improving the paralegal profession.

This committee subsequently was asked by leadership to develop Bylaws amendments to implement this House action. The co-chairs of the Membership Committee, together with a designated committee representative, worked with our committee to review materials and develop this report.

After considering the issues, the committee recommends that Article III be restructured to provide for a class of Non-attorney Affiliates, of which paralegals would be one,¹ in addition to the existing membership classes. The committee also recommends that the Association's current definition of paralegal be used to describe the qualifications needed to join the Association as a paralegal Non-attorney Affiliate.

STUDY OF ISSUES

As set forth in the report of the Task Force on the Role of the Paralegal, a membership category for paralegals "would provide a means for paralegals to learn from and contribute to the organized bar[and] provide guidance for paralegals who are considering law school attendance and the practice of law. In addition, [paralegal members] could focus on researching some of the open questions presented in this Report regarding the need for further regulation or certification of

¹ The other class on Non-attorney Affiliates would be law school graduates not admitted to any bar who work for a New York law school or a bar association; these people are currently called "Affiliate Members" under the bylaws.

paralegals.” Our committee observed several other benefits to the Association from creating a category for paralegals:

- Greater distribution of Association publications and programming.
- Increased dues revenue.
- Increased Association visibility.

This category would not permit paralegals to vote or hold office, as is currently the case with the affiliate members who hold a law degree but are not admitted to practice in any jurisdiction.

The committee reviewed other bar associations’ bylaws relating to paralegal/non-lawyer members; a list of these provisions may be found in Exhibit “B.” These provisions range from very limited non-lawyer members (Pennsylvania) to paralegals (North Carolina) to law-related employee members (Connecticut) to persons interested in the Association’s work (American Bar Association). After reviewing these provisions, it was the committee’s view that for the present time, it would be appropriate to base our proposed provision on the definition contained in the report of the Task Force on the Role of the Paralegal, approved by the House:

“a person qualified through education, training or work experience who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of, and/or accountability to, an attorney, of substantive legal work, which requires a sufficient knowledge of legal concepts that, absent such legal assistant/paralegal, the attorney would perform the task.”²

An issue raised by several committee members is whether a person with a criminal record should be permitted to become a paralegal affiliate of the Association. Our review of other bars’ provisions for non-lawyer members did not reveal any bars that have addressed the issue. However, the Denver Bar Association requires non-lawyer members to have an attorney sponsor their membership and renewals. The committee expressed concern that, paralegals, being unregulated paraprofessionals with no licensure or oversight by any regulatory body, might expose the Association to individuals with problematic professional histories joining through this new class. After study and discussion, the committee agreed to make several recommendations to address this situation.

An additional issue raised was whether non-attorneys might improperly use membership in an improper manner, including creating the appearance that they are attorneys. We believe this problem can be mitigated by including appropriate disclaimers in membership materials and prominently identifying these persons as non-attorneys. Accordingly, the committee agreed to make several recommendations on these points as well.

² This definition was adopted in the Association’s 1995 Guidelines for the Utilization by Lawyers of the Service of Legal Assistants, which were adopted by the NYSBA House of Delegates on June 28, 1997.

PROPOSED LANGUAGE

The committee proposes that Article III of the Association's bylaws be amended as follows:

III. MEMBERS AND AFFILIATES

Section 1. Membership. There shall be ~~five~~^{six} classes of membership in the Association: Active, Associate, ~~Affiliate~~, Honorary, Sustaining and Law Student, and the members shall be divided among such classes according to their eligibility.

A. Active Members. Any member of the legal profession in good standing admitted to practice in the State of New York may become an Active member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all responsibilities of membership.

B. Associate Members. Any member of the legal profession in good standing admitted to practice in any state, territory or possession of the United States or another country but not in New York may become an Associate member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities of membership, with the exception of being an officer of the Association, being a member of the House of Delegates or Executive Committee, or serving as a Section Chair; provided, however, that upon the request of a Section Executive Committee and with the consent of the Association Executive Committee, an Associate member may serve as a Section Chair.

~~**C. Non-attorney Affiliates.** Any person holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals, or who is employed by a bar association, may become an Affiliate member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities of membership except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee.~~

~~**D. Honorary Members.** Honorary members may be elected by the Association.~~

D.E. Law Student Members.

1. Any law student in good standing, if not otherwise eligible for membership in this Association, may become a Law Student member by written application to the Executive Director, endorsed as to the applicant's good standing as above prescribed on behalf of the applicant's law school, and by payment of the annual dues of the current year, provided that the law school is an approved law school under the Rules of the Court of Appeals. A Law Student member shall cease to be such at the end of any calendar year in which, for any reason other than graduation or service in the Armed Forces of the United

States or in any statutory substitute for such service, the law student ceases to be enrolled in good standing in an approved law school, provided that continuance of such membership because of service in the Armed Forces of the United States or in any statutory substitute for such service shall cease one year after the termination of such service if the Law Student member has not by that time again become a law student and met all qualifications for becoming a Law Student member. A Law Student member shall be exempt from dues while in service of the Armed Forces of the United States or in any statutory substitute for such service.

2. A Law Student member shall have all the powers and privileges of an Active member of the Association except those of voting, being an officer of the Association, serving as a member of the Executive Committee or House of Delegates, or serving as Chair of a Section or Committee.

3. A Law Student member may become an Active or Associate member of the Association, as the case may be, without further application upon notice to the Association of admission to the bar of any state, territory or possession of the United States or another country within nine months after graduation from law school (exclusive of time spent in the Armed Forces of the United States or in any statutory substitute for such service) accompanied by payment of the annual dues for the current year.

E.F.—Sustaining Membership. The House of Delegates shall have the power to establish Sustaining memberships in the Association and to fix from time to time the amount of dues therefor. Sustaining membership shall be available to such members of any class as are willing, for the support of the general work of the Association, to pay such amount as annual dues in any year, in lieu of the dues prescribed pursuant to Section 2 of this Article. A member who elects to be a Sustaining member in any year shall not be obligated thereby to continue as such in any subsequent year. Sustaining members shall have the same rights and privileges as pertain to the class of which they are a member. Subject to the provisions of this Article, the House of Delegates shall have power to make appropriate regulations as to such Sustaining membership and the collection of sustaining dues therefrom.

Section 2. Non-attorney Affiliates.

A. Any Person:

1. holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals or who is employed by a bar association, or

2. who is not admitted to practice law in any state, territory or possession of the United States or another country and is a legal assistant or paralegal, qualified by education, training or work experience, who is employed or retained by an attorney, law office, corporation, governmental agency or other entity, and who performs specifically delegated substantive legal work for which an attorney is responsible,

may become a Non-attorney Affiliate of the Association by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities as if such person were a member, except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee. Non-attorney Affiliates are not entitled to hold themselves out as members and their status as a Non-attorney Affiliate does not authorize them to practice law unless they otherwise have standing to do so.

RECOMMENDATIONS

The committee makes the following recommendations to the House of Delegates:

- **Recommendation #1:** That the House subscribe to the proposed amendment of the bylaws in the form set forth above that that proposed amendment can be put forth for a vote of the membership at the January 2020 Annual Meeting.
- **Recommendation #2:** That Sections which seek to involve Non-attorney Affiliates in their activities consider what, if any rights those persons may have within the Section. While the proposed amendment makes it clear that Non-attorney Affiliates are not eligible to vote or be Chair of the Section, the Committee did not reach any conclusion on whether a Non-attorney Affiliate should be allowed to chair a committee within the Section and, if they are so allowed, what rights to vote on Section issues the Non-attorney Affiliate should be given, if any. The committee recommends that each Section consider these issues and whether, as an associated inquiry, the Section's bylaws should be amended to address such issues.
- **Recommendation #3:** That a separate Non-attorney Affiliate membership application be developed by the Membership Committee and/or Staff. Such an application should carry the disclaimer "*NON-ATTORNEY AFFILIATES ARE NOT ENTITLED TO HOLD THEMSELVES OUT AS MEMBERS AND THEIR STATUS AS A NON-ATTORNEY AFFILIATE DOES NOT AUTHORIZE THEM TO PRACTICE LAW.*"
- **Recommendation #4:** That the application for Non-attorney Affiliates include a question about whether the applicant has ever been convicted of a felony or misdemeanor. If the answer is in the affirmative, the application should seek basic information about the conviction and require an attestation from an admitted attorney with whom the applicant works, attesting that the applicant possesses the requisite character and fitness to be affiliated with the Association.
- **Recommendation #5:** That a policy be implemented to revoke the affiliate status of any Non-attorney Affiliate who is convicted of a felony and to review the affiliate status of any Non-attorney Affiliate who is convicted of a misdemeanor.
- **Recommendation #6:** That any identification card that is issued to Non-attorney Affiliates be distinguished from the identification card issued to individuals in the

membership categories, and that any such card specifically state that the holder is a “Non-attorney Affiliate.”

- **Recommendation #7:** That the Membership Committee be tasked with recommending the dues and benefits level for the Non-attorney Affiliate category consistent with the amended bylaw and these recommendations.

CONCLUSION

Our committee proposes the foregoing amendment to provide an opportunity for growth of the Association and its revenues, in a manner consistent with expansions already in place in, or being considered by, other comparable Bar associations. We commend it to you for your consideration and subscription at the November 2, 2019 meeting of the House of Delegates. If subscribed, the above amendment will be presented for discussion and adoption at the 2020 Annual Meeting.

Respectfully submitted,

COMMITTEE ON BYLAWS

Robert T. Schofield, IV, Chair
Anita L. Pelletier, Vice Chair
Eileen E. Buholtz
Michael E. Getnick
LaMarr J. Jackson
A. Thomas Levin
Jay G. Safer
Oliver C. Young
Mitchell J. Katz, *ex officio*, Co-Chair of Membership Comm.
Hyun Choi, *ex officio*, Co-Chair of Membership Comm.
Rona Shamoan, *ex officio*, Member of Membership Comm.
Executive Committee liaison: Scott M. Karson
Staff liaison: Kathleen R. Mulligan Baxter
Staff reporter: Thomas Richards

APPENDIX A

D. The Task Force Recommends Creation of a Paralegal Division

The Task Force recommends that NYSBA create a Paralegal Division through which paralegals can become non-voting members of NYSBA and participate in NYSBA's activities, but particularly in programs aimed at the enhancement of the paralegal profession. The Task Force notes that the American Bar Association has such a division. The state bars of a number of states have paralegal membership categories and/or sections or divisions. These include, at least, Connecticut, Montana, New Mexico, Nevada, Texas, Florida, Indiana, Michigan, North Carolina, Utah, Vermont, Massachusetts, New Jersey, and Ohio.⁴⁴ Such a division would provide a means for paralegals to learn from and contribute to the organized bar. Moreover, a Paralegal Division could provide guidance for paralegals who are considering law school attendance and the practice of law. In addition, the Paralegal Division could focus on researching some of the open questions presented in this Report regarding the need for further regulation or certification of paralegals.

⁴⁴ New Mexico--

https://www.nmbar.org/nmstatebar/AboutUs/Divisions/Paralegal_Division/Nmstatebar/About_Us/Paralegal_Division/Paralegal_Division.aspx?hkey=7fea2437-2fa2-4acd-bef2-6d8e1d012f43

Nevada --https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Jan2018_

Michigan -- <http://connect.michbar.org/paralegal/home> (Paralegal/Legal Assistant Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, this site, public service programs, and publication of a newsletter. Membership in the Section is open to qualified legal assistants and to all members of the State Bar of Michigan).

Ohio --The Ohio State Bar Association (OSBA) has established a credentialing program for paralegals. Paralegals interested in earning a certification good for four years must meet educational standards stipulated by the bar association, have sufficient experience and pass an examination. The first exam was offered in March 2007.

Montana -- <https://www.montanabar.org/store/ViewProduct.aspx?id=2102697>

Nevada -- <https://www.nvbar.org/member-services-3895/sections/paralegal-division/>

North Carolina --<https://www.ncbar.org/join-ncba/applications/>

Texas--

<https://www.texasbar.com/Content/NavigationMenu/ForLawyers/MembershipInformation/ParalegalDivision/default.htm>

Indiana -- <https://www.inbar.org/page/paralegals>

Utah--<http://paralegals.utahbar.org/index.php/Bylaws>

Connecticut--<https://members.ctbar.org/page/Paralegals>

Vermont --

[https://www.vtbar.org/UserFiles/files/About%20the%20VBA/JOIN%20THE%20VBA/Vermont%20Bar%20Association%20Dues%20Structure0717\(1\).pdf](https://www.vtbar.org/UserFiles/files/About%20the%20VBA/JOIN%20THE%20VBA/Vermont%20Bar%20Association%20Dues%20Structure0717(1).pdf)

Massachusetts --<https://www.massbar.org/membership/dues-structure-and-rates>

New Jersey --<https://community.njsba.com/paralegalspecialcommittee/home?ssopc=1>

APPENDIX B



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Thomas J. Richards, Esq., *Deputy General Counsel • Director of Public Interest*
voice: 518/487-5640 • fax: 518/463-8844 • e-mail: trichards@nysba.org

MEMORANDUM

To: Robert Schofield, Esq.
Date: July 30, 2019
Re: Affiliate Membership Bylaws Provisions – ABA, State Bars, Major Local Bars

Please find below references to the specific affiliate/paralegal member provisions in the bylaws of several other state bar associations, the American Bar Association, and three major metropolitan bar associations

American Bar Association – Bylaws Article 3.4 (Affiliated Professionals) –
https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/constitution-and-bylaws/aba_constitution_and_bylaws_2018-2019.pdf

California Lawyers Association – Bylaws Article II.3. permits the House to establish non-voting member categories. These categories are not yet established. –
<https://calawyers.org/bylaws/>

The Colorado Bar Association – Bylaws 3.1.b (Associate CBA Members) –
<http://www.cobar.org/portals/cobar/repository/cbabylaws.pdf>

Connecticut Bar Association – Constitution Article III.1.B.iii. (Law-related Employee Members) –
https://www.ctbar.org/docs/default-source/resources/cba-constitution-bylaws-and-procedures_7-31-18.pdf

Illinois State Bar Association – Bylaws Section 1.1.i.1&2 (Associate (nonlawyer) members) –
<https://www.isba.org/sites/default/files/policy/Bylaws%20%28as%20amended%20120917%29.pdf>

Ohio State Bar Association – Constitution Article III.2 – <https://www.ohioabar.org/about-us/OSBA-constitution/>

New Jersey State Bar Association – Bylaws Article IV.B. (Associate Membership) –
https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/miscellaneous/Bylaws_2016_revised.pdf

North Carolina Bar Association – Bylaws Article 2.10 (Paralegal Members); Article 2A (Affiliate Members); Article 8 (paralegal division) – <https://www.ncbar.org/media/888020/north-carolina-bar-association-bylaws-6-24-17.pdf>

Pennsylvania Bar Association – Bylaws Section 201.8 (Affiliated Member) (n.b. this is a very limited definition, like our current affiliate membership class for JDs employed by bar association and law schools) – <http://www.pabar.org/site/About-PBA/Bylaws/Bylaws-200/Section-201>

Denver Bar Association – Article 2.1.7 (Associate) – <https://www.denbar.org/About/Governance/Bylaws>

Los Angeles County Bar Association – Article II.8 (Associate Members) – <https://www.lacba.org/docs/default-source/members-documents/lacba-bylaws-as-amended-5-22-19.pdf>

Philadelphia Bar Association – Article 2.1.3. (Nonvoting Members) – <http://www.philadelphiabar.org/page/ByLawsArticle2?appNum=1>

**PROPOSED AMENDMENT OF NYSBA BYLAWS ARTICLE III
to add paralegals as Non-voting Affiliates of the Association**

III. MEMBERS AND AFFILIATES

Section 1. Membership. There shall be ~~six~~five classes of membership in the Association: Active, Associate, ~~Affiliate~~, Honorary, Sustaining and Law Student, and the members shall be divided among such classes according to their eligibility.

A. Active Members. Any member of the legal profession in good standing admitted to practice in the State of New York may become an Active member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all responsibilities of membership.

B. Associate Members. Any member of the legal profession in good standing admitted to practice in any state, territory or possession of the United States or another country but not in New York may become an Associate member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities of membership, with the exception of being an officer of the Association, being a member of the House of Delegates or Executive Committee, or serving as a Section Chair; provided, however, that upon the request of a Section Executive Committee and with the consent of the Association Executive Committee, an Associate member may serve as a Section Chair.

C. Honorary Members. Honorary members may be elected by the Association. ~~**Affiliate Members.** Any person holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals, or who is employed by a bar association, may become an Affiliate member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities of membership except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee.~~

~~**D. Honorary Members.** Honorary members may be elected by the Association.~~

E. Law Student Members.

1. Any law student in good standing, if not otherwise eligible for membership in this Association, may become a Law Student member by written application to the Executive Director, endorsed as to the applicant's good standing as above prescribed on behalf of the applicant's law school, and by payment of the annual dues of the current year, provided that the law school is an approved law school under the Rules of the Court of Appeals. A Law Student member shall cease to be such at the end of any calendar year in which, for any reason other than graduation or service in the Armed Forces of the United States or in any

**PROPOSED AMENDMENT OF NYSBA BYLAWS ARTICLE III
to add paralegals as Non-voting Affiliates of the Association**

statutory substitute for such service, the law student ceases to be enrolled in good standing in an approved law school, provided that continuance of such membership because of service in the Armed Forces of the United States or in any statutory substitute for such service shall cease one year after the termination of such service if the Law Student member has not by that time again become a law student and met all qualifications for becoming a Law Student member. A Law Student member shall be exempt from dues while in service of the Armed Forces of the United States or in any statutory substitute for such service.

2. A Law Student member shall have all the powers and privileges of an Active member of the Association except those of voting, being an officer of the Association, serving as a member of the Executive Committee or House of Delegates, or serving as Chair of a Section or Committee.

3. A Law Student member may become an Active or Associate member of the Association, as the case may be, without further application upon notice to the Association of admission to the bar of any state, territory or possession of the United States or another country within nine months after graduation from law school (exclusive of time spent in the Armed Forces of the United States or in any statutory substitute for such service) accompanied by payment of the annual dues for the current year.

FE. Sustaining Membership. The House of Delegates shall have the power to establish Sustaining memberships in the Association and to fix from time to time the amount of dues therefor. Sustaining membership shall be available to such members of any class as are willing, for the support of the general work of the Association, to pay such amount as annual dues in any year, in lieu of the dues prescribed pursuant to Section 2 of this Article. A member who elects to be a Sustaining member in any year shall not be obligated thereby to continue as such in any subsequent year. Sustaining members shall have the same rights and privileges as pertain to the class of which they are a member. Subject to the provisions of this Article, the House of Delegates shall have power to make appropriate regulations as to such Sustaining membership and the collection of sustaining dues therefrom.

Section 2. Non-attorney Affiliates.

A. Any person:

1. holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals or who is employed by a bar association, or

2. who is not admitted to practice law in any state, territory or possession of the United States or another country and is a legal assistant or paralegal, qualified by education, training or work experience, who is employed or retained by an attorney, law office, corporation, governmental agency or other entity, and who performs specifically delegated substantive legal work for which an attorney is responsible,

**PROPOSED AMENDMENT OF NYSBA BYLAWS ARTICLE III
to add paralegals as Non-voting Affiliates of the Association**

may become a Non-attorney Affiliate of the Association by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities as if such person were a member, except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee. Non-attorney Affiliates are not entitled to hold themselves out as members and their status as a Non-attorney Affiliate does not authorize them to practice law unless they otherwise have standing to do so.

Proposed: September 23, 2019



Staff Memorandum

ANNUAL MEETING Agenda Item #4

Attached for your reference are the financial statements for the period ending December 31, 2019.

**NEW YORK STATE BAR ASSOCIATION
2019 OPERATING BUDGET
TWELVE MONTHS OF CALENDAR YEAR 2019**

REVENUE

	2019 BUDGET	ADJUST- MENTS	2019 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 12/31/2019	% RECEIVED 12/31/2019	2018 BUDGET	UNAUDITED RECEIVED 12/31/2018	% RECEIVED 12/31/2018
MEMBERSHIP DUES	10,050,000		10,050,000	9,637,873	95.90%	10,050,000	9,902,972	98.54%
SECTIONS:								
Dues	1,302,000		1,302,000	1,288,049	98.93%	1,341,574	1,292,120	96.31%
Programs	3,160,640		3,160,640	2,452,892	77.61%	2,894,561	2,529,827	87.40%
INVESTMENT INCOME	478,000		478,000	564,518	118.10%	477,000	556,521	116.67%
ADVERTISING	219,000		219,000	290,456	132.63%	296,000	267,591	90.40%
CONTINUING LEGAL EDUCATION	3,130,000		3,130,000	3,158,234	100.90%	3,635,000	3,240,221	89.14%
USI AFFINITY PAYMENT	2,196,800		2,196,800	2,270,694	103.36%	2,262,000	2,209,019	97.66%
ANNUAL MEETING	850,000		850,000	938,791	110.45%	930,000	838,408	90.15%
HOUSE OF DELEGATES & COMMITTEES	78,250		78,250	77,576	99.14%	211,500	194,294	91.86%
PUBLICATIONS, ROYALTIES AND OTHER	268,200		268,200	254,419	94.86%	296,500	309,358	104.34%
REFERENCE MATERIALS	1,274,000		1,274,000	1,097,627	86.16%	1,310,000	1,076,377	82.17%
TOTAL REVENUE	23,006,890	0	23,006,890	22,031,129	95.76%	23,704,135	22,416,708	94.57%

EXPENSE

	2019 BUDGET	ADJUST- MENTS	2019 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 12/31/2019	% EXPENDED 12/31/2019	2018 BUDGET	UNAUDITED EXPENDED 12/31/2018	% EXPENDED 12/31/2018
SALARIES & FRINGE	9,382,242		9,382,242	8,404,663	89.58%	10,105,550	8,667,283	85.77%
BAR CENTER:								
Rent	284,000		284,000	284,367	100.13%	287,000	283,623	98.82%
Building Services	230,750		230,750	401,673	174.07%	238,250	213,285	89.52%
Insurance	162,000		162,000	159,734	98.60%	142,000	170,277	119.91%
Taxes	2,750		2,750	160,539	5837.78%	5,250	6,872	130.90%
Plant and Equipment	862,000		862,000	469,794	54.50%	904,600	1,435,314	158.67%
Administration	539,100		539,100	349,115	64.76%	607,600	424,068	69.79%
SECTIONS	4,466,940		4,466,940	3,810,887	85.31%	4,198,850	3,853,509	91.78%
PUBLICATIONS:								
Reference Materials	306,752		306,752	222,214	72.44%	389,050	221,386	56.90%
Journal	360,200		360,200	342,366	95.05%	378,200	351,483	92.94%
Law Digest	172,300		172,300	154,153	89.47%	187,800	165,856	88.32%
State Bar News	135,300		135,300	101,163	74.77%	242,300	131,607	54.32%
MEETINGS:								
Annual Meeting	338,500		338,500	380,226	112.33%	345,800	274,263	79.31%
House of Delegates, Officers and Executive Committee	519,300		519,300	438,923	84.52%	526,950	488,803	92.76%
COMMITTEES:								
Continuing Legal Education	1,659,000		1,659,000	1,704,595	102.75%	1,711,950	1,493,009	87.21%
LPM / Electronic Communication Committee	55,950		55,950	28,964	51.77%	72,800	45,976	63.15%
Marketing / Membership	924,350		924,350	733,250	79.33%	798,100	656,299	82.23%
Media Services	30,450		30,450	113,104	371.44%	98,900	46,380	46.90%
All Other Committees and Departments	2,574,705		2,574,705	2,812,467	109.23%	2,556,410	2,278,345	89.12%
TOTAL EXPENSE	23,006,589	0	23,006,589	21,072,197	91.59%	23,797,360	21,207,638	89.12%
BUDGETED SURPLUS	301	0	301	958,932		(93,225)	1,209,070	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF DECEMBER 31, 2019

<u>ASSETS</u>	<u>UNAUDITED</u> <u>12/31/2019</u>	<u>UNAUDITED</u> <u>12/31/2018</u>	<u>UNAUDITED</u> <u>12/31/2018</u>
Current Assets:			
General Cash and Cash Equivalents	16,452,608	15,595,866	15,595,866
Accounts Receivable	128,765	230,010	230,010
Prepaid expenses	1,034,220	1,627,608	1,627,608
Royalties and Admin. Fees receivable	786,666	644,691	644,691
Total Current Assets	18,402,259	18,098,175	18,098,175
Board Designated Accounts:			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	2,648,140	2,191,231	2,191,231
Accrued interest receivable	0	0	0
	2,648,140	2,191,231	2,191,231
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,117,659	1,117,337	1,117,337
Repairs replacement reserve	794,431	794,202	794,202
Furniture replacement reserve	219,967	219,904	219,904
	2,132,057	2,131,443	2,131,443
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	26,428,457	21,745,927	21,745,927
Accrued interest receivable	138,364	147,237	147,237
	26,566,821	21,893,164	21,893,164
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	3,873,958	3,699,977	3,699,977
Cash	-69,946	-31,562	-31,562
	3,804,012	3,668,415	3,668,415
Fixed Assets:			
Furniture and fixtures	1,448,300	1,431,781	1,431,781
Leasehold Improvements	1,368,781	1,368,781	1,368,781
Equipment	9,325,163	8,311,267	8,311,267
Telephone	107,636	107,636	107,636
	12,249,880	11,219,465	11,219,465
Less accumulated depreciation	10,191,258	9,875,234	9,875,234
Net fixed assets	2,058,622	1,344,231	1,344,231
Total Assets	55,611,911	49,326,659	49,326,659
<u>LIABILITIES AND FUND BALANCES</u>			
Current liabilities:			
Accounts Payable & other accrued expenses	846,047	1,016,651	1,016,651
Deferred dues	7,798,323	8,382,450	8,382,450
Deferred income special	461,538	692,307	692,307
Deferred grant revenue	15,489	27,406	27,406
Other deferred revenue	1,092,283	1,228,772	1,228,772
Unearned Income - CLE	93,111	57,487	57,487
Payable To The New York Bar Foundation	26,307	28,915	28,915
Total current liabilities & Deferred Revenue	10,333,098	11,433,988	11,433,988
Long Term Liabilities:			
Accrued Pension Costs	0	0	0
Accrued Other Postretirement Benefit Costs	7,628,910	7,128,910	7,128,910
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	360,000	296,197	296,197
Total Liabilities & Deferred Revenue	18,322,008	18,859,095	18,859,095
Board designated for:			
Cromwell Account	2,648,140	2,191,231	2,191,231
Replacement Reserve Account	2,132,057	2,131,443	2,131,443
Long-Term Reserve Account	18,439,547	14,320,820	14,320,820
Section Accounts	3,804,012	3,668,415	3,668,415
Invested in Fixed Assets (Less capital lease)	2,058,622	1,344,231	1,344,231
Undesignated	8,207,525	6,811,424	6,811,424
Total Net Assets	37,289,903	30,467,564	30,467,564
Total Liabilities and Net Assets	55,611,911	49,326,659	49,326,659

New York State Bar Association
Statement of Activities
For the Twelve Months Ending December 31, 2019

	<u>December 2019</u>	<u>December 2018</u>	<u>December 2018</u>
REVENUES AND OTHER SUPPORT			
Membership dues	9,637,873	9,902,972	9,902,972
Section revenues			
Dues	1,288,049	1,292,120	1,292,120
Programs	2,452,892	2,529,827	2,529,827
Continuing legal education program	3,158,234	3,240,221	3,240,221
Administrative fee and royalty revenue	2,534,120	2,483,276	2,483,276
Annual meeting	938,791	838,408	838,408
Investment income	1,099,904	1,580,794	1,580,794
Reference Books, Formbooks and Disk Products	1,097,627	1,076,377	1,076,377
Other revenue	365,254	518,422	518,422
	<hr/>	<hr/>	<hr/>
Total revenue and other support	22,572,744	23,462,417	23,462,417
PROGRAM EXPENSES			
Continuing legal education program	2,548,619	2,307,567	2,307,567
Graphics	1,434,079	1,749,965	1,749,965
Government relations program	385,512	483,561	483,561
Law, youth and citizenship program	76,788	76,021	76,021
Lawyer assistance program	175,132	108,395	108,395
Lawyer referral and information services	122,938	122,216	122,216
Law practice management services	73,681	88,689	88,689
Media / public relations services	490,354	350,259	350,259
Marketing and Membership services	1,592,708	1,485,399	1,485,399
Pro bono program	174,271	208,883	208,883
Local bar program	103,916	103,730	103,730
House of delegates	397,724	431,481	431,481
Executive committee	41,199	57,322	57,322
Other committees	492,674	634,270	634,270
Sections	3,810,887	3,853,509	3,853,509
Section newsletters	130,668	160,727	160,727
Reference Books, Formbooks and Disk Products	822,418	794,391	794,391
Publications	597,683	648,945	648,945
Annual meeting expenses	380,226	274,263	274,263
	<hr/>	<hr/>	<hr/>
Total program expenses	13,851,477	13,939,593	13,939,593
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	2,904,792	3,907,677	3,907,677
Pension plans and other employee benefit plan costs	862,101	(131,456)	(131,456)
Rent and equipment costs	1,491,717	1,118,192	1,118,192
Consultant and other fees	1,337,712	903,249	903,249
Depreciation and amortization	316,024	1,294,000	1,294,000
Other expenses	308,378	176,382	176,382
	<hr/>	<hr/>	<hr/>
Total management and general expenses	7,220,724	7,268,044	7,268,044
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
Realized and unrealized gain (loss) on investments	1,500,543	2,254,780	2,254,780
Realized gain (loss) on sale of equipment	5,321,794	(2,603,313)	(2,603,313)
Gain relating to defined benefit plan curtailment			
Realized gain (loss) on sale of equipment			
	<hr/>	<hr/>	<hr/>
CHANGES IN NET ASSETS	6,822,337	(348,533)	(348,533)
Net assets, beginning of year	30,467,564	30,816,097	30,816,097
	<hr/>	<hr/>	<hr/>
Net assets, end of year	37,289,901	30,467,564	30,467,564
	<hr/>	<hr/>	<hr/>

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK
NOVEMBER 2, 2019**

Mr. Karson presided over the meeting as Chair of the House.

PRESENT: Arenson; Baum; Behrins; Ben-Asher; Bennett; Berman; Billings; Brown, T.; Buholtz; Burke; Castellano; Chang; Christensen; Christopher; Coffey; Cohen, M.; Cohen, O.; Dean; Disare; Doerr; Effman; Eng; England; Fennell; Fernandez; First; Fishberg; Flood; Fox; Freedman, H.; Friedman; Gayle; Gerstman; Gilmartin; Goldberg; Good; Greenberg; Grimaldi; Grimmick; Gross; Gutekunst; Gutierrez; Hack; Hamid; Hines; Holtzman; Horan; Jackson; Jaglom; James; Kamins; Kapnick; Karson; Kats; Kehoe; Kelly, K.; Kelly, M.; Kenney; Kiernan; Kirby; Koch; Kretser; LaBarbera; Lamberti; Lara-Garduno; Lawrence; Leber; Leo; Leventhal; Levin Wallach; Levin; Levy; Lewis; Lindenauer; Lisi; Madden; Madigan; Maldonado; Mandell; Marinaccio; Markowitz; Marotta; Martin Owens; Matos; May; McCann; McNamara, C.; McNamara, M.; Miller, C.; Miller, M.; Minkoff; Minkowitz; Miranda; Mohun; Muller; Mulry; Murphy; Napoletano; Nowotarski; Nussbaum; O’Connell; Onderdonk; Ostertag; Palermo, C.; Perlman; Peterson; Pitegoff; Pleat; Poster-Zimmerman; Purcell; Quist; Radick; Ranni; Ravin; Richter; Rivera; Robinson; Rosenthal; Rosner; Russell; Santiago; Scheinkman; Schofield; Schrauer; Schriever; Scott; Sen; Shafer; Shamoan; Champnoi; Sharkey; Sheldon; Sigmond; Singer; Slavit; Spolzino; Stanclift; Starkman; Sweet; van der Meulen; Warner; Westlake; Whiting; Wimpfheimer; Wolff; Yeung-Ha; Young; Younger.

1. Approval of minutes of June 15, 2019 meeting. The minutes were deemed accepted as previously distributed.
2. Report of Treasurer. Domenick Napoletano, Treasurer, reported that through September 30, 2019, the Association’s total revenue was \$19.2 million, a decrease of approximately \$762,000 from the previous year, and total expenses were \$16.2 million, a decrease of approximately \$49,000 over 2018. The report was received with thanks.
3. Report and recommendations of Finance Committee re proposed 2020 income and expense budget. T. Andrew Brown, chair of the Finance Committee, reviewed the proposed budget for 2020, which projects income of \$23,397,230, expenses of \$23,207,399, and a projected surplus of \$189,831. After discussion, a motion was adopted to approve the proposed 2020 budget.
4. Report and recommendations of the Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, outlined proposed bylaws amendments to implement the recommendation of the Special Committee on the Role of the Paralegal, approved by the House in June, that a membership category be created for paralegals. The House was asked to subscribe to the proposed amendments to allow them to be placed on the agenda of the 2020 Annual Meeting. The proposed amendments received the required subscriptions to permit their consideration at the Annual Meeting.

5. Memorial for Whitney North Seymour, Jr. John R. Dunne offered a memorial for Mr. Seymour, who was NYSBA President 1974-75 and who passed away June 29, 2019. A moment of silence was observed in memory of Mr. Seymour and his contributions to the Association and the profession.
6. Memorial for G. Robert Witmer, Jr. Past President David M. Schraver offered a memorial for Mr. Witmer, who was NYSBA President 1994-95 and who passed away August 18, 2019. A moment of silence was observed in memory of Mr. Witmer and his contributions to the Association and the profession.
7. Report and recommendations of Committee on Standards of Attorney Conduct. Prof. Roy D. Simon, Jr., co-chair of the committee, presented proposed amendments to the Rules of Professional Conduct, with action taken by the House as follows:

Rule 1.10: A motion was adopted to approve the proposed amendment.

Rule 2.4: A motion to table the proposal failed, after which a motion to amend the proposal to include the phrase “where appropriate” failed. A motion was then adopted to approve the proposed amendment.

Rule 4.1: A motion was adopted to approve the proposed amendment.

Rule 5.2: A motion was adopted to approve the proposed amendment.

Rule 5.4: A motion was adopted to approve the proposed amendment.

Rule 5.5: A motion was adopted to approve the proposed amendment.

Rules 7.1-7.5, 1.0: A motion was adopted to approve the proposed amendments.

Presiding Justice Scheinkman abstained from participating in the debate and vote.

8. Report and recommendations of Committee on Diversity and Inclusion. Mirna M. Santiago, chair of the committee, presented the committee’s report calling for bar associations to promote civil discourse and diversity. After discussion, a motion was adopted unanimously to approve the following resolution:

RESOLVED, that the New York State Bar Association affirms the principle of civility as a foundation for democracy and the rule of law and urges lawyers to set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others;

FURTHER RESOLVED, that the New York State Bar Association urges all lawyers, NYSBA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse;

FURTHER RESOLVED, that the New York State Bar Association urges all government officials and employees, political parties, the media, advocacy organizations, and candidates for political office and their supporters, to strive toward a more civil public discourse in the conduct of political activities and in the administration of the affairs of government;

FURTHER RESOLVED, that the New York State Bar Association supports governmental policies, practices, and procedures that promote civility and civil public discourse consistent with federal and state constitutional requirements;

RESOLVED, that the New York State Bar Association reaffirms its unwavering commitment to diversity, equity and inclusion at all levels of the Association, and its firm belief that diversity and inclusion must be fostered within the legal community and in society at large;

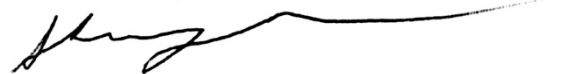
RESOLVED, that the New York State Bar Association strongly condemns the use of divisive and uncivil rhetoric by elected or other public officials that seeks to vilify specific groups or classes of individuals and/or seeks to sow division among the populace on the basis of gender, race, color, ethnic origin, national origin, religion, sexual orientation, age, disability and/or any other classification, by elected and other public officials.

9. Report of President. Mr. Greenberg highlighted the items contained in his written report, a copy of which is appended to these minutes.
10. Report of Nominating Committee. Claire P. Gutekunst, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2020-2021 Association year: President-Elect: T. Andrew Brown, Rochester; Secretary: Sherry Levin Wallach, White Plains; Treasurer: Domenick Napoletano, Brooklyn; Vice Presidents: 1st District – Diana S. Sen, New York City and Carol A. Sigmond, New York City; 2nd District – Aimee L. Richter, Brooklyn; 3rd District – Robert T. Schofield, IV, Albany; 4th District – Marne Onderdonk, Saratoga Springs; 5th District – Jean Marie Westlake, East Syracuse; 6th District – Richard C. Lewis, Binghamton; 7th District – Mark J. Moretti, Rochester; 8th District – Norman P. Effman, Warsaw; 9th District – Adam Seiden, Mount Vernon; 10th District – Donna England, Centereach; 11th District – David L. Cohen, Kew Gardens; 12th District – Michael A. Marinaccio, White Plains; 13th District – Jonathan B. Behrins, Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2020: Mirna M. Santiago (Diversity Seat), Pawling; Mark A. Berman, New York City; Sarah E. Gold, Albany; Ronald C. Minkoff, New York City; and Tucker C. Stanclift, Queensbury. Nominated as Section Member-at-Large was Jean F. Gerbini, Albany. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2020-2022 term: T. Andrew Brown, Rochester; Sharon Stern Gerstman, Buffalo; Henry M. Greenberg, Albany; David P. Miranda, Albany; and Kenneth G. Standard, New York City. Nominated as Young Lawyer Delegate to the American Bar Association House of Delegates was Natasha Shishov, New York City. The report was received with thanks.
11. Report and recommendations of Working Group on Attorney Mental Health. Working Group members Simeon Goldman, David R. Marshall, Thomas E. Schimmerling and Lauren E. Sharkey outlined the Working Group’s study of mental health questions in the bar admission questionnaire and its recommendation that such questions be eliminated.

After discussion, a motion was adopted to approve the report and recommendations. Presiding Justice Scheinkman abstained from participating in the debate and vote.

12. Report and recommendations of Task Force on the Parole System. Task Force co-chairs William T. Russell, Jr. and Seymour W. James, Jr. reviewed the Task Force's initial report containing recommendations with respect to technical parole violations, earned good time credits, and increasing the number of parole commissioners. After discussion, a motion was adopted unanimously to approve the report and recommendations.
13. Report of The New York Bar Foundation. Lesley Rosenthal, President of The Foundation, updated the House on The Foundation's fundraising efforts in support of its philanthropic programs. The report was received with thanks.
14. Report of Special Committee on Strategic Communications. David P. Miranda, chair of the committee, reviewed the committee's initiatives with respect to public relations, media and marketing, communications, and products, programming and publications. The report was received with thanks.
15. Report of Commercial and Federal Litigation Section. Mark A. Berman, past chair of the section, reviewed the section's Social Media Ethics Guidelines and led the House in participating in an interactive presentation of ethical issues implicated by social media. The report was received with thanks.
16. Administrative items.
 - a. The Committee on Leadership Development would hold an open meeting following the House meeting to discuss leadership opportunities within the Association.
 - b. On behalf of the sales committee, John H. Gross reported on sales and sponsorships for the upcoming Gala on January 30, 2020 and encouraged members to attend the Gala.
17. Date and place of next meeting. Mr. Karson announced that the next meeting of the House of Delegates would take place on Friday, January 31, 2020 at the New York Hilton Midtown, New York City.
87. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary



Henry M. Greenberg

President

Greenberg Traurig, LLP

54 State Street

Albany, New York 12207

greenbergh@gtlaw.com

518-689-1492

October 29, 2019

**President's Report
to the House of Delegates
November 2, 2019**

Constant change is the new normal. This is true for society as a whole, and also for lawyers. Change is the law of life, and now it is the life of law practice. Our profession has experienced more change over the past 20 years than it did over the last 200.

I went to law school in the Dark Ages – the 1980s, before Al Gore invented the internet. We knew nothing of cell phones or email or social networking. We did legal research using books, not computers.

We wrote legal briefs and memos on typewriters.

When I graduated from law school, the newest and most mind-blowing new technology was the fax machine.

Today, the world creates as much information every 48 hours as it did from the dawn of civilization to the dawn of the Millennium. And, owing to the sustainability revolution, the two fastest-growing occupations in the United States are solar installer and wind turbine service technician.

In 2005 – a lifetime ago it seems – author and *New York Times* columnist Thomas Friedman published *The World Is Flat*, referring to the revolutionary changes in commerce brought about by new technologies.

That technological revolution did not just affect commerce.

The same seismic changes in communication that made this “flattening” possible have permeated every aspect of our lives.

Time has accelerated. Social media is ubiquitous and demands instant response. Work hours are 24/7, 365 days of the year, and businesses are always on call. There are no breaks, there are no pauses. The world never rests.

As Friedman predicted, the world is now flat. So, too, the practice of law.

Because the law is a mirror of society, changes in society impact the law. The technological changes that revolutionized the way the world communicates have had an enormous impact on the practice of law.

Clients expect immediate responses to their questions. They demand cost-effective and efficient service. Before they speak with us, they have armed themselves with information about their matter and the relevant law – information they could not access in the pre-Google days.

To meet their legal needs, we must meet our clients where they are – not where we once were or where we wish them to be. The only way we can do that is by embracing the technological revolution and letting it work for us. We either adapt to change or we become irrelevant. And make no mistake, change *is* the new normal.

For millennial lawyers, harnessing and leveraging change – especially technological change – is second nature. But today, all lawyers need these skills. This is not optional. It is our professional obligation as lawyers. And it is a business obligation to our practices.

Not only must lawyers and law firms change, so too must the organizations that represent them. Bar associations must reimagine how they deliver services to meet members – and potential members – where they live. When our members look for the tools, resources and CLEs they need, they turn to the cloud. We need to be there as well.

That is why the New York State Bar Association is making deep investments in technology. We are building a virtual bar center to welcome members wherever they reside, however they work, in whatever field they practice. This is imperative. The strength and relevancy of NYSBA depends on our accessibility and the ease with which members can get what they require.

New York is the economic and legal capital of the world. New York law, and New York lawyers and judges, are globally recognized as the gold standard in the profession. Likewise, the New York State Bar Association is a global force. We are widely regarded as the world leader among bar associations; our reputation is unmatched.

Some 330,000 attorneys are licensed to practice in New York. More than 140,000 – over 40 percent – live or practice outside of the state, and more than 26,000 live outside the U.S.

While these attorneys are not physically inside the state, they have a professional tie to New York; they need New York law and New York connections. And NYSBA is expanding globally to meet their needs - virtually.

We have launched a quarterly e-newsletter – *NYSBA Global* – with articles of interest to international attorneys. We are offering more CLE programs in areas of international law and practice. We are building relationships with international bar associations, law firms, and law schools. In November, I will travel to Tokyo to represent NYSBA at the International Section Global Conference.

And these are just but a few of the steps being taken as part of our global membership initiative.

But our efforts aren't just on the global scale. New York lawyers — from Montauk to Niagara Falls — need NYSBA as well, especially those who practice in rural communities.

Forty-four of New York's 62 counties are rural. While attorneys clustered in cities have ready access to technology and professional resources, rural lawyers often face a different experience. Our virtual bar center will make it easier for rural attorneys to get the CLE, tools, resources, connections and communities they need.

Our new Task Force on Rural Justice — chaired by Justice Stan L. Pritzker and Taier Perlman — is looking at the issues particular to rural lawyers, including the expansion of broadband access. In the year 2019, broadband access should be a civil right. It is indispensable to closing the justice gap in rural areas.

The legal profession is more diverse than ever before and reflects the great diversity of our Empire State. We continue to work to ensure that our Association reflects the diversity of our profession and our society within its membership, leadership, and programming.

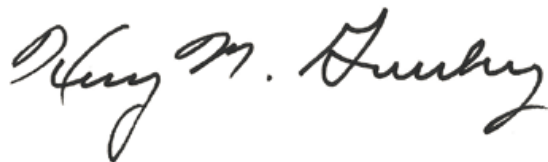
The Committee on Diversity and Inclusion has drafted a Diversity Plan for the Association. The Plan contains a set of goals and recommendations to promote and advance the participation of diverse attorneys in both the Association and the legal profession. I encourage you all to review the Plan before its presentation at the January 2020 meeting of the House of Delegates.

Many exciting changes are underway for our Association. Technology is helping NYSBA adapt for the future – and technology will ensure that we continue to be the trusted resource for the legal profession of New York State.

Technology makes it possible for us to serve lawyers everywhere. Technology is not a panacea, and it will not meet every challenge facing the legal profession. It is, however, a facilitator of the changes we must make and a tool we must learn to leverage if we wish to remain relevant in the digital age.

We must embrace change, and we must embrace technology.

It can help our practices, foster communication and expand access to justice. It can empower us to do the public good. And, it can help us be better lawyers.

A handwritten signature in black ink, reading "Gregory M. Durkin". The signature is written in a cursive, flowing style.

SPEECHES, REMARKS & OTHER PRESENTATIONS:

Address on the life and legacy of Judith S. Kaye at the 9th Annual Diamond & Hearts Event for New York's Children, sponsored by CASA: Court Appointed Special Advocates for Children, in Albany, New York (October 29, 2019).

Remarks on the legal profession's obligation to lead, delivered for broadcast on WAMC's Midday Magazine, Albany, New York (October 2, 2019).

Remarks welcoming attendees of 2019 Statewide Stakeholders Meeting: Working Together to Expand Effective Assistance for All Low-Income New Yorkers, convened by the New York State Permanent Commission on Access to Justice, Albany, New York (October 28, 2019).

Remarks at Local and State Government Law Section 2019 Fall Meeting, at The Embassy Suites, Saratoga Springs, New York (October 25, 2019).

Remarks at the 144th Annual Dinner of the Onondaga County Bar Association, Marriott Syracuse Downtown, Syracuse, New York (October 23, 2019).

Remarks welcoming attendees of the New York Fair Trial Free Press Conference 2019, sponsored by the New York Fair Trial Free Press Conference, First Amendment Watch at NYU's Carter School Journalism Institute, New York State-Federal Judicial Council, S.I. Newhouse School of Public Communications and the New York State Bar Association's Committee on Media Law and Committee on Continuing Legal Education, at the Daniel Patrick Moynihan United States Courthouse, in New York City (October 21, 2019).

Remarks honoring John Dunne at the 2019 Haywood Burns Award Ceremony and Symposium, sponsored by the New York State Bar Association's Committee on Civil Rights, at CUNY Law School, in Long Island City, New York (October 16, 2019).

Remarks introducing Cass R. Sunstein, Robert Walmsley University Professor at Harvard, at a continuing legal education program entitled "Impeachment: A Guide to the Legal Process and Its History," at Fordham Law School in New York City (October 15, 2019).

Interviewed, along with Harvard Law School Professor Cass R. Sunstein, by Brian Lehrer for WNYC Radio's The Brian Lehrer Show, a daily call-in program, covering politics and life, locally and globally. The interview was originally broadcast on October 14, 2019. The link to the broadcast is: <https://www.wnyc.org/story/impeachment-legal-guide/>.

Remarks on "Lawyers and Depression," delivered on WAMC's Midday Magazine. The remarks were originally broadcast on October 2, 2019. The link to the broadcast is: <https://www.wnyc.org/story/impeachment-legal-guide/>.

Interviewed by Susan Arbetter for the Capitol Pressroom, a news and analysis program aired daily from the New York State Capitol, on the upcoming New York State Constitutional Convention. The interview was originally broadcast on September 27, 2019. The link to the

broadcast is: <https://www.wcny.org/september-27-2019-reporters-and-nysba-president-hank-greenberg/>.

Remarks at Bridging the GAP CLE Program for newly admitted attorneys, sponsored by the New York State Bar Association, Albany, New York (September 27, 2019).

Remarks at NYSBA 2019 Technology Summit, in New York City (September 19, 2019).

Interviewed by Errol Louis for NY1's *Inside City Hall*, a news program that interviews political newsmakers, pundits and consultants from New York City and beyond, every weeknight at 7 p.m. and 11 p.m. The interview was original broadcast on September 19, 2019. The link to the broadcast is: <https://www.ny1.com/nyc/all-boroughs/inside-city-hall/2019/09/20/navigating-the-immigration-system>.

Interviewed by Alan Chartock for WAMC's *The Capitol Connection*, a news and analysis program aired on radio stations across New York State. The interview was originally broadcast on September 19, 2019. The link to the broadcast is: <https://www.wamc.org/post/capitol-connection-1938-hank-greenberg-president-new-york-state-bar-association>.

Interviewed by Casey Seiler for WMHT's *New York NOW*, an Emmy Award-winning public affairs program shown on PBS stations in New York State. The interview was originally broadcast on August 30, 2019. The link to the broadcast is: https://video.wmht.org/video/new-york-state-bar-association-on-2020-agenda-41v4kk/?fbclid=IwAR1QHHkA797MHFToUX8i3M7imVovY8Em_tZI_FbSVa4QA-OoUXP88mcv0J4.

Remarks at Opening Convocation of the Syracuse University College of Law, in Syracuse, New York (August 15, 2019).

Remarks in support of resolution (10A) creating the *ABA Best Practice Guidelines for Online Legal Document Providers*, proposed by the New York State Bar Association, the New York County Lawyers' Association, and the American Bar Association's (ABA's) Standing Committee on the Delivery of Legal Services, Center for Innovation and International Law Section, before the House of Delegates, at the ABA's Annual Meeting, in San Francisco, California (August 12, 2019).

Remarks at a continuing legal education program entitled, "Diversity, Inclusion and Elimination of Bias," and sponsored by the New York State Bar Association, in Albany, New York (July 26, 2019).

Remarks at Elder Law and Special Needs Section Summer Meeting, at Boston Marriott Long Wharf Hotel, in Boston, Massachusetts (July 18, 2019).

Remarks at Family Law Section Summer Meeting, at The Saratoga Hilton, in Saratoga, New York (July 12, 2019).

Formal remarks at the Admissions Ceremony for the New York State Supreme Court, Appellate Division, Third Judicial Department, at the Governor Nelson A. Rockefeller Empire State Plaza Convention Center, in Albany, New York (June 26, 2019).

Testimony at the New York State Office of Indigent Legal Services' hearing on financial eligibility for assignment of counsel in family matters, in Albany, New York (June 19, 2019).

Address upon being sworn-in as the 122nd President of the New York State Bar Association, in Albany, New York (June 7, 2019).

Remarks at the Presentation of the 2019 Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare and Education Program, sponsored by the Committee on Children and the Law Committee of the New York State Bar Association, in Albany, New York (June 5, 2019).

Remarks at an event entitled, “The *Braschi* Breakthrough: 30 Years Later, Looking Back on the Relationship Recognition Landmark,” sponsored by The Richard C. Faila LGBTQ Commission of the New York Courts, among other groups, held at the Supreme Court, New York County Ceremonial Courtroom, in New York City (June 3, 2019). The link to a video of these remarks is:
<https://www.youtube.com/watch?v=tF1APx3qoEI&feature=youtu.be&fbclid=IwAR0f190q-siSXhEYKNuIHnVQnXSRDrzHL0D5vvuVvM4hOpHX110VOR1gv4Q> (see 25:37 to 1:01:13).

**HOUSE OF DELEGATES
Agenda Item #3**

**ELECTION OF 2020-2021
OFFICERS AND MEMBERS-AT-LARGE
OF THE EXECUTIVE COMMITTEE**

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SECRETARY

Sherry Levin Wallach, White Plains

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Michael A. Marinaccio, White Plains

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Ronald C. Minkoff., New York City
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Mirna M. Santiago, Pawling (Diversity Seat)
Jean F. Gerbini, Albany (Section Seat)



Staff Memorandum

HOUSE OF DELEGATES
January 31, 2020

REQUESTED ACTION: Approval of the report and recommendations of the New York County Lawyers Association with respect to the problem of innocent people entering into plea bargains.

Attached is a report from the New York County Lawyers Association analyzing the problem of innocent people who plead guilty. Over 90% of criminal dispositions in both state and federal courts result from negotiated plea agreements. Evidence indicates that a segment of defendants plead guilty to crimes they did not, in fact, commit. The report notes several factors that can prompt an innocent person to plead guilty to “get the matter over with”: (a) the costs of repeated court appearances; (b) a lack of knowledge as to how the plea might affect housing and employment; (c) fear of a significantly longer jail or prison sentence; and (d) the disproportionate effect on vulnerable populations with limited resources.

The report makes a number of proposals to address this problem:

- Reduce unnecessary appearances by defendants.
- Facilitate pre-trial communication between incarcerated clients and defense counsel.
- Provide defendants with resources about the criminal justice system, criminal procedure, and what to expect as their case proceeds.
- Adopt the recommendations of the National Association of Criminal Defense Lawyers relating to penalizing a defendant who goes to trial and proportionality between pre-trial and post-trial sentences.
- Enhance judicial discretion in sentencing.
- Reduce the volume and impact of low-level offenses in the criminal justice system, including decriminalizing low-level offenses; declining to prosecute offenses; diversion; and expungement.

This report was submitted in November 2019. No comments have been received.

The report will be presented at the January 31 meeting by Hon. Jed S. Rakoff and Lewis F. Tesser.

**NYCLA JUSTICE CENTER
TASK FORCE:**

**SOLVING THE PROBLEM
OF INNOCENT PEOPLE
PLEADING GUILTY**

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I. INTRODUCTION¹

The operative basis of the criminal justice system in the United States today is that a substantial number of people charged with crimes will resolve those charges by entering pleas of guilty and forgoing their right to trial. While plea bargaining is generally accepted as necessary to a well-functioning justice system, an inevitable and hidden cost is that it can lead individuals who are innocent to plead guilty to crimes they did not commit.² The acceptance of plea bargaining is based on there being the semblance of an actual bargain struck by relatively equally situated and informed parties. But all too often this is a fiction. When an innocent person is pressured to plead guilty it undermines our fundamental expectation that criminal court procedure must lead to fair and just results. To the extent that pressures leading to not truly bargained for pleas have become endemic in the criminal justice system, they undermine the integrity and reliability of the system for all of us and breed disrespect for the courts, prosecutors and the rule of law.

The Plea Bargaining Task Force of the NYCLA Justice Center (the “Task Force”) was formed in 2018 at the suggestion of the chairs and under the auspices of the NYCLA Justice Center as part of its mission to combine NYCLA’s resources with other segments of the bench and bar and community groups to “identify and understand legal and social justice issues, promote access to justice, and act as a catalyst for meaningful improvement in, and a positive

¹ The Task Force wants to thank Morrison & Foerster LLP for hosting all of the Focus Group and Steering Committee sessions and a plenary Task Force meeting, and the New York County Lawyers’ Association (the “NYCLA”) for hosting an all-day Forum of the entire Task Force. The Task Force also wants to thank Tesser, Ryan & Rochman LLP, Colyn Eppes, Jackson Kerr, Randy Tesser, and Omar Evans for working tirelessly to conduct meetings, facilitating consensus, coordinating the preparation of this Report, and for keeping their heads and our heads level while immersed in this serious and compelling problem. Finally, the Task Force would like to acknowledge the efforts of the Honorable Judge Rakoff in bringing light to the issue of innocent people pleading guilty.

² Criminologists who have studied this phenomenon of innocent people pleading guilty “estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent.” Jed S. Rakoff, “Why Innocent People Plead Guilty” (The New York Review of Books Nov. 20, 2014), at 7-8.

perception of, the administration of justice in New York State”. The Task Force was asked to investigate whether and why innocent people plead guilty to crimes they did not commit and to recommend practical and achievable steps for reducing the incidence of such pleas and improving implementation and public perception of the fairness of the plea-bargaining process. Lew Tesser and Chet Kerr generously agreed to spearhead the project and, with the assistance of the Justice Center and a steering committee, assembled a 70-member task force of knowledgeable people with substantial experience and varied perspectives related to the criminal justice system in the federal and state courts in New York City. After a year of study, discussion and analysis, the Task Force has identified several factors that can powerfully influence an innocent person’s decision to plead guilty. These are related to, *inter alia*, systemic pressure for speed and efficiency of case processing, the burden of repeated court appearances placed on the accused, and unduly harsh sentences imposed on felony offenders who exercise their right to trial.

Accused misdemeanants and felony offenders often plead guilty simply to “get the matter over with.” Many make that choice because they cannot bear the costs of repeated court appearances, including lost work and/or necessary child care expenses. Others make the choice without knowing how the plea might seriously prejudice their housing and employment opportunities. For defendants accused of serious crimes, fear of a significantly longer jail or prison sentence after trial—compared with the state’s offer of a much lower sentence in return for a guilty plea—can motivate even an innocent person to plead guilty quickly. Finally, the enormous number of low-level offenses charged and prosecuted in our lower courts disproportionately affects our most vulnerable populations, including the impoverished and people of color, and results in a staggering number of people, who have only limited resources to

defend themselves, pleading guilty and being sentenced to undeserved and often harsh jail time and/or fines.

To address these negative factors inherent to the criminal justice system, the Task Force has developed a set of proposals and recommendations that will reduce their influence on the plea-bargaining system in New York and thus potentially reduce the number of innocent individuals who feel pressured or compelled to enter guilty pleas. These proposals include:

- Create systems to reduce unnecessary court appearances;
- Develop ways to help defendants to become more knowledgeable decision-makers;
- Restore judicial discretion with respect to sentencing outcomes and do not penalize defendants for rejecting a plea offer and proceeding to trial; and
- Increase the decriminalization of low-level offenses and employ sensible strategies to manage the criminal process more effectively, acknowledging that administrative efficiency is not and should not be the determining factor in plea bargaining discussions.

A. The Existence and Prevalence of the Problem

Jury trials and an independent judiciary have long been recognized and celebrated as a means to determine guilt or innocence and as a check on arbitrary government power.³ The reality today, however, is that few criminal defendants are tried by a jury of their peers. Negotiated plea bargain agreements account for well over 90% of criminal dispositions—with less than 3% of cases proceeding to trial—in both federal courts nationwide and in the New York

³ See Lucian E. Dervan & Vanessa A. Edkins Ph.D., *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 7-15 (2013).

State Courts.⁴ A principal reason for this wide use of plea bargaining is that, in the majority of cases, a negotiated plea agreement is seen as mutually beneficial for both an accused criminal defendant and the government. The ability of prosecutors to offer, and a defendant to accept, a reduced charge and/or a shorter sentence in exchange for a plea of guilty satisfies several interests: 1) the defendant's interest in obtaining the lowest sentence possible without facing the risk of trial; 2) the prosecutor's interest in serving justice while conserving the resources of its office; and 3) the interest of the judicial system of achieving efficient resolutions of a large number of cases.⁵

Exoneration data, scholarly estimates, and anecdotal evidence suggest, however, that there is a subset of criminal defendants who chose to plead guilty to crimes that they did not, in fact, commit.⁶ On the federal level, it is estimated that between two and eight percent of convicted defendants plead guilty to crimes for which they are factually innocent.⁷ While post-conviction exoneration of defendants who have previously pled guilty is some evidence of the phenomenon,⁸ the nature of wrongful convictions and the challenges of empirical research have

⁴ John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RESEARCH CENTER (June 11, 2019), available at <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> (based on research collected by the federal judiciary and the National Center for State Courts); John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, PEW RESEARCH CENTER (Mar. 28, 2017), available at <https://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/>; National Center for State Courts, Court Statistics Project, 2017 Gen. Jurisdiction Criminal Jury Trials and Rates, New York, available at http://popup.ncsc.org/CSP/CSP_Intro.aspx.

⁵ See generally, F. Andrew Hessick III, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *BYU J. PUB. L.* 189 (2002).

⁶ *People v. Tiger*, 32 N.Y.3d 91, 114-15 (2018) (Wilson, J., dissenting). The Supreme Court has implicitly acknowledged the phenomenon of innocent people pleading guilty and has upheld the practice of a defendant entering a guilty plea while maintaining their innocence. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

⁷ See Rakoff, *supra* note 2, at 7-8; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliability Acquit the Innocent*, 49 *RUTGERS L. REV.* 1317, 1343-44 (1997); cf. *People v. Serrano*, 15 N.Y.2d 304 (N.Y. 1965).

⁸ See *Exonerations in 2017*, THE NATIONAL REGISTRY OF EXONERATIONS (Mar. 14, 2018), available at https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf?utm_source=National+Registry+of+Exonerations+Newsletter&utm_campaign=7008e6a520-EMAIL_CAMPAIGN_2018_03_07&utm_medium=email&utm_term=0_47e13608bc-7008e6a520-66652693.

made it difficult to quantify the number of instances where someone who is factually innocent has entered a plea of guilty.⁹ Nevertheless, the available sources cited herein all point to the same conclusion: that there are individual defendants who are pleading guilty notwithstanding their factual innocence and, thereafter, suffer unjustly the consequences of a criminal conviction.¹⁰ It is the position of the NYCLA Justice Center (the “Justice Center”) and this Task Force that efforts must be made to reduce the incidence of innocent people pleading guilty.

B. Why do Innocent People Plead Guilty?

There are a variety of reasons that an innocent person might voluntarily enter a plea of guilty rather than seek vindication through a public trial.¹¹ Notably, there are various institutional forces that might prompt this act. These forces typically operate on misdemeanor defendants as process-related costs they cannot bear, and on felony defendants as the threat of significantly longer sentences of incarceration for those who exercise their right to trial and are convicted.

Even if a defendant believes that acquittal after trial is likely, trials can be long, difficult, and disruptive.¹² Defendants may desire to spare the often excessively high expense and emotional cost associated with proceeding to trial, both to themselves and their families. Entering a plea of guilty might well be seen as more acceptable than facing the exhaustive trial process, which can require missing work and having to make child care or elder care arrangements on short notice. Because the plea-bargaining process (and other pre-trial

⁹ See Rakoff, *supra* note 2, at 7-8.

¹⁰ Givelber, *supra* note 7, at 1318-1320; John H. Blume and Rebecca J. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 172-80 (2014); Josh Bowers, *Punishing the Innocent*, 156 U. PENN. L. REV. 1117, 1179-1121 (2008).

¹¹ Blume and Helm, *supra* note 10, at 172-80; see *People v. Tiger*, 32 N.Y.3d 91, 115-16 (2018) (Wilson, J., dissenting).

¹² According to the PETIT JUROR’S HANDBOOK, “[t]he average length of a criminal trial is five to ten days.” New York State Unified Court System Petit Juror’s Handbook, at p. 10, available at https://www.nyjuror.gov/pdfs/hb_Petit.pdf.

procedures) can be arduous and anxiety-inducing, some defendants may choose to plead guilty merely to put an end to their present situation, particularly if they are in jail pending a trial or other resolution.¹³

Prosecutors often have broad discretion in making charging decisions, including the ability to threaten more severe charges if a defendant declines a plea offer.¹⁴ In fact, post-trial sentences tend to be significantly higher than sentences offered in plea negotiations,¹⁵ and because of mandatory minimum sentence statutes, a prosecutor's charging decisions can often dictate the resulting sentence after trial. Some defendants may choose to accept a plea deal that carries a predictable outcome, rather than risk (even the unlikely chance) of a disproportionately more severe outcome after trial. Some defendants may also choose to plead guilty to become eligible for beneficial programs, such as diversionary programs, for which they must be found guilty to be admitted.¹⁶

Criminal defendants may also be unfamiliar with the criminal justice system and not fully understand that defense attorneys are on their side. As a result, defendants can feel powerless in a complex, opaque system, and may decide that entering a plea of guilty, with its known and sometimes unknown attendant consequences, is better than being caught in a stressful situation about which they have little understanding and over which they perceive they have little or no control. Many defendants charged with crimes carrying short jail terms or probationary sentences do not always realize the future implications for housing and employment

¹³ See, e.g., Blume & Helm, *supra* note 10, at 173-74.

¹⁴ See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

¹⁵ See NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018) (hereinafter, the "NACDL Report").

¹⁶ See, e.g., N.Y. Crim. Proc. L. § 216.05(4).

opportunities and will plead guilty to achieve what they perceive to be an inconsequential sentence.

C. Recent, Relevant Criminal Justice Reform Efforts

1. Bar Reports

Several bar associations and other institutions have recently published reports which have focused on addressing flaws within our criminal justice system, including the plea-bargaining process. The Task Force has reviewed and relied upon the following reports, which have been helpful in understanding the specific issues addressed in this Report.

In 2018, the National Association of Criminal Defense Lawyers (“NACDL”) issued a report discussing the phenomenon of the “trial penalty,” *i.e.*, the “discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial” if the defendant is convicted in federal courts.¹⁷ Based on its findings, the NACDL set out ten principles intended to guide ten specific recommendations for addressing this problem, some of which were particularly important to the Task Force’s work of identifying proposals to lessen the likelihood of innocent people pleading guilty.¹⁸ The principles related to the impact that the trial penalty and plea bargaining practices had on the role of the justice system.

In 2019, the New York State Bar Association’s second Task Force on Wrongful Convictions (the “TFWC”) published a report, expanding on the findings of an earlier TFWC report from 2009, which had identified six causes that were “primary factors responsible for wrongful convictions.”¹⁹ These factors included: identification procedures, mishandling of

¹⁷ See *NACDL Report*, *supra* note 15, at 5-6.

¹⁸ *Id.* at 11-12.

¹⁹ NEW YORK STATE BAR ASSOCIATION TASK FORCE ON WRONGFUL CONVICTIONS, REPORT OF TASK FORCE ON WRONGFUL CONVICTIONS 5 (February 8, 2019) (hereinafter, the “2019 TFWC Report”); NEW YORK STATE BAR

forensic evidence, use of false confessions, errors by law enforcement (including prosecutors), defense practices, and the use of jailhouse informants.²⁰ After reviewing recent data and developments over the past decade, the 2019 TFWC Report advocates, *inter alia*, that:

- Each District Attorney’s Office in the State of New York establish a Conviction Integrity Unit (CIU), or, where not feasible, create a program for conviction review;²¹ and
- The New York Legislature add a new section (h) to N.Y. Crim. Proc. L. § 440.10 that would permit newly discovered evidence claim after a guilty plea.²²

2. Prosecutorial Reform

In 2019, Kings County District Attorney Eric Gonzalez published an action plan for his office with the intention that it serve as a “national model of what a progressive prosecutor’s office can be.”²³ The action plan may well have the effect of reducing the amount of innocent people pleading guilty through, *inter alia*, expanded diversionary programs and exploring new alternatives to incarceration.

ASSOCIATION TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF NEW YORK STATE BAR ASSOCIATION’S TASK FORCE ON WRONGFUL CONVICTIONS (April 4, 2009).

²⁰ 2019 TFWC Report, *supra* note 19, at 5.

²¹ *Id.* at 6.

²² *Id.* at 10. In *People v. Tiger*, 32 N.Y.3d 91 (2018), the New York Court of Appeals held that a motion to vacate a judgment of guilty in a criminal proceeding based on newly discovered evidence is not available where the defendant has voluntarily entered a plea of guilty. *Id.* at 99-102 & n. 7.

²³ ERIC GONZALEZ, Justice 2020, BROOKLYN DISTRICT ATTORNEY’S OFFICE 9 (2019). District Attorney Gonzalez’s plan aims to take a targeted approach in dealing with crime in Kings County, focusing resources on “identifying and removing from the community those who cause the most harm ... while diverting out of the criminal justice system or into community-based services those who don’t pose a threat to public safety.” *Id.* at 8. In order to achieve those goals, the Kings County action plan focused on four main areas: 1) reducing incarceration by making jail the “alternative”; 2) engaging communities as partners in justice; 3) focusing resources on the drivers of crime; and 4) transforming and educating the internal culture of the DA’s office. *Id.* at 12-13.

3. Recent Legislative Amendments to the Criminal Justice System in New York

In April 2019, the New York State Legislature passed comprehensive reforms to its Criminal Procedure Law, which will take effect in January of 2020 (the “2019 NY Criminal Justice Reform Legislation”). These reforms focus on changes to the bail system, criminal discovery and speedy trial requirements under New York law. The Task Force studied these legislative changes and considered how they might potentially affect the extent to which innocent individuals agree to plead guilty. In particular, the Task Force has considered how a lengthy pre-trial detention and a lack of access to discoverable information in the early stages of a case can have a coercive impact on an innocent defendant’s decision whether to plead guilty.²⁴

First, the new legislation eliminates cash bail for all misdemeanors and class E felonies (the lowest level of felony offense), with some minor exceptions, and instead requires police officers to serve desk appearance tickets, allowing individuals to remain at liberty pending the resolutions of their cases.²⁵ This bold reform aims to decrease the disruption in individuals’ lives when they have been arrested and accused of committing low-level offenses. Instead of spending a night, multiple nights, or months in jail because they cannot afford to post bail, people will attend their jobs, take care of their families, and otherwise live their normal lives as they await court dates. The new bail legislation also incentivizes judges to release individuals under non-monetary conditions rather than holding them in pre-trial detention, unless a court determines an individual to be a flight risk.²⁶ The new legislation is expected to decrease the number of individuals who are being held in pre-trial detention.

²⁴ See Blume & Helm, *supra* note 10, at 173-74; *Id.* at 183; Hessick, *supra* note 5, at 211-15. See also Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 307-09 (2008).

²⁵ N.Y. Crim. Proc. § 510.10.

²⁶ N.Y. Crim. Proc. § 510.10(1).

Second, the new discovery statute calls for open discovery in all criminal cases and further requires prosecutors to turn over their discovery to defendants within fifteen days of a defendant's arraignment.²⁷ More transparent discovery practices ensure that defendants are better informed about the facts of their cases as they weigh the decision of whether to plead guilty or take their case to trial. In particular, the new discovery legislation assures that defendants will have access to the prosecution's discoverable material before accepting a plea offer.²⁸ This will help close the information gap between prosecutors and defendants, which previously led some defendants to feel coerced into accepting a plea deal without an understanding of the government's case.

Third, the changes to speedy trial requirements provide that when the prosecution tells the court that they are ready for trial, they must sign a certificate of compliance that the new discovery requirements have been met, and the defendant will have a chance to object on the record if this is not the case.²⁹ Moreover, if the prosecution tells the court that they are ready to proceed with trial, but subsequently asks for more time, the court will approve the request only upon "a showing of sufficient supporting facts." This legislative change is likely to shorten the pre-trial detention period for many defendants.

These reforms are relevant to the problem of innocent people pleading guilty, and it is expected that, if fully and effectively implemented, they will serve to moderate some of the

²⁷ The breadth of this initial discovery obligations includes, *inter alia*: all *Rosario* material, grand jury testimony of the victim and the defendant, names and contact information of witnesses (with certain exceptions), police reports, search warrants and accompanying affidavits in support of the warrants, electronically stored information, and criminal conviction records of both the defendant and prosecution witnesses. See N.Y. Crim. Proc. § 245.10.

²⁸ When a defendant is charged with a felony, and the prosecution makes a pre-indictment plea offer to a crime, the prosecutor must disclose all discoverable items not less than three calendar days prior to the expiration date of any plea offer or any deadline imposed by the court for acceptance of the plea offer. N.Y. Crim. Proc. § 245.25(1). When a defendant is charged with a misdemeanor and the prosecution makes a pre-indictment plea offer, the prosecution must disclose its discoverable material not less than seven calendar days prior to the expiration of the plea offer. N.Y. Crim. Proc. § 245.25(2).

²⁹ N.Y. Crim. Proc. § 30.30(5).

coercive aspects of plea bargaining. Taken together, these studies, policy initiatives, and recently-passed laws indicate that justice professionals are open to taking a fresh look at the issue of plea bargaining compelling innocent people to plead guilty. The Justice Center now adds its voice to the discussion.

II. NYCLA’S JUSTICE CENTER TASK FORCE

A. Mission & Composition of Task Force

The mission of the Task Force is to research and evaluate the issue of innocent people pleading guilty and to identify some practical and achievable solutions to prevent this phenomenon from happening. In order to efficiently utilize the resources of the Task Force, we focused our research primarily on the processes, procedures and rules applicable to the Federal and State courts in the New York City Metropolitan area. Nevertheless, the Task Force hopes that the proposals, individually and collectively, will serve as a model for New York State, other states and the federal government for reducing the occurrence of this disturbing phenomenon. In addition, the problem of innocent people pleading guilty extends to both felonies and misdemeanors. Accordingly, both levels of offenses were studied and proposals are made that have applicability to both felonies and misdemeanors.

The Task Force was composed of approximately 70 members, including former appellate court and criminal court judges, prosecutors, defense counsel, law school professors and other leaders of the bar. In the rare circumstance in which general consensus was not manifest, it is noted in this Report. The Roster of the Task Force is shown in Appendix A.

B. The Task Force Process

The Justice Center created the Task Force in late 2018. The Task Force quickly identified and collected a wide range of Law Review articles, Bar Reports and case law addressing the issue of plea bargaining and made that research available to all Task Force

Members. The Task Force held its first plenary meeting on January 22, 2019, to discuss its mandate and the process it would use to evaluate the issue of innocent defendants pleading guilty and to identify proposals to address this issue. The Honorable Jed S. Rakoff delivered the keynote address.

The Task Force conducted an exhaustive review of the history of plea bargaining and determined that it would be neither advisable nor practicable to endorse a wholesale overhaul of the plea bargaining system, which the Supreme Court has described as “not only an essential part of the [criminal justice] process, but a highly desirable part for many reasons.”³⁰ Over the Spring of 2019, the Task Force held a series of “focus groups,” at which Task Force members considered a wide range of substantive and procedural issues that arise over the duration of a criminal proceeding. The operating theory was that discussions by knowledgeable people with on-the-ground experience, looking at the various stages of the criminal and plea bargaining process might expose opportunities for corrective action that would not endanger public safety. Each of the six focus group meetings were open to the entire Task Force. Nearly the entire Task Force participated in one or more of the focus groups.

The focus group discussions examined how each of these issues impacted defendants, defense counsel, prosecutors and judges as a case moved through the system and how that, in turn, that could potentially motivate—or pressure—innocent people to plead guilty. Based on these discussions, participants in the focus groups identified potential proposals for reform.

In the initial stages of the focus group discussions, the Task Force determined that the topics of bail, criminal discovery and speedy trial were areas of possible concern, in part because

³⁰ *Santobello v. New York*, 404 U.S. 257, 261 (1971). For more information on the history of plea bargaining, see generally, Albert Alschuler, *Plea Bargaining and Its History*, 79 COL. L. REV. 1 (January 1979), and *Special Issue on Plea Bargaining – Historical Perspectives*, 13 LAW & SOC'Y REV. 189, 211-285 (1979).

the then current system was perceived as unduly burdensome on defendants, thus adding pressure on defendants to plead guilty. But after the 2019 New York Criminal Justice Reform Legislation passed, the Task Force decided that it would be more effective to support and supplement the efforts of the New York legislature, rather than propose entirely new initiatives in these areas. The Task Force discussed potential challenges that defense attorneys, prosecutors, and judges might face in adapting to the new legislative framework and whether there were any initiatives that it could undertake to ease this transition consistent with the goal of reducing the incidence of innocent people pleading guilty.

C. Topics Studied By The Focus Groups

1. Charging

The Task Force considered the role of prosecutorial discretion in our justice system, including balancing the presumption of innocence, managing prosecutorial resources, the values of an adversarial justice system, and the role of grand juries in moderating prosecutorial discretion. The Task Force also discussed unintended consequences that have stemmed from the current state of prosecutorial discretion, such as public perceptions of incongruent leverage between prosecutors and defendants, the ability to charge multiple degrees of the same offense and multiple offenses based on the same conduct, and reliance on police reporting which might not be sufficiently confirmed.

2. Role of Defense Counsel

The Task Force considered the role of defense counsel within the criminal justice system, and how the limits of that role might contribute to the phenomenon of innocent people pleading guilty. Topics explored included how and when defense counsel communicate with their clients, how the plea-bargaining process is affected by the mistrust of prosecutors among defense counsel, the lack of funding for defense counsel, and the impact of delay tactics by both

prosecutors and defense counsel during pretrial proceedings. Additionally, the Task Force discussed time pressures in the plea-bargaining process, and the limited access defense counsel have to their clients often resulting in insufficient time to speak with them about their cases.

3. Judicial Involvement in the Plea-Bargaining Process

The Task Force considered the differing approaches to judicial participation in the plea-bargaining process in the New York State courts and in Federal Court. The Task Force examined how judicial involvement in the plea-bargaining process could risk influencing the defendant's plea, learning confidential information, and giving the appearance of being a biased party. The Task Force also considered whether judicial involvement in plea bargaining would allow judges to ensure that defendants are informed, acting as a check on misconduct and power of litigants, and could increase perceptions of fairness.

4. Sentencing

The Task Force examined the history and intent of mandatory minimum sentence statutes and sentencing guidelines at both the State and Federal levels. The Task Force discussed the positive effects of these statutes and guidelines, such as deterrence from committing crimes, and the potentially problematic effects, such a widening the gap between pre-trial and post-sentences, which some argue can coerce defendants to plead guilty.

D. Developing and Selecting Potential Solutions

Guided by its research and the focus group process, the Task Force initially identified over one hundred proposals that, if implemented, could potentially reduce the number of innocent people who plead guilty. These proposals were circulated to, and ranked by, the members of the Task Force. In evaluating which proposals to potentially adopt, the Task Force considered both the likelihood—and the extent to which—such proposals would reduce the incidence of innocent people pleading guilty, as well as the feasibility of implementing such

proposals. The twelve highest ranked proposals were then discussed and debated at the Task Force’s second plenary session on May 9, 2019. Following these extensive deliberations, the Task Force voted on which proposals were most likely to affect positive change for innocent defendants (as well as the criminal justice system at large) and that are realistically implementable.³¹ The recommendations in this Report and the following declaration are the result of this multi-stage process.

III. DECLARATION THAT EFFICIENCY OF THE CRIMINAL JUSTICE PROCESS SHOULD NOT BE A DETERMINATIVE FACTOR FOR MAKING PLEA BARGAINING DECISIONS

A common foundational principle cutting across all points of concern the Task Force identified is that procedural efficiency should not produce unjust outcomes. Throughout the focus group meetings, there was a recurring discussion about the role of “efficiency” in the criminal justice system and whether it provides a justification for current plea bargaining practices. The Task Force recognized that the drive for efficiency in the criminal justice system – and an attendant pressure to plea bargain – can sometimes reflect and be driven by powerful institutional pressures to reduce costs and preserve resources. This ongoing dialogue set the stage for the generation of a number of proposals, some of which were ultimately adopted in this Report.

The Task Force has determined that the current plea bargaining system as it operates in New York effectively incentivizes criminal defendants to plead guilty, forfeiting their constitutional rights to avoid the time, risk and cost of a trial by jury. While plea bargaining is an important, and arguably necessary, component of this country’s criminal justice system, the

³¹ The Task Force decided that any proposals enacted in this Report must be generally endorsable by all of the various stakeholders in the criminal justice system, prosecutors, defense attorneys, judges, academics, and policy advocates—all of whom are represented on the Task Force. Drafts of the report were also shared with knowledgeable people from groups outside the Justice Center.

Task Force believes that encouraging defendants to plead guilty cannot and should not be justified by institutional pressure – from judges, prosecutors and/or defense counsel -- to preserve financial resources and avoid the necessary costs of a fair system of justice.

Administrative efficiency and cost savings are, of course, worthy goals, but protecting the bedrock constitutional values at play in the operation of a just criminal system must be paramount. To preserve these important values, it is essential that administrative efficiency must not be a determinative factor for making plea bargaining decisions.

The fundamental Constitutional rights afforded to any person charged with a crime – the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront one’s accusers – are essential to protect individuals from arbitrary governmental power, and serve to safeguard and validate the basic assumption that all defendants are innocent until proven guilty. Entering a plea of guilty necessarily requires a defendant to waive these rights and accept the finality of a criminal conviction.

The Task Force recognizes that, in appropriate cases, a plea of guilty can serve both a defendant’s needs and society’s interests in a fair, just and efficiently run criminal justice system. For this reason, the United States Supreme Court has long affirmed that a system that allows for guilty pleas – and that requires defendants who are charged with a crime to waive fundamental Constitutional rights – has many benefits for both defendants and Society as a whole.³²

But speed and the administrative efficacy of moving individuals charged with crimes quickly through the justice system – motivated by an interest in attendant cost savings – cannot alone justify the cost of waiving Constitutional protections. The Courts have made clear that “while justice should be administered with dispatch, the essential ingredient is orderly expedition

³² *Brady v. United States*, 397 U.S. 742, 751-52 (1970).

and not mere speed.”³³ Thus, the Supreme Court has emphasized the importance of defendants having a full and fair opportunity to assert their procedural and substantive rights, even if that slows down the criminal process.

In large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a *deliberate pace*. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.³⁴

This balance can be severely tested by institutional and cost-saving pressures to process defendants quickly through the criminal justice system by relying on plea bargaining to resolve the vast majority of criminal cases. There are statutory and institutional incentives for persons charged with a crime not only to plead guilty, but to enter a plea early in the process even if the defendant may not yet have a full understanding of the factual basis of the charges they face. This is especially true when local governments, judges and prosecutors are faced with financial pressures to allocate limited resources to address a large number of criminal defendants, many of whom are poor and cannot afford criminal representation of their own. As noted above, the institutional pressures to reduce costs and protect “scarce judicial and prosecutorial resources” is actually cited as a basis for justifying the use of guilty pleas instead of allowing full criminal trials.³⁵ In the Federal System, criminal defendants can receive a reduction in sentence by agreeing to plead guilty early in the process “thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.”³⁶

³³ *Smith v. United States*, 360 U.S. 1, 10 (1950).

³⁴ *United States v. Ewell*, 383 U.S. 116, 120 (1966) (emphasis added); see Darryl K. Brown, *Essay: The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

³⁵ *Brady*, 397 U.S. at 752.

³⁶ See United States Sentencing Commission, *Guidelines Manual* § 3E.1.1(b). This Guideline, which allows for a downward adjustment in the initial calculation of a possible criminal sentence, falls within the adjustment factor known as “Acceptance of Responsibility.” As made clear in the Commentary Notes, “[t]he timeliness of the defendant’s acceptance of responsibility is a consideration under both subsections [a and b]” of this adjustment factor. United States Sentencing Commission, *Guidelines Manual* § 3E.1.1 Commentary Note 6; see generally

When defendants feel pressured to barter their constitutional rights in order to save administrative costs, the system unavoidably breeds cynicism. The Task Force recognizes that the added pressures to process defendants quickly can be especially acute for those charged individuals who are factually innocent and are presented with plea deals seemingly endorsed by Judges, prosecutors and defense counsel, all of whom have an interest in keeping the system moving. There are inherent, conflicting pressures faced by anyone charged with a crime when considering whether to plead guilty, but impelling individuals who may not have not committed a crime to nevertheless plead guilty to meet the goals of saving money and administrative efficiency is an especially insidious attack on Constitutional protections that serve us all.

Thus, the Task Force believes that pursuing “administrative efficiency” in our system of plea bargaining – focusing solely on the expeditious processing of defendants through the criminal justice system for the purpose of saving money and resources – should not be and cannot be the driver of a fair criminal system. Pleas bargaining is and will likely remain a key part of our justice system, but its ongoing validity necessarily depends upon the ability of individuals charged with a crime to assert their rights secured by the Constitution without penalty. Accordingly, when evaluating how to improve our plea-bargaining system to reduce the number of innocent individuals who plead guilty – as well as protect all defendants charged with a crime – the safeguarding of every individual’s ability to assert and exercise their rights must be paramount.

Emphasizing the importance of allowing all defendants to freely choose to assert these Constitutional rights – even defendants who choose to plead guilty – is consistent with, if not required by, the Constitution.

Margareth Etienne, *Acceptance of Responsibility and Plea Bargaining Under the Feeney Amendment*, 16 FED. SENTENCING REP. 109 (2003).

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.³⁷

These important values of promoting the exercise of Constitutional rights by criminal defendants over the need to process them quickly through a criminal system primarily made up of plea-bargaining remain as important today as they did fifty years ago. Justice Gorsuch recently made this point forcefully in a case dealing with whether or not a defendant was entitled to a jury trial before he could be sentenced to the maximum sentence for violating the terms of his supervised release.

Jury trials are inconvenient for the government. Yet like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty. . . . This Court has repeatedly sought to guard the historic role of the jury against such incursions. For "however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters. [4 Blackstone, at] 344.³⁸

For all these reasons, the Task Force believes that cost savings in the operation of the criminal justice system should not be found through rewarding guilty pleas or by punishing defendants who decline to sacrifice their constitutional rights. The system should look elsewhere to find savings.

³⁷ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); accord *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 646 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

³⁸ *United States v. Haymond*, No. 17-1672, 2019 U.S. LEXIS 4398, at *32 (U.S. June 26, 2019).

IV. TASK FORCE PROPOSALS

A. Proposal No. 1: Reduce Unnecessary Appearances by Defendants

The Task Force determined that many participants in the criminal justice process—prosecutors, defense counsel and judges—believe that repeated court appearances by defendants, whether they are at liberty or are incarcerated, impose added and undue pressure. This, in turn, may result in some number of individuals pleading guilty just to end the process, including those defendants who are in fact innocent.

The need to attend repeated court appearances can be extremely disruptive to a defendant's everyday life. For those defendants who are not being held pre-trial, they are often compelled to disrupt their daily routine to appear for court appearances. If the defendant has a job, they may need to take a day off from work or, if that is not possible, get coverage from a co-worker or risk being fired. They might need to reveal to their employer or co-worker that they had been charged with a crime, a serious privacy concern. Even if a defendant has permission to take time off and go to court for a court appearance, scheduling changes are constant in the New York court system, and many defendants may end up having to come back to court repeatedly. To meet these scheduling demands, a defendant may need to cancel appointments, arrange and pay for childcare or elder care, and deal with many other disruptions to their everyday routine. This can be extremely burdensome, especially if a defendant needs to appear in court four, five, or even ten times during the disposition of their case, which often may result in the loss of employment.

Even when a defendant is being held in pre-trial detention, attending multiple court days can be extremely stressful, especially for a defendant who is, in actuality, factually innocent. A defendant will be awakened very early in the morning for transport and be required to travel a significant distance to get to the courthouse where they will sit in a holding cell until their case is

called. The defendant may have limited access to food and water while they are waiting for their case to be heard. Some defendants will wait in the holding cell in the courthouse all day only to learn that they will be traveling back to the jailhouse and doing it over again the following day because their case was not called.

The Task Force found that these lengthy and often unnecessary court appearances can be extremely disruptive and impose substantial pressure on a defendant during the pretrial process. The Task Force further found that the need to make repeated appearances, with the resulting substantial disruptions in a defendant's everyday life, imposes substantial pressure on defendants to terminate the proceedings by pleading guilty. The Task Force believes that reducing the need for these appearances can potentially relieve some of this pressure and, thus, make it less likely that individuals who are innocent will nonetheless feel they have no choice but to plead guilty.

The Task Force proposes that an accused defendant should not be required to attend any hearing or court appearance where there will be no substantive determination of the merits or case disposition and/or where there will be no impact on the defendant's substantive constitutional rights, unless the Court specifically directs the defendant to be present. Thus, the defendant will not need to be present for mere ministerial or scheduling hearings that will not impact the ultimate disposition of his or her case.

The Task Force further proposes that an accused person, with no criminal history, no previous warrants, or an overall history of regularly attending court proceedings should be deemed *presumptively* excused from certain court proceedings. An "eligible" court proceeding is one at which there is no realistic possibility of case disposition or of any proceedings regarding the merits of the case, or where the input, participation or presence of the accused is unnecessary. Additionally, an accused person with employment, educational, family care responsibilities or

other life situations that make repeated court appearances difficult or impossible could be excused whenever possible.

1. Implementation Considerations

All decisions regarding excusal of an accused shall be made by the court, on application of defense counsel, giving the prosecutor an opportunity to be heard. Those applications shall be made on the record with respect to each prospective court adjourn date, with appropriate notations made on the court file. Counsel should confer in advance of the call of the case to discuss whether the presence of the accused will be necessary on the next adjourn date.

In the event an accused advises court personnel that an unexpected pressing commitment has arisen, the court should endeavor to cooperate with the accused so that their commitment can be accommodated, to the extent possible. If the accused's presence is determined to be necessary, the court should explain why accommodation is not possible and attempt to fashion some alternate solution.

When the court has granted defense counsel's application to excuse the accused on the next court date, the accused should be given written notice of the next date, by court personnel, indicating that the defendant's presence is excused, and providing contact information for the courtroom where the case will next appear. The notice should advise that any intentional failure to appear at future court dates may result in the issuance of a bench warrant. Courts should be encouraged to give *Parker* warnings,³⁹ orally and in writing, at the first such adjournment.

Defendants should be promptly notified of what occurred when they were not present.

³⁹ In *People v. Parker*, 57 N.Y.2d 136 (1982), the Court of Appeals held, *inter alia*, where a defendant has actual notice of a trial date and voluntarily fails to appear, that defendant has not therefore implicitly relinquished their right to be present at trial. *Id.* at 140-42. A "Parker Warning" is an affirmative notice to a defendant that they have a right to be present in court and that they can, by their conduct, waive, forfeit, or lose that right. *See* NY MODEL COLLOQUIES, PARKER ADMONITIONS (Aug. 2016), available at <http://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml>.

Incarcerated accused persons may be separately permitted to waive their appearance in court at future ‘eligible’ court proceedings, preferably on the record on the preceding court date. As video technology advances and becomes more generally available in courtrooms, courts can explore its use as a way to facilitate appearances, for both defendants who are incarcerated and for defendants who are not incarcerated pretrial.⁴⁰

Implementation of these proposals, with the exception of those requiring increased personnel and financial support, will likely not require additional statutory authority or modification of court rules. Rather, whether on a court by court or county by county basis, individual defense counsel can make application to have their clients excused or placed on telephone alert. The Task Force hopes that, by highlighting the problems that can arise from requiring repeated appearances by defendants will result in increased receptivity by prosecutors, defense counsel and the courts to excusing accused individuals from appearing when appearance is unnecessary.

B. Proposal No. 2: Facilitate Pre-Trial Communication Between Incarcerated Clients and Defense Counsel

At the heart of the attorney-client relationship lies attorney-client communication and the trust between an attorney and their client. Effective communication is a vital method for, *inter alia*, the mutual transmission of information, the building of a relationship of trust, and the development of strategy by defense counsel and client. To be effective, it requires – among other things – sufficient privacy and adequate time.

Despite the importance of effective attorney-client communication, significant factors can impede the ability to communicate, especially for clients who are in custody pretrial. If attorney-

⁴⁰ As discussed below, video conferencing should not be used as a wholesale substitute for in-person meetings between attorneys and clients. *See infra*, at 26.

client communication only consists of a few rushed minutes near the courtroom when an incarcerated client is brought for an appearance, the rare visit at a correctional facility, or the occasional phone call, it is much more difficult to build a relationship of trust between a defendant and counsel.

The Task Force found that ineffective communication can lead to frustration and distrust of the criminal justice system by defendants and, thereby, impose added pressure on innocent defendants when presented with a proposed plea agreement. Many defendants do not have a sophisticated understanding of the criminal justice process and, therefore, are reliant on their counsel to advise them as their case proceeds. Moreover, defendants may not understand why their case seems to not be progressing even though they have been to court multiple times. Ensuring effective communication with counsel allows defendants to navigate the criminal justice process more effectively and helps them not to make rash decisions, such as pleading guilty to a crime they did not commit simply to end the process.

For those in custody, the pressure to accept a guilty plea is particularly significant, as a defendant may perceive, incorrectly, that taking a plea offers the quickest prospect of freedom. If defense counsel can effectively communicate with their clients, they can counter this pressure in various ways, such as educating their clients about the criminal justice process, gaining information that will strengthen arguments for taking a case to trial, making applicable pretrial motions, discussing possible trial strategies, and offering support and hope. Conversely, in those situations where it might be in a client's best interest to accept a plea deal rather than proceeding with a case, the lack of adequate communication can frustrate that outcome. In short, improved access to defense counsel will grant more defendants the ability to confidently make informed decisions about whether to plead guilty.

The Task Force specifically focused on those defendants who are in the pre-adjudication custody of the New York City Department of Correction (the “DOC”) and the need to improve communication between defense counsel and their clients at the City’s correctional facilities.

1. Reforming the Scheduling Procedure and Facility Accommodations for In-Person Visits with Clients at Correctional Facilities

One of the barriers to effective communication between attorneys and their incarcerated clients is the amount of time and difficulty it takes to visit clients at the City’s Correctional Facilities, especially Rikers Island.⁴¹ Rikers Island is inconveniently located, and the process for visiting or meeting with a defendant in custody is highly inefficient and often involves substantial wait times. Once through the initial security checkpoint at Rikers, attorneys must wait for a bus to take them to the specific facility where their client is held. After arriving at that specific facility, attorneys must once again go through security and can often wait for over an hour for a client to be brought to the visiting area to have in-person meeting.

The Task Force proposes that the DOC permit attorneys to schedule, in advance, in-person meetings at correctional facilities at specific, designated times so that clients can be brought in advance and attorneys are not required to endure long wait times.

The DOC is already using this type of scheduling process for video-conferencing, which has proven to be more effective at ensuring that clients are in a certain place at a certain time. Currently, if an attorney wants to meet with a client for a video conference, a call is placed by the attorney’s office to the specific facility where the client is being held to schedule the conference. Video conferences are available between 9:00 a.m. and 4:30 p.m. Monday through Friday, generally in 30 minute increments. After the conference has been scheduled, the

⁴¹ The DOC’s Facility at Rikers Island actually consists of ten separate jail facilities, all of which must be accessed through the Benjamin Ward Visit Center.

attorney's office must email a "production sheet" to the DOC with specific information about the client, the attorney, and the conference. All of this must happen by 3:30 p.m. the day before the scheduled conference.

At the date and time of the scheduled visit, the client is brought to the video conference area of the facility in which they are being held. The attorney calls that facility to confirm the client is present, and then places a call to the Office of Court Administration's ("OCA") Video Conference Unit, who connects the attorney's office to the booth the client has been placed in at the facility for the meeting.

The Task Force proposes that this same type of advance scheduling process be adopted for in-person meetings between counsel and a defendant. The attorney's office could call the specific facility where their client is being held in advance to schedule the meeting.⁴² The attorney's office would then send a "production sheet" to DOC with the required information by 3:30 p.m. the day before the scheduled meeting. It would then be up to the attorney to arrive at Rikers Island 30 minutes prior to the start of the scheduled meeting to allow them time to clear security and arrive at the specific facility.

The Task Force anticipates that DOC will express concern that attorneys will fail to show up for meetings at the scheduled time. As with video conferences, there should be a cancellation window before the meeting is scheduled to start. Attorneys who know that they will not be able to attend the meeting due to unforeseen circumstances must call and cancel by this time to ensure

⁴² The 9:00 a.m. to 4:30 p.m. scheduling limitations for video conferences should not be applicable in this instance because those times are constrained by the OCA Video Conference Unit's working hours. Because the OCA does not play any role in scheduling in-person meetings, the times could be extended.

that clients are not needlessly moved around the facility. Attorneys must also be sure to schedule meetings only for times when they are confident they will be available.⁴³

This simple change in scheduling policy would save time and greatly aid in facilitating communication between defense attorneys and their incarcerated clients.

2. Create Remote Communication Procedures for Incarcerated Clients

The Task Force believes that the value of in-person meetings between incarcerated clients and defense counsel cannot be overstated. Unlike other forms of communication, in-person meetings allow defense counsel to: 1) present and explain relevant documents to their client; 2) analyze the validity of the client's version of the factual nuances of the case; and 3) assess their client's physical and mental well-being. Moreover, in-person communication demonstrates to incarcerated clients that they have an advocate in their corner who is fervently advocating for their best interests.

The unfortunate reality, however, is that defense counsel, and especially public defenders, have limited opportunities to make personal visits to jails to discuss their client's case. The Task Force believes this problem can be remedied by making it easier for defense counsel to communicate with their clients by telephone.

The Task Force recommends that procedures be adopted by the DOC and other institutions that would allow defense counsel to contact their clients by telephone at specific designated times. Facilities can set aside time for inmates to receive calls from defense counsel at workable times, for example, taking into account daily routines such as meals, counts, and lockdowns. The Task Force also recommends that counsel be able to schedule calls in the same way videoconferences are currently scheduled.

⁴³ Scheduling a visit should not be required--an attorney could still show up at their own convenience just as before and choose to wait for a client to be brought to the visiting area at the correction facility.

Remote communications also play a vital role in ensuring adequate attorney-client communication. Incarcerated clients must know that they have the ability to reach out and communicate with their counsel. Making private remote communications between counsel and client more accessible allows defense counsel to provide updates about the status of their case, develop a rapport with their client and lessen the client's feeling of despair and being "lost in the system." Remote communication also allows counsel with large caseloads to regularly stay in contact with clients without devoting significant portions of a day to make personal visits, and should alleviate the frustration a client has when he or she attempts to call counsel and is unable to reach them.

As video conference technology continues to develop, the Task Force recommends that the DOC explore how to expand the availability of video conferencing for defendants and their counsel. This includes increasing the number of rooms available for defendants to use for video conferences with their attorneys and utilizing the DOC procedures already in place.⁴⁴ The Task Force further recommends the expansion of the availability of telephonic communications between attorneys and incarcerated clients.

C. Proposal No. 3: Provide Defendants with Educational Resources About the Criminal Justice System, Criminal Procedure, and What to Expect as their Case Proceeds.

The vast majority of criminal defendants lack a basic knowledge of criminal procedural and substantive law. In addition, despite the best efforts of defense counsel, many defendants have only a limited understanding about what has happened and what is likely to happen as their case progresses. The Task Force is concerned that this lack of information may prevent defendants from making well-informed decisions regarding plea offers, which in turn heightens

⁴⁴ See *supra*, at 26.

the risk that innocent defendants may be pressured to enter a plea of guilty. To address this problem, the Task Force recommends that defendants be provided with easily accessible educational resources about the criminal justice system and basic criminal procedure, the status of their individual cases, and the collateral consequences of taking a plea or being convicted of a crime.

Initially, it is important to understand the impact that a defendant's lack of understanding about the criminal law and criminal process has on the decision-making process. Individuals who find themselves caught in the machinery of the criminal justice system, a complex and at times opaque process, often have little or no training in the how the justice system operates. Therefore, many defendants have only a basic understanding of what to expect as they are pushed through the process. Legal terminology can be difficult and confusing. There are many procedural aspects of a criminal proceeding that only an attorney or someone experienced in the legal system would understand well. Most criminal defendants cannot be expected to understand the nature of motion practice, the various reasons for numerous court hearings, the purpose behind the defense attorney asking certain questions, or the explanation for why the process can take such a long time. Additionally, most defendants do not fully understand, let alone know about, the collateral consequences of accepting a guilty plea, such as prohibitions on obtaining housing and certain licenses, or the effects a conviction could have on employment opportunities. This lack of knowledge and understanding can make it extremely challenging for defendants to fully appreciate what is happening in their cases and to make reasoned and thoughtful judgments about the risks of proceeding to trial or accepting a plea offer.

When accepting any plea deal, criminal defendants are required to state on the record that their acceptance is knowing, voluntary and that understand the consequences of the acceptance.

In reality, however, many criminal defendants lack a basic understanding of the consequences of accepting a plea deal. This is true even after their attorneys have explained the consequences to them.

The Task Force believes that criminal defendants' lack of understanding of the criminal justice system can significantly and negatively impact their ability to consider and assess the costs and benefits of entering a plea of guilty. More importantly, this lack of understanding can impose added pressure on a defendant to accept a plea offer, notwithstanding their innocence. Providing criminal defendants with access to additional information will help them make better informed decisions regarding the full consequences of accepting guilty pleas, and not to act out of frustration simply to get out of jail and see their families.

Accordingly, the Task Force makes two recommendations to address this problem. First, the Task Force proposes that informational materials and videos be created that describe, in general terms, how the criminal justice process works and what defendants can anticipate will happen as their case proceeds through the system. Second, the Task Force proposes that docketing and scheduling information about individual defendant's cases be collected and made easily available to defendants, regardless of whether they have been incarcerated or released pending a resolution of their matter.

Turning first to the informational materials and videos, the Task Force recommends that information materials about the criminal justice system and how it works be created and made available to every individual who is arrested or charged.⁴⁵ In addition to written materials, this

⁴⁵ The New York Unified Court System website already has basic information about a range of subjects, including subjects such as Criminal Case Basics (which includes a section on Plea Bargaining), Collateral Consequences, Sentencing and Criminal Records & Sealing. *See* <https://www.nycourts.gov/courthelp/Criminal/caseBasics.shtml>. For those defendants without any internet access, however, this information is inaccessible.

could include creating a video (similar to the video that is shown to jurors at the beginning of jury duty) that defendants who are being held pre-trial can view. The written materials and video would provide an overview of the criminal justice process, including the stages of the criminal prosecution—*e.g.*, arraignment, discovery, motion practice, trial, appeal. They would also describe and explain each person's role in the criminal justice system, including the judge, prosecutor, and defense attorney, as well as rights defendants have regarding paperwork, trial, the People's burden, and other information relevant to most criminal cases. The Task Force recommends that these materials be made available and that the video be shown at the earliest possible time, *i.e.*, immediately following arraignments, and remain available for defendants to view at other points in time when they would otherwise be waiting idly. The Task Force also recommends creating companion written materials in plain, understandable language (and in various language translations) that defendants may review in their cells.

With respect to scheduling and docketing information for individual matters, the Task Force recommends that this information could be made available through kiosks at detention centers, courts, and in other areas where individuals are held. The kiosks could serve as information centers where defendants can learn about the status of their own cases, find contact information for their attorneys, and review the schedule of upcoming matters and appearances. For defendants to learn about the publically-available specifics of their own cases, the kiosks could allow individuals to type in or scan their docket number, which would pull up a list of charges against them. An application on the interface would allow the individuals to listen to or read the elements of the charges that the People must prove beyond a reasonable doubt (similar to pattern jury instructions). An application on the interface would inform individuals of the broad range of sentencing exposure and the advisability of consulting with their attorney as

to potential outcomes (similar to New York Prosecutors Training Institute's Crime Time), and another application would inform individuals of the proceedings that have already taken place and those upcoming (similar to the Criminal Records & Information Management System). The kiosks would have an application that defines legal terms in understandable language, and would allow defendants to print out individual dockets and the contact information of their attorneys.

1. Implementation Considerations

An obvious question is who will create and curate the material. A potential answer is that it could be done by the various Bar Associations, perhaps working with the Unified New York Court System.⁴⁶ Another question that may arise could pertain to the level of specificity that should be included in the kiosk information and ways to avoid creating conflicts or violating attorney–client privilege. To solve those issues, the kiosks could provide a reminder about the attorney–client privilege and could include a disclaimer that the information is not, and not a substitute for, legal advice. And, of course, the practical consideration of where the videos and kiosks would be placed will require input from those most acquainted with the process in each jurisdiction, who could provide the best insight regarding where defendants would be able to access the information the easiest.

To conclude, individuals charged with crimes lack appropriate access to information about their own cases and the criminal justice system as a whole. This information gap fosters a distrust in the system and a sense of hopelessness that leads these individuals into making uninformed – and sometimes non-beneficial decisions – including pleading guilty when they are innocent of the crimes charged. Bridging this gap is a means to fixing that problem for the

⁴⁶ See *supra* note 45 (describing the type of information that has already been developed by the Office of the New York Unified Court System).

people whose lives and liberty depend on it, and the Task Force recommends implementing informational videos and kiosks to achieve that goal.

D. Proposal No. 4: Adopt Recommendations of the NACDL Report Dealing with the Trial Penalty and Proportionality Between Pre-Trial and Post-Trial Sentences

In July 2018, the NACDL issued its Report “The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It”.⁴⁷ Based on its findings, the NACDL Report listed 10 guiding principles as well as 10 specific recommendations for reform. The principles reflected a broad range of beliefs, such as the values of the jury trial system, the troublesome nature of the decline of the frequency of trials, and the damage to society from mass incarceration—particularly for people of color and the poor. These principles have specific resonance with regard to plea bargaining, in expressing that there is a problematic discrepancy between pre-trial and post-trial sentences, that there are coercive elements of plea bargaining, and that choosing to go to trial is a right which should not be punished.⁴⁸

⁴⁷ *NACDL Report*, *supra* note 15.

⁴⁸ *NACDL Report*, *supra* note 15, at 11.

The trial penalty—the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial—undermines the integrity of the criminal justice system. Trials protect the presumption of innocence and encourage the government to charge cases based only on sufficient, legally-obtained evidence to satisfy the reasonable doubt standard. The decline in the frequency of trials impacts the quality of prosecutorial decision-making, defense advocacy, and judicial supervision. The decline in the frequency of trials tends to encourage longer sentences thereby contributing to mass incarceration, including mass incarceration of people of color and the poor. The decline in the frequency of trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system and also undercuts the role of appellate courts in supervising the work of trial courts. The trial penalty creates a coercive effect which profoundly undermines the integrity of the plea-bargaining process. A reduction for accepting responsibility through a guilty plea is appropriate. The same or similar reduction should be available after trial if an individual convicted at trial sincerely accepts responsibility after trial regardless of whether the accused testified at trial or not. No one should be punished for exercising her or his rights, including seeking pre-trial release and discovery, investigating a case, and filing and litigation of pre-trial statutory and constitutional motions.

Id. The *NACDL Report* also recommended the abolition of mandatory minimum sentences, which is treated separately in this Report. *See infra*, at 39-44.

An extreme difference between a sentence before and after trial, and the discretion of prosecutors to widen that gap by charging certain crimes and require mandatory minimums, create a grave risk that innocent people will plead guilty merely to avoid draconian consequences for exercising their constitutional right to trial. In circumstances in which the expected sentence after trial is substantially more severe than the plea offer (for no reason other than the mere fact of exercising the right to trial), a defendant's decision to plead guilty may have little to do with their actual guilt; instead the decision may be explained almost entirely by risk tolerance or risk avoidance theories.⁴⁹

Many of the NACDL Report's principles and recommendations, particularly those that aim to preserve criminal defendants' right to trial and reduce the use of coercive plea tactics, are consistent with the objectives of this Report. After extensive deliberation, members of this Task Force have overwhelmingly supported adopting two of the NACDL Report's recommendations, insofar as they relate to the New York State criminal justice system:

Remove the Trial Penalty: The government should not be permitted to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person's decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions.

Proportionality Between Pre-Trial and Post-Trial Sentencing: Procedures should be adopted to ensure that the accused are not punished with substantially longer sentences for exercising their right to trial, or its related rights. Concretely, post-trial sentences should not increase by more than the following: denial of acceptance of responsibility (if appropriate); obstruction of justice (if proved); and the development of facts unknown before trial.⁵⁰

⁴⁹ See generally, Dervan & Edkins, *supra* note 3.

⁵⁰ NACDL Report, *supra* note 15, at 12-13.

1. Removing the Trial penalty

The widespread practice of conditioning plea offers on an accused's agreement not to litigate statutory and/or constitutional issues undermines transparency, basic fairness, and the integrity of the criminal legal system more broadly.⁵¹ As such, the Task Force recommends adopting the NACDL's recommendation of doing away with the "trial penalty," thereby eliminating prosecutors' ability "to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty," including "an accused person's decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions."⁵² Eliminating the trial penalty would give substance to statutory and constitutional protections designed to protect innocence and proportionality of punishment and provide accountability for the conduct of law enforcement. Further, eliminating the trial penalty helps assure fair and proportionate outcomes for every person going through the criminal justice system.

The NACDL Report provides a summary of research showing how the trial penalty contributes to wrongful convictions by undermining procedural protections that elucidate when evidence is unlikely to be compelling prior to trial.⁵³ Because the majority of cases are resolved before pre-trial motions are heard, issues pertaining to the voluntariness of an accused's statements to law enforcement and whether an out-of-court perpetrator identification procedure is reliable rarely receive evidentiary hearings or meaningful judicial scrutiny.⁵⁴ As a result,

⁵¹ *Id.* at 28-30.

⁵² *Id.* at 59 (Recommendation No. 6).

⁵³ *Id.* at 24-30.

⁵⁴ *People v. Huntley*, 15 N.Y.2d 72 (1965) (voluntariness of statements); *United States v. Wade*, 388 U.S. 218 (1967) (suggestive identification procedures).

coerced confessions and misidentifications, as well as other potential abuses such as instances of police misconduct,⁵⁵ are unlikely to come to light.

New York's recent bail and discovery reforms have already addressed some of the concerns reflected in the NACDL Report's recommendations.⁵⁶ New York's new discovery statute, which goes into effect January 1, 2020, mandates open-file discovery early in the life of a criminal case. Critically, this requires prosecutors to comply with discovery obligations *prior* to the expiration of a plea offer and expressly provides that while the accused may waive his or her discovery rights, "a guilty plea offer may not be conditioned on such waiver."⁵⁷ This level of transparency, unique among the country's criminal discovery laws, eliminates one party's ability to exploit information asymmetries in plea negotiations. Moreover, New York's elimination of pretrial detention for the vast majority of people facing misdemeanor and nonviolent charges removes the inherently coercive effect of pretrial incarceration for large swaths of people in New York's criminal courts.

The elimination or reduction of the trial penalty would extend this transparency principle to the litigation of statutory and constitutional issues. As a first step, local and state bar associations can support broad adoption of the NACDL recommendations and facilitate the drafting of new ethics guidelines to regulate the exercise of prosecutorial discretion. District attorneys are encouraged to voluntarily adopt limits to their plea-bargaining practices.

The Supreme Court has granted prosecutors broad latitude to leverage their informational and procedural advantages against people accused of crimes in order to extract guilty pleas.⁵⁸

Further efforts should be under taken to explore legislative solutions to reforming plea

⁵⁵ See NACDL Report, *supra* note 15, at 8.

⁵⁶ *Id.* at 11-12.

⁵⁷ N.Y. Crim. Proc. L. § 245.25(1) and (2) (pre-indictment guilty pleas and all other guilty pleas, respectively).

⁵⁸ See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

bargaining conditions by examining the model of the recently passed criminal discovery statute and by expressly prohibiting the conditioning of plea offers on the waiver of pre-trial motions. Legislative limitations should be implemented only in conjunction with broad sentencing reform so that an end to the trial penalty does not provoke a reactionary response of elevated charges and plea offers.

2. Proportionality Between Pre-Trial and Post-Trial Sentencing

Because pre-trial and post-trial sentences are often so vastly disproportionate,⁵⁹ it is not surprising that many defendants feel they are coerced to accept pre-trial plea offers, regardless of the intent of prosecutors.⁶⁰ Evidence suggests that a large enough discrepancy between expected outcomes can lead factually innocent defendants to plead guilty.⁶¹

Of course, there are defensible reasons for a disparity between a sentence offered in a plea and one imposed after trial. For example, a sentencing disparity resulting from a finding of obstruction of justice or the development of facts unknown before trial is not considered problematic by the NACDL or the members of this Task Force. The existence of obstruction of justice is proper grounds for increasing a potential sentence following trial because the conduct is independently punishable. The development of facts unknown before trial is also a proper ground for imposing a different than anticipated sentence if it is relevant in ascertaining the conduct that is being punished and establishing whether the elements of an offense have been met.

⁵⁹ “In 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence. In antitrust cases, it was more than eight times as high.” *NACDL Report*, *supra* note 15, at 15.

⁶⁰ See *NACDL Report*, *supra* note 15, at 15-16; See *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (2013).

⁶¹ See *NACDL Report*, *supra* note 15, at 17; Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 95 (2012).

The Task Force also agree with the NACDL report that demonstrated remorse on the part of a defendant who pleads guilty is an acceptable justification for reducing a sentence, at least somewhat. However, basing sentences on a defendant's demonstrated remorse can be risky and imprecise because it is a subjective determination and runs the risk of artificially inflating sentence severity for those who do *not* "accept responsibility," *i.e.* who exercise the right to trial.

In practice, defendants who plead guilty are credited with "acceptance of responsibility" even if they feel no remorse, while genuinely remorseful defendants who exercise their constitutional right to trial are denied the sentencing credit of acceptance of responsibility. "Acceptance of responsibility" has become synonymous with "pleading guilty." This sentencing framework can pressure defendants to plead guilty early when the system dictates that an early guilty plea demonstrates remorse. Even factually innocent defendants may be unwilling to assume the risk of receiving a disproportionately harsh post-trial sentence.⁶² "Acceptance of responsibility" as a sentencing factor is a component of the framework that contributes to the disproportionality between pre-trial and post-trial sentences, and therefore deserves the attention of this Task Force.

The Task Force adopts the NACDL's reasoning and concludes that acceptance of responsibility is an appropriate factor to mitigate a defendant's sentence, but only: (1) when it is reflective of true remorse rather than an automatic result of plea-bargaining; (2) when it is available even after a defendant has exercised their right to trial; and (3) when it is not used punitively to increase a sentence solely because the defendant has exercised their right to trial.⁶³ The Task Force recommends that determinations regarding "acceptance of responsibility" be decoupled from the acceptance of plea offers.

⁶² See *NACDL Report*, *supra* note 15, at 39-40.

⁶³ *Id.* at 40-41.

More broadly, consistent with the NACDL findings, the Task Force recommends further investigation into avenues to enact comprehensive appellate review of the proportionality of sentences, by statute or by rule, and that further efforts be undertaken to develop an implementation plan for this proposal that balances the need to curb post-trial sentences that are disproportionately severe with the need to preserve judicial discretion in sentencing.

E. Proposal No. 5: Enhancing Judicial Discretion in Sentencing

Traditionally, a defining feature of our criminal justice system has been the jury trial, where a prosecutor charges a defendant and, if the defendant is convicted at trial, a judge imposes sentence. Today, however, the practical reality of our criminal justice system is that criminal trials have given way to the resolution of criminal charges through plea agreements, which are negotiated in private between the prosecutor and defense counsel. Fewer than five percent of all persons formally accused of a crime go to trial.⁶⁴ More importantly, in New York, a plea bargain typically determines the parameters of the ultimate sentence. Thus, the role of judges in determining the proper length of a criminal sentence has been significantly curtailed.

Defendants, including defendants who have been charged but are factually innocent,⁶⁵ may be confronted with having to defend against an offense carrying a mandatory minimum sentence. If the defendant is convicted at trial, the judge has no discretion to downwardly depart from the mandatory minimum sentence, even if the judge believes that the facts warrant such a deviation. Consequently, factually innocent defendants are confronted with a difficult risk-utility balancing decision as to whether they should assert their right to trial and potentially be

⁶⁴ *NACDL Report*, *supra* note 15, at 14.

⁶⁵ All defendants are presumed innocent and have a constitutional right to a trial. Systemic and other individual factors can have the effect of discouraging defendants from exercising this right, sometimes to excruciatingly unjust results. This Report addresses solely the predicament of factually innocent defendants.

convicted, thereby subjecting themselves to a mandatory minimum, or take a plea deal to a reduced charge carrying a lesser sentence.

The Task Force recommends that—within New York’s current mandatory minimum framework—judges be provided with the discretion to depart below a mandatory minimum sentence for defendants convicted of non-violent crimes if the judge states their reasons for doing so on the record (or in a subsequent written decision). The Task Force does not advocate for any specific changes in the Federal sentencing guidelines or mandatory minimum statutes. The Task Force believes that any such reforms would be extremely difficult to accomplish outside of federal legislation that would affect the entire country and not just the state of New York and, in any event, the restructuring of the entire federal criminal justice system is well beyond the mandate of this Task Force.

1. Mandatory Minimums Sentences

a) A Brief History of Mandatory Minimum Sentencing

In response to rising crime rates and drug usage during the 1970’s and 1980’s, Congress and several states began passing mandatory minimum sentences for, inter alia, drug offenses, gun offenses, and sex offenses.⁶⁶ To illustrate, before the passage of the Fair Sentencing Act of 2010 by the Obama Administration, simply possessing five grams of crack cocaine carried a five year mandatory minimum sentence.⁶⁷ Similarly, in 1973, New York passed the infamous “Rockefeller Laws”, which prescribed harsh mandatory minimums for a slew of drug offenses.⁶⁸ Possession of four ounces of marijuana, even without an intent to distribute, carried a fifteen year

⁶⁶ Frederick P. Hafetz, The “Virtual Extinction” of Criminal Trials: A Lawyer’s View from the Well of the Court”, VI. 31, NO. 4-5 FED. SENT’G REP. 248 (April/June 2019).

⁶⁷ United States Sentencing Commission, Report to Congress: Impact of the Fair Sentencing Act of 2010, UNITED STATES SENTENCING COMMISSION (2015), at 30.

⁶⁸ Madison Gray, A Brief History of New York’s Rockefeller Drug Laws, TIME MAGAZINE, available at <http://content.time.com/time/nation/article/0,8599,1888864,00.html>.

mandatory minimum sentence.⁶⁹ By the early 2000's, it had become clear that these draconian laws had led to unduly harsh sentences, especially in poor communities and among people of color.⁷⁰ For decades, New York has undergone the process of chipping away at this mandatory minimum framework – both in terms of length of sentences and offenses carrying mandatory minimum sentences.⁷¹ Nevertheless, New York still has numerous offenses⁷² that carry a mandatory minimum sentence from which the judge has no discretion to deviate, except in the most limited circumstances.

2. Pros & Cons of Mandatory Minimum Sentences

The Task Force has considered various arguments as to the utility and shortcomings of mandatory minimum statutes.

Pros:

- Mandatory minimums protect the public for a prescribed amount of time from behavior the legislature has deemed a threat to the public welfare.⁷³
- Mandatory minimums are a deterrence mechanism against recidivism by an individual offender, or by other would-be offenders.⁷⁴
- Mandatory minimums might tend to eliminate or reduce sentencing disparities among defendants convicted of the same crime and among similarly situated defendants, particularly as it affects minorities.⁷⁵

⁶⁹ Rakoff, *supra* note 2, at 2-3.

⁷⁰ Gray, *supra* note 68.

⁷¹ *Id.*

⁷² See e.g. N.Y. Penal Law § 60.04 (proscribing minimum sentences for Class A drug felony offenses); N.Y. Penal Law § 60.05 (proscribing minimum sentences for Class C non-violent felony offenses); N.Y. Penal Law § 130.95 (proscribing minimum sentences for non-drug offense predicate felons).

⁷³ See American Judges Association Annual Educational Conference, *Mandatory Minimum Sentences: Handcuffing the Prisoner or the Judge*, AMERICAN JUDGES ASSOCIATION (October 7, 2014), at 31 (hereinafter, “*American Judges Association*”).

⁷⁴ *Id.*

⁷⁵ *Id.*

Cons:

- Mandatory minimum sentences may exacerbate the phenomenon of mass incarceration by uniformly lengthening the sentences of convicted persons.⁷⁶
- There is insufficient evidence that – especially in narcotics cases – mandatory minimums lead to a reduced likelihood of recidivism.⁷⁷
- Longer sentences increase costs of monitoring and providing for prisoners.
- Mandatory minimum offenses only take into account the specific elements of the offense and do not consider the history and circumstances of the defendant.⁷⁸
- Judges have no discretion to deviate from the minimum – even when there are mitigating factors that might justify a deviation, such as the ability to weigh the nature and circumstances of the crime, as well as the individual who committed them, including the risk of reoffending, the defendant’s prior record, and any substance abuse or mental health issues.⁷⁹

The Task Force recommends that the New York legislature enact provisions whereby the judge is permitted – in non-violent felony cases⁸⁰ (as defined by New York’s Penal Law) – to deviate from a conviction carrying a mandatory minimum, provided that the judge states his or her reasons for doing so on the record, or in a subsequent written opinion. The Task Force further recommends the New York Legislature adopt guidelines for a judge to consider when

⁷⁶ See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CENTER FOR JUSTICE (October 5, 2018), available at <https://www.brennancenter.org/blog/sentencing-laws-and-how-they-contribute-mass-incarceration-0>.

⁷⁷ See *American Judges Association*, *supra* note 73, at 31.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ The Task Force did not achieve consensus as to whether a judge should also have the discretion to deviate from a mandatory minimum for persons convicted of violent felonies. We recommend that additional research be conducted by subsequent task forces as to the feasibility and advisability of providing judges with this discretion. The Task Force also recommends conducting empirical studies to examine the utility of eliminating (certain or all) mandatory minimum sentences under New York’s Penal Law.

departing from a mandatory minimum. These guidelines could mirror, for example, many of the factors federal judges are required to consult when sentencing a defendant.⁸¹ In determining whether a “sentence is sufficient, but not greater than necessary”,⁸² federal judges are required to consult a list of factors, which includes:

- the nature and circumstances of the offense and the history and characteristics of the defendant;⁸³ and
- the need for the sentence imposed:
 - to reflect the seriousness of the offense, to promote respect of the law, and to provide just punishment for the offense;⁸⁴
 - to afford adequate deterrence to criminal conduct;⁸⁵
 - to protect the public from further crimes of the defendant;⁸⁶
 - to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.⁸⁷

Under the Task Force’s proposal, prosecutors would have the right to appeal any sentence lower than the mandatory minimum.

Providing judges with discretion to deviate from mandatory minimum sentences alleviates the arguably coercive effect mandatory minimums play in plea bargaining. Restoring the judicial autonomy judges once enjoyed – and what was traditionally within their purview – would make a defendant’s choice to assert their right to a trial less onerous and less risky,

⁸¹ See 18 U.S.C. § 3553(a).

⁸² *Id.*

⁸³ 18 U.S.C. § 3553(a)(1).

⁸⁴ 18 U.S.C. § 3553(a)(2)(A).

⁸⁵ 18 U.S.C. § 3553(a)(2)(B).

⁸⁶ 18 U.S.C. § 3553(a)(2)(C).

⁸⁷ 18 U.S.C. § 3553(a)(2)(D).

thereby reducing the likelihood that an innocent person would choose to plead guilty to a lesser charge in order to escape a mandatory minimum sentence if convicted at trial.

Sentencing is one of the most difficult and nuanced tasks a judge must perform. It requires the judge to balance society's legitimate concerns—public safety, deterrence, promoting respect for the law and reflecting the seriousness of the offense—while also taking into account possible mitigating factors such as the history and characteristics of the defendant. Unlike the legislatures who set mandatory minimums—which focus solely on the offense—the sentencing judge hears the underlying facts of the case, hears the arguments of both the prosecutor and defense counsel, and receives reports from probation offices containing extensive background information about the defendant. Given the wealth of information in their hands, the Task Force believes judges should be allowed to use their practical judgment to arrive at an appropriate sentence.

F. Proposal No. 6: Reducing the Volume and Impact of Low-Level Offenses in the Criminal Justice System

The perceived impediments to pleading guilty are lessened if penalties such as those that affect low-level offenses are relatively minor. Even if an innocent defendant understands the consequences of a guilty plea, they might decide to plead if the sanctions are relatively minor. Low-level offenses are the perfect example of when an innocent person might say “it is easier to just plead guilty and pay the fine.” Of course, the collateral consequences of such a plea may extend to well beyond paying a fine, including significantly diminishing an individual's quality of life.

For an overwhelming majority of defendants, involvement with the criminal justice system stems from arrests and prosecutions for minor offenses. In 2018, over 270,000 misdemeanor arrests were made in New York State (nearly half of these within New York City),

representing two-thirds of all arrests that year.⁸⁸ A substantial proportion of such arrests are for victimless offenses commonly associated with poverty, homelessness, addiction, and mental illness. Of the misdemeanor arrests made in New York City in 2016, 27,642 (18%) were classified as a “theft of services” charge,⁸⁹ which is primarily fare-beating on public transit.⁹⁰ 21,457 (14%) were made for marijuana charges,⁹¹ 15,458 (10%) for other drug charges, 7,543 (5%) for trespassing,⁹² and 2,194 (1.5%) for prostitution.⁹³

In New York City, most misdemeanor arrests do not result in convictions: in 2018, 63% of dispositions for such arrests were dismissals of some form.⁹⁴ Where a conviction for a misdemeanor or a violation is obtained, the sentence itself is generally less than that for a felony, but the collateral consequences can be extremely severe. A criminal conviction may cause an

⁸⁸ Division of Criminal Justice Services, *Adult Arrests: 2009 - 2018*, <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/index.htm> (last visited Jun. 24, 2019).

⁸⁹ Preeti Chauhan, *et al.*, *Trends in Arrests for Misdemeanor Charges in New York City, 1993-2016*, Feb. 1, 2018, at 143-144, available at http://misdemeanorjustice.org/wp-content/uploads/2018/01/2018_01_24_MJP.Charges.FINAL_.pdf.

⁹⁰ *Id.* at 137 (stating that 95.1% of “Theft of Services” arrests from 1993-2016 were for violations of N.Y. Penal Law § 165.15(3)).

⁹¹ The state legislature recently passed legislation that would treat possession of small quantities of marijuana as a violation, and the New York City Police Department (“NYPD”) has announced of a policy of issuing Desk Appearance Tickets rather than making arrests in most such cases. *See* Jesse McKinley & Vivian Wang, *Marijuana Decriminalization is Expanded in N.Y., but Full Legalization Fails*, N.Y. TIMES, Jun. 20, 2019, available at <https://www.nytimes.com/2019/06/20/nyregion/marijuana-laws-ny.html>; Press Release, New York City Police Department, *Mayor De Blasio, Commissioner O’Neill Unveil New Policy to Reduce Unnecessary Marijuana Arrests* (Jun. 19, 2018), available at <https://www1.nyc.gov/site/nypd/news/pr0619/mayor-de-blasio-commissioner-o-neill-new-policy-reduce-unnecessary-marijuana-arrests>. Despite this development, it nonetheless remains the case that a significant number of individuals will be convicted of violations for marijuana possession in New York City and other parts of the state.

⁹² Defense attorneys in New York City have argued that a substantial proportion of trespassing charges are in fact brought against defendants who are lawfully present in apartment buildings. *See, e.g.*, Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 25, 2012, available at <https://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html> (reporting that then-chief of arraignments for the Bronx District Attorney’s Office “had received numerous complaints from defense lawyers who claimed that many of the people arrested were not trespassers,” and that upon investigation found that “in many (but not all) of the cases the defendants arrested were either legitimate tenants or invited guests”); M. Chris Fabricant, *Rousting the Cops*, VILLAGE VOICE (Oct. 30, 2007), available at <https://www.villagevoice.com/2007/10/30/rousting-the-cops/> (public defender in the Bronx reports that he has “had a disgraceful number of innocent clients, many of whom plead guilty to a trespassing charge”).

⁹³ Chauhan, *supra* note 2 at 143-144.

⁹⁴ Division of Criminal Justice Services, *New York City — Adult Arrests Disposed*, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf> (last visited Jun. 21, 2019).

individual to be denied employment or housing, or even to be legally prohibited from working in certain professions.⁹⁵ Persons convicted of misdemeanors are ineligible for public housing provided by the New York City Housing Authority (“NYCHA”) for periods of three or four years.⁹⁶ Being convicted of a drug offense, regardless of its severity, can cause even a lawfully present noncitizen to be deported, as can offenses treated under federal immigration law as “crimes involving moral turpitude,” which include minor offenses such as turnstile jumping, shoplifting, and indecent exposure.⁹⁷ The impact of these collateral consequences disproportionately fall upon minority communities: in New York City, the misdemeanor arrest rate for the black population is 5.5 times as high, and that of the Hispanic population is three times as high, as that of the white population.⁹⁸

1. Impact on Plea Bargaining and Wrongful Convictions

The various factors that lead criminal defendants to forsake trial and plead guilty are greatly exacerbated in the context of adjudicating minor offenses. Defendants charged with minor offenses face particularly strong incentives to plead guilty whether they are factually guilty or not, owing to the “process costs” of proceeding to trial: attending pretrial court appearances, enduring pretrial detention, paying legal fees if counsel is retained.⁹⁹ Even if the risk of a conviction and incurring the “trial penalty” are taken into account, such costs may

⁹⁵ See, e.g., Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C.D. L. REV. 277, 297-303 (2011); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 589-90 (2005).

⁹⁶ New York City Housing Authority, *Tenant Selection and Assignment Plan* (Sept. 23, 2016), at 23, available at <https://www1.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf> (last visited Jun. 24, 2019).

⁹⁷ Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1759-1760 (2013).

⁹⁸ Meredith Patten et al., *Trends in Misdemeanor Arrests in New York, 1980 to 2017* (Dec. 26, 2018), at 77, available at <http://misdemeanorjustice.org/wp-content/uploads/2018/12/FINAL.pdf>.

⁹⁹ See Bowers, *supra* note 10, at 1132-39.

outweigh those of pleading guilty, and may be more readily apparent and compelling than the long-term, often unforeseen collateral consequences of conviction.

In light of these considerations, it is unsurprising that virtually all misdemeanor defendants choose to forego trial: of the 259,016 cases that reached a disposition in New York City Criminal Court in 2017, 120,707 (46.6%) were resolved by a guilty plea, 111,679 (43.12%) were eventually dismissed or adjudicated in contemplation of dismissal (ACD); and only 646 (0.25%) terminated by a trial verdict.¹⁰⁰ A review of exonerations subsequent to misdemeanor convictions has found that almost 80 per cent were in cases where the defendant pled guilty, in contrast to the 16 per cent of felony exoneration cases where the defendant pled guilty.¹⁰¹ While it is impossible to know just how many more innocent individuals have been convicted of minor offenses, it is certainly a substantial number, for most defendants in such cases face overwhelming incentives to plead guilty.

The Task Force recommends that, in order to reduce the number of innocent people who plead guilty, there should be a reduction in the volume and impact of low-level offenses in the criminal justice system. The Task Force discussed multiple ways of achieving this goal and below are four examples of ways in which the volume and impact of low-level offenses can be reduced throughout the New York State criminal justice system.

2. Suggested Solutions

a) Decriminalize Low-Level Offenses¹⁰²

The simplest way to reduce the number of low-level cases in criminal court and low-level charges on criminal complaints is to remove at least some of those low-level criminal charges

¹⁰⁰ Office of the Chief Clerk of the New York City Criminal Court, *2017 Annual Report* (October 2018), at 17, available at <https://www.nycourts.gov/COURTS/nyc/criminal/2017-Annual-Report.pdf>.

¹⁰¹ Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1008 (2018).

¹⁰² Although the Task Force recommends decriminalizing a number of low-level offenses, the Task Force recognizes that certain low level offenses may still require a remedy outside of the criminal justice system.

from the New York State and New York City criminal codes. Reducing the number of misdemeanor cases and charges would have a direct effect on the ability of people accused of crimes to adjudicate their cases and demonstrate their innocence. Moreover, the imposition of civil fines as a substitute for incarceration may have the unintended effect of saddling an individual with debt.¹⁰³

Some examples of promising legislative decriminalization and legalization efforts include:

- In 2019, New York State repealed the gravity knife provision of the misdemeanor of strict liability possession of a weapon (N.Y. Penal Law §§ 265.01(1) and 265.00(5)).¹⁰⁴ This “gravity knife” possession crime had been used to prosecute tens of thousands of New Yorkers, for both misdemeanors and felonies, often for possessing knives that they used for work. In 2018, more than 85% of arrests for gravity knife possession in NYC were of Black or Latino men or women.¹⁰⁵
- In 2019, Illinois became the 11th state to legalize the possession of marijuana, and the first to do so through the legislative process.¹⁰⁶ The Illinois law legalizes recreational possession and sale of marijuana by adults, and also provides for the pardon and/or automatic expungement of previous low-level convictions for marijuana. This Illinois law stands in contrast to the weaker 2019 law passed in

¹⁰³ See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VANDERBILT L. REV. 1055, 1093 (2015).

¹⁰⁴ Jesse McKinley, *The “Gravity Knife” Led to Thousands of Questionable Arrests. Now Its Legal*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/nyregion/ny-gravity-knife-law.html>

¹⁰⁵ See Julie Ciccolini, *Gravity Knife Arrests in New York City From January 1, 2018 – June 29, 2018*, THE LEGAL AID SOCIETY (March 7, 2019), available at https://static1.squarespace.com/static/59578aade110eba6434f4b72/t/5c8130d8e5e5f04b9a2dd4fa/1551970520709/gravity_knife_analysis_press.pdf.

¹⁰⁶ Meghan Keneally, *Illinois Becomes the 11th State to Legalize Marijuana*, ABCNEWS.COM (Jun. 25, 2019, 12:22 PM), available at <https://abcnews.go.com/US/illinois-set-11th-state-legalize-marijuana/story?id=63929963>

New York State, which partially decriminalized but does not legalize marijuana possession.¹⁰⁷

b) Decline to Prosecute Low-Level Offenses

The charging decision is a significant opportunity for a prosecutor to exercise discretion. Charging decisions always should reflect an honest and informed analysis of the sufficiency of the evidence.¹⁰⁸ But even when there may be a justifiable basis for charging, a prosecutor has wide discretion to decline to do so.¹⁰⁹

The decision not to charge has several other salutary efficiency and economic benefits: reducing criminal court cases; allowing prosecutors to devote resources to serious crimes; and avoiding multiple, often financially and psychologically damaging court appearances by defendants. Most importantly, the upfront decision to decline prosecution eliminates any incentive for a defendant to plead guilty.

Several prosecutors around the country, including several District Attorneys here in New York City, are reviewing and establishing policies of declining to prosecute specific crimes, specific types of crime (*i.e.*, non-violent conduct or quality of life crimes) or specific levels of criminal charges.¹¹⁰ These practices not only divert low-level and non-violent crimes out of the court system, but also acknowledge that some arrests reflect racial disparities and/or conduct connected to poverty. The Task Force applauds the efforts of several of the New York City District Attorney's Offices that have taken the initiative to decline to prosecute certain types of

¹⁰⁷ See N.Y. Legis. S. S06579, Reg. Sess. 2019-2020. (N.Y. 2019) (amending N.Y. Pen. L. §§ 221.05 & 221.10; N.Y. C.P.L. §§1.20, 440.10 & 460.50; N.Y. Pub. Health L. §1399-n).

¹⁰⁸ See ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (4th ed.), Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges.

¹⁰⁹ See *id.*

¹¹⁰ See Alexandra Natapoff, *Misdemeanors*, No. 2017-41 U. CAL. IRVINE S. L. LEGAL STUD. RESEARCH PAPER SERIES 73, 93 (Aug. 15, 2017); *Justice 2020 Report*, *supra* note 23, at 14-17.

low-level non-violent conduct.¹¹¹ The Task Force recommends that all prosecutors explore ways to expand the use of their discretion to decline prosecution and enact policies that make the terms of this discretion clear to all assistant prosecutors.

c) Diversion without Charging or Guilty Pleas

Diversion is generally understood to mean alternatives to incarceration where social services replace traditional punishment in cases where the root cause of the criminal activity might be substance abuse, mental health problems or youth. Today, many courts have robust post-charging diversion programs which are supported by prosecutors' offices. Most focus on minor crimes, but in some instances, the criminal charges might be more serious and even violent. New York's Center for Court Innovation sponsors and implements many diversion alternatives.¹¹² The Center for Court Innovation also tracks initiatives which could provide additional models in New York.¹¹³

The Task Force is heartened by prosecutors' recognition that diversion can be an effective alternative to incarceration. We suggest that law enforcement and prosecutors consider the circumstances that would justify the implementation of diversion prior to charging. For example, the Brooklyn District Attorney has plans to offer pre-plea alternatives for all drug possession charges.¹¹⁴ Another example is the Center for Court Innovation's Project Reset Program,¹¹⁵ which provides participants the possibility to avoid court and a criminal record by

¹¹¹ See *Justice 2020 Report*, *supra* note 23, at 12.

¹¹² Center for Court Innovation, <http://www.courtinnovation.org> (last visited July 16, 2019).

¹¹³ Michael Rempel et.al., *NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs*, CENTER FOR COURT INNOVATION, available at https://www.courtinnovation.org/sites/default/files/media/document/2017/Pretrial_Diversion_Overview_ProvRel.pdf

¹¹⁴ See *Justice 2020 Report*, *supra* note 23, at 12.

¹¹⁵ See Center for Court Innovation, *Project Reset*, available at <https://www.courtinnovation.org/programs/project-reset> (last visited September 27, 2019).

completing community-based programming. Project Reset now operates in Brooklyn, Manhattan and the Bronx.

Court-based diversion programs should *not* require a guilty plea as a condition for entering a program and avoiding incarceration, except perhaps in the most serious cases. First, a defendant might be induced to plead guilty regardless of actual guilt simply to gain admission to the diversion program rather than face a more severe punishment. Second, even if the defendant succeeds in meeting all of the conditions of the program, a guilty plea has far reaching collateral consequences. Instead, diversion programs could, when possible, take the lead and address the immediate needs of the individual. For example, provide subway fares, assist in obtaining benefits, and refer to social services without requiring the defendant to repeatedly return to court. Compliance with the conditions of diversion can be monitored with written submissions to the court.

d) Expungement & Declining to Consider Past Convictions

Many New Yorkers who are accused of crimes come into criminal court at an extreme disadvantage in the plea-bargaining process. Indeed, studies demonstrate that it is often past convictions that dictate, even more than the facts of the case itself, how a prosecutor will treat a case in New York City criminal court, especially in misdemeanor cases.¹¹⁶ This disadvantage can be cured through (i) legislative action to facilitate expungements; (ii) executive action through mass pardons; and/or (iii) district attorney policies to seek expungements and to decline to consider past convictions in plea bargaining decisions.

Legislative action: The New York State legislature and the New York City Council can aim to pass laws that facilitate, and where possible

¹¹⁶ See generally ISSA KOHLER-HAUSSMAN, MISDEMEANORLAND (Princeton University Press) (2018) (conducting a long-term empirical study of the use of criminal records in misdemeanor cases in NYC).

automate, expungements of past convictions, including for serious felonies after a certain period of time.

Executive clemency: The Governor of New York can use his or her clemency powers to engage in mass pardons of low-level convictions and older felony convictions.

Prosecutorial discretion to seek expungements & not to consider past convictions: District Attorneys in New York City should be on the frontlines of efforts to ensure that past convictions do not interfere with plea bargaining. They can do so in at least two ways. First, District Attorneys can themselves facilitate the expungement of past convictions using existing laws; and second, they can enact policies under which they decline to consider past low-level offenses (and related warrants) during bail proceedings and plea bargaining negotiations if those offenses are no longer crimes, would no longer be prosecuted today, and/or are related to poverty, addiction, or racialized policing.¹¹⁷

V. CONCLUSION

From the inception of our Republic, a fair trial has been the guiding principle of our criminal justice system. In the subsequent 200 years, the basic way in which people are convicted of a crime has substantially changed; plea agreements predominate, while the trial by jury has become a decreasingly viable “right.” One of the unplanned effects of the ubiquity of plea bargaining has been that unacceptable numbers of innocent people are pleading guilty and being criminally punished. The proposals set forth in this Report should not be particularly

¹¹⁷ For more on the connections between prosecutors and expungements, see Brian M. Murray, *Unstitching Scarlet Letters: Prosecutorial Discretion and Expungement*, 86 *FORDHAM L. REV.* 2821, 2825 (2018).

controversial. The Task Force considered over 100 proposals. Feasibility and impact were our guiding principles. The overwhelming consensus of the Task Force was that these six proposals are achievable and corrective.

The Task Force believes that the recommendations put forward in this Report will have a direct impact on the dignity and self-respect of individuals going through the criminal justice system and will help alleviate the tragic, unjust decision an individual makes when they plead guilty to a crime they did not commit. More, they will assure the integrity of the criminal justice process, in itself a goal of paramount importance at a time of public cynicism and eroding confidence in lawyers and the courts. A system that tolerates and even encourages incorrect and unfair results demeans all who participate in it. This Report outlines what the Task Force believes are reasonable reforms. The time to implement them is now.

EXHIBIT A

Members of the Plea Bargaining Task Force of the NYCLA Justice Center

<u>Steering Committee</u>	
Belen	Hon. Ariel E.
Freedman	Hon. Helen
James	Seymour
Kerr	Chet
Kobak	James
Kolb	Dan
McKay	Hon. Kevin
Tesser	Lewis
Younger	Stephen
<u>Steering Committee Secretaries</u>	
Kerr	Jackson
Tesser	Randy
Eppes	Colyn
<u>Current List Of Task Force Members</u>	
Andrias	Judge Richard
Bierer	Sabrina
Bova	Anthe
Bress	Frank
Caplow	Stacy
Chan	Monica
Cohen	Carrie
Conti-Cook	Cynthia
Cullum	Kathleen
Darrow	William
Dolby- Shields	Elliot
Eibel	Andrew
Fasulo	Lou
Friedman-Agnifilo	Karen
Fuchs	Ilyssa S.
Granich	Jeffrey
Greenberg	Elayne E.
Hafetz	Fred
Hamilton	Phillip
Hechinger	Scott
Kamins	Judge Barry
Kenney	Dennis

Forthcoming Pace Law Review Spring 2020

King	Charles
Kleinig	John
Levine	Kate
Lippke	Rick
Macedonio	Elizabeth
Mariani	Gilda
McCoy	Candace
McEnany	John
Mitchell	Gina
Mushlin	Michael
Neily	Clark
Nevins	Elizabeth M.
Northrup	Eli
Olderman	Justine
Patton	David
Potkin	Vanessa
Reiss	Meg
Roberts	Anna
Rochman	Irwin
Rosario	Danielle
Rudin	Joel
Ryan	Greg
Sampeur	Jane
Sharma	Partha
Simonson	Jocelyn
Smith	Asha
Smith-Futrell	Nicole
Sonberg	Michael
West	Valerie
Yaroshefsky	Ellen C.
Zeidman	Steve



Staff Memorandum

**HOUSE OF DELEGATES
January 31, 2020**

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Cannabis Law.

The Committee on Cannabis Law has completed a study of issues related to legalized cannabis legislation in New York State, and the committee's report and recommendations are attached. The report contains an analysis of cannabis legislation at both the state and federal level, and the committee notes its support for exempting cannabis products from the Controlled Substances Act. The report makes a number of recommendations for legislation to regulate cannabis products:

- USDA-mandated cannabis testing.
- the creation of a comprehensive Office of Cannabis Management.
- provisions for local municipality opt-out.
- social equity.
- state tax.
- regulation of advertising and marketing.
- environmental protections.

No comments have been received with respect to this report.

The report will be presented by Aleece E. Burgio and Brian J. Malkin, co-chairs of the Committee on Cannabis Law.



NEW YORK STATE
BAR ASSOCIATION

Initial Report of the New York State Bar Association Committee on Cannabis Law **Regarding Legalized Cannabis Legislation in New York State**

2019



Opinions expressed are those of the Committee preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

REPORT AND RECOMMENDATION

OF THE

NEW YORK STATE BAR ASSOCIATION'S

COMMITTEE ON CANNABIS LAW

REGARDING LEGALIZED CANNABIS

LEGISLATION IN NEW YORK STATE

INTRODUCTION

In late 2017, the New York Bar Association (NYSBA) formed a [Committee on Cannabis Law](#) with the following mission:

The Committee on Cannabis Law is charged with serving as the New York State Bar Association's focal point for the evolving legal status of Cannabis at both the state and federal level. Cannabis law is perhaps one of the fastest growing yet complex areas of the law that poses a broad spectrum of challenges. This Committee seeks to help NYSBA lawyers give their clients better advice through sharing educational resources, and otherwise helping New York set the highest possible legal and business (including advice to medical professionals) standards for legalized Cannabis products.

The Committee is composed of subject matter experts in the key legal disciplines relevant to the developing area of cannabis law and includes an academic advisor, Professor Robert Mikos, Vanderbilt Law School, who wrote the first law school text book on cannabis law, *Marijuana Law, Policy, and Authority* in 2017.¹

Through its ongoing meetings and legal programs, the Committee has developed in a short amount of time deep legal expertise in the regulated area of cannabis law both nationally and in New York State. We aim to be one of the key legal resources on cannabis law in the country and for lawyers conducting business with companies involved in the cannabis industry. With these comments and recommendations, the Committee wishes to provide its thoughts on legalized cannabis legislation in New York State by first discussing some necessary background and then specific topics of legal interest, focusing on the social equity aspects that we understand stalled previous legislation, as well as certain other aspects. We are available to discuss these and other specific aspects of any proposed legislation in writing or in person, when so requested.

I. CANNABIS REGULATION IN NEW YORK STATE AND FEDERALLY

Like many states, New York has had a history regulating cannabis, at times unregulated or partially regulated as a medical product, available only by prescription, with varying degrees of tolerance for adult use or possession. In July 2014, New York first permitted marijuana use for medical purposes. The next year, New York launched its Industrial Hemp Agricultural Research Pilot Program, which permitted a limited number of educational institutions to grow and research industrial hemp. By 2017, the State eliminated the cap on the number of sites authorized to grow and research hemp and expanded the program to include farmers and businesses, and later legislation was passed to establish industrial hemp as an agricultural commodity under the State's Agricultural and Markets Law. In August 2018, New York Governor Andrew Cuomo created a panel charged with reviewing whether adult-use marijuana should be legalized in New York, along with revising parts of its prior medical marijuana program. As a result of that

¹ The Committee is Co-Chaired by Aleece Burgio and Brian Malkin and is composed of members from the following NYSBA Sections, as well as other legal disciplines: Business Law; Commercial and Federal Litigation; Corporate Counsel; Criminal Justice; Elder Law and Special Needs; Entertainment, Arts and Sports Law Section; Food, Drug and Cosmetic Law, General Practice; Health Law; Intellectual Property Law; International Law; Labor and Employment Law; Real Property Law; Tax Law; Trusts and Estates Law; and Young Lawyers.

research, Governor Cuomo proposed in the State's budget in January 2019 a comprehensive program to regulate cannabis called the Cannabis Regulation and Taxation Act (CRTA). The CRTA would have created a central Office of Cannabis Management as a subsidiary of the Division of Alcoholic Beverage Control, which would be responsible for regulating the licensure, cultivation, production, distribution, sale, and taxation of all forms of legalized cannabis in New York.

On the federal level, on December 20, 2018, Congress passed a new Agricultural Improvement Act (commonly called "the 2018 Farm Bill"). The 2018 Farm Bill created a system of shared state and federal regulatory oversight over domestic hemp production, requiring that hemp be produced in accordance with: a) a U.S. Department of Agriculture (USDA)-approved state or tribal plan governing the licensing and regulation of hemp production, or b) a federal plan administered by the USDA for hemp produced in a state or territory that does not have a USDA-approved plan and in which hemp production is legal. According to the USDA's State and Tribal Plan Review webpage, ten states and ten tribal governments had already submitted proposed hemp production plans to the USDA before the issuance of the final rule. As discussed in more detail later in this report, New York has not yet submitted its hemp plan to the USDA for review and approval.

The 2018 Farm Bill also changed the definition of "hemp" to cover any part of the cannabis plant as long as the delta-9-tetrahydrocannabinol (delta-9-THC) was below 0.3 percent on a dry weight basis, and removed hemp (but not marijuana, which is a form of cannabis) from the list of substances regulated under the Controlled Substances Act (CSA). The 2018 Farm Bill further empowered states to develop industrial hemp programs consistent with certain conditions in the Bill (or to make it illegal within the state), but each state program would need to be approved by the (USDA), which would also develop a federal hemp program.

At the same time, the 2018 Farm Bill stated that the U.S. Food and Drug Administration (FDA) would regulate hemp products that fell within its jurisdiction, i.e., food, dietary supplements, drugs, cosmetics, and medical devices that are sold in interstate commerce. FDA held a public meeting on May 30, 2019 and opened a public docket to consider how it would regulate hemp products and in particular an active drug component of hemp, cannabidiol (CBD). So far, FDA has stated that other than certain hemp seed products that do not contain CBD or THC and may be used as foods, when hemp contains CBD, it must be regulated as a drug and cannot be included in any food products, including dietary supplements. In addition to CBD and THC, hemp and marijuana also contain a significant number of other cannabinoids, including cannabigerolic acid (CBGA). CBGA is a precursor molecule in cannabis that produces delta-9-tetrahydrocannabinolic acid (THCA), which can be decarboxylated to delta-9-THC. CBGA also produces cannabidiolic acid (CBDA), which can be decarboxylated to CBD. Unless hemp extracts are processed to remove these other cannabinoids, most hemp extracts are considered "full spectrum" variety, with varying amounts of these other cannabinoids.

While several bordering states, e.g., Vermont² and Massachusetts, and New York's bordering country, Canada, have already legalized some adult-use of marijuana,³ federal law still considers marijuana production, possession, and sales illegal, and marijuana is classified as a Schedule 1 controlled drug substance under the CSA, putting it in the same substance abuse category as LSD or heroin. After the 2018 Farm Bill, cannabis plants that exceed the 0.3 percent of delta-9-THC on a dry weight basis are still considered "marijuana" and as a Schedule I drug illegal to produce, possess, or sell under the CSA. This designation is for drugs perceived to show a high potential risk for abuse, contain minimal or no medical value, and cannot be safely prescribed. Therefore, the transporting of marijuana interstate is still illegal, as is the advertisement of marijuana products.

On October 31, 2019, the USDA published its Interim Final Rule governing the domestic production of hemp pursuant the 2018 Farm Bill. The USDA's Interim Final Rule codified some similar but distinct requirements for hemp production under the state and tribal plans and under the federal plan. All hemp producers, however, will be subject to similar requirements including: a) mandatory licensure, b) maintaining and reporting information about production locations and cultivated acreage, delta-9-THC testing requirements, procedures for disposing of non-compliant plants, and procedures for handling negligent and willful violations.

The Interim Final Rule became effective upon publication on October 31, 2019 and will sunset on November 1, 2021, when the USDA plans to have issued final regulations. At that point, all of the provisions of the 2018 Farm Bill will be in effect. The USDA accepted comments until December 30, 2019. The Interim Final Rule does not preempt state or tribal law, and such laws may be more stringent than federal law. State and tribal laws, however, may not prohibit or restrict interstate transportation of hemp across their borders. The USDA will have sixty days to review state and tribal hemp production plans submitted to the USDA for approval. And thirty days after the effective date of the Interim Final Rule, if a producer's State or Tribe does not have a hemp production plan or intends to have such a plan, producers may begin applying for licenses to produce hemp under the federal plan for the 2020 growing season. For the first year of the program, applications may be submitted any time, and for subsequent years, applications and renewals must be submitted between August 1 and October 31. Such licenses are not transferrable. A producer, however, cannot receive a hemp production license from a State, Tribe, or the USDA, if convicted of a felony related to a controlled substance in the last ten years.

On December 9, 2019, Governor Andrew M. Cuomo signed legislation (S.6184/A.7680) (amended and substituted as S.06968/A.08977, January 7, 2020) establishing a regulatory framework for producing and selling hemp, cannabinoid hemp, and hemp extract in New York State including a process for laboratory testing of such hemp extract products, including CBD, and product labeling. New York's framework requires "industrial hemp" of any part of the cannabis plant to have no more than 0.3 percent delta-9-THC on a dry weight basis with the testing procedure to use post decarboxylated method authorized by the U.S. Department of Agriculture or similarly reliable methods. New York will approve independent laboratories to test

² See *Marijuana Policy Project*, available at; <https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/> (noting Vermont, allows adults to possess and cultivate marijuana, but does not yet allow regulated sales).

³ See *Legality of cannabis by U.S. jurisdiction*, available at : https://en.wikipedia.org/wiki/Legality_of_cannabis_by_U.S._jurisdiction (last edited Nov. 28, 2019).

the hemp extract products produced by the manufacturer including the required tests and services. All hemp extracts must be extracted and manufactured in accordance with good manufacturing practices. New York will also promulgate rules and regulations regarding the advertising of hemp extract and any other related products. All hemp extract for human or animal consumption must be licensed by New York under these provisions and promulgated rules and regulations. The new law also includes a revised definition for “marihuana”, which excludes hemp and cannabinoid hemp. NYSBA’s COMMITTEE ON CANNABIS LAW ENDORSES THE AMERICAN BAR ASSOCIATION’S AUGUST 12-13, 2019 RESOLUTIONS REGARDING CANNABIS

The American Bar Association’s (ABA’s) Resolution regarding resolving issues between federal laws and state laws regarding cannabis and drug scheduling are as follows:

RESOLVED, That the American Bar Association urges Congress to enact legislation to exempt from the Controlled Substances Act any production, distribution, possession, or use of marijuana carried out in compliance with state laws;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to remove marijuana from Schedule I of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq.; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to encourage scientific research into the efficacy, dose, routes of administration, or side effects of commonly used and commercially available cannabis products in the United States.

NYSBA’s Committee on Cannabis Law supports the ABA’s Resolution for the reasons discussed in their proposal.⁴ In particular, the Committee supports exempting cannabis from the CSA for production, distribution, possession, or use of marijuana carried out in compliance with state laws. The other two provisions necessarily go hand-in-hand with this first provision, because descheduling marijuana to another schedule to further study medical uses for cannabis and to better understand its benefit/risk for those medical uses may create more barriers to research with additional federal oversight. In general, however, we support continuing cannabis research, both at the federal and state level to help guide regulators.

II. NEW YORK’S CANNABIS REGULATION AND LEGALIZED USE LEGISLATION SHOULD INCLUDE USDA MANDATED CANNABIS TESTING, A COMPREHENSIVE OFFICE OF CANNABIS MANAGEMENT, PROVISIONS FOR LOCAL MUNICIPALITY “OPT-OUT”, SOCIAL EQUITY, STATE TAX, ADVERTISING/MARKETING, and STATE ENVIRONMENTAL PROTECTIONS.

As a general comment, we recommend that New York adopt cannabis regulation and legalized use legislation that is based on reasoned decision making and analysis of successful

⁴ See American Bar Association House of Delegates Resolution 104 (adopted Aug. 12-13, 2019), available at: <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/104-annual-2019.pdf>.

aspects of legislation passed in other states that have legalized cannabis use either for medical or adult-use. As an initial step, in January 2018, New York commissioned a multi-agency study, led by the Department of Health, to assess the impact of a regulated marijuana program in New York State. The impact assessment examined the health, economic, public safety and criminal justice impact of a regulated marijuana program in New York State and the consequences to New York State of legalization in surrounding states. The study found that the positive impacts of a regulated marijuana market in New York State outweigh the potential negative impacts, and that areas that may be a cause for concern can be mitigated with regulation and proper use of public education that is tailored to address key populations.⁵ Based on the findings of the study, Governor Cuomo announced the creation of a Regulated Marijuana Workgroup to provide advice to the State on legislative and regulatory approaches needed to protect public health, provide consumer protection, ensure public safety, address social justice issues, and capture and invest tax revenue.

We are not aware of a single jurisdiction that has passed model cannabis regulation and legalized adult-use that would necessarily be appropriate for New York to adopt in total. However, we note that the RAND Corporation (“RAND”) has been commissioned by several state legislatures for comprehensive advice and analysis prior to developing their legalized cannabis use legislation. For example, RAND published *Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions*.⁶ RAND is a research organization that develops solutions to public policy challenges. RAND is nonprofit, nonpartisan, and committed to the public interest. RAND We believe New York would similarly benefit by commissioning RAND or a similar organization to conduct such a study or analysis.

A. Cannabis Testing

Because the delta-9-THC concentration of a cannabis plant determines whether it is regulated as an agricultural commodity or a Schedule I drug, the methods and testing requirements for delta-9-THC testing are critical. Prior to the USDA’s Interim Final Rule, there were no national standards for testing, which led to inconsistent regulatory requirements, industry confusion, and criminal prosecution. The Interim Final Rule now specifies when sampling must be conducted, who conducts the testing, and what methodology must be used. In terms of timing, sampling must occur prior to and within fifteen days of harvesting, i.e., harvesting may not precede sampling. If the producer fails to complete a harvest within fifteen days of sampling, a secondary pre-harvesting sample must be taken and submitted for testing. Sampling must be performed, at the producer’s expense, by an approved sampling agent or authorized government enforcement agent, accompanied by the licensee or designated employee.

The USDA’s Final Interim Rule further provided details about the sampling procedure. Samples must be collected from the flowering material (flower or bud) located at the top one-third of the cannabis plants. The sampling procedure must ensure collection of a representative sample, i.e., one that represents a homogeneous composition of a lot of hemp crop acreage. The Rule further defines “lot” to mean a contiguous area in a field, greenhouse, or indoor growing

⁵ *Assessing Regulated Marijuana in New York*, available at: <https://www.ny.gov/programs/assessing-regulated-marijuana-new-york>.

⁶ Available at: https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR864/RAND_RR864.pdf.

structure containing the same variety or strain of cannabis throughout the area. On the USDA's website are supplemental guidelines regarding the sampling procedure, e.g., the number of plant specimens to be composited (about one per acre) to provide a representative sample for laboratory analyses.

The USDA's Interim Final Rule also imposes a number of requirements on laboratories that conduct delta-9-THC testing for the purpose of determining compliance with the 2018 Farm Bill. First, all testing laboratories will need to register with the DEA, because there is the potential that a hemp sample could have delta-9-THC levels that exceed 0.3 percent on a dry weight basis, thereby making the product "marijuana" and requiring Schedule I controls. In addition, the USDA is also considering requiring laboratories to obtain an International Organization for Standardization (ISO) 17025 accreditation ("General Requirements for the Competence of Testing and Calibration Laboratories") or a process for accrediting hemp testing laboratories, which would require the laboratories to comply with the USDA's Laboratory Approval Program requirements.

The Final Rule also clarified that when the 2018 Farm Bill defined "hemp" with regard to "delta-9-tetrahydrocannabinol concentration," this meant "total THC". As a result, the Final Rule described a process where all hemp cannabis would be tested for "total THC" including both delta-9-THC plus its precursor molecule, delta-9-tetrahydrocannabinolic acid (THCA), calculated or measured as its decarboxylated form on a dry weight basis. The analysis must be performed by a sufficiently-sensitive, validated, and reliable analytic method using, for example, gas chromatography (GC) or high performance liquid chromatography (HPLC) in combination with a suitable detector. The GC method involves heating the sample, which automatically decarboxylates any THCA present to form delta-9-THC. When delta-9-THC is subsequently detected and measured by the detection device, it is actually a combination of the delta-9-THC originally present in the sample and decarboxylated THCA, i.e., "total THC". The HPLC method detects and measures delta-9-THC and THCA separately. Total THC is then calculated by adding 87.7% of the THCA concentration to that of the delta-9-THC (since only 87.7% by weight of the THCA molecule is delta-9-THC). In addition, the USDA will allow state plans to specify different testing methods, provided that they are "similarly reliable" as compared to GC and HPLC.

An important consideration regarding compliance with the delta-9-THC testing will be a testing laboratory's calculated "measurement of uncertainty", i.e., similar to a margin of error, which will be represented by a range of values. If the concentration range represented by the measurement of uncertainty includes or falls below the statutory limit of 0.3% total THC, the cannabis will be considered "hemp" and compliant with the 2018 Farm Bill. Laboratories must share results with both the licensed producer and the USDA. Licensed producers may request retesting if, for example, they believe the original testing results are erroneous.

Cannabis plants grown under an USDA-approved industrial hemp program that exceed the "acceptable hemp THC level" are considered "marijuana" and must be disposed of in accordance with the CSA and applicable DEA regulations. Producers who use reasonable efforts to produce hemp that complies with the 2018 Farm Bill but inadvertently produce cannabis that exceeds the "acceptable hemp THC level" will not have committed a "negligent violation", if the total THC concentration is 0.5% or less.

Finally, hemp seeds can be imported into the U.S. from Canada and other countries if accompanied by a phytosanitary certificate from the exporting country's national plant protection organization to verify the origin of the seed and confirm that no plant pests are detected. In addition, Canadian seed also requires a Federal Seed Analysis Certificate (SAC, PPQ Form 925). The USDA noted, however, that the same hemp seeds can produce different total THC concentrations depending on where they are grown and under what conditions.

Committee Recommendations on Cannabis Testing

The Committee on Cannabis Law recommends that New York develop industrial hemp provisions that are feasible and mirror, to the extent possible the requirements for state programs as discussed in USDA's Interim Final Rule. Further, New York State should submit its program for approval to the USDA to comply with the federal rules as soon as possible to be in position to expand hemp production in line with the 2018 Farm Bill and any subsequent related legislation when effective.

Based on our research and discussions with our members who have connections to hemp producers, however, we are concerned that one or more of the requirements discussed in USDA's Interim Final Rule will be difficult if not impossible for many hemp producers in any state to meet in the short term. First, until there is a well-established list of DEA-licensed laboratories with THC testing as required by the Interim Final Rule, the required 15-day pre-harvest testing requirement may be difficult, or impossible for some localities. If a laboratory cannot turn around testing fast enough, hemp producers may be required to undergo additional testing prior to harvest, potentially resulting in more mature, noncompliant crops that exceed the delta-9-THC levels. While a hemp producer may request retesting, it is unclear how the timing of the retesting may impact the ability to harvest a compliant hemp crop. As a result, we think that it is imperative that New York help facilitate the development of a network of DEA-compliant testing laboratories for THC as described in the Interim Final Rule to meet the needs of its hemp producers.

The USDA appears to have assumed that since THCA can be converted to delta-9-THC, usually following heating, the statutory limit for "hemp" with regard to delta-9-THC should include THCA. In some regards, the USDA's interpretation in the Interim Final Rule has been viewed as a broadening of the definition of delta-9-THC. THCA, however, can be completely converted to delta-9-THC with only a 7.94 percent loss in total molar concentration and no side reactions.⁷ Similar to marijuana, hemp may be made into a flour and used for baking, which likely yields a less complete conversion.⁸ Therefore, to the extent hemp flour is not derived

⁷ See Mei Wang et al., *Decarboxylation Study of Acidic Cannabinoids: A Novel Approach Using Ultra-High-Performance Supercritical Fluid Chromatography/Photodiode Array-Mass Spectrometry*, *Cannabis and Cannabinoid Research*, 1:1, 2016, available at: <https://www.ncbi.nlm.nih.gov/pubmed/28861498> (Table 1).

⁸ See Kerstin Iffland et al., *European Industrial Hemp Association (EIHA) paper on: Decarboxylation of Tetrahydrocannabinolic acid (THCA) to active THC*, available at: <https://www.hanfanalytik.at/hanf/Iffland-2016-Decarboxylation-of-THCA-to-active-THC-European-Industrial.pdf> (noting that real-life scenarios with baking hemp flour may yield less conversion of THCA to delta-9-THC, because the temperature on the inside of the cake is lower at 100 Celsius versus the outside at 180 Celsius, where delta-9-THC may also evaporate).

completely from hemp seed, which contains no CBD or THC, there is also the potential for THCA to delta-9-THC conversion.

On the other hand, our members have heard from their hemp-farming clients that the 0.3 percent delta-9-THC limit, as well as hemp sampling/testing, as interpreted by the USDA's Interim Final Rule, may be too stringent for producing commercially-viable hemp crops for CBD extraction. In addition, some hemp producers have suggested that the USDA's requirement to test the top one-third of a hemp plant, including primarily the hemp flower and not the entire hemp plant, would not be consistent with current practice, which involves processing the entire plant, and that some hemp plants may be devoid of flowers or buds when harvested. In particular, the 2018 Farm Bill's definition of "hemp" does not require the delta-9-THC testing to be confined to the top one-third of the plant or the hemp flower. As noted in New York's new industrial hemp legislation (S.6184/A.7680), New York does not specifically require testing the top one-third of mature plants, but this definition is not inconsistent with requiring "any part of the plant" to have not more than 0.3 percent delta-9-THC.

Our review of the legislative history of the definition of "hemp", however, finds some support for the USDA's interpretation for testing with regard to the historical taxonomy of hemp versus marijuana varieties of cannabis now set by federal and a majority, if not all, state regulators. As explained in the reference, the limit was set based on observing the "young, vigorous leaves of relatively mature plants," which could arguable include the leaves and flowers in the top third of the cannabis plant.⁹ In both varieties, plant taxonomists observed that CBD and THC comprised a majority of the total 2% cannabinoids by dry weight in the same sample, either in a high CBD/low THC (and high fiber and oil content) or low CBD/high THC (low fiber / higher terpene content) variety, which so formed the definition later for differentiating hemp from marijuana. Our research further supports this differentiation, because the biosynthetic pathway of generating CBD and delta-9-THC both come from the same precursor molecule, CBGA.¹⁰ As a result, we would recommend that New York's industrial hemp regulations adopt the cannabis testing suggested by the USDA's Interim Final Rule.

At the same time, given that the THC limit for hemp is a statutory provision of the 2018 Farm Bill, we would recommend that New York's Department of Agriculture and Markets aggregate comments from its farmers to address the potential concerns regarding whether the 0.3 percent concern. As support for why the 0.3 percent delta-9-THC limit should be revisited, it would appear from the article that cannabis crops sampled in 1976 in Canada were either grown for THC or fiber/oil production, not CBD. We would therefore recommend that the research be updated by Dr. Small or another reputable researcher to include hemp crops cultivated for CBD extraction to determine a more appropriate hemp v. marijuana delineation based on percent of delta-9-THC, as interpreted for testing by the USDA in the Interim Final Rule.

⁹ See Ernest Small et al., *A Practical and Natural Taxonomy for Cannabis*, *Taxon* 25(4): 405-35 (Aug. 1976), Exhibit 1..

¹⁰ Hanuš LO, Meyer SM, Muñoz E, Tagliatatela-Scafati O, Appendino G. Phytocannabinoids: a unified critical inventory. *Nat Prod Rep.* 2016 Nov 23; 33(12): 1357-1392. <https://pubs.rsc.org/en/content/articlelanding/2016/NP/C6NP00074F#!divAbstract>.

B. Office of Cannabis Management

We agree that New York should set up one regulating body to oversee each program of cannabis: adult-use marijuana, medical use marijuana, and hemp product regulations. States¹¹ have found that a single body governing cannabis is required due to the complex regulations and little federal oversight that comes with legalization. The mission should be to safely, equitably, and effectively implement and administer the laws for access to adult-use and medical-use marijuana, as well as hemp products.

Committee Recommendations on the Office of Cannabis Management

We recommend that New York proceed with establishing a single Office of Cannabis Management. We believe, however, that given the complex nature of this space, that cannabis be managed as a separate, standalone office including relevant regulatory expertise, rather than part of another established entity that regulates health or alcohol/tobacco products. To the extent that the Office of Cannabis Management requires expertise from other governmental authorities, such as Agriculture and Markets or the Division of Alcoholic Beverage Control, then it can seek such advice on a consult basis.

C. Opt-Out Provisions

Past New York legislative proposals to legalize adult-use marijuana have included so-called “opt out” provisions, where municipality (i.e., county or city) with 100,000 or more residents could prohibit production and sales of marijuana in their county or city. If a municipality opts-out of allowing marijuana production and sales, however, such municipality also opts-out of receiving any tax revenue generated by sales of the drug statewide. Also, municipalities with less than 100,000 residents, as well as all towns and villages regardless of population, cannot opt-out of allowing marijuana sales. However, all municipalities, regardless of size, can adopt laws relating to the time, place, and manner in which adult-use dispensaries can be operated. Many localities in California and Michigan have opted out, and more than 40 towns in New Jersey have done so before the State has even passed its legislation.¹²

As written, the opt-out provisions could potentially harm local governments more than it protects them. There are many towns in New York with more than 100,000 residents that will not be able to opt-out under the current proposal, since it only applies to counties and cities. This could be an issue in population dense areas like, Nassau, Suffolk, and Westchester Counties,

¹¹ See, e.g., Oregon’s Cannabis Commission, which was established in 2017 after originally being under the Oregon Liquor Control Commission, available at:

<https://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/CHRONICDISEASE/MEDICALMARIJUANAPROGRAM/Pages/Cannabis-Commission.aspx>; see also Massachusetts Cannabis Control Commission, available at: <https://mass-cannabis-control.com/>.

¹² See https://www.michigan.gov/documents/lara/MRTMA_Municipality_Opt-Out_Update_1-25-2019_644664_7.pdf (stating that as of 12/6/2019 approximately 80% of municipalities in the State of Michigan have opted of allowing recreational sales in their communities).

See also, <https://mjbizdaily.com/chart-most-of-california-municipalities-ban-commercial-cannabis-activity/> (noting that Only 161 of California’s 482 municipalities and 24 of the 58 counties have opted to allow commercial cannabis activity).

See also, <https://www.nytimes.com/2019/05/13/nyregion/marijuana-legalization-ny-nj.html>

where many towns have over 100,000 people. Also, if a town of over 100,000 people wants to prohibit adult-use cannabis business from operating within its boundaries, it will not be able to do so. Thus, a foreseeable result of the opt-out could be that some counties may end up prohibiting adult-use marijuana to appease one or more large or more influential towns within the counties' boundaries, even if the majority of towns or residents within the county in favor of adult-use marijuana businesses and the tax revenue and jobs that could be realized therefrom.

By way of example, in Nassau County, the Town of North Hempstead enacted a local law on January 8, 2019 prohibiting the retail sale of adult-use marijuana.¹³ If the proposed opt-out provisions are enacted, however, this local law would be preempted. One reasonably foreseeable result of preemption, therefore, would be that the Town of North Hempstead would lobby the Nassau County legislature to exercise the county-wide opt-out, thereby prohibiting marijuana businesses from operating in one of the largest counties in the state.

Committee Recommendations on Opt-Out Provisions

We recognize that opt-out provisions are helpful to allow local cities and towns to not allow adult-use marijuana in their local areas. Given the possibility for disparities with municipalities that do not meet the proposed definition, we would recommend that towns and cities larger than 100,000 or larger be given the opportunity to opt out to allow adult-use marijuana, as well as adopt laws relating to the time, place, and manner in which adult-use dispensaries can be operated, if not opted out. Because of the potential for county governments to opt-out because one or more influential cities or towns lobbies for it to the potential detriment of a majority of other cities or towns in that county, we recommend that counties not be given the option to opt-out.

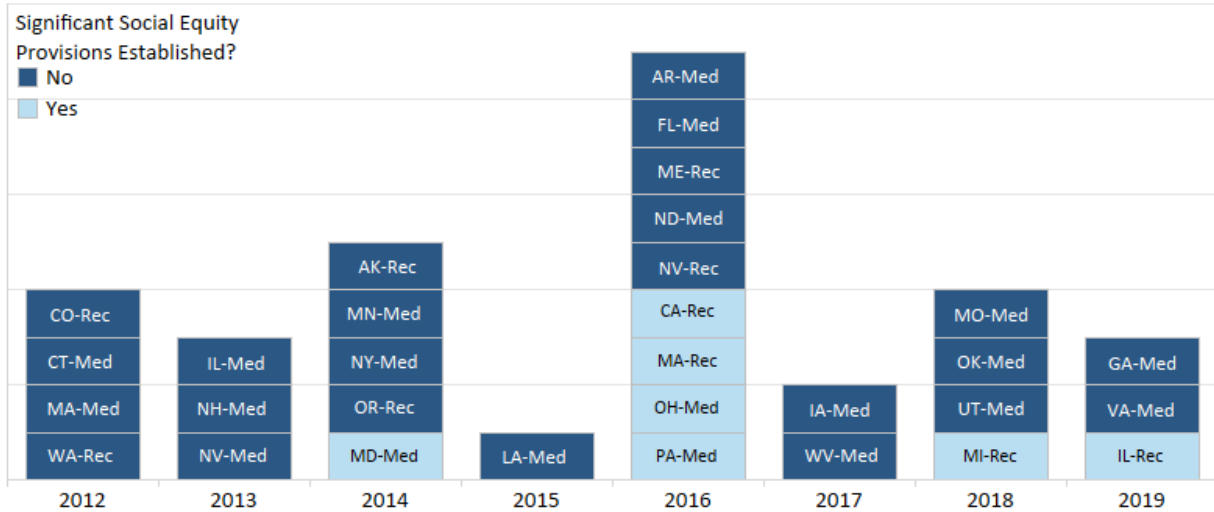
D. Social Equity

Social equity has been both a sticking and selling point among New York legislators when weighing whether to implement adult-use legislation. Of the eighteen states that have legalized medicinal or recreational marijuana since 2016, six have taken measures to increase diversity in their marijuana programs. Most of the first states to legalize marijuana, such as Colorado and the State of Washington in 2012, did not include provisions that state licenses to grow, process, or dispense marijuana would be distributed equitably or would positively impact less prosperous communities. More recent states to enact adult-use marijuana legislation, such as Massachusetts, however, have included social equity provisions.¹⁴

¹³ See Town of North Hempstead Local Law 1 of 2019.

¹⁴ Under Massachusetts Law, Part I Title XV, Chapter 94G, Section 4.

**Status Of Social Equity Provisions By State & Market:
2012-2019**



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In Massachusetts, for example, a Social Equity Program was created where applicants must either have lived for five of the last ten years in an “area of disproportionate impact” and have an income under 400 percent of the federal poverty level, or they must have a past drug conviction or be a spouse or child of someone who does and have lived in Massachusetts for the past year. In addition, Massachusetts has an Economic Empowerment Priority Review Program, which prioritizes review and licensing decisions for applicants seeking retail, manufacturing, or cultivation licenses who are able to demonstrate business practices that promote economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for marijuana possession offenses under state and federal laws.

Under Michigan’s adult-use legislation, Michigan has adopted social equity provisions that promotes and encourages participation in the cannabis industry by people from communities that have been disproportionately impacted by cannabis prohibition and enforcement.¹⁵ In addition, Michigan’s marijuana regulatory agency established a Social Equity Team, which provides: one on one assistance with the social equity application, assistance preparing and completing the adult-use application, education on marijuana rules and regulations, and connecting participants with resources regarding the program.¹⁶

The most notable and controversial social equity program, however, was enacted by Illinois. Illinois’ social equity program includes: technical assistance and support through the Illinois Department of Commerce and Economic Opportunity, applicants automatically receive

¹⁵ Michigan Regulation and Taxation of Marihuana Act., 333.27958 Rules; limitations., Sec. 8. 1.

¹⁶ Michigan.gov, Department of Licensing and Regulatory Affairs, Social Equity (Adult-Use Marijuana), available at: https://www.michigan.gov/lara/0,4601,7-154-89334_79571_93535---,00.html.

50 points out of a possible total of 250 on the application score, extra points are provided for having a diversity plan or having a plan to engage the community (e.g., establishing an incubator program or contributing to local treatment centers), and diversity applicants have reduced application and license fees as well as options for low interest loans.¹⁷

Committee Recommendations on Social Equity

We recommend that New York should look in particular to the six more recent states to adopt social equity provisions to see which provisions have been effective to encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and how to best use the tax proceeds from legalized cannabis in New York to positively impact those communities. As part of that process, we recommend that New York commission an outside research entity like RAND to take a critical look at states with social equity programs for legalized marijuana to guide public policy decisions for what provisions to institute.

We recommend that New York not adopt any specific social equity provisions until this analysis is complete, but that such efforts should not prevent comprehensive regulation of legalized adult-use cannabis. However, to ensure that social equity measures be promptly considered and enacted, we recommend that the comprehensive regulation expressly provide for a two-year sunset and that a plan for social equity programs be part of a recertification bill within one or two years of enacting the comprehensive cannabis regulations.

Specific provisions that the Committee recommends New York consider in its initial social equity programs and commissioned state analysis include:¹⁸

- Develop incubator programs to provide direct support to small-scale operators who are marijuana license holders in the form of legal counseling services, education, small business coaching and funding in the form of grants.
- Require licensees to use good-faith efforts in hiring employees who meet the equity eligibility criteria, and certify annually that 25% of their employees meet the criteria or that they have use a good faith effort to achieve that 25% threshold.
- Dedicate a percentage of local cannabis tax and non-licensing fee revenue to support a Community Reinvestment Fund to, at a minimum, provide reentry services, job training, and criminal-record-change assistance to residents of disproportionately impacted areas.
- Ban local or state government from discriminating against licensing applicants on the basis of their substance-use treatment history, or convictions unrelated to honesty, and background checks can only be used to check for those convictions.

¹⁷ Illinois Cannabis Regulation and Tax Act, Article 7.

¹⁸ See Minority Cannabis Business Association's Ten Model Municipal Social Equity Ordinances available at <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/07/MCBAs-Ten-Model-Municipal-Social-Equity-Ordinances.pdf>

- Create a basic framework for permitting cannabis-consumption lounges, while leaving zoning to local governments. Local governments are authorized to regulate consumption lounges where cannabis may be used on site.
- Authorizing local government to facilitate resentencing and expungement to restore the civil rights of prior cannabis arrestees and to fund these efforts through cannabis taxes. This can include automation, fee waivers, and funding legal fairs and lawyers to publicize and execute.

E. Marijuana Taxes

1. Adult-Use Marijuana

States that have legalized adult-use marijuana have experimented with various taxation regimes, including flat and weight-based taxes. A pattern appears to be emerging, however, indicating that a lower rate of tax returns higher per capita tax revenues and fosters a robust and thriving market while simultaneously discouraging growth of the gray and illicit market. Both the type and amount of marijuana taxes, therefore, should be designed to prevent business and consumers from operating in the gray and illicit markets.

Cultivation taxes, for example, are imposed by some states and should be carefully considered: What the cultivation tax does not consider is the potency, and, therefore, value of the crop. Some consumers, or medical users, may prefer less potent versions of the product. Therefore, pure product weight may not be the best metric for a cultivation tax. Cannabis is a plant that can vary widely in its composition among species. Using weight to determine the tax rate may limit growers to certain biochemical makeups and limit production potential. Examples of some state cultivation taxes: Maine - \$ 335/lb., Alaska - \$50/oz., and California - \$9.25/oz.

A marijuana sales tax that is more in the form of a traditional sales tax may make the most sense, because it does not differentiate between products and is instead a function of price. New Jersey is reportedly considering the nation's lowest tax of 10% on marijuana. Colorado has a 15% sales tax on adult-use marijuana that started as a combined 12.9% sales tax that increased to 15% on July 1, 2017.¹⁹ The current 15% marijuana sales tax is in addition to a 15% state retail excise tax on marijuana sales. The combined 30% marijuana tax rate generated over \$266 million for Colorado in 2018.²⁰

Though, as shown below, Colorado is generating the most tax revenue per capita of those 21 and over, the illicit market continues to grow due, at least in part, to a combined 30% sales tax rate. Unlicensed growers are growing cannabis for sale in other non-legal states, in search of higher profits.²¹ A 30% sales tax may lead consumers to seek illicit market products as those products are not taxed. This hurts both the state as well as legitimate businesses.

¹⁹ Colorado Department of Revenue, Marijuana Tax Data (updated Dec. 2019), available at: <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> .

²⁰ *Id.*

²¹ CBC, *Why Colorado's black market for marijuana is booming 4 years after legalization* (May 28, 2018), available at: <https://www.cbc.ca/news/world/colorado-marijuana-black-market-1.4647198> .

California’s cannabis taxes can amount to nearly 40%, including wholesale taxes, which has caused nearly 20% of consumers to purchase cannabis from the illicit market. Studies have shown that a reduction of 5% in taxes could move nearly a quarter of purchases made on the illicit market to legal purchases.²²

New York may be in a rare position to attempt to insulate itself from the continued growth of the illicit market. New York can impose a tax rate no more than 30% in total, keeping it in line with other states or even lowering the tax rate below other states to attempt to create a market that effectively prices the illicit market out of competition.

(a) Current Tax Rates

As a comparison, states that have legalized marijuana for adult use have the following tax rates:²³

State	Retail	Wholesale	Population (>=21)	Adult-Use Revenue (2018)	Per Capita Revenue (>= 21)
California	9.25% Sales Tax; 15% Excise Tax; Up to 10% Local Tax Total: 34.25%	\$9.25/oz. flowers \$2.75/oz. leaves	30,892,866 ²⁴	\$236,000,000 (estimate) ²⁵	\$7.63
Colorado	15% State Tax; Up to 10% Local Tax; Total up to 25%	15% Excise Tax	3,014,312 ²⁶	\$266,529,637 ²⁷	\$88

²² Ease Insights, The High Cost of Illicit Cannabis (July 2018), available at: https://mjbizdaily.com/wp-content/uploads/2018/08/High-Cost-of-Illegal-Cannabis_FINAL_.pdf .

²³ Cannabis Tax Rates: A State-By-State Guide (June 22, 2017), available at: <https://www.leafly.com/news/industry/marijuana-tax-rates-by-state> .

²⁴ Suburban Stats, Current Population and Demographics and Statistics for California by age, gender, and race (2019, 2020), available at: <https://suburbanstats.org/population/how-many-people-live-in-california> .

²⁵ California taxmakers are considering a tax cut – for cannabis, The Sacramento Bee (Jan. 28, 2019), available at: <https://www.sacbee.com/news/politics-government/capitol-alert/article225185310.html> .

²⁶ Infoplease, CO Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-33> .

²⁷ Colorado Department of Revenue (through November 2019), available at: <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> .

State	Retail	Wholesale	Population (≥21)	Adult-Use Revenue (2018)	Per Capita Revenue (≥ 21)
Maine	10% Sales Tax Total: 10%	\$335/lb. flowers \$94/lb. leaves \$1.50/immature plant; \$0.30/seed	1,131,622 ²⁸	NA	NA
Massachusetts	6.25% State Tax; 10.75% Retail Tax; 3% Local Tax Total: 20%	NA	4,587,935 ²⁹	NA	NA
Nevada	10% Excise Tax; Up to 8% Local Tax; Total: 18%	15% Excise Tax	1,411,378 ³⁰	\$69,400,000 (estimate to June 2019) ³¹	\$49
Oregon	17% State Tax; 3% Optional Local Tax; Total up to 20%	NA	2,429,348 ³²	\$82,203,729 (fiscal year 2018) ³³	\$34
Washington	6.5% State Tax; 37% Excise Tax;	NA	5,650,485 ³⁴	\$64,000,000	\$11

²⁸ Suburban Stats, Current Population Demographics and Statistics for Maine by age, gender and race (2019, 2020), available at: <https://suburbanstats.org/population/how-many-people-live-in-maine> .

²⁹ Infoplease MA Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-149> .

³⁰ Infoplease Nevada Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-217> .

³¹ *Nevada marijuana tax revenues top \$31M from July to October*, Las Vegas Review-Journal (Dec. 31, 2018), available at: <https://www.reviewjournal.com/news/pot-news/nevada-marijuana-tax-revenues-top-31m-from-july-to-october-1562785/> .

³² Infoplease Oregon Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-245> .

³³ Oregon Marijuana Tax Statistics: Accounting Information (through November 2019), available at: <https://www.oregon.gov/DOR/programs/gov-research/Documents/Financial-reporting-receipts-public.pdf> .

³⁴ Suburban Stats, Current Population Demographics and Statistics for Washington by age, gender and race (2019, 2020), available at: <https://suburbanstats.org/population/how-many-people-live-in-washington> .

State	Retail	Wholesale	Population (≥21)	Adult-Use Revenue (2018)	Per Capita Revenue (≥ 21)
	Total: 43.5%			(annualized) ³⁵	

(b) Taxation Analysis

The above table shows a probable correlation between tax rate and revenue per capita of those 21 and older. Colorado’s 20% retail tax along with a flat 15% excise tax on the wholesale side resulted in the highest tax revenue out of any adult-use state. Colorado, however, also has one of the most mature adult-use markets. Conversely, California’s over 34% retail tax and weight-based excise tax and Washington’s over 40% retail tax resulted in significantly lower tax revenues per capita of those 21 and over. It is important to note that there are many factors that influence the revenue collected by a state, and the tax regime is merely one factor.

Cumulatively, the tax rate in California can be as high as 45% which has caused significant numbers of consumers to turn to the illicit market in order to avoid substantially-increased prices associated with legal purchases. The marijuana tax revenue shortfall of \$101 million in California has prompted the legislature to reduce the retail excise tax from 15% to 11% and suspend all cultivation taxes until 2022. The legislature’s rationale is that states with lower tax rates have seen continued tax revenue growth (e.g., Colorado over 7% tax revenue growth from 2017 to 2018.³⁶). Democratic Assemblyman Rob Bonta, sponsor of California’s bill to reduce cannabis taxes, stated, “Lowering a tax rate to bring in more money might sound counterintuitive, but as they found in Washington state, if you drop the tax, more people will buy more legally so revenue will go up.”³⁷

If New York were to follow California’s model of relatively high taxes out of the gate and then lower the taxes after tax revenues fail to meet expectations, New York runs the risk of small businesses being unable to withstand the initial high tax period. This will lead to a business environment where only the most well-funded businesses are able to absorb and offset the taxes with an eye towards lower taxes. The smaller businesses will not be able to absorb and offset some of the taxes and will not be able to push the ultimate cost to the end consumer in the form of higher retail prices as these small businesses would be undercut by larger businesses with bigger profit margins.

Additionally, Section 280E of U.S. Internal Revenue Code law increases the tax burden on businesses which will necessarily pass on the tax to consumers, resulting in higher pricing.

³⁵ *Recreational and medical marijuana taxes*, Department of Revenue Washington State, available at: <https://dor.wa.gov/about/statistics-reports/recreational-and-medical-marijuana-taxes>.

³⁶ *Marijuana Tax Data*, Colorado Department of Revenue (through November 2019), available at: <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data>.

³⁷ *California craving more tax revenue from recreational cannabis sales*, San Francisco Chronicle (Feb. 3, 2019), available at: <https://www.sfchronicle.com/bayarea/philmatier/article/California-craving-more-tax-revenue-from-13582251.php>.

Section 280E prohibits traffickers in controlled substances (all legal cannabis businesses) from deducting of all business expenses, except cost of goods sold (“COGS”). An excise tax paid by cultivators that would otherwise be a deductible business expense becomes non-deductible by virtue of Section 280E resulting in the need to increase sales price. Legal cannabis businesses can face effective tax rates in excess of 70% which results, to an extent, on taxation of revenue, not profits.³⁸ Tacking on an additional 45% tax, as we’ve seen in California (and higher rates proposed by the CRTA) will lead to an immediate increase in retail pricing that far exceeds the illicit market as cannabis companies seek to project what little profit margin exists.

Lastly, IRS Chief Counsel Advisory, IRS CCA 201631016, requires that excise taxes be capitalized which reduces gain on the sale of property. Therefore, an excise tax, according to the CCA, is not a deductible expense for businesses, and instead must be capitalized into the cost of goods. If a cultivator is required to pay an excise tax, the cost would be difficult for the cultivator to capitalize as they are not buying a product for resale, but instead creating the product. This could result in the situation wherein a cultivator is taxed on the money used to pay the excise tax.

Committee Recommendations on Marijuana Taxes

New York would be advised to adopt a taxation regime similar to Colorado’s to avoid increasing illicit market sales. Section 280E is unlikely to change for the next two to four years and therefore, a lower New York State tax rate allows for the economic reality that the federal tax law denies deductions to all expenses except COGS.

If New York were to enact lower tax rates until the federal tax law is updated, it would act as an investment into the cannabis ecosystem in New York. Further, it would allow small businesses, who cannot afford sophisticated planning techniques, to compete with large cannabis companies who can engage expensive legal and taxation advice to reduce effective tax rates through exotic and complicated business structures.

The Committee proposes that New York adopt rates that have proven efficacy to facilitate legal sales, sustain increased tax revenue growth year-over-year and support a thriving market. Upon a change in federal tax law, New York would have the availability to increase its tax rates and maintain price equilibrium as companies will be allowed to deduct their ordinary and necessary business expenses, including excise taxes.

Lastly, it would be advisable that New York refrain from imposing an excise tax at the production and wholesale levels to avoid the penalties of Section 280E. Instead of imposing a weight based or flat tax on producers and processors, the excise tax should instead be borne by retailers or consumers. As explained above, an excise tax paid by retailers would allow the retailer to capitalize the excise tax into the basis of the property sold, and therefore it would reduce the gain upon the sale. For example, if a cultivator sells cannabis for \$100 to a retailer and the retailer pays \$100 plus a \$25 excise tax, the retailer’s basis in the cannabis would be, by virtue of § 164 of the Tax Code, \$125. If the retailer sells the cannabis for \$200, the retailer would only be taxed on \$75 of gain.

³⁸ *Fed Slaps 70% Tax on Legal Marijuana Businesses*, Daily Beast (Apr. 13, 2017 updated), available at: <https://www.thedailybeast.com/feds-slap-70-tax-on-legal-marijuana-businesses>

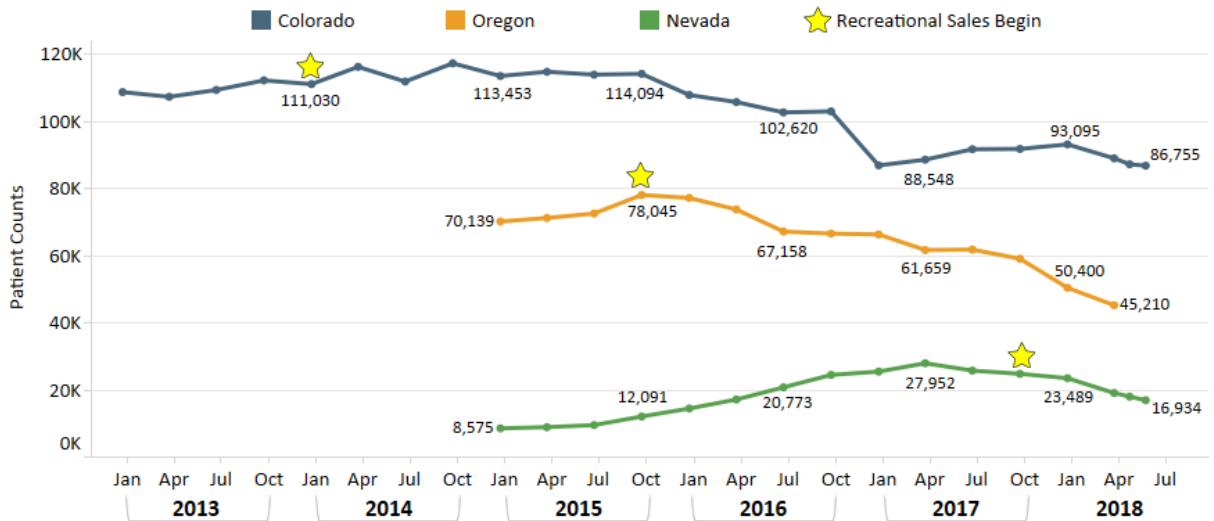
The tax revenue to New York would be indistinguishable but this would allow businesses to escape a non-deductible tax. If businesses do not have to account for a non-deductible tax in determining the price of their product, it may result in lower prices to consumers, which will help avoid increasing activity into the illicit market. The placement of the excise tax, whether at production/wholesale or retail, could be reversed upon a change in federal law allowing for ordinary and necessary business deductions for cannabis companies. Moreover, the ability to allocate an excise tax between retail and wholesale gives the State a mechanism, similar to the federal government's ability to control interest rates through the Federal Reserve Bank, to encourage or discourage production capacity and pricing without the need to consistently adjust license numbers.

2. Tax Considerations Regarding Medical Marijuana

Based on data published by other states, we can expect New York's medical marijuana program to experience some patient decreases if New York legalizes adult-use marijuana. One way that New York could stem this reduction would be by managing the taxation of medical cannabis to retain medical marijuana patients. As noted in the chart below,³⁹ states where there were tax advantages to staying in the medical marijuana program had the lowest attrition from the medical marijuana programs. For example, Oregon's medical marijuana observed the greatest reduction, with patient counts falling 42% since early adult-use sales began in October 2015. Nevada also observed significant reductions, with patient counts down 32% since its October 2017 adult-use launch, i.e., an average decline of 5% per month. In contrast, Colorado fared better, with patient counts down 22% since the state's adult-use market launched in January 2014. Based on a comparison between these three states, the smaller decline was thought to be likely driven by a combination of low-cost medical marijuana cards and significantly-reduced tax requirements on medical purchases.

³⁹ Eli McVey, Marijuana Business Daily, *Chart: Can medical marijuana programs survive in states with recreational markets?* (July 16, 2018), available at: <https://mjbizdaily.com/chart-can-medical-marijuana-programs-survive-in-states-with-recreational-markets/>.

Impact of Legalizing Recreational Marijuana on MMJ Patient Counts In Colorado, Oregon & Nevada



Source: Oregon Medical Marijuana Program, Colorado Marijuana Enforcement Division, Nevada Division Of Public and Behavioral Health
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So far New York has maintained a relatively conservative medical marijuana program to allow for better record-keeping of diseases treated and patient results, which should continue to be collected to help guide the program in coming years by following Colorado’s model. For patients navigating the certification process in New York’s medical program, the price of high-quality, medical-grade cannabis should be affordable enough to preserve the market and its tested products from recreational offerings. New York should also consider implementing procedures to simplify the procedure for patients to obtain certifications for medical marijuana, e.g., by permitting more physicians to prescribe and further removing restrictions on the types of indications where medical marijuana could be prescribed. Otherwise, patients who view the certification as too arduous or too expensive will turn to recreational products to self-medicate, effectively removing clinical oversight, product integrity, and targeted therapeutic relief from the use of cannabis.

In addition, we believe that given what happened in Oregon and Nevada, attrition from the medical program to recreational use will be driven primarily by the economic framework of the two programs. One of the most common complaints among patients certified through New York State’s medical cannabis program is that of cost. New York-certified patients pay average monthly expenditures ranging from \$100 to \$500 for physician-recommended doses. Financial incentives, including reduced tax requirements, low-cost medical cannabis cards, financial

hardship discounts, and exclusive access to higher-dose formulations have been proposed in other states to prevent erosion of medical programs.⁴⁰

New York's organization of both medical and adult-use marijuana programs under a single regulatory body should act to shield its medical marijuana program. A robust medical marijuana program will be a driver for New York's leadership in marijuana legitimacy and clinical relevance and reliability. A broadening of opportunities for physician-led research on marijuana, its properties, and its various efficacy rates for the State's approved conditions will benefit the overall science as well as patient outcomes in the medical marijuana program.

The State program should lean on qualified medical professionals, New York's leading clinicians and pharmacists, to determine an appropriate measurement for impairment and to promote research-backed safety indications for all marijuana users. Coordination of both programs with the protection of the medical program in mind will benefit all marijuana users in New York State.

F. Advertising and Marketing

The Committee recommends that New York's proposed comprehensive cannabis legislation work in congruence with the FDA as to avoid any confusion on which rules govern. For example, it is recommended that any proposed cannabis legislation refer to its own state labeling requirements for food products that are consistent with the Federal Food Drug & Cosmetics Act and the Fair Packing and Labeling Act. The reasoning behind this recommendation is that if the proposed legislation refers directly to application of FDA regulations to label it could potentially expose New York cannabis businesses to FDA enforcement on the basis that they are violating federal food labeling laws. For example, the FDA has stated that only products containing no CBD or THC, two of the most common drug components of cannabis, e.g., hemp seed products, can be used in FDA-regulated food products, i.e., sold in interstate commerce, including dietary supplements.⁴¹ On the other hand, if New York or any state were to develop food product laws that governed products not subject to FDA's jurisdiction, i.e., manufactured from products exclusively grown, packaged, and sold in New York, then New York could develop its own laws to govern these products separate from food products sold in interstate commerce.

Committee Recommendations on Advertising and Marketing

We recommend that New York develop cannabis marketing and labeling guidelines for products that would be grown, processed, and packaged for exclusive use in New York, separate from cannabis products that would be developed for interstate commerce and would be subject to

⁴⁰ Shira Shoenburg, MassLive, *Will recreational marijuana stores help or hurt medical marijuana patients?* (May 29, 2018; updated Jan. 30, 2019), available at: https://www.masslive.com/politics/index.ssf/2018/05/will_recreational_marijuana_st.html.

⁴¹ FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD) (updated Dec. 6, 2019), available at: <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#legaltosell>.

concurrent jurisdiction by the FDA. Along those lines, we recommend some of the following labeling and packaging guidelines to be considered.

Medical Marijuana Packaging Should Be Adopted

It is recommended that the proposed adult-use bill also adopt the regulations set forth in S. 1004.11(h), (i), (j), and (k) -- Manufacturing Requirements for Approved Medical Marijuana Product, which was made part of New York State's medical marijuana program.

More regulations need to be implemented, however, in light of adult use in New York State based on an analysis of other states' robust packaging and labeling regulations such as California's and Colorado's packaging and labeling laws.

All Packaging Should Be *Certified* Child-Resistant Packaging

Prior to delivery or sale at a retailer, cannabis and cannabis products shall be labeled and placed in a resealable, child-resistant package, and it is recommended that such cannabis products, prior to delivery or sale at a retailer, be placed in a resealable package that has been tested by companies similar to the ones recommended by the Consumer Product Safety Commission.

Add Allergen Warnings

The proposed legislation should require cannabis-infused products to list a nutritional fact panel. It is recommended that a requirement also be made that cannabis labeling for cannabis-infused products include allergen warnings which, at a minimum, warn the consumer whether the cannabis-infused product contains nuts and dairy products.

Additional Labeling Requirements

The proposed law should also mandate that all labeling of cannabis include:

- A. **Exit Packaging:** Opaque Containers for Exit Packaging with Child-Resistant Locks.
- B. **Font Size:** That lettering be of a minimum font size of a Primary Panel be no less than 6-point font and in relation to size of panel and container; and the Informational Panel be no less than 6-point font and in relation to size of primary panel. If the font cannot fit all required info, the product may be accompanied by a supplemental labeling with no less than 8-point font. In addition, warning statements must be on non-supplemental labels and in no less than 6-point font and should only be in black lettering with a white background.
- C. **Add Universal Symbol Requirement:** New York State was to create a universal symbol for single serving edibles as of January 1, 2019. It is uncertain whether New York's universal symbol has been implemented into its Medical Marijuana Program as of the date of this recommendation. If such a universal symbol has been implemented for single serving edibles for the Medical Program, then it is

recommended that it be carried forward in the proposed adult-use legislation. In addition, it is recommended that there be an educational program developed to be taught in the public schools and in public service announcements to children and the public about what the cannabis universal symbol means akin to the skull and cross bones on dangerous substances.

- D. Prohibit untruthful or misleading statements
- E. Prohibit packaging that resembles packaging of certain commercially available products
- F. Include liquid unit measurements.
- G. Packaging must protect contents from contamination.
- H. **Labeling Cannabis or Cannabis Products as “Organic”:** It is recommended that the proposed adult-use legislation add a section on explicitly prohibiting adult-use cannabis processors from using the term “Organic” in labeling of cannabis products to refer to cannabis or cannabis products/edibles, unless the cannabis is produced, processed and certified in a manner that is similar to the Organic Foods Production Act of 1990.

G. Committee Recommendations on Environmental Issues

Experience has shown that cannabis cultivation does have the potential to cause adverse environmental impacts. Any state legislation that will result in increased cannabis cultivation should consider environmental issues.

The issues which should be addressed include the use of pesticides, energy management, air quality, including odor control, and wastewater and waste disposal considerations. Most of these issues are too technically complex for specific mandates to be included in federal legislation. Evolving technology and concerns can be more efficiently addressed through regulation without the need to amend the federal legislation. Any legislation should require that the administrative body which regulates state cannabis growing, cultivating, processing, and use should develop regulations embodying environmental standards to which permitted cultivators and manufacturers are required to adhere.

The issue of pesticide use likely to be a particularly sensitive issue. Some industry participants and advocates urge that no pesticides be allowed, or that only those pesticides that qualify for use with the U.S.D.A. National Organic Program (“NOP”) be allowed. However, while some cultivators strive to grow organically,⁴² even under the most sophisticated Integrated Pest Management (“IPM”) programs, some use of pesticides, particularly fungicides, is likely to

⁴² Qualification under the NOP is not currently legally possible, given the Schedule 1 listing of cannabis. Thus, while some cultivators may describe their product as “organically produced,” use of the term “organic” and use of the USDA NOP seal are not allowed.

be necessary. The statute should mandate that rules require that IPM programs be part of any cultivation program, but should not otherwise specify the prohibition of specific products.

With respect to pesticide use the rules shall require the development and implementation of integrated pest management plans incorporating to the extent practicable sanitation and the use of cultural controls including beneficial pests as well as the appropriate use of pesticides. Cultivators of adult-use cannabis should be permitted to only use pesticides that are registered by the department of environmental conservation or that meet the United States environmental protection agency registration exemption criteria for minimum risk pesticides, and only in compliance with regulations and guidance issued by the Department of Environmental Conservation. Such regulations and guidance shall require the use of integrated pest management principles, including where required the appropriate use of pesticides.

Recycling of excess waste from manufacturing and consumption of cannabis product and packaging have become a major environmental issue across the country. Vaporizing cannabis has become one of the most popular ways to consume cannabis just behind traditional smoking of the cannabis flower. Spent plastic tubes used to hold cannabis cigarettes, vaporizer cartridges containing excess cannabis, and vaporizer batteries are polluting the environment without product controls.

It is also recommended, therefore, that state cannabis legislation require minimal packaging requirements to reduce the amount of material used to house the cannabis product for sale to consumers. California has enacted such environmental controls for its adult use and medical marijuana products and, therefore, New York should commission a study of California's and other states' regulations on cannabis environmental laws to understand how to best implement a section on recycling regulations in New York's cannabis regulations.

III. CONCLUDING REMARKS

NSYBA's Committee on Cannabis Law will continue to monitor the evolving legal status of cannabis at both the state and federal level. In addition to offering top-quality cannabis law continuing education and resources for its members, the Committee hopes to be a resource to New York's and federal legislatures to help set the highest possible legal and business standards for legalized cannabis products. We hope that you found this report useful and will endorse it for the broader acceptance by NYSBA's House of Delegates and the Association generally.



Staff Memorandum

**HOUSE OF DELEGATES
January 31, 2020**

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Diversity and Inclusion for an Association Diversity Plan.

Attached is a report from the Committee on Diversity and inclusion recommending that the Association adopt a Diversity Plan to promote the full and equal participation of diverse attorneys in the Association and at every level of the legal profession. The report reviews the 2003 adoption of a diversity policy, the committee's development of a biennial Diversity Report Card since 2005 and Diversity Challenges issued and promoted by past presidents. The proposed plan includes a number of objectives and goals, including the following:

- Require wide dissemination of the Diversity Plan.
- Promote and track diversity within leadership.
- Promote and track diversity in leadership nominations and leadership development.
- Urge adoption by all NYSBA entities of diversity plans consistent with the overall Diversity Plan.
- Promote diversity in membership.
- Promote diversity in CLE and other programming.
- Promote diversity in publications.
- Promote diversity in "marquee" events.
- Enhance reporting and tracking of diversity efforts.
- Develop or enhance mentoring programs.
- Develop, encourage and participate in "pipeline" events.
- Promote diversity accomplishments.

- Create a Diverse Speakers Bureau/Database.
- Follow the Mansfield Rule with respect to leadership positions.

This report was submitted in November 2019. Attached are comments from the Committee on Disability Rights, the Committee on Membership, and the Committee on Legal Aid.

The report will be presented at the January 31 meeting by Mirna M. Santiago, Chair of the Committee on Diversity and Inclusion.

New York State Bar Association

Diversity Plan

Commitment

The New York State Bar Association continues its commitment to enhancing diversity at every level of participation. The Association strives to reflect the diversity of our profession and our society within its membership, leadership, program involvement and outreach to the community at large.

History

The Association's House of Delegates adopted a diversity policy on November 8, 2003, which reads:

The New York State Bar Association is committed to diversity in its membership, officers, staff, House of Delegates, Executive Committee, Sections and Committees and their respective leaders. Diversity is an inclusive concept, encompassing gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability. We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives experiences, knowledge, information and understanding inherent in a diverse relationship.

The Committee on Diversity and Leadership Development in 2005 conducted a seminal Section Diversity Survey. The survey was designed to evaluate the level of diversity in Section leadership, membership and activities, and to inform the Association of ongoing Section initiatives to enhance diversity. The Committee transposed the results of that survey into a Diversity Report Card, which the Executive Committee considered as an informational item at its June 23 and 24, 2005 meeting. Since that first survey and report in 2005, subsequent data-gathering efforts and resulting reports have been issued, with project oversight moved to the Committee on Diversity and Inclusion in 2011. With each report, more detailed data have allowed a more comprehensive analysis of how far the Association has come in raising the awareness of diversity issues within its own organization and the profession. After publication of the 2011 report, committee leadership agreed that that year's format would serve as a benchmark for subsequent reports, with only minimal references to earlier editions of the report as needed. This agreement was made to coincide with the start of the presidential Section Diversity Challenge in 2011 – 2012, followed by a second yearlong challenge in 2012 – 2013. We recognize the leadership of Presidents Vincent E. Doyle III and Seymour W. James Jr. in issuing the Diversity Challenges.

The summary below provides a brief history of the Diversity Report Card's development and its expanding scope – it initially covered only Sections but now includes NYSBA executive

voluntary leadership, including governance and its Nominating Committee. The report continues to highlight the need for raising the level of diversity awareness within the profession and increase opportunities for attorneys to serve in leadership positions.

2005 (First Edition) Diversity data reported gender, ethnicity/race and disability status. Nearly half of all Sections appointed a diversity chair and/or formed a diversity committee and developed a diversity plan.

2007 (Second Edition) The report was circulated at the Section Leaders Conference to foster increased diversity awareness. It was also posted on the Association's Web site and the report narrative published in the *State Bar News*. The report recommended developing a strategic plan, with the aid of the Association's Office of Bar Services, to encourage collaboration between Sections and minority bar associations as a way to enhance Section diversity; and convening a joint conference of all Section diversity committees and/or leaders for the purpose of fostering collaboration among the Sections themselves.

2009 (Third Edition) Sexual orientation status was added to diversity data reporting. The report recommended collecting diversity data from Section publications editors, CLE program chairs and faculty, with plans to promote increased self-reporting from Section members. It also requested additional administrative staff support (in the form of an intern or law student).

2011 (Fourth Edition) Diversity data on House of Delegates and membership of NYSBA's Executive and Nomination Committee added. The report recommended the Association promote enhanced communications and relationship building with its members and Section leaders and governance leaders regarding the importance of accurate self-reporting for purposes of collecting diversity data.

2013 (Fifth Edition) Diversity data in NYSBA governance, broken down by Judicial District, added.

2015 (Sixth Edition) Age data of overall Association membership added.

2017 (Seventh Edition) The report spotlights eight Sections of the Association in order to highlight improvements and provide specific recommendations.

To date, some but not all, of the recommendations presented within the reports have been carried out. For example, expanding coverage of diversity data to governance groups and continued self-reporting of diversity status has taken place. However, significant resistance to diversity data collectibles continues. Fully one third of the Association's House of Delegates fails to provide their data; 54 % of all NYSBA members decline to answer all demographic questions. The survey is being updated to make it easier to answer all questions, but we need to encourage response and timely data analysis and visualization.

Purpose and Goals

Purpose

For the purposes of the Diversity Plan (the “Plan”), the term “diversity” generally represents both diversity and inclusion. Diversity often pertains to the numbers – ensuring sufficient numbers of targeted populations are represented. Inclusion addresses how well the diverse individuals are included in all aspects of the organization. Diversity is often associated with recruitment; inclusion plays a pivotal role in retention. As such, this Plan is designed to achieve not just diversity – the presence of lawyers and law students from all backgrounds – but inclusion as well – their full and equal participation in the Association.

Goals

The Plan will promote and advance the full and equal participation of attorneys of color and other diverse attorneys in the New York State Bar Association and in all sectors and at every level of the legal profession through research, education, fostering involvement and leadership development in NYSBA and other professional activities, and to promote knowledge of and respect for the profession in communities that historically have been excluded from the practice of law. The Committee shall also foster the development of, monitor progress of and report on diversity initiatives of the Association, as well as partner with the Sections to continue to pursue enhanced diversity and inclusion in the Association, including among the leadership of the Association.

The Diversity Plan sets forth numerous objectives and broad goals. In addition, certain implementation recommendations are set forth as specific actions the New York State Bar Association is urged to undertake in the immediate future.

- A. Require wide dissemination of the Diversity Plan within the New York State Bar Association, and public availability of the Diversity Plan, including:
 - 1. Membership-wide dissemination of the Diversity Plan after adoption, with a cover letter or email from the NYSBA President.
 - 2. Continuous availability of the Diversity Plan through pertinent pages on the NYSBA website.
 - 3. Distribution of the Diversity Plan, or emailing a link to the Diversity Plan, to all new NYSBA members.
 - 4. Reference to the Diversity Plan in member solicitation materials.
 - 5. Ensuring accessibility of the Diversity Plan to members with visual or other disabilities.

- B. Promote and track diversity within the NYSBA’s leadership, including:
 - 1. The Association’s Officers (President, President-Elect, etc.);
 - 2. Executive Committee;
 - 3. Standing Committees, Administrative Committees, Special Committees, Task Forces, Commissions, and other presidentially appointed positions;
 - 4. House of Delegates;
 - 5. Practice Sections, including top leaders, their executive committees and committee chairs;

6. Special emphasis on diversity among the Nominating Committee membership (see item “C” below).
- C. Promote and track diversity in the NYSBA’s leadership nominations and leadership development processes.
1. Require diversity as an emphasis in all leadership nominations processes, including diversity among the decision-makers on the Nominating Committee.
 2. Require diversity as an emphasis in the Presidential appointments process, including diversity among the appointments committee members (such diversity to be measured, at least in part, by consideration of data that indicates the diversity of Association membership).
 3. Urge Sections to emphasize diversity in leadership training and development programs.
 4. Build diversity-related sessions into the annual Section Leaders Conference and all leadership training efforts.
- D. Urge adoption by all entities within the NYSBA of entity-specific diversity plans that are consistent with the objectives of this Diversity Plan, or their review and appropriate modification of existing diversity plans.
1. Strongly encourage periodic review and updating of entity diversity plans.
 2. Recommend designation of an officer or other entity leader with responsibility for ensuring implementation of diversity plans.
 3. Advocate wide dissemination of entity diversity plans, as with the NYSBA Diversity Plan.
 4. Urge the compiling of uniform statistics and information on diversity participation by each entity and member. Association leadership shall encourage each leader and member to update their demographics here:
<https://members.nysba.org/MyNYSBA/Profile/Profile.aspx?ProfileCCO=6#/ProfileCCO>.
- E. Promote diversity in NYSBA membership. Marketing and membership solicitation materials should be welcoming to diverse populations, including showing adequate representation of diverse populations in such materials
1. The NYSBA should compile and disseminate uniform statistics and other information on lawyers and law students – both NYSBA members and non-members – for each of the major diversity categories and target non-NYSBA members for membership solicitations. The membership committee shall consider introductory joint memberships with diverse specialty associations.
 2. With assistance from the Association’s Office of Bar Services, NYSBA entities are urged to engage in active marketing, recruitment and outreach efforts to affinity bars and other professional organizations, legal communities, and law schools to promote diversity.
 3. NYSBA entities shall have liaison relationships with the diversity-focused entities of the Association (such as the Standing Committee on Diversity and Inclusion) and appoint persons who will be active liaisons.

- F. Promote diversity in CLE and other programming, both live and virtual.
1. Implement strategic actions to improve diversity among speakers, moderators, and attendees.
 2. Ensure program content appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
 3. Urge NYSBA entities to explore partnering or co-sponsoring opportunities with affinity bars and other organizations that can contribute to diversity.
 4. Ensure program venues and materials are accessible to participants with disabilities.
 5. Urge NYSBA entities to use program locations and venues, as well as social media, to enhance opportunities for participation by diverse lawyers and law students (e.g., locations that may minimize cost barriers; venues that may increase diverse community participation, like law schools with a diverse student body, affinity bar association locations; and social networking sites that may increase marketing efforts to diverse communities).
- G. Promote diversity in NYSBA publications (hard copy and electronic).
1. Implement strategic actions to increase diversity in NYSBA members responsible for editorial policy and content of publications.
 2. Ensure content of publications appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
 3. Ensure content of publications is accessible to persons with disabilities.
- H. Promote diversity in NYSBA entities' "marquee" events (e.g., annual awards dinners, luncheons, receptions), including diversity of:
1. Speakers,
 2. Award recipients,
 3. Planning and award nominations committees.
 4. Report in Section and Committee success in diversity of speakers annually to the Executive Committee.
- I. Enhance the current tracking and reporting of progress in diversity efforts, including:
1. Enhanced and accurate reporting of NYSBA diversity members in leadership roles in the biennial Diversity Report Card, which will urge more robust participation and tracking by NYSBA entities; encourage greater promotion of the reporting process by NYSBA leadership and accountability for entities that require significant improvement in their diversity efforts.
 2. Ensure widespread dissemination of the biennial Diversity Report Card among NYSBA leadership and throughout NYSBA entities, providing accessible formats for persons with disabilities and through posting on the NYSBA website.
- J. Urge NYSBA entities to develop or enhance mentoring programs that target young lawyers and law students and are designed to advance diversity within the Association.

- K. Urge NYSBA entities to develop, encourage and participate in “pipeline” events and organizations, designed to introduce young and/or diverse students (other than law students) to the law and increase diversity within the profession.

- L. Promote NYSBA’s diversity accomplishments, including the following:
 - 1. Develop and prominently post on the NYSBA website information about successful diversity programs and activities of the Association and its entities.
 - 2. Invest in a regular presence in pertinent legal and diversity publications to showcase NYSBA diversity accomplishments.
 - 3. Urge NYSBA members and staff with an expertise in diversity areas to regularly write and speak on behalf of the NYSBA.

- M. Create a Diverse Speakers Bureau/Database, in conjunction with the standing Committee on Diversity and Inclusion.

- N. Follow the Mansfield Rule (see <https://www.diversitylab.com/pilot-projects/mansfield-rule/>) with respect to leadership positions in all NYSBA entities, e.g. consider at least 30% diversity candidates for all positions, with the goal of ultimately reaching 30% diversity in leadership across the board.



December 6, 2019

President Hank Greenberg
New York State Bar Association
One Elk Street
Albany, New York 12207

Re: NYSBA Diversity Plan

Dear President Greenberg:

The mission of the Committee on Disability Rights includes consideration of all matters affecting people with disabilities. The 14-point plan articulated by the Committee on Diversity to promote diversity and inclusion within the organization is commendable. From our unique perspective as a Committee advocating for people with disabilities through a membership including attorneys with disabilities, we aspire to making every portal of entry to the NYSBA accessible; whether the entry point is a building, website, marquee event or CLE program. Once barriers are eliminated lawyers with disabilities should assume greater leadership within the organization and the profession. We ask the Committee on Diversity to recognize the contributions of lawyers with disabilities to the NYSBA and define programs and priorities with this particular constituency in mind.

We appreciate your efforts and endorse your report.

Sincerely,

Alyssa M. Barreiro
Co-Chairperson

Sheila E. Shea
Co-Chairperson

Statement in Support of the Diversity Plan 2020
Submitted on behalf of the Committee on Membership

The Membership Committee wholeheartedly endorses the Diversity Plan submitted by the Committee on Diversity and Inclusion.

The Membership Committee also acknowledges its role in implementing the Diversity Plan, and will work with the Committee on Diversity and Inclusion to develop actionable plans and programs to advance the Association's commitment to diversity and inclusion.

Respectfully submitted,
The Committee on Membership
By: its Chairs

Mitch Katz
Hyun Suk Choi
December 6, 2019

COMMITTEE ON LEGAL AID

December 23, 2019

TO: NYSBA Committee on Diversity and Inclusion

RE: Diversity Plan

The NYSBA Committee on Legal Aid submits this comment with regard to the Diversity Plan proposed by the NYSBA Committee on Diversity and Inclusion. COLA supports NYSBA's attention to issues related to Diversity and Inclusion and in spirit supports the Diversity Plan. Nevertheless, the Committee finds that the Diversity Plan as drafted lacks important components that are necessary to address Diversity and Inclusion in our Association.

First, COLA believes that the House of Delegates urgently needs to update the Diversity Policy to include "gender identity" and "gender expression". Both gender identity and gender expression are now recognized protected classes under New York Human Rights Law, as codified by the Gender Expression Non-Discrimination Act and NY Unified Court Rules include gender identity and gender expression in all non-discrimination rules. Transgender individuals continue to face heightened levels of discrimination and harassment in society and are underrepresented in the legal profession.

Second, in paragraph N, a goal is established to follow the Mansfield Rule of considering at least 30% diversity candidates for leadership positions. We feel that this goal is not ambitious enough, especially given how broad NYSBA's definition of diversity is. By NYSBA's definition of diversity, it is likely that over 70% of the population would be considered "diverse." Even in the legal community, nearly 40% of the profession are women and 12% are people of color, with over 50% of recent law graduates being women and 40% being people of color. We believe that the goal for the diversity plan should be 50% diversity candidates for leadership positions, with no less than 20% people of color considered.

Third, with regard to demographics, we agree that collecting and tracking demographics is very important. There is impressive work being done nationally in this regard, and we suggest that NYSBA retain an outside consultant to establish best practices in gathering demographics so that the response rate is much higher.

Fourth, COLA recognizes the importance of supporting and mentoring law students and young lawyers from diverse backgrounds as a critical component of not only recruitment but retention in the legal profession for years to come. To that end, NYSBA should take a more proactive role in mentoring law students from diverse backgrounds and rather than "urge" NYSBA entities to partner with minority study groups, NYSBA should require all entities to do so. Moreover, both sub-sections J and K should include a provision for the creation of diversity fellowships to help fund paid opportunities for mentorship and experience for diverse law students and young lawyers.

Finally, in the history section at the beginning, we believe that it is important to name and acknowledge the history of systemic oppression that have kept people who fall under the broad concept of diversity in this plan from joining the legal profession and becoming leaders. At the time that the New York State

Bar Association was formed in 1876, women and people of color were not permitted to attend most law schools in New York. In some instances, they were not permitted to attend for another 50 years. See <https://www.nywba.org/history2/>. Even when able to obtain Juris Doctorates, some, like William Herbert Johnson in Syracuse in 1903, were not permitted to join the New York Bar and practice law, solely because of their race. This systemic exclusion was perpetuated in NYSBA, where NYSBA began accepting women in 1901 but only had its first woman President in 1987. NYSBA had its first African American President in 1993 and its first Asian American President in 20145. It should explicitly be stated that active steps such as those outlined in this plan are critical to address a longstanding history of systemic oppression and exclusion in the legal profession and in NYSBA.



Staff Memorandum

HOUSE OF DELEGATES
January 31, 2020

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. During the past year, the House approved a number of amendments to the Rules for transmittal to the Administrative Board of the Courts. In November, COSAC circulated another set of proposed amendments for comment by interested groups. In response to comments received, the committee has made several amendments to its report, and is presenting its report to you for debate and vote at this meeting.

The proposed amendments may be summarized as follows:

- **Rule 1.8:** Amend paragraph (e) by adding a “humanitarian exception” that will (subject to certain restrictions) allow the following lawyers and organizations to provide financial assistance to indigent litigation clients, beyond the costs and expenses of litigation:
 - lawyers providing legal services without charging a fee
 - non-profit legal services organizations
 - public interest organizations
 - law school clinical programs
 - law school pro bono programs, and
 - lawyers who work for or volunteer with such organizations or programs
- **Rule 3.4:** Add a new Rule 3.4(f), which would prohibit a lawyer from requesting any person (except a client) not to speak with or provide information to another party, unless (i) the unrepresented person is the client’s relative, employee, or other agent and (ii) the advice would not harm the person’s interests – but a new sentence in Comment [4] to Rule 3.4 makes clear that a lawyer may inform any person of the right not to be interviewed by another party.
- **Rule 8.1 (first proposal).** Add a new Rule 8.1(b) and a new Comment [3] to clarify that the disclosure requirements of Rule 8.1(a) are subject to certain confidentiality requirements in the Rules.

- **Rule 8.1 (second proposal).** Amend Comment [1] to make clear that the Rule applies to applications for reinstatement just as it applies to applications for admission.
- **Rule 8.3 (first proposal).** Amend Rule 8.3(c)(1) to provide that the exception to mandatory reporting where information regarding a lawyer's violation of law or rules is confidential under Rule 1.6 also extends to information that is confidential under Rules 1.9 or 1.18. Also amend Comment [2] to make clear that the disclosure obligations of the Rule cannot be avoided by entering into confidential settlements or other private agreements.
- **Rule 8.3 (second proposal).** Amend Comment [3] to provide guidance on the application of the Rule by making clear that a lawyer's conversion or theft of a client's or third party's funds presumptively raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer.

Also attached is a City Bar report that originally proposed the "humanitarian exception" to Rule 1.8(e) that COSAC references at page 3 of its report.

The report will be presented by Prof. Roy D. Simon, co-chair of the Committee on Standards of Attorney Conduct.

MEMORANDUM

January 15, 2020

COSAC Proposals to Amend Rules 1.8, 3.4, 8.1, and 8.3 of the New York Rules of Professional Conduct

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC presents some (but not all) of the proposals that it circulated for public comment, in two separate reports, dated August 13, 2019 and October 31, 2019. COSAC received formal or informal comments on these proposals from the following groups:

- United States Attorneys in New York
- NYSBA Committee on Professional Ethics
- NYSBA Real Property Law Section
- NYSBA Committee on Attorney Professionalism
- NYSBA Dispute Resolution Section
- New York City Bar Committee on Professional Discipline
- New York City Bar Committee on Professional Responsibility

COSAC thanks all of these groups for the time and thought they invested in commenting on COSAC's proposals. COSAC carefully considered every comment. COSAC accepted many of the suggested revisions, and all of the comments directed COSAC's attention to areas of potential concern and helped COSAC to improve its earlier proposals or COSAC's explanation of those proposals.

In light of the comments received, COSAC has revised its proposals to amend or delete the following black letter Rules (and to amend or eliminate some of the Comments to these Rules):

- Rule 1.8: Current Clients: Specific Conflict of Interest Rules
- Rule 3.4: Fairness to Opposing Party and Counsel
- Rule 8.1: Candor in the Bar Admission Process (two proposals)
- Rule 8.3: Reporting Professional Misconduct (two proposals)

Proposed changes to the black letter Rules can take effect only if they are adopted by the Appellate Divisions of the New York state courts. Proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval (although some

proposed changes to the Comments are contingent on Appellate Division approval of the related changes to the black letter Rules).

We first summarize the proposals, then explain the issues and reasoning that led COSAC to propose each amendment, and then set out the essence of the public comments and COSAC's response to these comments. We set out each proposed amendment in redline style, striking out deleted language (~~in red~~) and underscoring added language (in blue).

Summary of Proposals

- **Rule 1.8:** Amend paragraph (e) by adding a “humanitarian exception” that will (subject to certain restrictions) allow the following lawyers and organizations to provide financial assistance to indigent litigation clients, beyond the costs and expenses of litigation:
 - lawyers providing legal services without charging a fee
 - non-profit legal services organizations
 - public interest organizations
 - law school clinical programs
 - law school pro bono programs, and
 - lawyers who work for or volunteer with such organizations or programs
- **Rule 3.4:** Add a new Rule 3.4(f), which would prohibit a lawyer from requesting any person (except a client) not to speak with or provide information to another party, unless (i) the unrepresented person is the client's relative, employee, or other agent and (ii) the advice would not harm the person's interests – but a new sentence in Comment [4] to Rule 3.4 makes clear that a lawyer may inform any person of the right not to be interviewed by another party
- **Rule 8.1 (first proposal).** Add a new Rule 8.1(b) and a new Comment [3] to clarify that the disclosure requirements of Rule 8.1(a) are subject to certain confidentiality requirements in the Rules.
- **Rule 8.1 (second proposal).** Amend Comment [1] to make clear that the Rule applies to applications for reinstatement just as it applies to applications for admission.
- **Rule 8.3 (first proposal).** Amend Rule 8.3(c)(1) to provide that the exception to mandatory reporting where information regarding a lawyer's violation of law or rules is confidential under Rule 1.6 also extends to information that is confidential under Rules 1.9 or 1.18. Also amend Comment [2] to make clear that the disclosure obligations of the Rule cannot be avoided by entering into confidential settlements or other private agreements.
- **Rule 8.3 (second proposal).** Amend Comment [3] to provide guidance on the application of the Rule by making clear that a lawyer's conversion or theft of a client's or third party's funds presumptively raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer.

The remainder of this report will explain each of COSAC's recommendations.

Rule 1.8

Current Clients: Specific Conflict of Interest Rules

In March 2018 the Professional Responsibility Committee of the New York City Bar Association issued a detailed report (the "City Bar Report," attached as Appendix A) recommending a "humanitarian exception" to Rule 1.8(e), as well as a new Comment to Rule 1.8 to explain the exception. The Report was later approved by the City Bar President and represents the position of the City Bar. The new exception to Rule 1.8(e) proposed in the City Bar Report would permit lawyers representing indigent clients on a pro bono basis, lawyers working in legal services or public interest offices, lawyers working in law school clinics, and the legal services offices, public interest offices, and law school clinical programs themselves, to provide financial assistance to indigent litigation clients.

COSAC has carefully considered the City Bar Report and strongly supports the proposal to add a humanitarian exception to Rule 1.8(e). COSAC therefore recommends the City Bar proposal to the House of Delegates with a few relatively minor edits and additions. COSAC has discussed these edits and additions with the City Bar and understands that the City Bar supports COSAC's proposal to amend Rule 1.8(e) as set forth below.

As amended, Rule 1.8(e) would provide as follows:

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; ~~and~~
- (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; ~~and~~

(4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, a law school clinical program, a law school pro bono program, or a lawyer employed by or volunteering for such an organization or program, may provide financial assistance to indigent clients, provided that:

(i) the lawyer, organization or program does not promise or assure financial assistance allowed under subparagraph (e)(4) to a prospective client before

retention, or as an inducement to continue the lawyer-client relationship after retention, and

(ii) the lawyer, organization or program does not publicize or advertise a willingness to provide such financial assistance to clients.

The Comment to Rule 1.8 would be amended as follows:

COMMENT

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain “ultimately liable” to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer’s fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer’s own account. However, ~~like the former New York rule,~~ subparagraphs (e)(1)-(3) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses under subparagraphs (e)(1)-(3) do not include living or medical expenses other than those listed above.

[10] Except in representations covered by subparagraph (e)(4), ~~L~~awyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

[10A] Subparagraph (e)(4) allows certain lawyers and organizations to provide financial assistance beyond court costs and expenses of litigation to indigent clients in connection with contemplated or pending litigation. Examples of financial assistance permitted under subparagraph (e)(4) include payments or loans to cover food, rent, and medicine - but loans must comply with Rule 1.8(a) (governing business transactions with clients). Subparagraph (e)(4) permits lawyers providing legal services without fee, not-for-profit legal services or public interest organizations, and law school clinical or pro bono programs (as well as lawyers employed by or volunteering for such organizations or programs) to provide financial

assistance to indigent clients. The organizations or programs (and lawyers employed by or volunteering for such organizations or programs) may provide such financial assistance even if the organization or program is eligible to seek or is seeking fees under a fee-shifting statute, a sanctions rule, or some other fee-shifting provision. However, subparagraph (e)(4) does not apply to any other legal services provided “without fee.” Thus, subparagraph (e)(4) does not permit lawyers or other organizations to provide financial assistance beyond court costs and expenses of litigation in matters in which they may eventually recover a fee, such as contingent fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer or organization ultimately does not receive a fee.

[10B] Subparagraph (e)(4) is narrowly drawn to allow charitable financial assistance to clients in circumstances in which such financial assistance is unlikely to cause conflicts of interest or to incentivize abuses. To avoid incentivizing abuses, such as “bidding wars” between qualifying organizations or pro bono lawyers to attract or keep clients, subparagraph (e)(4) does not permit a lawyer or organization to promise or assure financial assistance to a prospective client as a means of inducing the client to retain the lawyer or to continue an existing lawyer-client relationship. Nor does subparagraph (e)(4) permit a lawyer or organization to publicize or advertise a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation. However, the restrictions on promises, assurances, advertising, and publicity in subparagraphs (e)(4)(i) and (ii) apply only to financial assistance allowed under subparagraph (e)(4) and not to costs and expenses of litigation that are permitted under subparagraphs (e)(1)-(3).

COSAC Discussion of Rule 1.8(e)

Currently, Rule 1.8(e) allows payment of “court costs and expenses of litigation” for indigent clients represented in connection with contemplated or pending litigation on a pro bono basis but bars other financial assistance to indigent clients as well as other clients. As described in the City Bar Report, the proposed “humanitarian exception” would give certain attorneys and organizations discretion to provide financial assistance to indigent clients represented on a pro bono basis as long as the attorney or organization (i) does not promise financial assistance allowed under Rule 1.8(e)(4) in order to induce a client to commence or continue an attorney-client relationship, and (ii) does not advertise or publicize a willingness to provide such financial assistance.

Some form of humanitarian exception similar to proposed subparagraph (e)(4), with varying terms and limitations, has been adopted by ten other states and the District of Columbia.

COSAC supports the proposed humanitarian exception. COSAC believes that the concerns about attracting clients and fomenting litigation through loans or payments (and the attendant conflicts and professionalism issues that such assistance could raise) would generally not exist for outright payments or loans to (or on behalf of) indigent, non-fee paying litigants for necessities of life such as food, rent, and medicine. (Rule 1.8 already permits lawyers to advance the costs of medical examinations to create evidence or comply with discovery requests, but the rule does not permit lawyers to advance other expenses for medicines or medical treatment.)

Any likelihood of abuse is reduced by the City Bar proposal to prohibit advertising or promises of humanitarian assistance designed to induce a client to retain the lawyer or to continue an existing attorney-client relationship. In addition, COSAC believes that payments of such expenses may sometimes be necessary to enable potentially meritorious litigation to proceed (much as litigation funding already does for many non-indigent clients).

According to the City Bar Report, the public interest bar is said generally to support a humanitarian exception. This claim is based on an ABA nationwide survey of legal aid and public defender organizations and on the City Bar Professional Responsibility Committee's own inquiries of some law school clinics and legal services organizations in New York and New Jersey. The Report notes the prospect that lawyers representing indigent clients with desperate needs could be placed in a difficult position regarding whether to provide financial assistance to their clients (perhaps out of their own pockets), but also notes that law firms and legal services organizations could adopt (and in some cases have adopted) policies that would make decisions on financial assistance less personal, or would assign the decisions on financial assistance to attorneys or administrators who are not involved in the matter in question.

Though not mentioned in the City Bar Report, lawyers and legal service providers may also ethically discuss and actively explore with their clients other available charitable resources that may reduce or eliminate the client's need for financial assistance under subparagraph (e)(4). Nothing in COSAC's recommendation is meant to detract from those efforts. In any case, whether or not the Courts adopt a humanitarian exception, COSAC encourages lawyers to educate themselves and their clients about other charitable organizations that may assist litigants who are struggling financially, and COSAC encourages lawyers to support such organizations and to urge others to support them.

Public comments on Rule 1.8(e) and COSAC's response

New York State Bar Association Committee on Professional Ethics.

The NYSBA ethics committee supports the proposed amendments to Rule 1.8(e) and related Comments but urges COSAC to do three things: (a) define or clarify the meaning of "indigent" in Rule 1.8(e); (b) explain COSAC's view that contingent fee personal injury cases do not qualify for the humanitarian exception; and (c) make clear that a "loan" to a client must comply with Rule 1.8(a) (governing business transactions with clients). Specifically, the ethics committee said:

With the following observations, we agree with COSAC's proposal, which originates with the New York City Bar's Committee on Professional Responsibility.

The N.Y. Rules of Professional Conduct (the "Rules") do not explicitly define "indigent." So noting in our Opinion 786 (2005), which interpreted the identical predecessor of Rule 1.8(e), we said that the New York courts "have defined the term as 'destitute of property or means of comfortable subsistence; needy; poor; in want; necessities' (citing *Healy v. Healy*, 99 N.Y.S.2D 874, 877 (Sup Ct. Kings County 1950)." Since then, Comment [3] to Rule 6.1 was added to define "poor person" in the context of pro bono representations. In our Opinion 1044 (2015), at ¶ 8, we opined that a person qualifying as a "poor person" under that Comment would be "indigent" under Rule 1.8(e). We assume that COSAC's proposal uses the term "indigent" in this same ordinary and common sense, but we believe

that COSAC should expressly so state in a Comment; the matter should not be left to our assumptions.

Also needful of clarity is proposed paragraph (c)(4), which extends to any lawyer providing services without fee to indigent clients, with the explanation in proposed Comment 10A that this does not exclude “an organization or program” that is eligible to seek fees under a fee-shifting statute, common in, among other things, civil rights laws. This is not what the proposed revision of paragraph (c)(4) actually says, so a discordance exists between the proposed Rule and the proposed Comment. Equally unclear is whether a so-called “non-public” interest matter is confined to personal injury contingency cases, and why such cases are invariably of a “non-public” character. Wise public policy may be that such matters are not apt for the “humanitarian exception” but the bar deserves greater guidance than the COSAC proposal puts forth.

That COSAC contemplates that the financial aid may take the form of a loan implicates Rule 1.8(a), to which our Committee has consistently required adherence in loan transactions between a lawyer and client. See, e.g., N.Y. State 1145 ¶ 9 (2018); N.Y. State 1104 ¶ 4 (2016); N.Y. State 1055 ¶ 13 (2015). Although mention is made of other parts of Rule 1.8 in its commentary on the proposed change, COSAC does not say whether the proposal would require compliance with the strict standards of Rule 1.8(a). While we are loath to burden a humanitarian measure with undue complexity, we believe that any business transaction with a client – that is, a transaction other than an act of charity – compels application of Rule 1.8(a). At a minimum, if COSAC disagrees, then we think clarification and explanation is needed.

COSAC has deliberated regarding each of the ethics committee’s suggestions and will address each one.

With respect to the term “indigent,” COSAC does not believe it is a necessary to clarify the meaning of “indigent.” That term has been in Rule 1.8(e) or its predecessor, DR 5-103(B)(2), for at least twenty-five years and has not created problems. Also, as the ethics committee noted, ethics opinions have addressed the meaning of the term “indigent” and have provided substantial guidance that is not readily captured in a short Comment.

With respect to making clear that a “loan” to a client must comply with Rule 1.8(a), COSAC agrees and has added appropriate language to proposed Comment [10A].

With respect to whether personal injury cases serve the public interest, COSAC believes that sometimes they do and sometimes they do not. COSAC has excluded them for the same reason that the New York City Bar excluded them: abuses of the financial assistance exception are least likely to occur when financial assistance to clients is provided by lawyers providing legal services without fee, by not-for-profit legal services or public interest organizations, by law school clinics or law school pro bono programs, or by lawyers working for or with such organizations or programs. Lawyers in the for-profit sector have different incentives and motivations. COSAC understands that a number of jurisdictions allow lawyers to provide financial assistance to a wider variety of needy individual clients (including contingent fee clients) beyond the costs and expenses of litigation, and COSAC recognizes that extending the humanitarian exception to contingent fee lawyers might be an

appropriate step at a later time, but adopting the proposed humanitarian exception would be a big step for New York, and COSAC thinks it best to see how the humanitarian exception works in pro bono and public interest cases before expanding it to the private sector.

New York City Bar

The New York City Bar originated the proposed humanitarian exception and generally supports COSAC's changes to its proposals, but requested the following modifications:

Proposed Comment 10A to proposed Rule 1.8(e)(4) seems to describe the universe of lawyers who may provide financial assistance to indigent clients more narrowly than does the proposed Rule itself. The proposed Rule provides that such assistance may be provided by, among others, “[a] lawyer providing legal services without a fee...” The third sentence of comment 10A lists the other categories of attorneys who are covered by the rule, but excludes this category (except to the extent that it overlaps with lawyers volunteering for public interest organizations or law school clinical or pro bono programs, which is a separately listed category under the Rule). We suggest clarifying language so that the comment does not create confusion about the ability of a lawyer or law firm providing pro bono services to an indigent client to provide such assistance.

COSAC agrees with the City Bar's suggestion and has made the requested modification to COSAC's earlier proposal.

Rule 3.4 **Fairness to Opposing Party and Counsel**

COSAC proposes to add a new paragraph (f) to Rule 3.4. The new paragraph would provide as follows:

Rule 3.4. A lawyer shall not ...

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COSAC also proposes to amend Comment [4] to Rule 3.4 to explain the new provision. As amended, Comment [4] would provide as follows:

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3. However, subject to Rule 4.3, a lawyer may inform any person of the right not to

[be interviewed by any other party.](#)

COSAC Discussion of Proposed Rule 3.4(f)

COSAC proposes to make clear that a lawyer ordinarily may not request a person other than a client to refrain from voluntarily talking with or giving relevant information to another party unless (1) the person is a client's relative, employee, or other agent and, in addition, (2) the lawyer reasonably believes that such a person's interests will not be adversely affected by refraining from giving such information.

COSAC's proposal is based verbatim on the black letter text of ABA Model Rule 3.4(f). The Restatement (Third) of the Law Governing Lawyers adopts a nearly identical position, but explicitly adds in a Comment that lawyers may inform third parties that they have the *right* not to be interviewed by another party if they so choose. COSAC recommends that New York add the Restatement language to Comment [4] to Rule 3.4.

The prohibition (with limited exceptions) on lawyers asking persons not to provide information to opposing counsel derives from the general view that witnesses do not "belong" to any particular party and that "fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." ABA Model Rule 3.4, Comment [1].

The New York Rules do not contain the proposed language. A constellation of other rules might be interpreted to prohibit the conduct at issue, but according to N.Y. City 2009-5 (2009), they do not. Opinion 2009-5 noted that in 2008 the New York State Bar Association recommended that the Courts adopt Rule 3.4(f), and that the COSAC Reporter's Notes explained the need for Rule 3.4(f) as follows:

... Rule 3.4(f) has no equivalent in the existing Disciplinary Rules but deserves a place in the mandatory rules because it provides clear guidance on a question lawyers for entities face on a daily basis. The Rule strikes an appropriate balance between the justice system's search for the truth through the presentation of evidence and an organization's right to control the disclosure of trade secrets or other proprietary information to the organization's adversaries.

Despite the State Bar's support, the Appellate Divisions did not include Rule 3.4(f) in the final version of the Rules that took effect on April 1, 2009. According to Opinion 2009-5, "there is no rulemaking history shedding any light on the omission." Opinion 2009-5 went on to state: "We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved." Thus, at least according to the City Bar ethics committee, lawyers are not currently prohibited from asking witnesses to refrain from voluntarily providing information to opposing counsel.

The vast majority of states closely follow the ABA Model Rule 3.4(f). In fact, anecdotal evidence suggests that even in New York many attorneys believe that the prohibition in proposed Rule 3.4(f) already exists, perhaps because the prohibition exists in many other jurisdictions and because many attorneys intuitively believe that the behavior is wrong.

COSAC has also been told by some criminal defense attorneys that the lack of the prohibition in proposed Rule 3.4(f) leads to asymmetric access to witnesses. This lack magnifies the already asymmetric nature of criminal discovery in New York, where prosecutors have many tools to gather evidence that defense lawyers do not have. We are also told that some defense lawyers refrain from telling a third party witness not to speak to law enforcement or a prosecutor out of a concern that making such a request might lead to a charge of obstruction of justice. Yet on the prosecution side there does not appear to be any (realistic) danger that a prosecutor risks discipline or sanctions for requesting a witness not to speak to defense counsel – even though a “request” coming from a prosecutor or law enforcement official might sound more like an order than a mere request.

Whether or not New York’s Courts adopt proposed Rule 3.4(f), COSAC recommends that the State Bar add the language from the Restatement explicitly stating: “A lawyer may inform any person of the right not to be interviewed by any other party.” That language appears in Comment e to § 116 of the Restatement. COSAC believes this language should be placed in the Comment rather than in the black letter text of Rule 3.4. The ABA Model Rule 3.4(f) contains no analogous language in its Comment, but COSAC believes the Restatement language is valuable.

Public comments regarding Rule 3.4(f), and COSAC’s response

New York State Bar Association Committee on Professional Ethics. After summarizing COSAC’s proposal, the ethics committee said:

We have no objection to the proposals, which hail from the ABA Model Rules as well as The Restatement (Third) of the Law Governing Lawyers.

The Rules do not currently contain an explicit injunction against a lawyer advising anyone from voluntarily providing information to another party. In 2008, the State Bar recommended that the Appellate Divisions adopt a variation of COSAC’s proposed 3.4(f), but the courts declined to do so. In its Opinion 2009-5, the New York City Bar Association cited this omission as a factor in concluding that a lawyer is ethically permitted to advise anyone to refrain from providing information to another party. Thus, COSAC’s proposed Rule 3.4(f) would sharply curtail the City Bar’s expansive view of the Rules.

COSAC explains, persuasively we think, that clarity on this question is important. Despite the City Bar’s cogent opinion, many practitioners believe that advising someone to refrain from voluntarily providing information to another party is wrong and, whether guided by ethics or tactics, forbear from doing so. As COSAC notes, in the context of criminal defense, such advice is rife with peril if the conduct approaches the border of obstruction. We see benefit in stating with some measure of precision whom a lawyer may permissibly advise not to cooperate with another party, and we think that the proposed Rule 3.4(f) achieves an appropriate balance.

In all events, we endorse COSAC’s proposed addition to the Comments to Rule 3.4 that a lawyer may always tell anyone that a person has the right to decline to volunteer information to others.

COSAC appreciates the ethics committee’s support for Rule 3.4(f) as proposed.

Rule 8.1

Candor in the Bar Admission Process

COSAC recommends two changes to Rule 8.1: an entirely new Rule 8.1(b), and an amendment to Comment [1] to Rule 8.3.

Proposal # 1: Proposed amendment adding a new Rule 8.1(b) and Comment [3]

Rule 8.1 requires lawyers to make disclosures in specified circumstances, but the Rule contains no exception for protected information. To remedy this shortcoming, COSAC proposes the following new paragraph (b) to Rule 8.1 and accompanying Comment:

(b) This Rule does not require disclosure of information protected by Rules 1.6, 1.9, or 1.18, or information gained through participation in a bona fide lawyer assistance program.

COMMENT

— ...

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rules 1.6, 1.9, 1.18 and, in some cases, Rule 3.3.

COSAC Discussion of Rule 8.1(b)

ABA Model Rule 8.1 has an explicit exception for information protected by Rule 1.6. The 2005 COSAC version of proposed Rule 8.1 followed the ABA's lead by explicitly providing that disclosure is not required of information otherwise protected by Rule 1.6. A provision in the 2008 NYSBA version of proposed Rule 8.1(b) included that same exception and added an additional clause providing that disclosure is not required of information gained while participating in a *bona fide* lawyer assistance program.

Consistent with the exception to ABA Model Rule 8.1 for confidential information, Comment [3] to ABA Model Rule 8.1 notes that a lawyer representing an applicant for admission is governed by Rule 1.6 (and in certain cases by Rule 3.3). Likewise, Comments to Rule 8.1 proposed by COSAC in 2005 and by the NYSBA in 2008 also referred to the applicability of Rule 1.6.

However, when the New York Courts adopted Rule 8.1 effective April 1, 2009, the Courts dropped proposed Rule 8.1(b), and thus eliminated the exceptions for information protected by Rule 1.6 or gained in a *bona fide* lawyer assistance program. Since Rule 8.1 as adopted did not contain any exception for confidential information, the textual basis for proposed Comment [3] no longer existed, so COSAC deleted it. (In this report COSAC proposes to restore it.) The current version

of Rule 8.1 has only two Comment paragraphs and does not refer to Rule 1.6 or to lawyer assistance programs.

Rule 8.1 is thus in tension with Rule 8.3, which ordinarily requires a lawyer to report a serious violation of the Rules by another lawyer, but includes an express exception providing that Rule 8.3 “does not require disclosure of: (1) information protected by Rule 1.6; or (2) information gained ... while participating in a bona fide lawyer assistance program.” COSAC proposes adding similar confidentiality exceptions to Rule 8.1.

When the Courts omitted these exceptions in 2009 by rejecting the language of proposed Rule 8.1(b), it is not clear whether the Courts meant to require disclosure of information protected by Rule 1.6 and information obtained through a lawyer assistance program. Simon and Hyland suggest that the Courts did not mean to require lawyers to tell bar admission authorities about such confidential information, and further suggest that the Rule be interpreted to include an implied exception. *Simon’s New York Rules of Professional Conduct Annotated* 1666 (2019 ed.) (“we should imply language in Rule 8.1 protecting confidential information and information acquired through a *bona fide* lawyer assistance program”).

COSAC recommends resolving this ambiguity by proposing a new Rule 8.1(b) and Comment [3], using the same language that the NYSBA recommended in 2008, to clarify that there are indeed exceptions for information protected by Rule 1.6 and information gained while participating in a *bona fide* lawyer assistance program. The justification for these exceptions is similar to the justification that underlies the parallel exceptions in Rule 8.3(c). Moreover, the same justification extends to confidential information as to former clients under Rule 1.9, and as to prospective clients under Rule 1.18, so COSAC has added references to Rules 1.9 and 1.18. Finally, the proposed exceptions are justified by the need to avoid discouraging bar applicants who desire to retain counsel or to contact a lawyer assistance program for help with substance abuse, stress, or other problems.

Proposal # 2: Proposed amendment to Rule 8.1, Comment [1]

While the Rule and Comment refer only to applications “for admission” to the Bar, COSAC proposes to make clear in a Comment that the Rule applies equally to applications for reinstatement. The amended Comment would read as follows:

[1] If a person makes a material false statement in connection with an application for admission [or reinstatement](#), it may be the basis for subsequent disciplinary action if the person is admitted [or reinstated](#) and in any event may be relevant in a subsequent admission [or reinstatement](#) application. The duty imposed by this Rule applies to a lawyer’s own admission [or reinstatement](#) as well as that of another.

COSAC Discussion of Rule 8.1, Comment [1]

COSAC believes that the policies supporting discipline for false statements in bar applications apply just as strongly in the case of applications for reinstatement as they do in the case of original applications for admission. COSAC therefore proposes to make clear that the Rule applies equally in both contexts.

Public comments regarding Rule 8.1, and COSAC's response

New York State Bar Association Real Property Law Section. The NYSBA Real Property Law Section supports the addition of a new Rule 8.1(b) but is concerned that (i) the phrase “bona fide” is not a defined term and that (ii) using the modifier “bona fide” before “lawyer assistance program” might be read as restricting lawyers from helping other lawyers.

COSAC does not intend to restrict lawyers helping lawyers and does not believe that limiting the exception in proposed Rule 8.1(b) to a “bona fide” lawyer assistance program will discourage lawyers from helping other lawyers. The phrase “bona fide” does not require definition. The Real Property Section is correct that the phrase “bona fide” is not defined in Rule 1.0 (“Terminology”) or in proposed Rule 8.1(b) or its Comment, but the phrase “bona fide lawyer assistance program” is used in several places in the Rules – see Rules 7.1(b)(1), 7.2(b)(1)(ii), 7.2(b)(4) and, most importantly, 8.3(c).

Specifically, Rule 8.3(c)(2) expressly “does not require disclosure of ... information gained ... while participating in a bona fide lawyer assistance program.” The proposed revision to Rule 8.1 is designed to make the exception to mandatory reporting of material facts in the bar admission process consistent with the exception to mandatory reporting of misconduct of lawyers to bar authorities. Since COSAC has not heard about problems interpreting the phrase “bona fide lawyer assistance program” in Rule 8.3(c)(2), COSAC is not persuaded that it should be defined for purposes of the proposed amendments to Rule 8.1.

New York City Bar

The New York City Bar, while not taking a formal or official position, expressed “overall support” for COSAC’s proposed amendments to Rule 8.1.

Rule 8.3 **Reporting Professional Misconduct**

COSAC recommends two kinds of changes to Rule 8.3:

- Amendments to Rule 8.3(c)(1) and a related change to Comment [2] to Rule 8.3; and
- Amendments to Comment [3] to Rule 8.3

Proposal # 1: Proposed amendments to Rule 8.3(c)(1) and Comment [2]

COSAC proposes two changes to Rule 8.3 and its comments so as to refine or clarify the scope of that Rule’s reporting obligation and its exceptions.

First, Rule 8.3 requires that lawyers in certain circumstances report professional misconduct, and Rule 8.3(c) sets forth certain exceptions to that requirement. While the exceptions currently apply

to information confidential pursuant to Rule 1.6, they do not currently extend to information that is confidential under Rules 1.9 or 1.18.

Second, some lawyers and law firms may believe that they can escape from the duty to report another lawyer in their own firm by entering into a confidential settlement agreement (or other form of nondisclosure agreement) with an accuser.

To remedy these shortcomings, COSAC proposes both (i) an amendment to the text of Rule 8.3(c)(1) and (ii) a corresponding explanatory amendment to Comment [2] to Rule 8.3. The proposed amendment to the text of Rule 8.3 provides that there is an exception to the reporting requirement for information that is confidential under certain rules other than Rule 1.6. The proposed amendment to Comment [2] makes clear that confidential settlement agreements by themselves do not excuse otherwise mandatory reporting. The amended versions of the Rule and Comment would provide as follows:

(c) This Rule does not require disclosure of:

- (1) information otherwise protected by [Rules 1.6, 1.9, or 1.18](#); or ...

Comment

[2] A report about misconduct is not required where it would result in violation of Rules 1.6, 1.9, or 1.18. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. [If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality rules, then Rule 8.3\(a\) requires a lawyer to report the information to a tribunal or other appropriate authority even if there are contractual restrictions on disclosing the information, such as in a settlement agreement or nondisclosure agreement. For example, if a lawyer is accused of sexual harassment, and if other lawyers in the firm know that such misconduct occurred and raises a substantial question about the alleged harasser's fitness as a lawyer, the other lawyers in the firm cannot avoid their reporting obligations under Rule 8.3\(a\) by signing a confidential settlement agreement with the accuser. However, Rule 8.3\(a\) does not necessarily override the obligation of a person bound by a legal duty to maintain confidentiality. A clash between Rule 8.3\(a\) and a statutory or other legal duty of confidentiality would present a question of law that this Comment does not attempt to resolve.](#)

COSAC Discussion of Rule 8.3(c)(1) and Comment [2]

The proposed change to the text of Rule 8.3(c)(1) would provide that the exception includes not only information that is confidential with respect to current clients under Rule 1.6, but also information that is confidential with respect to former clients under Rule 1.9 and with respect to prospective clients under Rule 1.18. COSAC believes that the policy considerations supporting the

exception apply equally no matter which of these Rules provides the basis of confidentiality. This proposal would align the confidentiality exception to Rule 8.3 with the confidentiality exception to Rule 8.1 as COSAC has proposed to amend the latter (discussed above), and for the same reasons.

The second issue addressed in this proposal concerns the relationship between Rule 8.3 and nondisclosure agreements (“NDAs”) or other contractual confidentiality provisions. This issue came to COSAC’s attention in March 2018 when the Solicitors Regulation Authority in the U.K. sent lawyers a notice reminding them that lawyers are required to report potential professional misconduct to disciplinary authorities, and warning law firms that nondisclosure agreements do not negate that reporting requirement. “The authority noted that it has received ‘relatively few’ complaints of inappropriate sexual behavior, just 21 complaints over a two-year period ending in October 2017,” and noted that media reports have suggested that “the low levels of reporting may be the result of NDAs and cultural issues within some firms.” Coe, *UK Regulator Sends Law Firms Gag Order Warning Shot* (Law360 Mar. 12, 2018).

The proposed amendment would clarify that a lawyer otherwise required to report misconduct cannot expand the exceptions to the reporting requirement set forth in Rule 8.3(b) by contracting to keep the information confidential. See Krane, *You Can’t Stop Client from Complaining* (NYPRR Sept. 2003).

Proposal # 2: Proposed amendment to Comment [3] to Rule 8.3

Many lawyers are uncertain about when Rule 8.3(a) requires them to report another lawyer’s violation of the Rules of Professional Conduct. COSAC proposes to add some guidance in this area by amending Comment [3] to Rule 8.3 as follows:

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. [For example, when a lawyer knows that another lawyer has violated the Rules through conversion or theft of a client’s or third party’s funds, such a violation raises a substantial question as to the accused lawyer’s honesty, trustworthiness or fitness as a lawyer. For other examples of violations that would presumptively mandate reporting, see Rule 8.4, Comment \[2\].](#) A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

COSAC Discussion of Rule 8.3, Comment [3]

Rule 8.3(a) mandates reporting when a lawyer’s known violation of the Rules “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer.” That standard is extremely

ambiguous. None of the terms triggering a reporting obligation are defined in Rule 1.0 (“Terminology”) or elsewhere in the Rules. Comment [3] to Rule 8.3 is relevant but not particularly helpful to the practitioner – it merely states that a “measure of judgment” is required, and that the word “substantial” refers to the “seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” By contrast, ABA Model Rule 1.0(*l*) defines the term “substantial” as follows: “‘Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.” (New York has not adopted this definition and the New York Rules do not define the term “substantial.”)

Comment [2] to Rule 8.4 (not Rule 8.3) says more about the types of conduct that meet the mandatory reporting test. It says:

[2] ... Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Simon and Hyland comment that it is easy to come up with examples of violations that implicate a lawyer’s “honesty” (*e.g.*, fraud, deception, misrepresentation, backdating documents, creating false evidence, and stealing funds from trust accounts), but it is difficult to come up with examples of conduct that implicates “fitness as a lawyer.” *Simon’s New York Rules of Professional Conduct Annotated* 1681 (2019 ed.).

In Massachusetts, the Office of Bar Counsel (the Massachusetts disciplinary authority) has published an official Policy Statement that provides some additional guidance on conduct lawyers are required (or not required) to report. Of particular import here, the Policy Statement says:

There are some such matters that clearly fall within the scope of “substantial” misconduct: theft, conversion, or negligent misuse of client funds resulting in deprivation to the client; a felony conviction, or perjury or a misrepresentation to a tribunal or court. As to an impaired or disabled lawyer, certainly when a mental or physical problem results in the abandonment of clients or law practices, the lawyer with knowledge of these types of problems is required to report the situation to Bar Counsel.

There are other matters that must be reported, such as when, as noted in Comment [1] to Rule 8.3, in a lawyer’s judgment, there is likelihood of harm to a victim who is unlikely to discover the offense. For example, an attorney with knowledge of a lawyer’s misrepresentation to a client and concomitant failure, or impending failure, to file a claim within the statute of limitations, which does not fall within the confidentiality exception, is required to report that lawyer if the client is unaware of

the problem and would likely suffer substantial damage as a result of the lawyer's misconduct.

There also are some violations that clearly do not fall within the scope of Mass. R. Prof. C., 8.3. For example, the failure of a lawyer to return a file as promptly as might have been optimal would not require a report, nor would knowledge that a lawyer failed to act with reasonable diligence, if the matter caused little or no potential injury to the client or others. [Emphasis added.]

Reporting Professional Misconduct: An Analysis of the Duties of a Lawyer Pursuant to Mass. R. Prof. C. 8.3 (1998) (citations omitted). See also S. Best, *The Snitch Rule and Beyond, Mandatory and Permissive Reports of Lawyer Misconduct under Mass. Rule 8.3* (2016).

The Massachusetts Bar Counsel's Policy Statement thus "clearly" mandates reporting of misconduct involving client financial matters.

Courts in New York have also consistently emphasized the serious nature of escrow account violations and other financial malfeasance by lawyers. Each Appellate Department has in recent years disbarred lawyers who misused or misappropriated escrow funds or otherwise breached fiduciary duties regarding money. See, e.g., *In re Bloomberg*, 154 A.D.3d 75 (1st Dep't 2017) (disbarment for lawyer who intentionally converted \$200,000 of client funds); *Matter of McMillan*, 164 A.D.3d 50 (2d Dep't 2018) (disbarment for lawyer who deprived sister of inheritance while acting as administrator of deceased mother's estate); *Matter of Castillo*, 157 A.D.3d 1158 (3d Dep't 2018) (disbarment for converting client funds to personal use); *In re Agola*, 128 A.D.3d 78, 6 N.Y.S.3d 890 (4th Dep't 2015) (disbarment for misappropriating client advances earmarked for expenses).

Likewise, all four Appellate Departments have suspended lawyers who engaged in financial misconduct. See, e.g., *Matter of Pierre*, 170 A.D.3d 36 (1st Dep't 2019) (five year suspension for commingling client and personal funds using escrow account to pay personal and business expenses); *Matter of Costello*, 174 A.D.3d 34 (2d Dep't 2019) (one year suspension for misappropriating client funds and failing to maintain required bookkeeping records for attorney escrow accounts); *Matter of Kayatt*, 159 A.D.3d 101 (3d Dep't 2018) (two year suspension for using escrow accounts as business and personal accounts to shield personal funds from tax authorities); *In re McClenathan*, 128 A.D.3d 193 (4th Dep't 2015) (one year suspension for misappropriating client funds and engaging in other escrow account violations).

Ethics opinions also emphasize the importance of abiding by the rules relating to honesty and escrow accounts. See N.Y. State Ethics Op. 1165 (2019) (under Rule 1.15, a lawyer "must not remove from the trust account those sums that the client questions until the dispute is resolved"); N.Y. City 2017-2 (a lawyer who learns that another lawyer has fraudulently billed a client must report the other lawyer pursuant to Rule 8.3 unless the report would reveal client confidences without client's consent); N.Y. State Ethics Op. 965 (2014) (under Rules 1.15 and 8.4, "[c]lient funds in a lawyer's

escrow account may not be shielded from lawyer’s creditor by transferring them to an escrow account held by the lawyer’s lawyer”).

COSAC believes it would make sense for the Comments to Rule 8.4 to include a statement recognizing the consistent treatment by courts of lawyers who convert or steal client funds, or otherwise breach their duty to maintain “a high degree of vigilance” to ensure that funds entrusted to lawyers in a fiduciary capacity are returned upon request. *See Matter of Galasso*, 19 N.Y.3d 688 (2012) (affirming finding of Rule 1.15 violation by a lawyer who had failed to supervise his law firm’s bookkeeper, resulting in loss of client funds). The proposed amendment to Comment [3] to Rule 8.3 therefore makes clear that offenses such as conversion or theft of client funds must be reported. The proposed amendment also cross-references Comment [2] to Rule 8.4, which provides additional and helpful guidance as to what kinds of misconduct reflect adversely on fitness to practice law.

Public comments regarding Rule 8.3, and COSAC’s response

United States Attorneys in New York

The United States Attorneys based in New York, as well as other New York components of the United States Department of Justice (the “Department”), said the Department “believes the proposed amendments to Rule 8.3(c)(1) provide useful clarification for purposes of reporting misconduct.”

Regarding proposed amendments to Comment [2], however, the Department raised an important issue:

The Department occasionally confronts non-disclosure agreements (“NDAs”) during its investigations, although NDAs covering lawyer misconduct are likely rare. We believe that, in general, the public policy in favor of reporting wrongdoing will override an NDA. But we also believe the circumstances in which public policy will override an NDA raise a question of law. And ethicists do not give advice on questions of law. Yet proposed Comment [2], which is only a Comment, and not even a proposed Rule to be officially enacted, sets forth a rather strong statement of law, requiring a lawyer to disregard contractual NDAs. To be consistent with its role as giving ethical advice, as opposed to making a statement of law, perhaps the proposed amendment to Comment [2] could be rephrased as follows:

If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality Rules but is subject to a contractual restriction (or proposed contractual restriction) on disclosing the information, such as in a settlement agreement or nondisclosure agreement, the lawyer should still evaluate whether the public policy in favor of disclosing wrongdoing would render the contractual restriction (or proposed contractual restriction) void and accordingly ineffective to relieve the lawyer from the obligation to report under Rule 8.3(a).

COSAC disagrees. The proposed additions to Comment [2] to Rule 8.3 address a question of ethics, not a question of law. It is well established that lawyers cannot contract out of the Rules of Professional Conduct unless a particular rule provides for waiver. Otherwise, lawyers might seek to draft partnership agreements, retainer agreements, and other contracts that would prohibit counterparties from reporting information to an attorney grievance committee even when Rule 8.3 mandates such a report. Rule 8.3 contains no provision for waiver. Once the elements of Rule 8.3(a) are met, the only exception to mandatory reporting arises when the information to be reported is protected by Rule 1.6 or other confidentiality rules per Rule 8.3(c) – but COSAC’s proposal applies only when a lawyer knows reportable information about misconduct that is “not protected by Rule 1.6 or other confidentiality rules.”

The case-by-case analysis suggested by the U.S. Attorneys could allow lawyers in effect to barter with the professional responsibilities and obligations imposed by Rule 8.3. A settlement provision precluding reporting under Rule 8.3 would be counter to the goals and mission of the bar, especially the goals of protecting the public and protecting the integrity and reputation of the legal profession. Lawyers have a duty to report when the elements of Rule 8.3 are met, and it is the role of an attorney grievance committee to determine whether a violation has occurred and, if so, what penalty should be imposed on the offending attorney in light of all of the facts and circumstances.

If lawyers are currently unsure whether Rule 8.3 or an NDA would take precedence, or if some lawyers think that the issue must be decided on a case-by-case basis, amended Comment [2] will make clear that Rule 8.3 mandates a report despite a non-disclosure agreement. Moreover, if lawyers know they cannot evade mandatory reporting by inserting an NDA into a settlement agreement arising out of sexual harassment or other offenses, COSAC believes that lawyers may be less likely to engage in the prohibited conduct in the first place.

New York State Bar Association Dispute Resolution Section

The NYSBA Dispute Resolution Section submitted the following comment:

The Section believes that the proposed changes to Rule 8.3 and its accompanying commentary are generally desirable With respect to the proposed amendment to Comment [2] to Rule 8.3, on its face, the amendment addresses confidentiality and non-disclosure agreements. Notably, it does not address the issues of mediation confidentiality and a mediator’s confidentiality obligations. Although we do not understand the amendment to be so broadly drafted as to encompass mediation confidentiality, we are concerned that it could be misunderstood to have such an effect. We propose, therefore, that the amendment include the following express limitation: [“This rule does not affect the obligation of a mediator to maintain the confidentiality of mediation proceedings.”](#)

The Section has no other recommendations regarding the balance of the text in, or the other changes proposed by COSAC to, Rule 8.3 and its accompanying commentary.

COSAC agrees with the Dispute Resolution Section’s comment to the extent that a mediator has a legal obligation not to disclose what occurs in mediation proceedings, but takes no position on that legal question. COSAC has added language at the end of Comment [2] recognizing that Rule 8.3(a) does not necessarily override the obligation of a person bound by a legal duty to maintain

confidentiality. Such a clash would present a question of law beyond the purview of a Comment to resolve.

New York State Bar Association Committee on Attorney Professionalism

Regarding COSAC's proposed amendments to Comment [2] to Rule 8.3, two individual members of the NYSBA Committee on Attorney Professionalism ("CAP") raised questions about the standard "come to know"? Is it good faith? Is an investigation or other due diligence required?

COSAC has changed the phrase "come to know" to the single word "know," which is defined in Rule 1.0(k). A lawyer who "knows" a fact must at some point have "come to know" the fact in the past, so reducing the phrase to the word "know" does not sacrifice any meaning. As for whether an investigation or other due diligence is required, that is an issue more closely related to a lawyer's or law firm's supervisory duties under Rule 5.1 and need not be addressed in the Comments to Rule 8.3.

CAP also noted that reporting a lawyer to an attorney grievance committee is likely to have strong negative ramifications regarding the reported lawyer's reputation and perceived character, and might even trigger libel or slander liability for attorneys and firms filing a report under Rule 8.3. The Committee also questioned whether COSAC's proposal could have unintended consequences if an accused would only agree to a monetary settlement where there is confidentiality. Would the ability of a complaining witness to procure a reasonable settlement would be adversely affected?

COSAC acknowledges all of these concerns but does not believe that mandatory reporting is a policy choice requiring or allowing a balancing of interests. COSAC's proposal is simply intended to point out that a non-disclosure agreement cannot negate a mandatory reporting duty under Rule 8.3.

New York State Bar Association Real Property Law Section

The NYSBA Real Property Law Section believes that the proposed amendments to Comments [2] and [3] to Rule 8.3 are acceptable.

New York City Bar

One committee of the New York City Bar submitted the following comment on COSAC's proposed amendment to Comment [3] to Rule 8.3:

[T]he New York City Bar proposes that the text of the amendment be altered slightly to make clear that the conduct described in Comment [2] to Rule 8.4 (which is referenced in the proposed revision to Comment [3] to Rule 8.3) must be evaluated on a case-by-case basis in order to determine whether the conduct raises a "substantial question" about a lawyer's honesty, trustworthiness, or fitness as a lawyer. Existing Comment [2] to Rule 8.4 states that "illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law." However, it does not follow that the conduct described in Comment [2] to Rule 8.4 always raises a substantial question about a lawyer's honesty, trustworthiness or fitness as a lawyer. For instance, an act of violence such as misdemeanor assault may

constitute conduct that reflects adversely on a lawyer's fitness to practice law. However, if the act of violence was an aberration in the lawyer's life and did not involve aggravating factors (e.g. non-domestic violence, extenuating circumstances, etc.) it may not be the case that the incident raises a "substantial question" about the lawyer's fitness as a lawyer. As a result, the Committee believes that the proposed addition to Comment [3] to Rule 8.3 should be modified to make clear that whether actions mandate reporting under Rule 8.3 must be evaluated on a case-by-case basis.

COSAC understands these concerns, and has added the word "presumptively" before the citation to Rule 8.4, Comment [2]. COSAC thinks this is an accurate reflection of New York case law and gives better guidance to attorneys about the kinds of offenses that trigger mandatory reporting while leaving room for a case-by-case analysis of the particular offense. As for mitigating circumstances, however, those are for the attorney grievance committee to take into account in determining discipline and are not generally relevant to determining whether a lawyer has a reporting duty under Rule 8.3.

REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE

**PROPOSED AMENDMENT TO RULE 1.8(E), NY RULES OF PROFESSIONAL
CONDUCT**

We propose an amendment to New York’s Rule 1.8(e), Rules of Professional Conduct, and its comments, in order to allow attorneys handling pro bono matters to provide financial assistance to indigent clients, beyond the court costs and expenses of litigation allowed by the current Rule.

**I. NY RULE 1.8(e) AND COMMENTS, WITH PROPOSED NEW LANGUAGE
UNDERLINED**

NY Rule 1.8(e)

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- a. (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- b. (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; ~~and~~
- c. (3) A lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; and
- d. (4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship, and shall not publicize or advertise a willingness to provide such financial assistance to clients.

Comments to Rule 1.8(e): Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain “ultimately liable” to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer’s fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer’s own account. However, like the former New York rule, paragraph (e), subsections (1) to (3), limit permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Under those subsections, permitted expenses do not include living or medical expenses other than those listed above.

[10] With the exception of representations covered by subsection (e)(4), lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

[11] Subsection (e)(4) allows financial assistance, beyond court costs and expenses of litigation, to be given to indigent clients in connection with contemplated or pending litigation, in certain circumstances. For the purposes of subsection (e)(4), legal services provided "without fee" do not include cases accepted on a contingent fee basis, regardless of whether the lawyer receives a fee, and do not include litigation in which the lawyer collects fees under a fee-shifting statute. As the rule indicates, however, not-for-profit legal services or public interest organization, or a law school clinical or pro bono programs, may provide financial assistance to indigent clients under subsection (e)(4) even if the organization or program is seeking fees under a fee-shifting statute. Subsection (e)(4) is narrowly drawn to allow acts of charity in some specific circumstances in which it is unlikely that the giving of financial assistance would cause serious conflicts of interest or incentivize abuses.

II. RATIONALE FOR THE PROPOSAL

President Trump's first travel ban recently stopped a four-month old Iranian baby and her family from entering the United States for life-saving surgery. Lawyers worked to help the family, and the lawyers' firm agreed to underwrite the expense of bringing the family and the baby to New York and back to Iran, and all costs while in New York City. If the lawyers were representing the girl and her family in connection with actual or contemplated litigation, this act of charity could have been a violation of the disciplinary rules.

New York's bar should be taking the lead in enhancing access to justice and facilitating the charitable impulses and public service tradition of its lawyers. The proposed Rules change, with its narrow focus and careful safeguards, will increase the scope of the charity New York bar members can offer without sacrificing other important goals of the Rules of Professional Conduct.

a. Background

Paralleling the ABA's Model Rules of Professional Responsibility, the New York Rules of Professional Conduct prohibit a lawyer giving financial assistance to a client, in connection with litigation, except in narrowly defined circumstances. A lawyer may advance "costs and expenses of litigation" under some circumstances and conditions, and may pay such expenses on behalf of "an indigent or pro bono client." Rule 1.8(e). The rule under the last iteration of New York's prior Code was the same. *See* DR 5-103(B).

Rule 1.8(e) derives from the historical prohibitions on champerty and maintenance.¹ Champerty was the crime of improperly stirring up litigation by investing in a lawsuit; maintenance was a variety of champerty, usually taking the form of "providing living or other expenses to a client so that the litigation could be carried on."² These prohibitions have been narrowed in modern times, but still survive in part in the law of many jurisdictions. The New York Judiciary Law embodies some of the ancient concerns about champerty and maintenance.³

¹ *See* 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 13:18 (4th ed. 2014); ROY D. SIMON & NICOLE HYLAND, *SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED* 532 (2016 ed.); Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 *Geo. J. Legal Ethics* 39, 50 (2015).

² HAZARD, HODES & JARVIS, *supra* note 1, § 13:18.

³ Judiciary Law § 488: An attorney or counselor shall not:

2. By himself or herself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his or her hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to:

b. "Humanitarian" Exceptions in Ten States and the District of Columbia

In recent years, some jurisdictions have made exceptions to the prohibition on giving financial assistance to clients that allow lawyers to make loans or gifts to relieve necessitous circumstances. In some states, this "humanitarian" exception is tied to client financial difficulties that could cause the client to settle the litigation that is the subject of the representation early and for a lower amount than could likely be obtained later. The main justifications for these "humanitarian exceptions" are (1) motives of simple charity, (2) easing access to the justice system for the indigent,⁴ or (3) helping "level the playing field between financially unbalanced parties."⁵

Eleven U.S. jurisdictions—including some with very large bars, notably California, D.C., and Texas—have codified humanitarian exceptions of different kinds. The full texts of these rules and, if applicable, comments, are attached to the end of this report as Appendix A. In summary, this is what the different rules allow:

- i. **Alabama:** "A lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer." Alabama Rule 1.8(e).

a. an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received;

b. a lawyer representing an indigent or pro bono client paying court costs and expenses of litigation on behalf of the client;

c. a lawyer advancing court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or

d. a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, paying on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

3. A lawyer that offers services as described in paragraphs b, c and d of subdivision two of this section shall not, either directly or through any media used to advertise or otherwise publicize the lawyer's services, promise or advertise his or her ability to advance or pay costs and expenses of litigation in such manner as to state or imply that such ability is unique or extraordinary when such is not the case.

4. An attorney or counselor who violates the provisions of this section is guilty of a misdemeanor.

⁴ See, e.g., North Dakota Rules of Prof'l Responsibility, Rule 1.8(e), cmt. 11.

⁵ SIMON & HYLAND, *supra* note 1, at 547. See also D.C. Rules of Professional Conduct, Rule 1.8.(d), cmt. 9.

- ii. **California:** A lawyer may pay or agree to pay "personal or business expenses" of a client to third persons from funds collected or to be collected for the client as a result of the representation, and "[a]fter employment," may lend money to the client upon the client's written promise to repay. California 4-210(a).
 - (1) The Board of Trustees of the California Bar recently proposed to change and broaden this rule. The proposal would allow attorneys or their firms to "pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person in a matter in which the lawyer represents the client" California Proposed Rule 1.8.5(b)(4).
- iii. **District of Columbia:** In addition to court costs and litigation expenses, a lawyer may "pay or otherwise provide" "[o]ther financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings." District of Columbia Rule 1.8(d).
- iv. **Louisiana:** "In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances" subject to a variety of conditions and limitations, including: the client's necessitous circumstances must "adversely affect the client's ability to initiate and/or maintain the cause," and the financial assistance cannot be advertised, used as an inducement to hire the lawyer, given prior to hiring of the lawyer, or be subject to any interest, fees, or charges. Louisiana Rule 1.8(e)(4)-(5).
- v. **Minnesota:** "A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client." Minnesota Rule 1.8(e)(3).
- vi. **Mississippi:** A lawyer may "advance" "[r]easonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation" and "[r]easonable and necessary living expenses." which shall be repaid if the matter is successfully concluded, and subject to a variety of limitations and conditions, including: client must be in "dire and necessitous circumstances," financial assistance cannot be advertised and cannot be given prior to 60 days after the

representation started, it must be reported to the Mississippi Bar Standing Committee on Ethics, and cannot exceed \$1500 without approval of that Committee. Mississippi Rule 1.8(e)(2).

- vii.** *Montana:* "A lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client." Montana Rule 1.8(e)(3).
- viii.** *New Jersey:* "[A] legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined [NJ Court Rules] may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee." New Jersey Rule 1.8(e).
- ix.** *North Dakota:* "A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client." North Dakota Rule 1.8(e)(3).
- x.** *Texas:* "A lawyer may advance or guarantee . . . reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter." Texas Rule 1.08(d)(1).
- xi.** *Utah:* "[A] lawyer representing an indigent client may pay . . . minor expenses reasonably connected to the litigation." Utah Rule 1.8(e)(2).

The remaining U.S. jurisdictions have rules paralleling the ABA's and New York's Rule 1.8(e).

Although a few states with the same ABA/NY wording in their rules of professional conduct have construed them to allow small "humanitarian" gifts in some circumstances,⁶ or have held that a humanitarian motive might mitigate the need to punish a violation,⁷ New York appears to strictly construe its Rule 1.8(e).⁸ In New York, financial assistance provided under the exceptions must be "directly related to litigation,"⁹ and the exceptions listed in the rule are exclusive.¹⁰ New York courts have disciplined attorneys for giving or loaning money to clients for living or medical expenses, seemingly without regard for the amount of money involved or whether the client's financial situation was dire.¹¹

⁶ See, e.g., Fla. Bar v. Taylor, 648 So. 2d 1190 (Fla. 1994) (no violation to give indigent client used clothing for child and \$200 for necessities as "act of humanitarianism"); Okla. Bar Ass'n, Ethics Op. 326 (2009) (permitting "[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses" because such gifts "offer no possibility of a share of the proceeds of any pending action, nor is such a gift related to 'officials intermeddling' to enable the inmate to prosecute or defend a pending action. The client's choice of a public defender is dictated by his or her indigent circumstances, and not by expectation of financial assistance"); Va. State Bar, Ethics Op. 1830 (2006) (public defender may give indigent client nominal amount to buy personal items at jail commissary; gift not "in connection with" client's case); Maryland Ethics Docket 2001-10 (opining that a "de minimus gift" is not a violation but attorney cannot "provide housing or other financial assistance in connection with litigation"); Ariz. Bar Ass'n, Ethics Op. 91-14 (1991) (attorney may give a gift, but not extend a loan, to a "previously-retained client[]," "if it truly resulted from a charitable motivation by the attorney, and so long as the gift was not accompanied by any business, proprietary or pecuniary overtures, and there was no expectation by the attorney of any repayment by the client at any future time") (quotation marks omitted).

⁷ See, e.g., In re Berlant, 458 Pa. 439, 446 (1974) (stating that the fact that a lawyer violated professional responsibility rules by advancing money to an indigent client "for rent, food, and other necessities" "may be a mitigating factor when considering the sanction"); John Sahl, *Helping Clients With Living Expenses: "No Good Deed Goes Unpunished,"* 13 No. 2 Prof. Law. 1 (Winter 2002) (noting that the Ohio Supreme Court appears to have a practice of imposing the least onerous sanction—public reprimand—on attorneys for violating the rule against paying client living expenses).

⁸ But note that, by the plain text of the rule gifts or financial assistance are allowed in non-litigation matters. And according to Roy Simon, without violating Rule 1.8(e), "[a] lawyer may give the client things that have *de minimis* monetary value, such as a ride to the court house, a fruit basket at the holidays, or an occasional lunch, and a lawyer may certainly assist the client in purely non-monetary ways, such as by writing a favorable employment recommendation for the client." SIMON & HYLAND, *supra* note 5, at 540.

⁹ N.Y. Rules Prof'l Conduct, Rule 1.8, cmt. 9B. See also N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 2010-03 (stating that Rule 1.8(e)(1) "is strictly limited to those expenses and costs incurred in litigating a lawsuit to completion").

¹⁰ See, e.g., N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 852 (2011) (attorney representing client in asbestos litigation may not as part of settlement indemnify defendants for client's Medicare liens); N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 553 (1983) (attorney in matrimonial matter may not lend money or guarantee a loan to allow client to bid on matrimonial property being sold pursuant to an equitable distribution decree); N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 133 (1970) (no loans or guarantees of money for client are allowed except those specially enumerated in the rules); SIMON & HYLAND, *supra* note 5, at 547 ("[A] lawyer may not pay or guarantee any expenses that go beyond court costs and expenses of litigation.").

¹¹ See, e.g., In re Cellino, 21 A.D.3d 229 (4th Dep't 2005); Matter of Arensberg, 159 A.D.2d 797, 798 (3d Dep't 1990). See also In re Moran, 42 A.D.3d 272, 273 (4th Dep't 2007) (disciplining attorney for circumventing ban on providing financial assistance to clients); Waldman v. Waldman, 118 A.D.2d 577 (2d Dep't 1986) (upholding disqualification of attorney for violating rule against financial assistance to clients).

c. Rationales for the Current N.Y. Rule 1.8(e) and the Proposed Amendment

The Comments to N.Y. Rule 1.8(e) set out the current justifications for the prohibition:

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.¹²

Commentators have also identified an additional policy reason supporting this rule: a humanitarian exception to the ban on giving financial assistance to clients might lead lawyers to compete with each other for business through the generosity of the gifts or loan terms.¹³

The concern about encouraging frivolous lawsuits is not persuasive. First, it is rooted in an ancient hostility to litigation that has been largely rejected in the United States for decades.¹⁴ Second, frivolous litigation is deterred directly in other ways, making Rule 1.8(e) unnecessary for that purpose. Frivolous litigation is sanctionable in New York courts under 22 NYCRR 130-1.1 and CPLR 8303-a, and in federal courts in New York under Fed. R. Civ. P., Rule 11. In addition, the New York Rules of Professional Conduct directly prohibit frivolous lawsuits, claims, and defenses in Rule 3.1, and litigation tactics that "have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense" in Rule 3.2. Third, the financial self-interest of lawyers and their concern for the professional reputations provide incentives against pursuing frivolous litigation.¹⁵

¹² Cmt. 10.

¹³ HAZARD, HODES & JARVIS, *supra* note 1, § 13:18 n.26.

¹⁴ See Utah State Bar, Ethics Advisory Opinion Comm., Op. No 11-02 (2011) ("The original goal of not stirring up litigation is no longer a justification for this rule. The United State Supreme Court has made clear, in finding lawyer's advertising to be protected commercial speech, that there is no state interest in suppressing litigation in general as an individual has a right to seek judicial redress for wrongs he has suffered.") (citing *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988)).

¹⁵ See, e.g., Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. Rev. 457, 486 (2014) ("Similar to contingency fee cases, lawyers are less likely to lend money to clients during litigation of claims with little merit.").

The concern about lawyer-client conflicts is a real one. But the concern is not weighty enough to justify a total prohibition on humanitarian assistance to clients. A tailored exception, surrounded by safeguards, would provide significant benefits to indigent clients in New York while avoiding the core concerns that underline the current Rule 1.8(e).

For one thing, there will rarely be conflicts concerns if the lawyer makes an outright gift, rather than extending a loan.¹⁶ Our proposal allows both gifts and loans, but because it is limited to representations of the indigent undertaken pro bono, we think it unlikely that many loans will occur. If a loan is made under the proposed new rule, any conflicts which may arise could be address under the usual process of Rule 1.7. Moreover, the Rules already tolerate the potential for conflicts created by contingency fees and by advances of court costs and litigation expenses. Loans to clients for humanitarian reasons would not seem to create greater and fundamentally different kinds of potential conflicts than those currently tolerated.

The concern about lawyers competing based on financial assistance they can provide is addressed by provisions in the proposed new rule (1) limiting financial assistance to pro bono cases and specifically excluding contingency fee representations, and (2) banning the advertising of financial assistance, the offer of financial assistance prior to establishment of the attorney-client relationship, and the use of financial assistance as an inducement to retain an attorney in the first instance or to continue the representation. In addition, where there is no financial incentive for obtaining a client, competition for pro bono clients should continue to be rare.

Some may be concerned that a rule change allowing lawyers to give financial assistance to indigent clients will result in lawyers and organizations providing legal services to the indigent being inundated with requests for money—requests that will likely exceed available resources, and requests that, if rebuffed, could potentially cause tension in the attorney-client relationship. We note that the proposed rule change would not require that financial assistance be given; it would merely permit it. Lawyers and legal services providers could decide to have an organizational policy against providing such assistance. Being able to point to such an organization-wide policy would allow attorneys to decline requests from clients without causing interpersonal discomfort and potential damage to the attorney-client relationship. Or organizations could have policies that, for example, channel all requests for financial assistance away from the individual attorney to a central-decisionmaker who operates under pre-existing rules and standards.

¹⁶ Okla. Bar Ass'n, Ethics Op. 326 (2009) (“It is the expectation of repayment which gives rise to the conflict of interest concern, creating the risk that the lawyer might encourage the bird in hand of a settlement offer over the two birds which might be available at trial. Here, as there is no expectation of repayment, there is no concern of a conflict of interest.”).

The committee making this proposal reached out to several law school clinics and legal services organizations in New York and New Jersey to see whether they had any concerns about a rule allowing financial assistance to be given to indigent clients in pro bono representations. This was not an exhaustive survey, and so the responses should be understood to be anecdotal rather than broadly representative. But we can report that the responses received to date to our inquiries have not found concerns about such a rule.

The proposing committee is also aware that, at the request of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), the National Legal Aid and Defender Association (NLADA) conducted a nationwide survey of legal aid and public defender organizations to determine whether they would support a change to the ABA's Model Rules of Professional Conduct 1.8(e), to allow an exception for subsistence payments to litigation clients of legal aid and defender offices. We understand that a large majority of the legal aid and defender organizations which responded were supportive of such a change, especially if the dollar amounts involved were limited. We also understand that there have been discussions between SCLAID and the ABA Standing Committee of Ethics and Professional Responsibility about whether Model Rule 1.8(e) might be amended to allow a humanitarian exception.

Finally, the committee informally consulted bar regulators and academic ethicists in the jurisdictions which currently have a version of a “humanitarian exception,” in order to assess whether those rules have led to any notable abuses or problems. Without exception, no one reported problems with a humanitarian exception in pro bono cases. The only concerns which we heard about came from a few jurisdictions which allow loans or gifts to clients in for-fee cases; it appears that some plaintiff-side attorneys in personal injury or related areas may have been tempted to use promises of loans or gifts for living expenses or other purposes as a way to induce clients to hire the attorney. Since the proposed change for New York is very clearly limited to representations in which the motive for financial gain by the attorney is absent, and since the text of the proposal clearly bars any promises, inducements, or advertising, we are satisfied that any significant abuse of the proposed rule is unlikely to occur in practice.

III. APPENDIX A: FULL TEXT OF STATE RULES

a. Alabama 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
 - (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;

- (3) A lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and
- (4) In an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, from his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.
- ***Comments – Emergency Financial Assistance:***
 - On occasion, a client of a lawyer may suffer a financial emergency. The client may be totally unable to turn to traditional sources of emergency financial assistance such as banks, families, or neighbors to obtain necessary assistance in meeting such a financial emergency. While the client may have an expectation that a recovery in a pending lawsuit would provide ample funds from which to repay a loan, the collateralization of a loan with the anticipated proceeds of litigation is not generally accepted as a good business practice. In these circumstances, the only alternative to whom the client may realistically be able to turn is the lawyer handling the lawsuit. For true financial emergencies, arising from circumstances beyond the control of the client, the Rule permits the lawyer either to advance a loan to the client or to guarantee the repayment of a loan by a third party to the client.
 - A lawyer departs from the role of advocate when the lawyer becomes a lender to the client. The lawyer as lender is placed in a position adverse to the client, particularly if the client refuses to repay. Since the repayment by the client may not be contingent on the outcome of a matter, the client is always responsible for repayment of any loan, whether the client wins or loses the pending lawsuit.
 - Rule 1.8(e)(3) permits the lawyer to act as both advocate for and lender to the client under only the narrowest and most compelling of circumstances. The lawyer must not, prior to employment, directly or indirectly, have assured the client of the availability of emergency financial assistance. The assistance must meet a true emergency. Emergency financial assistance does not include the regular provision of income and support to a client. Rather, the Rule is intended to permit the lawyer to help in those few cases which rise to the level of an emergency. The lawyer is never obligated to provide such assistance, and he is obligated to attempt collection from the client regardless of the outcome of the matter.

b. California 4-210(a):

- (a) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:
 - (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or
 - (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
 - (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

c. California—Proposed Rule 1.8.5 (Proposed Rule Adopted by the Board of Trustees of the State Bar of California on March 9, 2017¹⁷):

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

¹⁷ <http://ethics.calbar.ca.gov/Committees/RulesCommission2014/ProposedRules.aspx>

- (c) “Costs” within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

d. District of Columbia 1.8(d):

- (d) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:
 - (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and
 - (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.
- ***Comment – Paying Certain Litigation Costs and Client Expenses:***
 - [9] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to “bid” for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

e. Louisiana 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as follows.
 - (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).
 - (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
 - (3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services.
 - With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses.
 - With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.
 - (4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.
 - (i) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.
 - (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
 - (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a

client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

- (iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.

- (5) Any financial assistance provided by a lawyer to a client, whether for court costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.

- (i) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.

- (ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to any federally insured bank, savings and loan association, savings bank, or credit union where the lawyer's ownership, control and/or security interest is less than 15%.

- (iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

- (iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including any fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.

- (v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however, that the court must have accepted and exercised responsibility

for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.

- (vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.

- (vii) For purposes of Rule 1.8(e), the term “financial institution” shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

d. Minnesota 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

- (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

- (3) A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

- ***Comment – Financial Assistance:***

- [10] Lawyers may not subsidize lawsuits brought on behalf of their clients, such as by making loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing

indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. A lawyer may guarantee a loan to enable the client to withstand delay in litigation under the circumstances stated in Rule 1.8 (e)(3).

e. Mississippi 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:
 - 1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and
 - 2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
 - a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
 - b. Reasonable and necessary living expenses incurred.
 - The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.
 - Payments under paragraph 2 shall be limited to \$1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed \$1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating

\$1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating \$1,500 or less, shall be confidential.

f. Montana 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
 - (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;
 - (3) A lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client.

g. New Jersey 1.8(e)

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
 - a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee.¹⁸

¹⁸ New Jersey Rule of Court, Rule 1:21-11(a) provides:

(1) Qualifying Pro Bono Service. Qualifying pro bono service consists of:

(i) legal assistance to low-income persons;

(ii) legal assistance to nonprofit charitable, religious, civic, community, or educational organizations or governmental entities in matters that are designed primarily to address the needs of low-income persons;

h. North Dakota 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
 - (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
 - (3) A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client.
- ***Comment – Financial Assistance to Client:***
 - [11] Rule 1.8(e) recognizes the impact of finances on a client's access to the judicial system and provides limited avenues to improve the client's financial ability to be represented by counsel through negotiation or litigation or both without undue financial pressure to settle prematurely. This provision is not to be interpreted as requiring lawyers to provide financial assistance to clients.

i. Texas 1.08(d):

- (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(iii) legal assistance to individuals, groups, or organizations seeking to secure, protect, or advance civil rights, civil liberties, or other rights of great public importance; or

(iv) legal assistance to nonprofit charitable, religious, civic, community, or educational organizations or governmental entities in matters in furtherance of their purposes, where payment of standard legal fees would significantly deplete the organization's or entity's economic resources or would otherwise be inappropriate.

Qualifying pro bono service does not include partisan political activity or service on a nonprofit board of directors or other service that is unrelated to the provision of legal representation or legal advice. It does include legal mentoring and training to prepare attorneys, or students in a law school clinical or pro bono program as defined in subsection (a)(3), to provide qualifying pro bono service.

Qualifying pro bono service is undertaken outside the course of ordinary commercial practice and is performed without a fee from the client. If a fee-shifting statute applies in a qualifying pro bono case, attorneys or firms in commercial practice may seek fees and are strongly encouraged to donate them to a legal services or public interest organization or law school clinical or pro bono program as defined in subsections (a)(2) and (3). If an attorney or firm in commercial practice retains fees in a qualifying pro bono case, no attorney may claim an exemption from court-appointed pro bono service based on the hours expended on that case. See R. 1:21-12(b). Cases accepted on a contingency-fee basis do not constitute qualifying pro bono service regardless of whether the attorney receives a fee.

- (1) A lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
- (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

j. Utah 1.8(e)

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.
- **Comment – Financial Assistance**
 - [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses and minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.
 - [10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

Professional Responsibility Committee
 Wallace Larson, Jr., Chair (wl Larson@cgsh.com)
 Andrew Kent, Primary Draftsperson (akent@fordham.edu)
 March 2018

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
BAR CENTER, ALBANY, NEW YORK
NOVEMBER 1, 2019**

Present: Jonathan B. Behrins, Mark A. Berman, John P. Christopher, Norman P. Effman, Donna England, Evan M. Goldberg, Henry M. Greenberg, Richard M. Gutierrez, Erica M. Hines, Andre R. Jaglom, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Michael Miller, Domenick Napoletano, Marne L. Onderdonk, Aimee L. Richter, William T. Russell, Robert T. Schofield, IV, Diana S. Sen, Rona G. Shamoan, Carol A. Sigmond, Tucker C. Stanclift, Mark T. Starkman, Jean Marie Westlake.

Guests: James M. Barnes, T. Andrew Brown, Donald C. Doerr, Simeon Goldman, Claire P. Gutekunst, Seymour W. James, Jr., Hilary F. Jochmans, Katrina F. Kuh, Bennett Liebman, David R. Marshall, David P. Miranda, Hon. Karen K. Peters, Richard Rifkin, Mirna M. Santiago, Lauren E. Sharkey, Prof. Roy D. Simon, Jr.

Mr. Greenberg presided over the meeting as President of the Association.

1. Approval of minutes of meetings. The minutes of the June 13-14, 2019 meeting were approved as distributed.
2. Consent calendar:
 - a. Bylaws of Judicial Section.
 - b. Bylaws of Tax Section
 - c. Bylaws of Commercial and Federal Litigation Section
 - d. Bylaws of Women in Law Section

The consent calendar, consisting of the above items, was approved by voice vote.

3. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported that through September 30, 2019, the Association's total revenue was \$19.2 million, a decrease of approximately \$762,000 from the previous year, and total expenses were \$16.2 million, a decrease of approximately \$49,000 over 2018. The report was received with thanks.
4. Report of Special Committee on Strategic Communications. David P. Miranda, chair of the committee, reviewed the committee's initiatives with respect to public relations, media and marketing, communications, and products, programming and publications. The report was received with thanks.
5. Report of staff leadership. Pamela McDevitt, Executive Director, updated the Executive Committee with respect to technology upgrades, including the planned launch of the new website on December 20, 2019, the new association management system, and new

accounting and contract management systems. She introduced Gerard McAvey, who joined the staff as Director of Marketing. The report was received with thanks.

6. Report and recommendations of Committee on Bylaws. In his capacity as chair of the committee, Mr. Schofield outlined proposed bylaws amendments to implement the recommendation of the Special Committee on the Role of the Paralegal, approved by the House in June, that a membership category be created for paralegals. The House would be asked to subscribe to the proposed amendments to allow them to be placed on the agenda of the 2020 Annual Meeting. After discussion, a motion was adopted to endorse the House's subscription.
7. Report of Committee on Continuing Legal Education. James R. Barnes, chair of the Committee on Continuing Legal Education, together with Senior Director Katherine Suchocki, provided an update on the Association's continuing legal education program, including revenue and expenses and new policies and initiatives. The report was received with thanks.
8. Report and recommendations of Committee on the New York State Constitution. Hon. Karen K. Peters, chair of the committee, together with committee member Bennett Liebman, presented a report recommending an amendment to the State Constitution to provide that mental health is a matter of public concern that must be provided for by the state and its subdivisions. After discussion, a motion was adopted to approve the report and recommendations.
9. Report and recommendations of Steering Committee on Legislative Priorities.
 - a. Committee on State Legislative Policy. Ronald F. Kennedy, Director of Government Relations, reported on the committee's recommendations of the following items for inclusion on the list of the Association's state legislative priorities: integrity of New York's justice system; reorganize the state court system; reform statutory power of attorney; legal representation for persons in immigration matters; permit attorneys admitted in New York to practice in the state without a residence or office within the state; increase the rate of compensation for attorneys who provide mandated representation; and support for the legal profession.

After discussion, a motion was adopted to approve these items as the Association's 2020 state legislative priorities.
 - b. Committee on Federal Legislative Priorities. Hilary F. Jochmans, chair of the Committee on Federal Legislative Priorities, presented the committee's recommendations of the following items for inclusion on the list of the Association's 2020 federal legislative priorities: integrity of the justice system; support for the Legal Services Corporation; support for legislation to address immigration representation; support for states' authority to regulate the tort system; sealing records of criminal convictions; and support for the legal profession.

After discussion, a motion was adopted to approve these items as the Association's 2020 federal legislative priorities.

10. Report of President. Mr. Greenberg highlighted the items contained in his written report, a copy of which is appended to these minutes.
11. Report and recommendations of Finance Committee re proposed 2020 income and expense budget. T. Andrew Brown, chair of the Finance Committee, reviewed the proposed budget for 2020, which projects income of \$23,397,230, expenses of \$23,207,399, and a projected surplus of \$189,831. After discussion, a motion was adopted to endorse the proposed budget for favorable action by the House.
12. Report and recommendations of Environmental and Energy Law Section. Section member Katrina F. Kuh outlined the section's proposal for Association support of a "Green Amendment" to the State Constitution. After discussion, a motion was adopted to refer the proposal to the Committee on the New York State Constitution and other interested groups.
13. Report and recommendations of Committee on Civil Practice Law and Rules. In his capacity as committee co-chair, Mr. Napoletano presented the committee's affirmative legislative proposal to amend CPLR 312-a regarding waiver of service of process. After discussion, a motion was adopted to approve the proposal.
14. Report and recommendations of Committee on Standards of Attorney Conduct. Prof. Roy D. Simon, Jr., co-chair of the committee, reviewed the committee's proposed amendments to Rules 1.0, 1.10, 2.4, 4.1, 5.2, 5.4, 5.5 and 7.1-7.5 of the Rules of Professional Conduct. After discussion, a motion was adopted to endorse the proposals for favorable action by the House.
15. Report and recommendations of Committee on Committees. Ms. Sigmond, in her capacity as co-chair of the committee, together with co-chair Donald C. Doerr, presented the committee's recommendations (1) that the Committee on Transportation be discharged, with its mission being handled by the Task Force on Autonomous Vehicles and the Law, the General Practice Section, the Local and State Government Law Section, and the Torts, Insurance, and Compensation Law Section; and (2) that the Committee on Federal Legislative Priorities and the Committee on State Legislative Policy should be merged and a new mission statement be developed. After discussion, a motion was adopted to approve the report and recommendations.
16. Report and recommendations of Committee on Diversity and Inclusion. Mirna M. Santiago, chair of the committee, presented the committee's report calling for bar associations to promote civil discourse and diversity. After discussion, a motion was adopted to endorse the following resolution for favorable action by the House:

RESOLVED, that the New York State Bar Association affirms the principle of civility as a foundation for democracy and the rule of law and urges lawyers to set a high

standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others;

FURTHER RESOLVED, that the New York State Bar Association urges all lawyers, NYSBA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse;

FURTHER RESOLVED, that the New York State Bar Association urges all government officials and employees, political parties, the media, advocacy organizations, and candidates for political office and their supporters, to strive toward a more civil public discourse in the conduct of political activities and in the administration of the affairs of government;

FURTHER RESOLVED, that the New York State Bar Association supports governmental policies, practices, and procedures that promote civility and civil public discourse consistent with federal and state constitutional requirements;

RESOLVED, that the New York State Bar Association reaffirms its unwavering commitment to diversity, equity and inclusion at all levels of the Association, and its firm belief that diversity and inclusion must be fostered within the legal community and in society at large;

RESOLVED, that the New York State Bar Association strongly condemns the use of divisive and uncivil rhetoric by elected or other public officials that seeks to vilify specific groups or classes of individuals and/or seeks to sow division among the populace on the basis of gender, race, color, ethnic origin, national origin, religion, sexual orientation, age, disability and/or any other classification, by elected and other public officials.

17. Report and recommendations of Working Group on Attorney Mental Health. Working Group members Simeon Goldman, David R. Marshall and Lauren E. Sharkey outlined the Working Group's study of mental health questions in the bar admission questionnaire and its recommendation that such questions be eliminated. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
18. Report and recommendations of Task Force on the Parole System. Mr. Russell, in his capacity as Task Force co-chair, together with co-chair Seymour W. James, Jr. and member Richard Rifkin, reviewed the Task Force's initial report containing recommendations with respect to technical parole violations, earned good time credits, and increasing the number of parole commissioners. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
19. Report of Nominating Committee. Claire P. Gutekunst, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2020-2021 Association year: President-Elect: T.

Andrew Brown, Rochester; Secretary: Sherry Levin Wallach, White Plains; Treasurer: Domenick Napoletano, Brooklyn; Vice Presidents: 1st District – Diana S. Sen, New York City and Carol A. Sigmond, New York City; 2nd District – Aimee L. Richter, Brooklyn; 3rd District – Robert T. Schofield, IV, Albany; 4th District – Marne Onderdonk, Saratoga Springs; 5th District – Jean Marie Westlake, East Syracuse; 6th District – Richard C. Lewis, Binghamton; 7th District – Mark J. Moretti, Rochester; 8th District – Norman P. Effman, Warsaw; 9th District – Adam Seiden, Mount Vernon; 10th District – Donna England, Centereach; 11th District – David L. Cohen, Kew Gardens; 12th District – Michael A. Marinaccio, White Plains; 13th District – Jonathan B. Behrins, Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2020: Mirna M. Santiago (Diversity Seat), Pawling; Mark A. Berman, New York City; Sarah E. Gold, Albany; Ronald C. Minkoff, New York City; and Tucker C. Stanclift, Queensbury. Nominated as Section Member-at-Large was Jean F. Gerbini, Albany. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2020-2022 term: T. Andrew Brown, Rochester; Sharon Stern Gerstman, Buffalo; Henry M. Greenberg, Albany; David P. Miranda, Albany; and Kenneth G. Standard, New York City. Nominated as Young Lawyer Delegate to the American Bar Association House of Delegates was Natasha Shishov, New York City. The report was received with thanks.

20. Date and place of next meeting.
Thursday, January 30, 2020
Hilton Midtown New York, New York City
21. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary