NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
APRIL 2020
VOL. 92 | NO. 3

COVID-19 Upends the Legal Community

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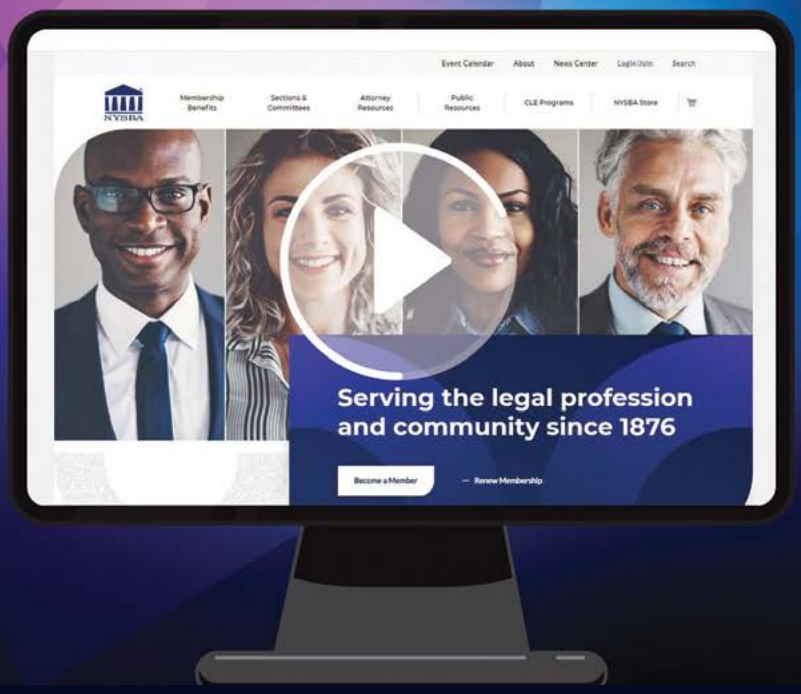

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NYSBA

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This book is a guide for attorneys, judges, and businesspeople regarding the major issues of diversity and inclusion in the 21st Century.
Print: 415819 | E-book: 415819E | 236 pages
Member $22 | List $30

Is America Fulfilling Its Promise: Safeguarding Legal Protections for Immigrants
This book explores the sharp contrast between the policies in place in New York State and the anti-immigrant policies implemented by the current administration in Washington
Print: 42619 | E-book: 42619E | 362 pages
Member $15 | List $20

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Print: 40264 | E-book: 40264E | 436 pages
Member $60 | List $75

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Print: 40996 | E-book: 40996E | 450 pages
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Print: 41074 | E-book: 41074E | 344 pages
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Member $150 | List $190

Grow Your Practice: Legal Marketing and Business Development Strategies
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Print: 41265 | E-book: 41265E | 302 pages
Member $50 | List $65

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Coronavirus (COVID-19) Information Center

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NYSBA Updates and Cancellations
Wellness

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Journal

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by Kathleen Lynn

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Our Finest Hour

Our entire society is in the throes of a historic public health crisis. Our lives have been upended, and the legal profession is not immune. As the state and federal governments work to contain the novel coronavirus (COVID-19), it continues to race across the nation and globe, leaving a trail of hardship and suffering in its wake. Here in New York, the epicenter of the pandemic, the virus has forced mass cancellations, curtailed our travel and compelled businesses and schools to close indefinitely. Most of us are cloistered at home in hopes of "flattening the curve" of infections and preventing our already stressed health care system from being completely overwhelmed.

The New York State Bar Association is meeting this unprecedented challenge head-on. Leaders and staff are working around the clock to help our members and the public. Rather than shut down, we stepped up. No bar association is providing more services or engaging in more effective advocacy for the betterment of the profession.

To paraphrase Winston Churchill, this is our finest hour.

Here are just a few examples of the work being done to address the challenges presented for lawyers by COVID-19.

Information Center

Because COVID-19 forced most lawyers to hunker down at home, it forced us to shift our law practices from real to virtual. NYSBA was well positioned to support and assist our members.

This past June we launched an all-out effort to complete construction of a "Virtual Bar Cente r" – a digital platform where attorneys across the street and around the world are just a click away on their computer or smart phone from accessing NYSBA's services and benefits. To do this, we overhauled our operating systems by creating a new website, adding state of the art e-commerce technology, enhancing the quality and reach of our communications capacity and digitalizing all publications.

When we were forced to close the Bar Center at 1 Elk Street in Albany, our Virtual Bar Center was open for business and could be operated remotely. In just a week, we converted NYSBA's website, social media outlets and other digital platforms into the most robust COVID-19 information center of its kind for lawyers. Our members are kept up to date on the latest information – including court notices, summaries of new directives and laws, and other developments – through a continuous stream of e-mail alerts, podcasts, real-time posts on social media and original news stories.

At the same time, we have provided a record number of online CLE programs and webinars that address the unique legal issues arising from the crisis. Many of our coronavirus-related webinars are offered for free to members.

NYSBA has updated and reissued a comprehensive book on the state's public health laws entitled "New York State Public Health Legal Manual: A Guide for Judges, Attorneys and Public Health Professionals." The book, issued in collaboration with the New York State Office of Court Administration, examines the law governing the containment of communicable diseases, including pandemics like the one we now face.

We have also sought to educate the public about the laws that govern a public health crisis. NYSBA leaders have been cited and quoted in numerous news outlets on the complex civil liberties dimensions of the crisis.

Only when we are armed with accurate and timely information can we make smart decisions that will best prepare us to represent our clients, serve our communities and do the public good. NYSBA is providing our members with the information they need to navigate the crisis.

Emergency Task Force for Solos & Small Firms

Solo practitioners and law firms of fewer than 10 attorneys comprise more than half of NYSBA's membership. COVID-19 is having a devastating impact on these practitioners, many of whom have limited financial resources to draw upon during the crisis.

To provide immediate assistance, we have established an emergency task force comprised of a distinguished group of lawyers and judges from around the state. The task force is chaired by Domenick Napoletano from Brooklyn and June Castellano from Rochester, both solo practitioners themselves. This body is focused like a laser beam on the needs of solos and small firms and will make recommendations to get them help as quickly as possible.

Statewide Pro Bono Network

NYSBA has been in communication with senior officials in all three branches of government throughout the crisis. Lawyers

have always led in times of crisis and policymakers are turning to us for ideas, assistance and support.

In late March, NYSBA and the Office of Court Administration announced a partnership to support and coordinate a statewide pro bono network of lawyers to handle the expected surge in legal cases resulting from the coronavirus pandemic and the ensuing economic fallout. New York's network of pro bono and institutional legal service providers was strained prior to the pandemic and will not be able to handle the expected onslaught of virus-related cases unaided. Thousands of New Yorkers will need help with a wide range of legal issues, including those arising from unemployment, evictions, family emergencies and claims by creditors. We will support legal aid societies and other institutional providers by matching pro bono attorneys with the anticipated overflow of clients.

The partnership between NYSBA and the state court system will seek to ensure that all indigent New Yorkers are able to exercise their right to legal counsel at a time when the demand for legal services will be higher than ever. As a first step, we will convene meetings of the state's bar associations, large law firms, the heads of law school clinics, institutional providers of legal services and others for the purposes of assembling a network of pro bono lawyers who can be rapidly dispatched to help those in need. Former Chief Judge Jonathan Lippman has agreed to spearhead the effort.

In times of crisis, lawyers and law firms have always met their professional obligation to protect the rights of those who cannot afford an attorney. We saw that during 9/11. We saw that in 2017, when thousands of lawyers mobilized at the nation's airports in response to President Trump's attempt to ban entry into the United States by people from predominantly Muslim countries. We are seeing that again now.

Enhanced Advocacy

NYSBA has ramped up its advocacy efforts on multiple fronts. We joined the chair of the state Senate Judiciary Committee, Brad Hoylman, and other lawmakers in calling for Governor Andrew Cuomo to toll all statutes of limitations for the duration of the coronavirus disaster emergency. Our motive was simple: litigants and attorneys should not have to choose between placing themselves at risk of exposure to the coronavirus or pursuing civil and criminal justice.

Within two days of our announcement supporting this measure, the Governor signed the executive order.

In a similar vein, NYSBA has battled for graduating law students, many of whom carry massive student loan debts and are facing declining job opportunities as a result of the pandemic. Adding to their stress is the uncertainty over when they would be able to take the bar examination in New York. On March 23, I charged our Task Force on the Bar Examination on an emergency basis to consider how the state should handle the examination during the coronavirus crisis. In a week, the task force produced a cogent report that made three recommendations: First, that the July bar exam be rescheduled for a later date, as soon as possible around Labor Day. Second, if circumstances make a fall bar exam impossible, then graduates should be allowed to engage in certain law practice under practice orders, with the supervision of licensed attorneys. Third, a one-time general waiver should be granted to all law schools of the Court of Appeals' limits on distance learning credits for applicants to the New York bar, so that students completing law school this year would not be penalized due to widespread social distancing measures implemented by their law schools to stop the spread of the coronavirus.

In less than 48 hours, the Court of Appeals adopted all three of the task force's recommendations. That action is a testament to the extraordinary leadership of the task force's chair, Hon. Alan Scheinkman, presiding justice of the Appellate Division, Second Department, and diligence of his colleagues. It also speaks volumes about the esteem with which NYSBA is regarded by the court system's leaders.

Attorney Well-Being

The COVID-19 outbreak is not only a threat to lawyers' physical health and law practices. It is also taking a toll on their emotional well-being. In this time of fear and isolation, many are experiencing anxiety and depression.

To help judges, attorneys and law students cope with the crisis, NYSBA is offering confidential support groups being held weekly via videoconference. The group is facilitated by Libby Coreno, the chair of the Attorney Well-Being Committee, and Kerry O'Hara, a psychiatrist. Each group session is organized with an overarching theme for discussion. All participants are given the opportunity to share if they wish, with supportive conversation to follow.

Looking to the Future

An old adage holds that "this too shall pass." And it shall. We have been here before. Just as NYSBA has weathered dangerous storms in the past – including two World Wars and the Great Depression – so too we will overcome the current crisis.

That said, the coronavirus pandemic is an inflection point. Trends long underway in the practice of law have been accelerated. With respect to the use of technology, for example, the profession has experienced more change in just the past few weeks than it has in the past few decades. It does not require prophetic powers to know that, when the crisis passes, traditional face-to-face encounters with clients and others will be less necessary as remote options become the norm. I am confident that soon technology-enhanced courtrooms will become commonplace from Niagara Falls to Montauk.

The New York State Bar Association is now an agile technological powerhouse. That is a good thing, because never in the association's storied history has our voice and leadership been more desperately needed. Our response to the COVID-19 crisis proves that we are up to the challenge.

Be well. Stay safe. Remember: we are here for you.

Henry M. Greenberg can be reached at hgreenberg@nysba.org

NYSBA Creates Online Coronavirus Information Center

With the shutdown of all-but-essential businesses in New York State and the transformative impact it is having on the legal profession, the New York State Bar Association (NYSBA) has launched a comprehensive one-stop webpage that will be updated continuously to serve as a resource for members, policymakers and journalists.

"As courts and the legal profession respond to the unprecedented challenges presented by the coronavirus, it's imperative that we provide real time access to the latest information," said NYSBA President Hank Greenberg. "Our goal is to keep our members, the legal community and the general public as well informed as we can. Only when we are armed with accurate and timely information can we make smart decisions that will best prepare us to represent our clients, serve our communities and do the public good."

NYSBA's coronavirus information center page – nysba.org/covid-19-information-updates/ – is a comprehensive virtual resource, featuring the latest articles, memos, links and directives. It also includes details on NYSBA CLE webinars on legal topics relating to the coronavirus as well as non-credit informational webinars that are offered at no charge to NYSBA members.

The coronavirus information center also includes materials dedicated to helping members maintain health and wellness during the coronavirus public health emergency, as well as links to a range of court, government and information sites and other online resources.

Breaking news also appears on NYSBA's social media accounts on Twitter, Facebook and LinkedIn.

Additionally, in collaboration with the Office of Court Administration, NYSBA is updating and reissuing a comprehensive book on the state's public health laws entitled: "New York State Public Health Legal Manual: A Guide for Judges, Attorneys and Public Health Professionals." The book examines the law governing the containment of communicable diseases – including pandemics like the one we now face.

Find more information at nysba.org/covid-19-information-updates/.

NYSBA CLE April & May Webinars

By Brendan Kennedy

Social distancing to slow the spread of the coronavirus has forced the legal community to adjust to a new reality of working from home, meeting via videoconference, and even dealing with court proceedings remotely. NYSBA CLE programs recognize this new reality, with webinars that make CLE programs available wherever you are.

NYSBA is presenting CLE webinars in the coming weeks and months on a wide range of topics and issues, including the coronavirus and its impact on attorneys' professional and personal lives.

An important reminder: In response to social distancing measures now in place across New York State, the Unified Court System's CLE Board has temporarily implemented changes to allow attorneys admitted for two years or less to earn Skills CLE credits via videoconference. So, some programs that previously required in-person attendance can now be completed via webinars.

NYSBA also offers hundreds of on-demand CLE programs. Get more information and register at https://nysba.org/cle-programs/.

NYSBA webinars in April and May include:

CORONAVIRUS RELATED PROGRAMS

MINDFULNESS FOR LAWYERS IN A TIME OF STRESS
APRIL 16, 1 P.M.

1.0 MCLE Credit in Professional Practice
Sponsored by Committee on Law Practice Management

Already one of the highest stress, competitive and highly demanding professions, lawyers must now adjust to remote work, reduction in caseload, and for those small firm and solo practitioners, a loss of income. The stress, worry and anxiety that stems from our day-to-day lives takes a toll on productivity, creativity, professional responsibilities and personal relationships.

In this hour-long webinar, members will learn:

- Tips for managing stress, worry, anxiety and how to use mindfulness to boost your immune system.
- How to maintain social connections via electronics to prevent loneliness.
- How to control stress and help improve productivity, creativity and the ability to uphold ethical responsibilities as an attorney.

Register for this program at https://nysba.org/events/mindfulness-for-lawyers-in-a-time-of-stress-webinar/.

PANDEMICS AND PLANNING: THE DOCUMENTS EVERY ATTORNEY SHOULD HAVE
APRIL 23, 12 P.M.

1.0 MCLE Credit in Professional Practice
Sponsored by Senior Lawyers Section

Learn best practices and the important documents that will make it more effective to protect employees, customers and partners during this pandemic, including:

- The importance of a health care proxy, living will and HIPAA authorization form.
- Insuring last wills, revocable living trust express current wishes.

Register for this program at https://nysba.org/events/pandemics-and-planning-the-documents-every-attorney-should-have-webinar/.

RECENTLY ENACTED LEGISLATION

N.Y. SHIELD ACT: NEW DATA PRIVACY REQUIREMENTS FOR BOTH CLIENTS AND LAWYERS
MAY 13, 12 P.M.

1.0 MCLE in Credit Professional Practice
Sponsored by Committee on Law Practice Management

Passed in July 2019, the New York Stop Hacks and Improve Electronic Data Security (SHIELD) Act requires businesses to build in reasonable safeguards to protect private information of New York residents. The law also expanded New York breach notification requirements and the law provides mandates on how to secure sensitive information in the digital age.

This hour-long program will look into:

- What a data breach actually is
- How New York defines 'private information'
- Best practices for handling sensitive information
- Tips on how to begin a compliance program at your law firm
- Steps to take to prepare for a data breach.

Register for this program at https://nysba.org/events/the-ny-shield-act-new-data-privacy-requirements-for-both-clients-and-lawyers-webinar/.

Here for You, Wherever You Are

DIVERSITY & INCLUSION IN THE WORKPLACE

A GUIDE TO DIVERSITY AND INCLUSION IN THE 21ST CENTURY WORKPLACE
APRIL 16, 11 A.M.

1.0 MCLE Credit in Diversity Inclusion, & Elimination of Bias
Sponsored by Committee on Diversity and Inclusion

This program will allow attorneys, judges and business executive to navigate the major issues of diversity and inclusion in the 21st century. Members will review the provisions within federal and state law concerning the areas of anti-discrimination, anti-harassment, and anti-retaliation. There will be a discussion about protection for sexual orientation, equal pay and the current status of the federal Equal Rights Amendment.

Register for this program at https://nysba.org/events/a-guide-to-diversity-and-inclusion-in-the-21st-century-workplace-webinar/.

CULTURAL DIVERSITY IN AMERICA'S MILITARY
APRIL 17, 10 A.M.

1.0 MCLE Credit in Professional Practice
1.0 MCLE Credit in Diversity, Inclusion & Elimination of Bias
Sponsored by Committee on Veterans

This virtual roundtable discussion, featuring a diverse panel of current and former service members from different branches of the military, will provide an overview of military cultures and the differences in each. Members will learn how to apply sensitivity to cultural differences when representing and working with military or veteran clients.

Register for this program at https://nysba.org/events/cultural-diversity-in-americas-military-live-webcast/.

THE LAWYER AS EMPLOYER: DIVERSITY IN THE LAW FIRM WORKPLACE
APRIL 21, 12 P.M.

1.0 MCLE Credit in Diversity, Inclusion & Elimination of Bias
Sponsored by Committee on Law Practice Management

This program will discuss ways to talk and think about diversity in your firm by becoming familiar with federal, state and local laws that prohibit discrimination and harassment in the workplace. Practical steps will also be given so that firms are able to communicate its commitment to diversity and inclusion, the importance of investigating internal complaints and training now required under state and local law.

Register for this program at https://nysba.org/events/the-lawyer-as-employer-webinar/.

PRACTICAL TIPS FOR LAWYERS

10 TIPS TO HELP GROW YOUR PRACTICE
APRIL 29, 12 P.M.

1.0 MCLE Credit in Law Practice Management
Sponsored by Committee on Law Practice Management

Whether you are a solo practitioner or an associate at a 100-lawyer firm, it's never too late to learn new skills. This program will give members 10 tips for improving tech and productivity.

Register for this program at https://nysba.org/events/10-tips-to-help-grow-your-practice-webinar/.

STARTING A SOLO PRACTICE IN NEW YORK 2020
MAY 1, 9 A.M.

3.0 MCLE Credits in Ethics and Professionalism
4.5 MCLE Credits in Law Practice Management
Sponsored by Committee on Law Practice Management

This all-day program will provide an overview of what it takes to own your own practice. Whether you are considering opening up your own firm or a recent law school graduate just starting your career, you'll get practical and useful tips on everything from setting up bank accounts and choosing an office space to navigating the ethical issues of using the internet to market your practice.

Register for this program at https://nysba.org/events/starting-a-solo-practice-in-new-york-2020-live-webcast/.

LEGAL PROJECT MANAGEMENT 2020
MAY 7, 12 P.M.

MCLE Credit in Law Practice Management
Sponsored by Committee on Law Practice Management

Learn techniques you can use to improve the delivery of legal services and become more efficient in all aspects of legal project management. Panelists will also provide members an overview of how firms can meet client demands for greater efficiency and predictable spending.

Register for this program at https://nysba.org/events/legal-project-management-2020-webinar/.

How to Work Remotely With Your Kids Around…and Not Lose Your Mind

By Brandon Vogel

Lawyers who are more accustomed to e-filing cases in recent weeks have been using those skills to e-file their children's homework via Google Classroom.

Others improved their oral advocacy skills through the help of their new full-time clients: teenagers.

With schools closed throughout New York State and most attorneys working remotely, several lawyers talked about how they are adjusting to the new normal of meeting with clients virtually while homeschooling their kids.

We spoke to three attorneys with kids at all stages of life to get a sense of what they are experiencing and what strategies are and aren't working, as well as present us with both sides of their cases.

The good, the bad, the new normal

Robert Rosborough of Albany, a partner with Whiteman Osterman & Hanna, is working from home with three children, ages 2, 5 and 8.

His biggest challenge thus far is learning how to teach elementary school while keeping up with his caseload.

Rosborough says, "Because all of their work now comes through Google Classroom, my wife and I are the ones to lead instruction and convince the kids to sit down and complete their daily work rather than focus on their latest Lego build."

He appreciates that his morning commute from Saratoga to Albany has been temporarily eliminated and that he doesn't have to race to court on a moment's notice. He says the best part is "just being home with my kids as they're growing up and not missing any of the milestones I would have otherwise while I was in the office."

Evan S. Rosenberg, a special education lawyer in New York City, is home with a 16-month-old son. "The quality time with my son has actually been pretty wonderful, a major oxytocin rush," said Rosenberg. "Also, I get to connect with my clients on a more basic, even therapeutic level; mostly checking in and making myself available to them."

His primary challenge is negotiating a schedule with his wife as well as dealing with his son's boredom and cabin fever.

Describing her 12-year-old son as "not the most organized even during ordinary times," Gina Calabrese, a professor at St. John's University School of Law, has experienced her share of challenges, such as making sure her son follows his usual morning routine. For his example, his English teacher noticed his unmade bed during a Google Hangout session and promptly reprimanded him. Her son often finishes assignments before the end of the period. "Online school doesn't happen on auto-pilot," said Calabrese. "Parents need to monitor progress."

She has appreciated being able to help her son with schoolwork and hav-

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Easing Stress While Working from Home

By Brandon Vogel

New to working from home? Unforeseen challenges in working remotely? NYSBA Lawyer Assistance Program Director Stacey Whiteley offers these tips to help ease anxiety and stress while working from home.

Stay connected to your colleagues, to the profession, and to family and friends.

Use the many services that are available online to help ease feelings of isolation. Twitter, Facebook, LinkedIn, Instagram, and Snapchat all provide easy contact with others to stay in touch, check in with one another, and keep up with the news. Be careful though and make sure your feeds aren't overwhelming you with bad news.

Take time to curate your friends and follow lists; mute or unfollow friends or sources that are creating feelings of anxiety or dread. You can always go to their individual pages if you wish and after this crisis you can unmute them again. There's no reason to bring more negativity into your life at this time.

Google provides a number of free services, including video chatting, that will allow you to see your friends and family and stay in touch. Most businesses use video conferencing services as part of their daily work. Take advantage of these services to stay in contact with your staff, colleagues, and clients.

NYSBA and other bar associations are offering webinars covering a number of legal topics. Commit to attending these webinars to keep informed and engaged in the profession.

Follow a routine while working at home.

Keeping a routine during your workday will help you maintain a sense of normalcy and control over your time. If you usually wake up at 6:00 a.m. on a regular workday, aim to continue to wake up at that time. If you usually take a lunch break at 1:00 p.m., continue to do that and be sure to make it an actual break; don't eat in front of your laptop or take calls during this time. If you have regular staff meetings on Monday at 10:00 a.m., continue that practice over Zoom or Skype.

Limit your time checking the news to specific times during your workday. Once in the morning and once in the afternoon during your workday should provide you with enough time

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HOW TO WORK REMOTELY WITH YOUR KIDS AROUND… AND NOT LOSE YOUR MIND

continued from page 10

ing more meals together as a family. There are less logistics involved now with his care and sports practices. And he now has more time to enjoy his hobbies like cooking.

Pro tips

Calabrese has found that having a schedule and structure has been "good for everyone." She recommends having a hard stop time to step away from work. "There's so much coming at us these days, and always one more urgent email we need to respond to before the end of the workday, etc. That's led to a few very late dinners, even though we are all home," said Calabrese. "You can log back on later or get up a bit earlier in the morning."

She also advised families to have designated areas of the house for each family member's office or classroom. "Then, when you must focus or have privacy, boundaries are clear," she explained.

Rosborough says to "be flexible." "Regimented schedules are fine, but when we're transitioning into this new reality, it's most important to be flexible and patient not only with the kids but also yourself. If you can work remotely, that work can be done at any time," said Rosborough. "Take 30 minutes in the middle of the day to go play basketball with the kids in the driveway or go exercise. Breaking up the day will be very important.

"Let go and accept that things are beyond your control," said Rosenberg, who also emphasized expressing love for your kids and patience. "Also, it helps to simply explain to your clients upfront that you have a responsibility to your family right now."

EASING STRESS WHILE WORKING FROM HOME

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to catch up on what's going on. If you regularly go to the gym or for a run after work, continue to plan on getting those work outs done at your home. Going for runs or walks is absolutely okay and can clear your mind and help you feel better.

Move your body as best you're able.

This is vitally important. Going for a walk, a run, watching an old exercise video or something on YouTube, having a dance party in your kitchen, or breaking out that long unused piece of gym equipment stuck in the corner is exactly what you should be doing.

There are also plentiful online exercise classes to be found for free right now: yoga, barre, old-school Jane Fonda workouts, strength training – just about anything and everything is available. This site shares a number of these online resources: https://makeyourbodywork.com/how-to-exercise-at-home/. Moving your body helps clear your mind, increases your feelings of wellbeing, and gives you a moment to focus on yourself and not on the news or work.

Take a break.

There are free online concerts, online museum tours, free Broadway shows, and operas being streamed daily. Links can be easily found by googling "free online concerts/Broadway shows," etc. Relax and take the time to enjoy these cultural experiences.

Netflix is providing watching parties, so you can remotely watch shows and movies with a group of friends. It's a free download (netflixparty.com) and lets your group chat and watch the movie together, with the ability to stop and play back portions of the movie you're watching.

Be kind to yourself.

These are unprecedented times we are in. Every day brings new changes to our lives. People are home, kids are home, and our new "normal" is unfolding in real time. We are all doing our best in circumstances we've never faced before, so don't feel that you need to be on top of everything every second of every day. Let yourself take time to pat yourself on the back for doing all you can do right now and having the ability to continue to do the next right thing.

Seek help.

If you are struggling with your mental health and feeling overwhelmed and helpless, seek help. You can call NYSBA's LAP Helpline at (800) 255-0569 or call the Mental Health Association of New York State's Helpline for mental health resources in your community at (800) 766-6177. Although many in-person meetings have been suspended right now, counselors and therapists are working with clients over the phone or through video chat. Don't hesitate to seek help – it is available.

NYSBA ATTORNEY WELL-BEING COMMITTEE

Lawyer to Lawyer Roundtable

Weekly on **Thursdays at 4pm** via Zoom

New York State Bar Association's Attorney Well-Being Committee and Lawyer Assistance Program have launched a new program for attorneys who are struggling emotionally during these anxiety inducing times.

No Need for Social Distancing in NYSBA's Online Communities

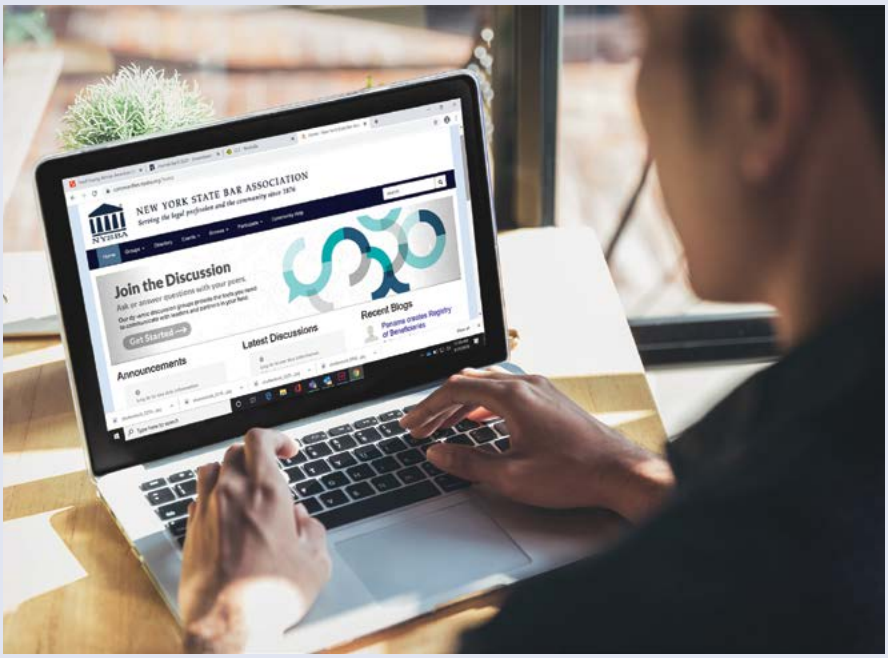
By Brandon Vogel

When New York Governor Andrew Cuomo issued an executive order allowing notarial services via video-conference in the wake of the coronavirus, some attorneys wondered how to get started.

One attorney posed this question on NYSBA's very active Trusts and Estates Law Section online community. Dozens of responses quickly poured in about how to handle this seismic shift in practice, from nuances to consider when signing affidavits to how to secure your Zoom account, as well as creative tips to handle form signings in person following social distancing guidelines.

NYSBA has become a virtual bar center, and our online communities are a prime example of that – especially when nearly all lawyers are working remotely. Members are using the communities more than ever before: Discussions have more than doubled compared with the same period in 2019, and 54% more members are contributing.

Our solo and small-firm practitioner members have long relied on these communities to connect with their colleagues down the virtual hallway. They have provided members with quick answers to their pressing questions that they might not otherwise obtain. They are a secure, effective and convenient way for members across the globe to interact with each other. As the coronavirus public health emergency unfolds, we have seen substantive discussions from members seeking guidance on paid sick leave; what qualifies as an essential service; and recommended wellness tips to stay calm during this time.



Interested in learning more about the communities? Here are three things you should know:

You don't have to log in to post or respond to messages.

At the top of each community email, you will see the name of your community and underneath a "Post New Message" function. Similarly, on each message, you can hit "Reply to Group" or "Reply to Sender" via email to respond to a specific post. It will pull up a blank email form for you to respond from; the message will also be posted online directly from your email. Community messages are set up differently than listserve emails, so there's no mystery as to who sent you the message.

Videos, photos and documents can be uploaded to the library.

The community supports a wide variety of file types and any file up to 5 GB can be uploaded. Sections have made great use of the community libraries to post photos from their events. Like our discussion boards, every file is stored and searchable. You can also send files straight from your email and they will go into the community library.

Opt-in Communities

We auto-subscribe all members of sections and committees to their communities, but we also host an opt-in community related to legal technology. Here, members can post questions about software, latest tech developments, and anything that helps your practice through technology. To get started, go to communities.nysba.org and go to the Groups Tab. On the "Modify Communication Settings" area, you can choose to receive notifications from this community or change your settings for other communities if you prefer.

Ready to connect with your colleagues online? Visit https://communities.nysba.org and join the discussion.

NYSBA Launches Initiatives to Address Impacts of Coronavirus on Legal Profession

NYSBA has launched two initiatives – one in partnership with the New York State Unified Court System – to address the impacts on the legal profession of the coronavirus public health emergency.

Assisting Solo Practitioners and Small Firms

The COVID-19 Task Force to Assist Solo Practitioners and Small Firms will focus on meeting the needs of these attorneys during the crisis and afterward as well. Almost one in four members of NYSBA are solo practitioners and another 29% work in small firms with fewer than 10 attorneys.

"COVID-19 is having a devastating impact on solo and small firm practitioners, many of whom have limited financial resources to draw upon during the crisis," said Hank Greenberg, president of the New York State Bar Association. "The task force will focus like a laser beam on these lawyers' immediate needs, in addition to helping them meet the challenges the profession will face when the crisis subsides."

The task force will be chaired by two solo practitioners – NYSBA Treasurer Domenick Napoletano in Brooklyn and June Castellano in Rochester.

The New York Bar Foundation, the association's charitable arm, is also creating a special fund to aid legal service providers who are responding to urgent new needs for legal representation due to the crisis.

NYSBA and New York Courts Launch Statewide Pro Bono Network

NYSBA is partnering with the New York State Unified Court System to launch a statewide pro bono network of lawyers to handle an expected surge in legal matters resulting from the coronavirus pandemic and ensuing economic fallout.

As a first step, the courts and NYSBA will convene meetings of the state's bar associations, large law firms, the heads of law school clinics, institutional providers of legal services and others to assembling a network of pro bono lawyers who can be rapidly dispatched to help those in need. Former Chief Judge Jonathan Lippman has agreed to spearhead the effort.

"At this unprecedented moment in our state and nation's history, we all need to do what we can to support one another and ensure that we will not only meet this challenge but emerge from it stronger and more united than ever before," said Chief Judge Janet DiFiore. "I know that members of New York's talented and big-hearted legal community are up to the task, and I applaud NYSBA for joining with us in this effort."

"With New York City as the epicenter of the pandemic and the economy at a standstill, we are facing unprecedented legal challenges that will transform the profession and society as we know it," said NYSBA President Hank Greenberg. "Lawyers have always led in times of crisis and our state and profession needs NYSBA's leadership now more than ever before."

New York's existing network of pro bono and public defense attorneys were already strained prior to the COVID-19 pandemic. The courts and NYSBA are taking this action to make sure that all New Yorkers are able to exercise their right to legal counsel at a time when the need for legal services will likely be higher than ever before.

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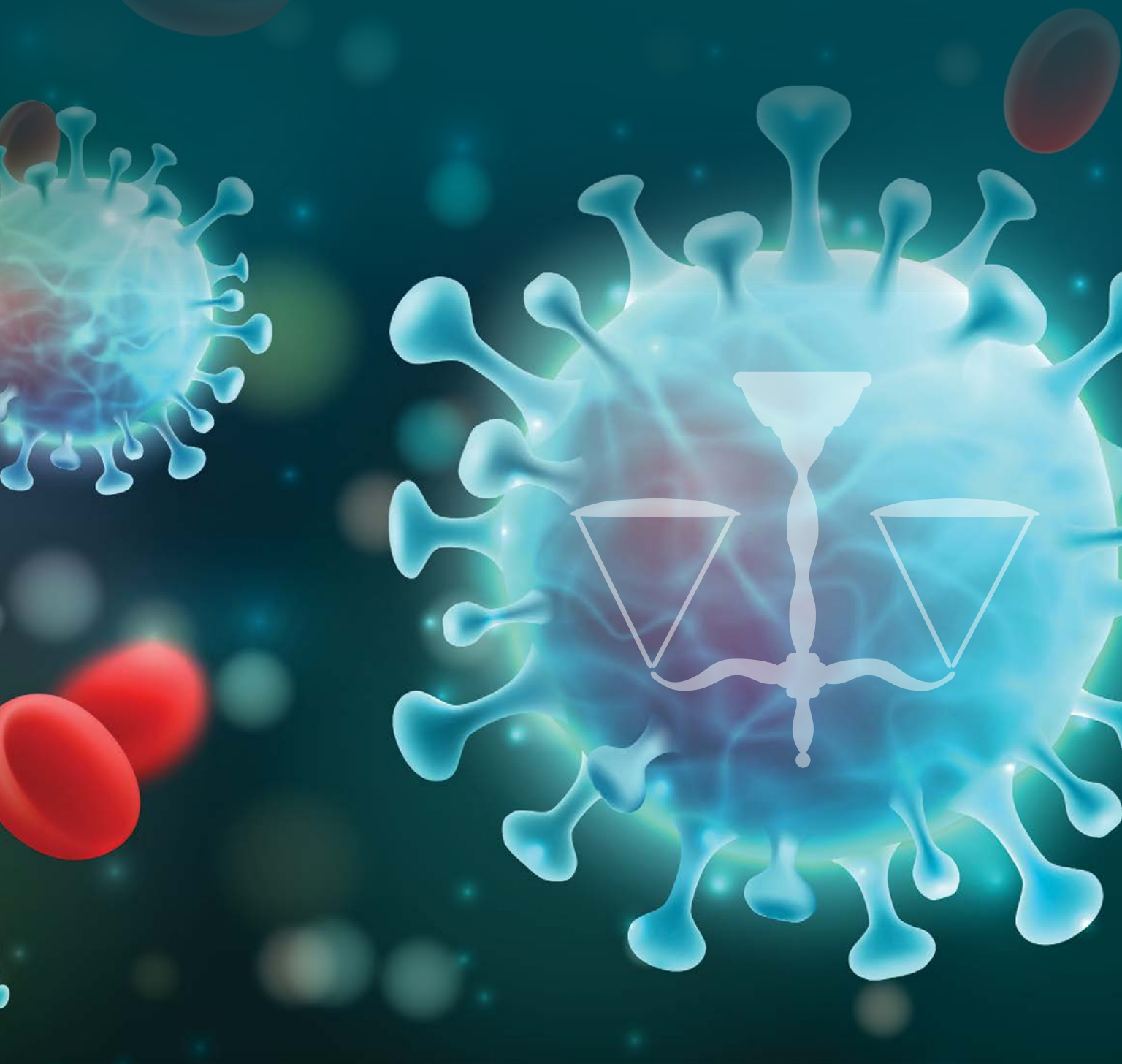
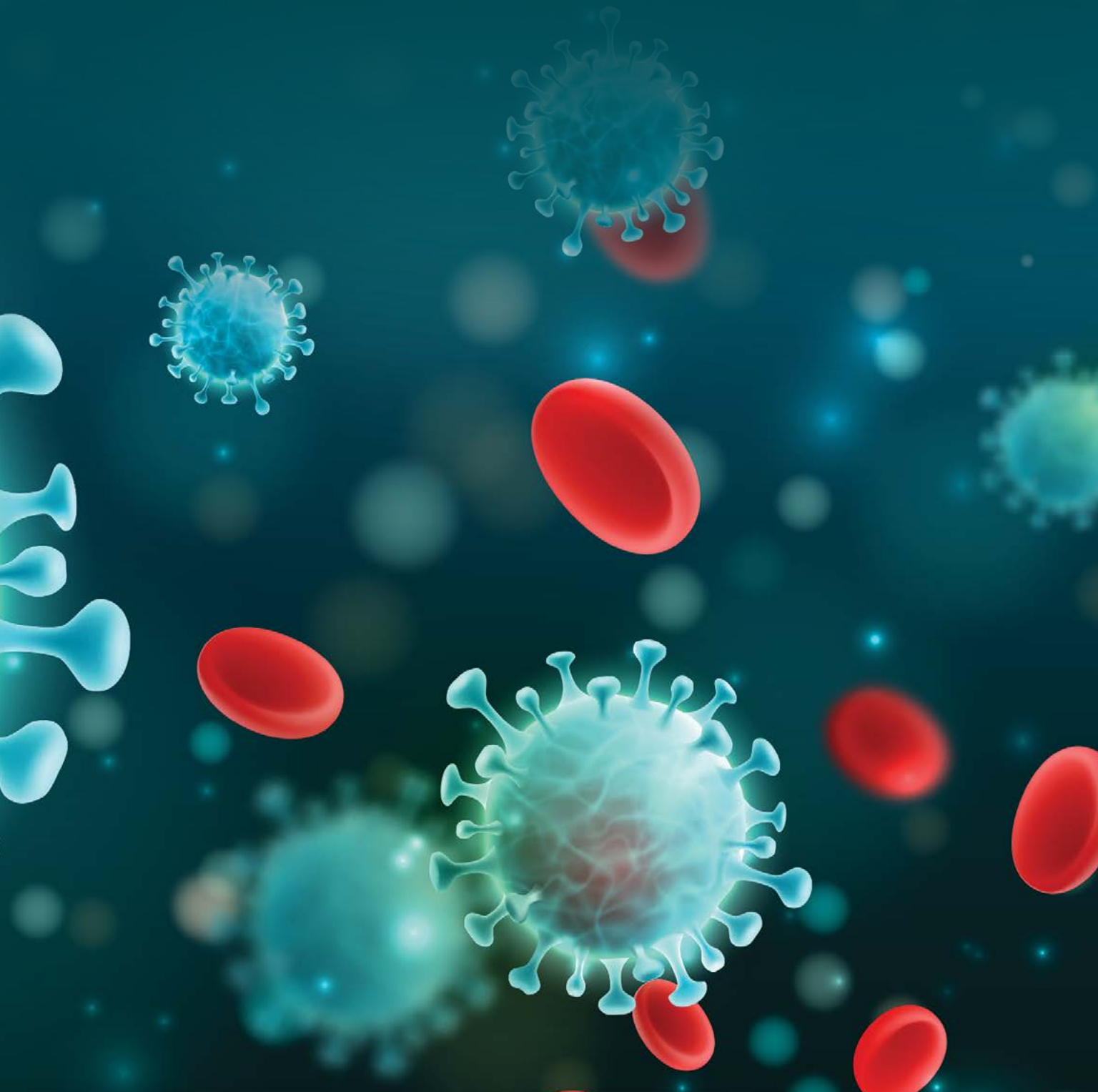
COVID-19 Upends

Lower revenues, job cuts likely

By Kathleen Lynn



the Legal World



Law firms are cutting jobs. Solo practitioners are struggling to keep afloat. The July bar exam has been postponed. And attorneys are figuring out how to work remotely, as New Yorkers and other Americans are told to stay home.

This is the new reality as New York's legal profession faces the coronavirus public health emergency, which has swept ruthlessly across the national and global economy, with legal and business activity drastically slowed in an effort to contain the pandemic.

"Some lawyers are completely without business," said Libby Coreno, chair of NYSBA's Attorney Well-Being Committee and general counsel to a developer in Saratoga Springs. "They're dealing with crushing amounts of fear and anxiety."

on court-assigned work, because the courts aren't in session except for emergency matters.

"They have no work, none. That has to be terrifying," Coreno said. Also suffering are lawyers who handle transactions, which have slammed to a halt; and lawyers who do contract work when other law firms have an overflow.

The Attorney Well-Being Committee is sponsoring a weekly conference call every Thursday with a clinical psychologist for attorneys affected by the shutdown, including some who worry that their practices cannot survive, Coreno said.

The crisis has also landed hard on young lawyers and law students, many of whom are burdened with large amounts of student debt. The job market has suddenly taken a hard turn for the worse, with firms rescinding

"I have a lot of clients in the process of doing things that will have to wait – like leasing a space or selling their business. While I'm still getting new work, it's going to be limited and may dry up."

"The scale of the crisis and the impact on the economy – we have not experienced anything like this, I believe, in American history," said NYSBA President Hank Greenberg of Greenberg Traurig in Albany. Even catastrophes like the Sept. 11 terrorist attacks and the 2008 financial crisis didn't force an abrupt halt in business and social activity worldwide, he pointed out.

"A lot of law firms went from a year that was probably starting off quite well to being turned completely upside down," said Jim Cotterman, principal with Altman Weil Inc., a management consultant for law firms.

Small firms are especially vulnerable, because they generally don't have large financial reserves to get through hard times. NYSBA has set up a task force to help small firms deal with the fallout of the shutdown.

"The economic and social lockdown amounts to a stranglehold on operations and cash flow. Many small firms have already begun making layoffs, and others plan to do so within the next week or two," said T. Andrew Brown of Brown Hutchinson in Rochester, NYSBA's president-elect designate.

The economic stimulus law recently signed by President Trump includes aid to small businesses, and small law firms are trying to figure out if they qualify for help. But Brown's afraid many won't survive long enough to get the assistance.

Many attorneys have already seen their incomes dry up, Coreno said. The hardest hit include lawyers who depend

employment offers and eliminating summer associate positions.

And as if that's not bad enough, the state bar exam scheduled for July has been postponed to the fall, delaying the start of new grads' law careers. Typically, more than 10,000 graduates take the New York exam each July, Greenberg said. A number of graduating law students have asked to be allowed to practice under supervision while they wait to take the exam.

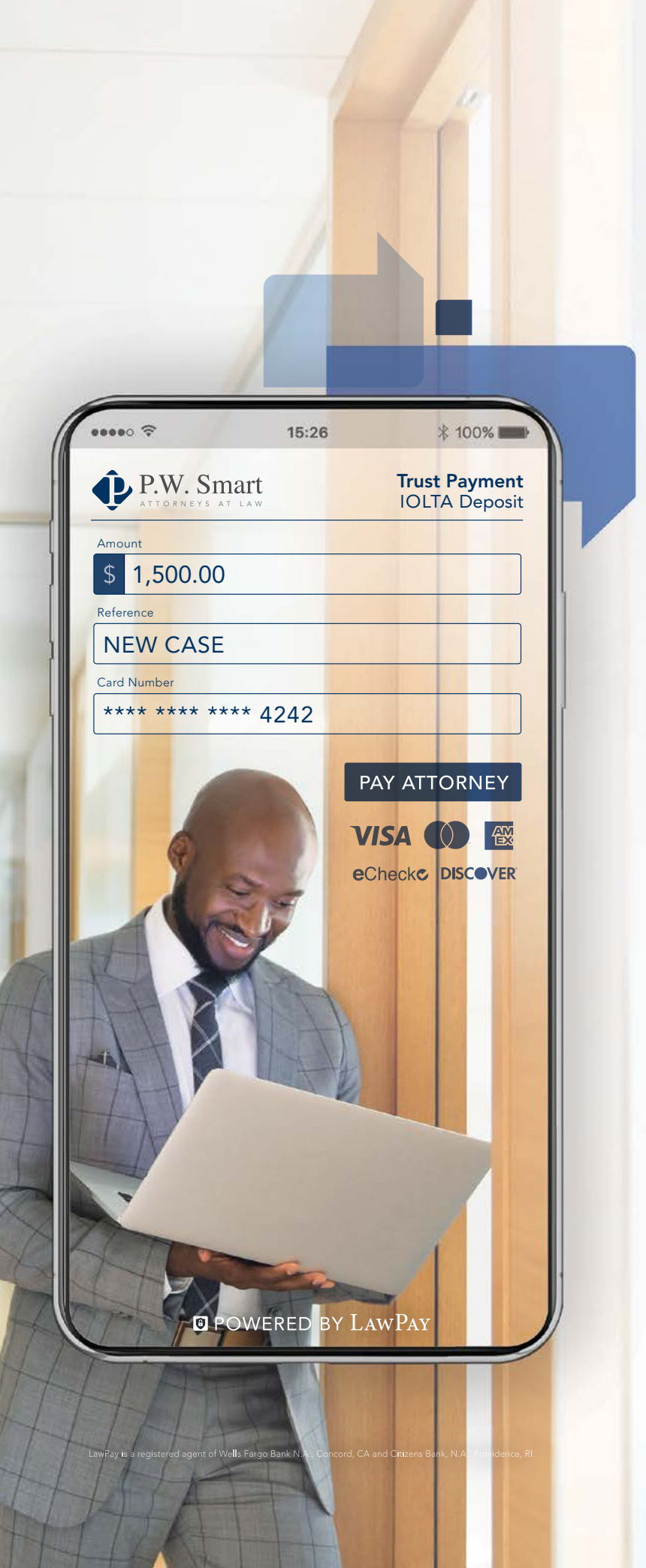
"It's an enormously stressful period for them," Greenberg said of law students and young lawyers.

NYSBA is taking other steps to respond to the crisis, including joining forces with the New York State Unified Court System to set up a statewide network of pro bono attorneys who will assist people hurt by COVID-19 and its economic fallout.

"The virus will present new challenges when we return to our courthouses and adjudicate all the pending cases that have been postponed and new cases that will arise," said Chief Judge Janet DiFiore.

"When the crisis subsides, we will have the greatest demand for legal services that the state has ever seen," Greenberg predicted. Many people will be unable to afford an attorney, he said.

In a similar vein, the large New York City law firm Paul, Weiss, Rifkind, Wharton & Garrison has created a Coronavirus Relief Center online portal, with information about hundreds of aid programs, including federal, state,



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"In this time of fear and isolation, it is imperative that the legal profession fulfill its professional obligation to help the most vulnerable members of our society, especially as the impacts of this pandemic will be felt most acutely by those least able to endure financial hardship," Brad S. Karp, chairman of Paul, Weiss, said in a statement.

The pain of the virus shutdown won't fall equally within the law profession. Some specialties have seen business rise already. For example, employment law firms are busy advising employers how to handle furloughs or layoffs triggered by COVID-19.

Michael Billok, a lawyer representing employers at Bond, Schoeneck & King in Saratoga Springs, said he expects a continued need for legal guidance as employers adapt to changes that emerge from the crisis. For example, he said, the Americans with Disabilities Act generally forbids employers from taking workers' temperatures, but that's now allowed in the face of the coronavirus. That raises the question, he said, of whether workplaces could take temperatures during future flu epidemics.

Bankruptcy lawyers are also expected to be in demand as the economy craters and businesses collapse. Commercial litigators may be dealing with disputes over deals that can't go through during the pandemic. And estate lawyers may get more calls as the sometimes-deadly virus reminds older people, in particular, that they need to plan.

But other law firms, especially those serving hard-hit industries such as hotels or restaurants, are at risk. Attorneys doing transactional work, such as mergers or real estate deals, are also hurting as business activity is put on hold.

Many businesses and individuals won't be able to retain lawyers "because everybody is taking a big hit," said NYSBA President-elect Scott Karson of Lamb & Barnosky in Melville.

"There are a lot of law firms that are going to be decimated by this," said John Remsen, president of the Remsen Group in Atlanta, a management consulting firm specializing in legal firms.

"Most managing partners want to try their damnedest to hold on to people as long as they can," he added. But ultimately layoffs and hiring freezes are likely. Partners may take lower draws. Some firms will merge, and practice groups may jump from failing firms to more solid ground, he said.

"Some firms aren't going to make it," Remsen said. "There'll be more consolidation."

"This reminds me of early 2009," after the financial crisis, said Sarah Gold, a solo practitioner specializing in business law in Albany. "A lot of firms put the brakes on everything and said we've got to wait to see how this plays out. A lot of firms now may have to wait for the business to come back in the door, and they may not be in a position to hire right away."

Gold expects her own practice to feel the impact.

"I have a lot of clients in the process of doing things that will have to wait – like leasing a space or selling their business," she said. "While I'm still getting new work, it's going to be limited and may dry up."

In the face of these challenges, Gold will rely in part on her income from a side job as a lecturer teaching business law and ethics at Rensselaer Polytechnic Institute in Troy.

During the pandemic, attorneys will have to use their best judgment to handle matters under current conditions, then revisit them later, according to Tara Anne Pleat of Wilcenski & Pleat in Clifton Park, chair of NYSBA's Elder Law and Special Needs Section.

For example, Pleat said, she has clients who want to write or update their wills. Normally, they would come to her office to sign the wills in the presence of two witnesses, but now clients are restricted to their homes. So, in some cases, clients are signing their wills at home, in video consultation with the lawyer and witnesses. Once the pandemic passes, Pleat said, the wills can be re-executed with proper formality in person.

Some law firms already had technology in place for attorneys and other staffers to work from home, but others have scrambled to figure it out.

"We've seen more digital transformation in the last five to 10 days than in the last five to 10 years," Greenberg said.

In the future, attorneys and judges are expected to use technology more, after becoming comfortable with it during the pandemic.

"It'll be just as effective once we get used to it, just as powerful," said Dan Kohane of Hurwitz & Fine in Buffalo. "It makes sense. Why is it better for me to get on a plane to travel to New York City to argue an appeal, when I can do it less expensively and just as effectively from my office?"

There is a cost to remote work, Kohane and others acknowledged.

"The only thing you miss is the interrelationship between the attorneys at the office," said Kohane, who says he enjoys working with younger associates. "Mentoring is much easier face to face," he said.

Still, he added, there's no going back: "We have to change. We have to recognize the beauty of technology."

Kathleen Lynn is a freelance writer.

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Covid-19's Impact on Commercial Transactions and Disputes

By Stephen P. Younger, Muhammad Faridi, and Timothy Smith

The ongoing coronavirus (COVID-19) pandemic is among the most devastating and disruptive forces in recent history, with, as of the writing of this article, tens of thousands of cases confirmed worldwide. In an effort to curb the outbreak, governments have introduced various emergency measures, including travel restrictions, curfews, bans on public gatherings, and mandatory quarantines. In addition, many businesses have cancelled events, are requiring employees to work from home, and are taking other steps to limit the spread of the virus.

It is unclear how long the pandemic will last or how long the measures currently being undertaken will remain in effect. It is likely, however, that the COVID-19 pandemic will lead to numerous civil disputes, particularly in the context of commercial contracts.

THE PANDEMIC'S IMPLICATIONS FOR COMMERCIAL DISPUTES

As a result of the emergency measures imposed by various governments, it has or will become impracticable or impossible for many parties to perform their contractual obligations – or at least some will claim as such.[1] A common question in the wake of the pandemic will thus be whether a party should be excused for its non-performance.

The answer to that question will vary by the terms of the contract at issue, the particular facts surrounding the non-performance, and the law of the jurisdiction involved. However, a party whose operations were compromised by the pandemic should seek to assess the applicability of three potential defenses: force majeure, frustration of purpose, and impossibility. In addition, parties to a contract of sale disrupted by the COVID-19 pandemic may be able to invoke Section 2-615(a) of the Uniform Commercial Code, which governs commercial impracticability for U.C.C. transactions.[2]

1. FORCE MAJEURE

The force majeure defense is available only if the contract contains a force majeure clause,[3] which is a provision that excuses non-performance due to certain circumstances beyond the parties' control. What constitutes a force majeure event varies by contract but typically includes events such as war, strikes, riots, governmental orders, and "Acts of God."[4]

In deciding whether to rely on a force majeure clause, parties should be cognizant of a few potential obstacles. First, courts construe these clauses narrowly. In New York, for example, the general rule is that a party's performance will be excused only if the clause specifically contemplates the particular event which prevents performance.[5] In addition, the New York Court of Appeals held in a seminal case involving interpretation of a force majeure clause that, where such a clause contains an expansive catch-all provision in addition to specifically listed events, the catch-all provision should not be given expansive meaning.[6] Instead, according to the court, it should be read to include only those events that fall within the same general kind or class as the listed events. In that case, the recited events pertained to a party's ability to conduct day-to-day operations on its premises. The court found that the claimed force majeure event (i.e., the inability to procure and maintain certain insurance) did not relate to day-to-day operations and therefore could not excuse non-performance.

Second, under certain circumstances, a party may be unable to rely on a force majeure clause if it failed to comply with conditions attached to the exercise of that clause.[7] Such conditions may include, among other things, obligations to notify affected parties within a specific time period following a force majeure event and to take steps to minimize the impact of the force majeure.[8] Relatedly, some force majeure clauses may not totally relieve a party of the obligation to the perform, instead suspending or delaying the time for performance.

Third, again depending on the language of the clause, a party seeking to invoke this defense may be required to show that non-performance was unavoidable.[9] Mere commercial impracticality of, or unanticipated difficulty in, performance is typically insufficient to excuse non-performance.[10] Consistent with these principles, some courts applying New York law have rejected a force majeure defense where the purported basis for non-performance was financial hardship,[11] but this defense is valid where the contract specifically contemplated such an excuse.[12] The need to comply with a government order, by contrast, has been held to be a sufficient excuse because the government has the power to compel compliance.[13]

Fourth, a force majeure defense is only available if the non-performance resulted from the claimed force



Stephen P. Younger (far left) (spyounger@pbwt.com) and **Muhammad Faridi** (center) (mfaridi@pbwt.com) are litigation partners at Patterson Belknap Webb & Tyler LLP. They are co-editors of the Commercial Division Blog.

Timothy Smith (left) (thsmith@pbwt.com) is an associate in Patterson Belknap's litigation department.

majeure.[14] Therefore, if a party was incapable of performing regardless of the COVID-19 outbreak, that party likely could not successfully argue that the outbreak should excuse its non-performance.

The foregoing are only some of the issues associated with likely litigation surrounding force majeure defenses, and the outcome of any of these disputes will turn on the particular facts involved.

2. FRUSTRATION OF PURPOSE

A non-performing party may also be able to avail itself of the frustration of purpose defense. Unlike force majeure, this defense is potentially available regardless of whether the contract specifically mentions the doctrine.

It has or will become impracticable or impossible for many parties to perform their contractual obligations – or at least some will claim as such. A common question in the wake of the pandemic will thus be whether a party should be excused for its nonperformance.

The specific requirements for this defense vary by jurisdiction but are generally quite stringent. Under New York law, the frustration doctrine excuses non-performance only when a change in circumstances makes one party's performance virtually worthless to the other, frustrating its purpose in making the contract.[15] The defense does not apply where performing under the contract would merely occasion financial difficulty or hardship.[16] In addition, the defense is not available where the event that prevented performance was foreseeable and reasonable provision could have been made for its occurrence.[17]

3. IMPOSSIBILITY AND U.C.C. SECTION 2-615(A)

If neither of the foregoing defenses is available, a non-performing party may still seek to invoke the impossibility defense. Under New York law, the impossibility doctrine excuses a party's performance when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.[18] Generally, the impossibility must be the result of an unanticipated event that could not have been reasonably foreseen or guarded against in the contract.[19]

The court's decision in *U.S. Bancorp Equip. Fin., Inc. v. Ameriquest Holdings LLC* is instructive. In that case, participants in the airline industry who had defaulted on their loan agreements argued that their performance was rendered impossible by the events of 9/11.[20] The court rejected that argument because, although 9/11 had radically depressed the market for airplanes, the subject matter of the contract – i.e., airplanes – had not been destroyed.

Some jurisdictions have abandoned the requirement of strict impossibility and, following Section 2-615(a) of the Uniform Commercial Code, require only commercial impracticability.[21] The commercial impracticability doctrine typically requires a party to show impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.[22]

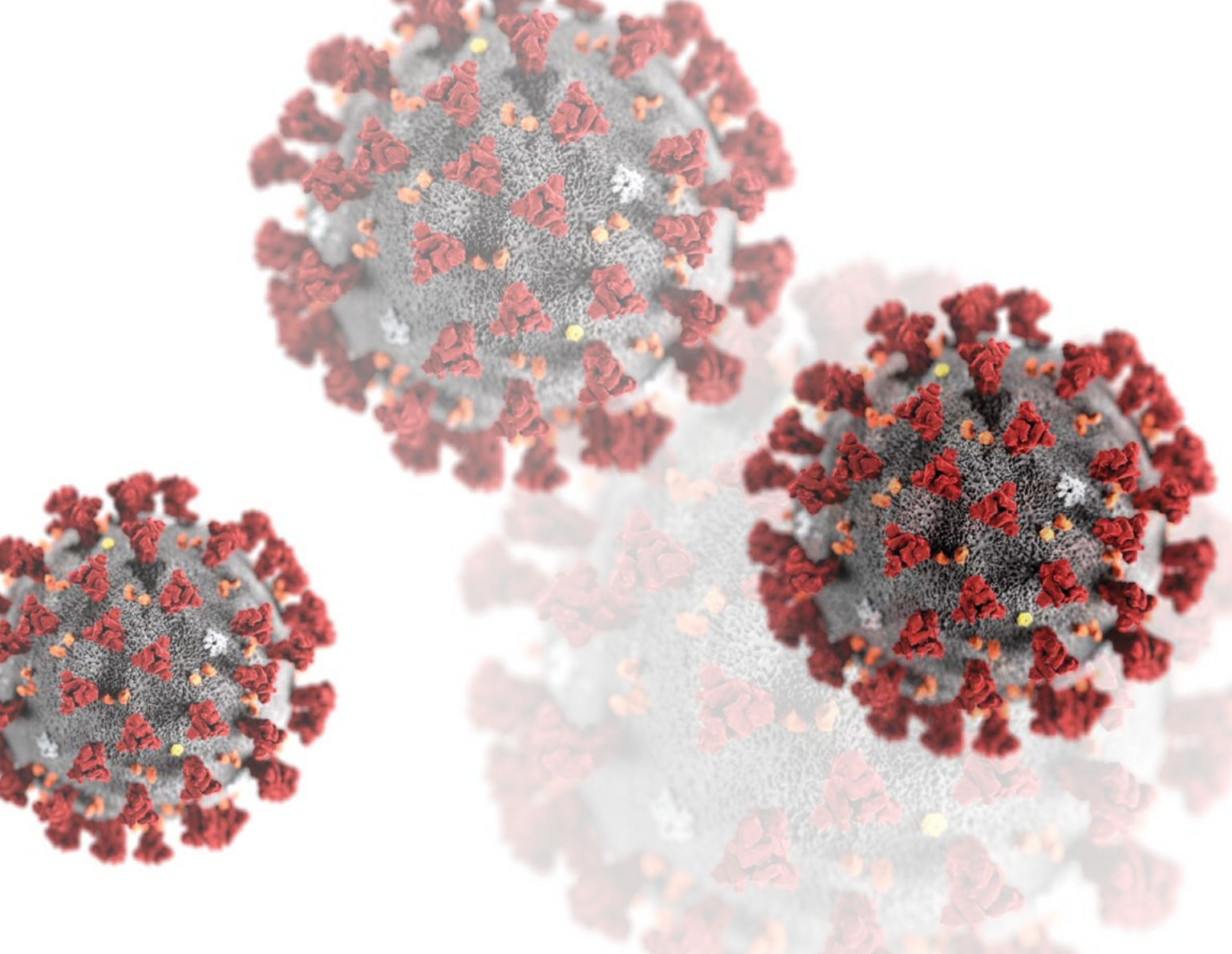
OTHER LEGAL ISSUES ARISING OUT OF THE PANDEMIC

In addition to these contractual issues, the pandemic is poised to create numerous other legal challenges for businesses. Businesses experiencing operational disruptions, for example, may find themselves embroiled in insurance disputes. These disputes will turn on the language of the policy at issue. For example, in some property insurance policies, coverage for business interruptions requires "direct physical loss" to insured property.[23] Thus, if a business files a claim for a COVID-19-related interruption, insurers may dispute whether a "physical loss" has occurred. Other policies may contain exclusions such as for viruses.

Businesses may also face tort claims from patrons alleging that they contracted COVID-19 on their premises, as well as employees claiming that they contracted the virus on the job.

Another issue that may arise is whether the pandemic constitutes a "Material Adverse Change" or "Material Adverse Effect" (collectively, MAC) under an existing transaction. Many acquisition and financing agreements contain MAC provisions, under which the non-existence of a MAC is a condition to closing. Whether the pandemic constitutes a MAC will depend on the terms of the provision at issue, as well as the magnitude of the impact on the relevant party's business. However, a few general principles bear mentioning. First, courts typically read MAC provisions narrowly. Second, while there is no bright-line rule for assessing materiality, courts generally apply a strict standard. For example, in a seminal decision from the Delaware Court of Chancery, the court held that the event at issue must substantially threaten the overall earnings potential of the relevant party in a durationally-significant manner (i.e., for years, not months).[24] Third, an adverse change must usually be company-specific. If every business in the relevant market is similarly affected, then the buyer or financier must usually bear the risk.

In sum, a host of legal issues are likely to arise in the wake of the coronavirus pandemic.



1. For example, in New York City, Mayor Bill DeBlasio has issued an Executive Order requiring all bars and restaurants to close effective on the evening of March 16, 2020. *See* https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf (last visited March 17, 2020). This, in turn, will force the cancellation of any events that were to be held at these establishments. In addition, the president has restricted travel from Europe, which will render unfeasible various business conferences and meetings.

2. Where contracts are governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), non-performance may also be excused under Article 79 of the CISG. Article 79 provides that "[a] party is not liable for failure to perform any of his obligations if he proves that failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences." CISG Art. 79(1). It also imposes notice obligations. CISG Art. 79(4). Article 79 applies even if a contract does not contain an express *force majeure* provision. *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, KG, No. 03 C 1154, 2004 WL 1535839, at *3 (N.D. Ill. July 7, 2004). In applying the Article, courts have looked to caselaw interpreting analogous U.C.C. provisions for guidance. *Id.*; *see also Macromex SRL v. Globex Int'l, Inc.*, No. 08 CIV. 114 (SAS), 2008 WL 1752530, at *1 (S.D.N.Y. Apr. 16, 2008).

3. *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417, 418 (1st Dep't 2002).

4. *See, e.g., Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942 (3d Dep't 2007).

5. *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902–03 (1987).

6. *Id.* at 903.

7. *PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, 180 F. Supp. 2d 475, 482 (S.D.N.Y. 2001).

8. *See id.*

9. *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 559 (1st Dep't 2017) (denying motion to dismiss on the basis of force majeure clause because the defendant had not established as a matter of law that its failure to perform was an unavoidable result of the claimed force majeure); *see also Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308, at *13 (N.D. Iowa Sept. 7, 2017) (in commercial dispute arising out of the avian flu epidemic, poultry farmer was unable to invoke force majeure to cancel an order for no-longer-needed machinery because the force majeure clause applied to the supplier's performance, and supplier remained capable of performing).

10. *Id.*; *see also Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

11. *See, e.g., Macalloy Corp. v. Metallurg, Inc.,* 284 A.D.2d 227, 227 (1st Dep't 2001).

12. *In re Old Carco LLC*, 452 B.R. 100, 119 (Bankr. S.D.N.Y. 2011).

13. *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993).

14. *In re Old Carco,* 452 B.R. at 120.

15. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dep't 2011).

16. *Bierer v. Glaze, Inc.*, 2006 WL 2882569, at *7 (E.D.N.Y. Oct. 6, 2006).

17. *Warner v. Kaplan*, 71 A.D.3d 1, 6 (1st Dep't 2009).

18. *Kel Kim*, 70 N.Y.2d at 902.

19. *Id.*

20. *U.S. Bancorp Equip. Fin., Inc. v. Ameriquest Holdings LLC*, 2004 WL 2801601, at *4 (D. Minn. Dec. 7, 2004) (applying New York law).

21. *See Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts,* 817 F.2d 1094, 1099 (4th Cir. 1987).

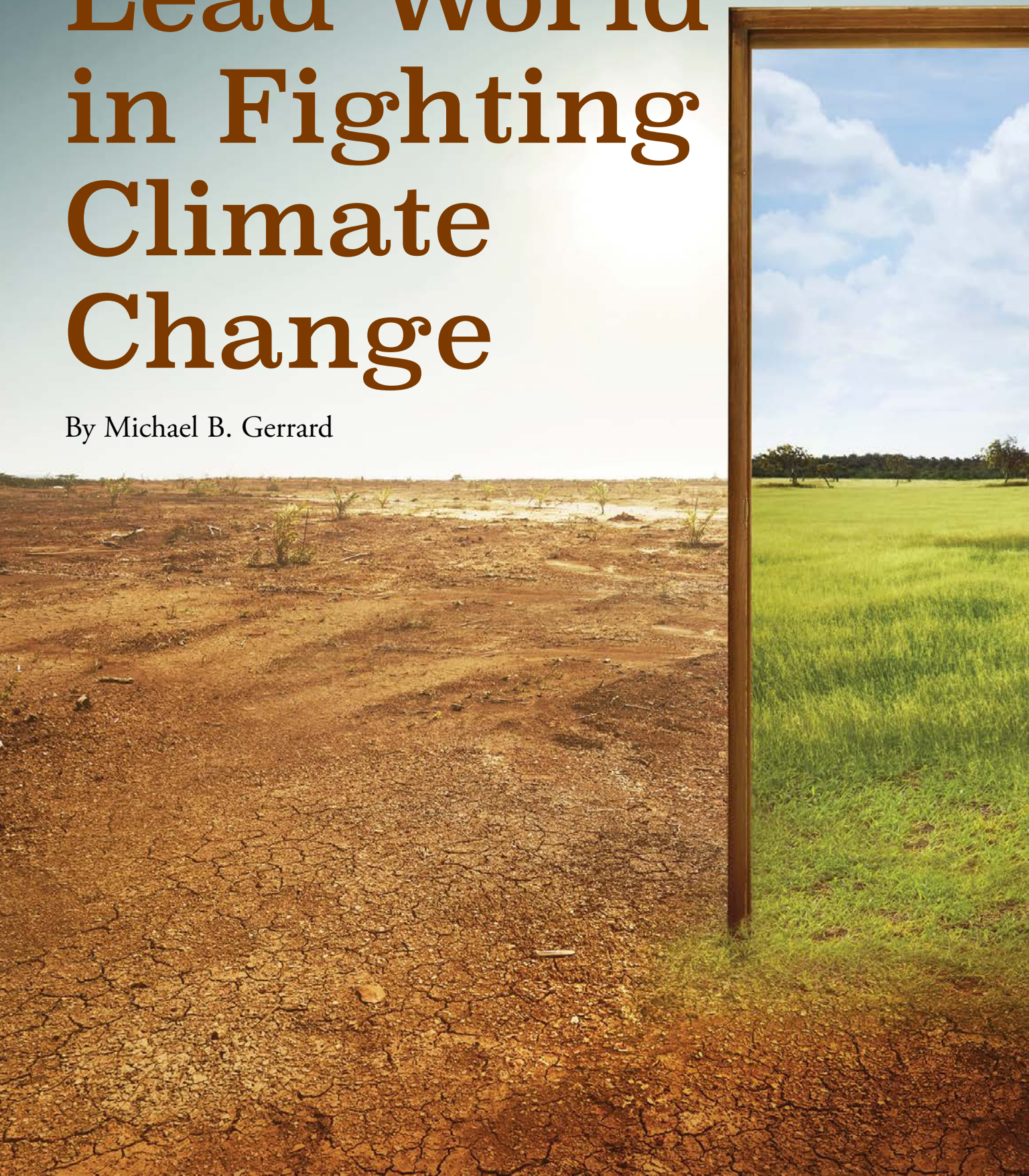
22. *Hemlock Semiconductor Operations, LLC v. SolarWorld Indus. Sachsen GmbH*, 867 F.3d 692, 702 (6th Cir. 2017) (applying Michigan law); *accord Int'l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 886 (10th Cir. 1985) (applying New Mexico law).

23. *See generally*; "Physical" loss or damage, 10A Couch on Ins. § 148:46.

24. *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001).

New York Can Lead World in Fighting Climate Change

By Michael B. Gerrard



New York State now has one of the strongest climate change laws in the world, and if we succeed in implementing it, the state will have demonstrated that it is possible to defeat what may be the greatest threat facing humanity.

On July 19, 2019, Governor Andrew Cuomo signed the Climate Leadership and Community Protection Act (CLCPA), which requires total statewide greenhouse gas (GHG) emissions to be 40% below 1990 levels in 2030 and 85% below 1990 levels in 2050. As of 2015, the last year for which data are available, emissions were 8.5% below 1990 levels. There is also an aspirational goal of a 100% reduction by 2050.

The new law is not very specific about how these targets are to be met. The job of coming up with the plan is left to a new body established by the CLCPA, the Climate Action Council. Of its 22 members, 12 are the heads of state agencies, and 10 are appointed by state legislative leaders and the governor. It held its first meeting on March 3. The Council has until January 2022 to devise a draft "scoping plan" and circulate it for public review. The final plan is due in January 2023, and by January 2024 the Department of Environmental Conservation must issue regulations to enforce the plan. The Public Service Commission has less time – until June 2021 – to adopt rules to meet the new requirements for the power sector.

The largest source of GHGs in New York is transportation, which accounts for 33% of emissions. Buildings are second at 26% (16% residential and 10% commercial). Electricity is 13% (or 17% if one counts net imports of power from outside the state). All other categories, including industry, ozone depleting substances, landfills, incineration, and agriculture, are 5% or less.

Michael B. Gerrard is a professor and director of the Sabin Center for Climate Change Law, and a former partner and currently senior counsel in the New York office of Arnold & Porter. His latest book is *Legal Pathways to Deep Decarbonization in the United States* (co-edited with John Dernbach, 2019).

TRANSPORTATION

Drastically reducing transportation emissions will require the replacement over time of virtually all gasoline- and diesel-using passenger cars and SUVs with electric vehicles. (It is possible that some will use hydrogen or other zero-emission energy sources.) Heavy-duty vehicles such as trucks and buses will also need to move to cleaner fuel sources; that could be electricity (if battery technology improves considerably), biogas from municipal and agricultural waste, or hydrogen. Current vehicles will live out their useful lives, but increasingly their replacements will need to have zero emissions.

Fuel and emission standards for motor vehicles are under federal control. New York cannot mandate electric vehicles on its own except for publicly owned fleets. The Trump Administration is moving to relax the existing standards, but if a different president is elected in November, he or she may well strengthen them again. Meanwhile, states and cities will need to establish robust systems of electric vehicle charging stations.

Vehicle miles travelled will also have to go down. This will entail improvements in mass transit; more bicycle lanes; and, in time, land use patterns that are friendlier to transit, biking and walking.

BUILDINGS

Most of the GHGs from buildings are from burning oil and natural gas for heating, hot water, and cooking. Getting this down to near zero will require converting all of this to electricity; the heating part will probably be accomplished largely through heat pumps. More energy efficiency, such as through better insulation, will also be needed. Municipalities will play a central role through their building codes.

Moving aggressively in that direction, in May 2019 the New York City Council adopted a law, called Local Law 97, that set stringent limits on GHG emissions on most buildings larger than 25,000 square feet, of which there are more than 50,000. Buildings that do not meet these limits are subject to stiff penalties. A trading program may be established to allow buildings that can achieve these savings inexpensively to sell credits to those where the cost would be much greater.

Conversions to electricity can be very expensive, and there is great concern over how they will be paid for in low-income and middle-income housing. Subsidies or other kinds of assistance will certainly have to be on the table.

ELECTRICITY

Though producing electricity now generates only about 13% of the state's GHG emissions, the amount of power needed will go up – about 40%, by one estimate – as we electrify transport and buildings.

CLCPA mandates that 70% of electric power demand in 2030 be met by renewables, and 100% be from "zero emissions" in 2040. Thus the requirement for 2040, unlike that for 2030, may include nuclear. In 2018, 32% of New York's power came from nuclear power plants. However, the two Indian Point units in Westchester County are scheduled to close in 2020 and 2021. The remaining four are all on the shores of Lake Ontario. Their operating licenses have all been extended; all but one of those will expire before 2040. Since there are no proposals to build new nuclear power plants in New York, it appears that nuclear power will make little contribution to New York's electricity supply in 2040, barring very rapid development and acceptance of new nuclear technologies.

Lawyers will be needed to handle the real estate, financing, construction contracting, environmental impacts, land use, and other aspects of the untold number of transactions that will be involved.

Of the remaining sources of power for New York, 39% comes from fossil fuel; 23% from hydro; and 6% from wind and solar. The fossil fuel electricity is overwhelmingly from natural gas. (The two remaining coal-fired power plants in the state are closing in 2020, and oil is no longer used to make electricity except for emergency generators.) Since electric generating plants cannot use offsets, it looks like all the natural gas power plants in the state will need to close by 2040 (except perhaps for a few plants to meet peak loads a few hours or days a year), unless carbon capture and sequestration technology for such plants develops rapidly and is able to achieve zero emissions, something that is beyond current commercial capabilities. The environmental justice community played a major role in shaping CLCPA, and it has long complained that natural gas plants are disproportionately located in or near low-income and minority communities.

To make up for the added load and the loss of fossil fuel capacity, the new law contemplates a massive increase in renewables. It mandates a minimum of 6 gigawatts (GW) of distributed solar capacity (such as on rooftops) by 2025 (there is now 1.5 GW), and 9 GW of offshore wind capacity by 2035. There is currently no offshore

wind power generation, though the state is actively working to build several plants off Long Island. (To put these numbers in perspective, a large nuclear power plant has a capacity of about 1 GW.) There will be more onshore wind power as well, but CLCPA does not specify how much. The law further requires 3 GW of energy storage capacity by 2030 (there is now 0.039 GW). The storage does not itself generate electricity, but it helps provide power when the sun is not shining and the wind is not blowing.

These minimum numbers will not be nearly enough. A study by the McKinsey consulting firm estimated that by 2040, New York will need 17 GW of offshore wind capacity, 11 GW of onshore wind (we now have 2), and 23 GW of utility-scale solar. The state may also buy more power from HydroQuebec using a new transmission line that has been approved but not yet built, but that would only make a dent. A massive program is needed to build the new wind and solar capacity and the associated transmission lines.

This kind of new construction does not always go smoothly. Wind farms and transmission lines, in particular, are often unpopular in local communities. The state's process for siting new electricity generating units under Article 10 of the Public Service Law has not worked; approvals typically take years. Governor Cuomo has proposed legislation that would take this process out of Article 10 and create a new, hopefully much faster process in the Department of Economic Development.

These challenges also create great opportunities. A large workforce will need to be recruited and trained to build and maintain all the new facilities and equipment that will be required. Lawyers will be needed to handle the real estate, financing, construction contracting, environmental impacts, land use, and other aspects of the untold number of transactions that will be involved. Major efforts will also be needed to cope with sea level rise and other climate impacts that will occur regardless of our best efforts.

The scale of the construction required for all of this is unprecedented since the mobilization that occurred during World War II. If the New York legal community can help make all of this happen, this effort will be a shining example for the rest of the world.

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The Arc of Hazardous From Superfund to

By David J. Freeman and Larry Schnapf

Waste Cleanup: Brownfields

America's serious attempts to clean up hazardous wastes began with the passage of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) during the waning days of the Carter Administration. CERCLA is widely referred to as Superfund and over the past 40 years has not only facilitated the cleanup of contaminated sites – its original intention – but has also transformed the practice of real estate and corporate law.

Superfund was enacted in large part as a response to series of discoveries of abandoned hazardous dump sites in the late 1970s. The most notorious of these sites was Love Canal, in the city of Niagara Falls in upstate New York. In summer of 1978, toxic chemicals were discovered seeping from city sewers into basements of homes built on a landfill that had been used to bury 21,000 tons of hazardous waste, including dioxin and PCBs. 950 families were evacuated from a 10 square-block area and their homes purchased by the federal government. At the time, the U.S. Environmental Agency's Acting Administrator ruefully observed:

> [Q]uite simply, Love Canal is one of the most appalling environmental tragedies in American history. But that's not the most disturbing fact. What is worse is that it cannot be regarded as an isolated event. It could happen again – anywhere in this country – unless we move expeditiously to prevent it.

The recurrence of Love Canal and other similar tragedies is what Superfund was designed to prevent.

The Superfund statute imposes cleanup liability on four classes of parties: owners, operators, generators and transporters. However, it was hastily drafted, with ambiguous provisions and a limited legislative history. Accordingly, courts looked to its broad remedial goals and liberally construed the statute's liability provisions.

By the mid-1980s, courts were imposing joint, strict and retroactive liability on a far broader class of parties than many had originally anticipated. Courts held that owners of property contaminated prior to acquisition, or where wastes were disposed of in accordance law, could be liable for cleanup. So could passive landlords and sublessors. Individual officers, directors, and corporate shareholders (parent corporations) also got caught up in the liability net because of control exercised over the property or a business. The CERCLA liability net even swept up the ultimate deep pockets – financial institutions when they participated in the operation of their borrower or foreclosed on contaminated collateral.

Not surprisingly, this imposition of vicarious liability on parties not responsible for the original contamination, along with the substantial cost of cleaning up sites, substantially altered the nature of corporate and real estate transactions, as parties now had to account for such liabilities and determine how they would be allocated. Negotiation of environmental representations, warrantees and indemnifications quickly became a crucial ele-

David Freeman is the director of environmental practice at Gibbons Law. He has over 35 years of experience representing buyers, sellers, and developers of contaminated properties, as well as both plaintiffs and defendants in Superfund and other litigation regarding the cleanup of hazardous waste sites. He is a past co-chair of the NYSBA Environmental Law Section Committee on Hazardous Waste/Site Cleanup. He has also served as president of the New York City Brownfield Partnership, vice chair of the New York State League of Conservation Voters Education Fund, and special legal counsel to the United National Education Programme for North American Environmental Affairs. dfreeman@gibbonslaw.com

Lawrence P. Schnapf is an environmental attorney based in New York City and New Jersey. He is a past chair of the Environmental Law Section of NYSBA and co-chair of the NYSBA Brownfield Task Force. He is also a past chair of the American Bar Association Section of Business Law Committee on Environmental, Energy and Natural Resources Law, and a former board member of the NYC Brownfield Partnership and the advisory board of the Brownfield Coalition of the Northeast. He is an adjunct professor of environmental law at New York Law School and a faculty member of its Center for Real Estate Studies. www.schanpflaw.com

ment of – and, all too often, a substantial obstacle to – successful completion of such transactions.

As originally drafted, CERCLA contained only three statutory defenses. Most courts narrowly interpreted the third party defense so it was largely unavailable. Virtually anyone in the chain of title would be liable under CERCLA.

Accordingly, in 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA) which, among other things, added an Innocent Purchaser defense to CERCLA: a purchaser who did not know or have reason to know about contamination, after performing "all appropriate inquiries" into past use and ownership of the property, generally would not be considered a responsible party if it demonstrated that the contamination was solely caused by another party. The "all appropriate inquiries" requirement gave birth to what is now commonly referred to as a Phase I Environmental Site Assessment, which is now a standard element in virtually every corporate or real estate transaction involving real property.

Unfortunately, the 1986 amendments did nothing to address the growing problem of brownfield sites – properties that any investigation would demonstrate were contaminated. Such properties, most of which were in urban or old industrial areas, sat vacant and undevelopable because no one wanted to become a responsible party, liable for cleanup, by purchasing them.

As a result, in 2002, Congress passed the Small Business Liability Relief and Brownfield Revitalization Act (BRERA), which added a Bona Fide Prospective Purchaser (BFPP) exemption to CERCLA. A BFPP may knowingly purchase contaminated property without being considered a responsible party, provided that it performed pre-acquisition due diligence, was not associated with a responsible party, and could demonstrate that all disposals occurred prior to taking title and that after becoming owner it exercised appropriate care with respect to any onsite hazardous substances.

The liability relief provided by SARA and BRERA was helpful but not sufficient to spur the redevelopment of contaminated sites. At least some of the vicarious liability burden had been removed, but many of these sites still sat vacant because of the cost of cleaning them up to make them usable.

Many states stepped in with their own policies to address this problem. New York did so with the enactment in 2003 of the Brownfield Cleanup Act (BCA). The BCA contained numerous features not previously found in New York State law or regulations, including:

- The establishment of a *statutory* brownfield cleanup program for hazardous waste and petroleum-contaminated sites. The prior program run by the New York State Department of Environmental Conservation (NYSDEC) – the Voluntary Cleanup Program (VCP) – was created administratively and therefore subject to challenge as legally unauthorized.
- A release of liability and contribution protection from all state agencies, including the State Attorney General's office and the Office of the State Comptroller, which runs the New York State Oil Spill Fund. Releases under the VCP bound only NYSDEC.
- An express authorization of cleanups that did not achieve "pre-release" (i.e., background) levels of contamination. It did so by providing for different levels of cleanup geared to site conditions and currently or reasonably anticipated future use. NYSDEC subsequently promulgated regulations establishing acceptable cleanup levels in soil and groundwater for unrestricted, residential, commercial and industrial uses.
- The establishment of a protocol for monitoring and enforcement of engineering and land use controls at sites where hazardous materials were allowed to remain in place.
- An extensive program of public involvement and participation in decisions of hazardous waste cleanups.
- Last, but definitely not least, the provision of tax credits and other forms of financial assistance to encourage the cleanup and redevelopment of contaminated property.

Although the Brownfield Cleanup Program has generated its share of controversy, it has been very successful in incentivizing the cleanup and the development of contaminated sites around the state.

The significance of the tax credit provisions was not widely recognized when the BCA was first enacted. However, it soon became apparent that they were extraordinarily generous. Credits were awarded not only for cleanup costs but also for the expenses of subsequently developing the site. As a result, lightly contaminated sites on which substantial development dollars were spent could generate millions of dollars in tax credits.

NYSDEC responded by imposing "eligibility criteria" in order to limit the tax expenditures generated by the Program. After years of litigation, these criteria were struck down by the New York State Court of Appeals as being statutorily unauthorized.

Meanwhile, the state legislature took matters into its own hands. In 2008 and again in 2015, it reauthorized the program but restructured the tax credit provisions to incentivize more complete cleanups, while limiting the tax credits available for development expenses. For example, at sites within the five boroughs of New York City, development tax credits are now generally limited to sites in special "Environmental Zones" or being developed for affordable housing.

Although the Brownfield Cleanup Program has generated its share of controversy, it has been very successful in incentivizing the cleanup and the development of contaminated sites around the state. As of this writing, over 900 sites have been enrolled in the program, with more than 400 of them having received Certificates of Completion. Private investment in these sites has exceeded $13 billion, generating over $2 billion worth of tax credits for site owners, developers and investors.

The tax credit provisions of the current version of the BCA sunset in 2022. Most commentators expect the state legislature to reauthorize the program within the next year or two. However, as has happened with each reauthorization, there will undoubtedly be substantial debate and controversy about further amending the program, including its tax credit provisions.

Over the last 50 years we as a society have come full circle in dealing with hazardous waste sites. Through lax regulation and complacency, we allowed them to be created. We then began the arduous and expensive process of cleaning them up, but under a statute whose draconian liability scheme caused many less seriously contaminated sites to be abandoned because no one wanted to shoulder the cleanup liability that accompanied ownership.

Twenty years into that process, we created brownfield programs with carrots and sticks to incentivize the successful remediation and safe redevelopment of these sites, spurring economic revitalization in the communities around them. In the process we have created a legal and regulatory structure that has both forced and incentivized governments, businesses and individuals to care much more about how they handle and dispose of hazardous substances.

In this sense, at least, the Superfund statute, and federal and state brownfields programs, are one of the big success stories of the past 50 years of environmental law and regulation.

Help Wanted: New York Needs More Lawyers – in Rural Areas

A NYSBA Task Force Looks at Access to Justice Beyond Our Metropolitan Centers

By Dan Weiller

New York State needs a lot more lawyers – in our rural communities.

New York has more licensed attorneys than any other jurisdiction in the United States, but an estimated 96% of them practice in or around the state's urban centers – New York City, Buffalo, Rochester, Syracuse, Utica and Albany/Schenectady/Troy.

At the same time, 44 of New York's 62 counties are classified as rural under state law. These rural areas offer a laid-back lifestyle with easy access to outdoor recreation and extraordinary scenery. As alluring as such amenities many be for some, they are not attracting young lawyers to live and practice in these communities.

NYSBA's President, Hank Greenberg, formed the Rural Justice Task Force last year to look at this important issue and make recommendations for how to address it, and the task force report is being released this month. The annotated maps included here were created for the report and present a stark graphic reminder of the challenges New York faces in ensuring access to justice for New Yorkers in rural communities across the state.

The Government Law Center at Albany Law School published its Rural Law Practice in New York State Report in April 2019. This report surveyed rural practitioners and detailed the growing shortage of rural attorneys based on several indicators: rural attorneys have difficulty making referrals in their geographic region; they feel overwhelmed by the volume of cases they are handling, and there is a greying of the rural bar due to a shortage of new attorneys.

The demographic trend cannot be ignored: 74.3% of respondents in the Albany Law School report were 45 years or older, with 54% at or near retirement age. This means that within 10 to 30 years, the majority of current rural attorneys in New York State will be fully retired.

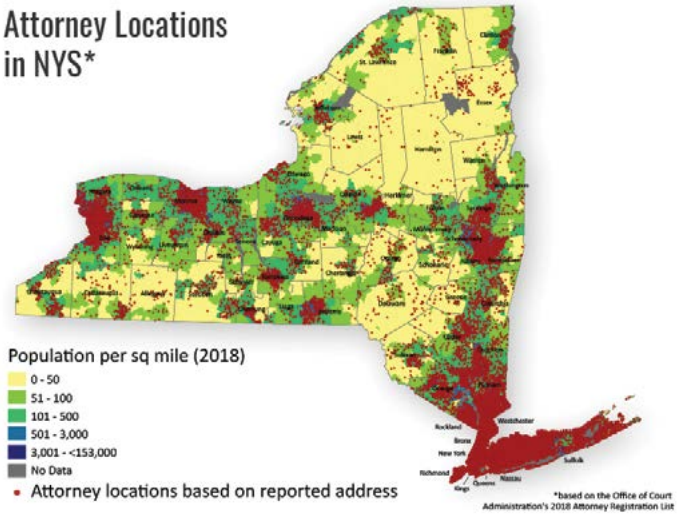
What will it take to attract young lawyers to rural practice? The NYSBA task force report offers a range of potential solutions including loan forgiveness and repayment assistance programs, law school tuition assistance for those who plan to practice in rural areas, and a reassessment of law school programs to encourage promoting access to justice, providing information to students about rural law practice, and offering direct legal services in impacted areas.

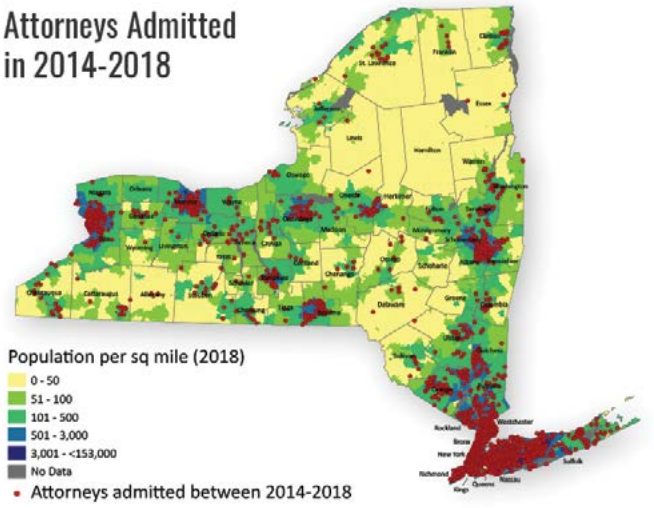
The NYSBA report also calls for an increase in assigned counsel rates, which have not risen in New York since 2004.

Young lawyers who have grown up in a fully connected world are less likely to be willing to settle in communities without fast internet access and dependable cellphone service, so the NYSBA report also calls for better and more widespread broadband service across the state as well as other telecommunications improvements.

The New York State Bar Association Task Force on Rural Justice was chaired by Taier Perlman, staff attorney, Legal Services of the Hudson Valley, and Hon. Stan Pritzker, associate justice, Third Department. The report of the task force can be found here: http://www.nysba.org/RuralTFReport.

The complete Albany Law School Government Law Center Rural Law Practice in New York State Report can be found here: https://www.albanylaw.edu/centers/government-lawcenter/the-rural-law-initiative/Documents/rural-lawpractice-in-new-york-state.pdf

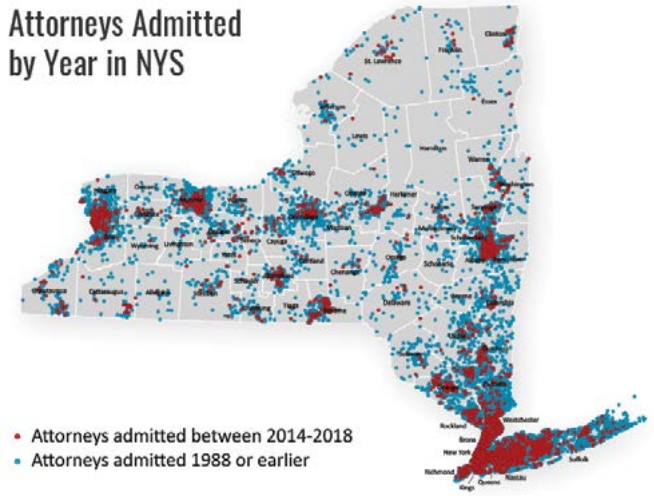




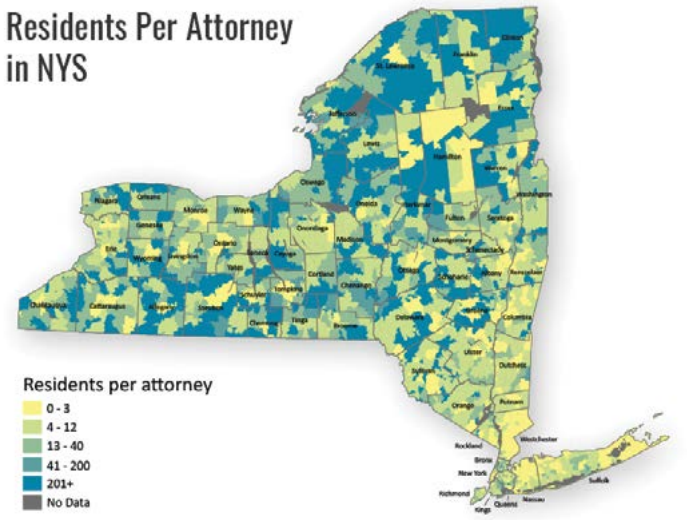
Each dot represents a single attorney based on addresses reported to the Office of Court Administration.[1] The vast majority of New York State attorneys are located in urban centers of the state – the New York City, Buffalo, Rochester, Syracuse, Utica, Albany/Schenectady/Troy metropolitan areas. Geographically, however, New York is primarily rural. Comprised of 62 counties, 44 are considered rural according to New York State Executive Law.[2]

Newly admitted attorneys cluster in New York's urban and suburban counties.

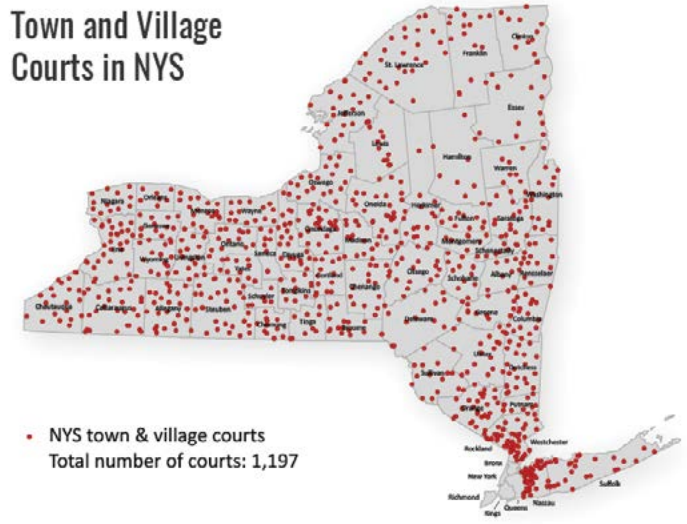
1. The attorney registration list maintained by the Office of Court Administration's Attorney Registration Unit only publicly releases attorney work addresses, not their home addresses. Accordingly, attorneys who only report a home address, without including a work address, are not projected on this map. Additionally, 4,725 attorneys in suspended status are not shown on this map.
2. New York's Executive Law § 481(7) defines a county as rural when it has less than 200,000 people https://www.nysenate.gov/legislation/laws/EXC/481.



The older generation of attorneys are much more numerous and spread out across New York's rural area. They also clearly outnumber the newly admitted attorneys who are settling in rural areas.



Rural areas across New York State have higher resident-per-attorney ratios. In urban and suburban areas, for each attorney there are 1 to 40 residents. In many rural areas, however, for each attorney there are 201+ residents. Rural practitioners reported an overwhelming volume of cases and difficulties making referrals to legal experts in their geographic region.



Active rural practitioners face another challenge. They have to travel tremendous distances to appear in widely scattered town and village courts, which typically only hold court during night hours a few times each month.

The Unified Court System's Guide to New York Evidence

By William C. Donnino

Hon. William C. Donnino is a retired Supreme Court Justice and co-chair of the New York Unified Court System Guide to N.Y. Evidence Committee.

There now exists for the benefit of the bench and bar a new resource, the Guide to New York Evidence, published by New York's Unified Court System at http://www.nycourts.gov/JUDGES/evidence/, with a "rule" set forth in black letter and a "note" explaining the decisional or statutory derivation of the rule and any decisional nuances on the meaning of the rule.[1]

The Guide to New York Evidence is a milestone in the publication of the law of evidence in New York. It brings this state into the 21st century with the federal government and all other states that have either a consolidated Code or Guide of their own rules of evidence.

As Chief Judge Janet DiFiore explained in commissioning a Committee to write the Guide to New York Evidence:

> New York is one of the very few states that does not have a statutory code of evidence. Our law of evidence is scattered throughout thousands of judicial decisions, statutory provisions and court rules. For judges and lawyers, this is both frustrating and inefficient. This past July, I established an Advisory Committee on Evidence to create a single, definitive compilation of New York's law of evidence. Creating an accessible, easy-to-use guide for judges and lawyers will save research time, promote uniformity in applying the law, avoid erroneous rulings and improve the quality of legal proceedings.[2]

The Committee members are sitting and retired trial and appellate judges, including Susan Phillips Read, retired judge of the Court of Appeals, who serves as co-chair; and Michael J. Hutter, professor of the law of evidence, who serves as the Committee's Reporter. (All committee members are listed at the website.)

Publication of the guide on the internet permits the bench and bar to carry it in various electronic devices and thereby have free, ready access.

It is important to understand that the Guide to New York Evidence is not a statutory code of evidence. It is, as its name is intended to make clear, a "guide" to the existing New York law of evidence, with a rule conforming to the language of the relevant statute or decisional law, particularly of the Court of Appeals. Language from the last Proposed Code of New York Evidence (1991) or the Federal Rules of Evidence (FRE) may be utilized but only when that language accurately reflects existing New York law. As rule 1.01 of the Guide to New York Evidence states: "the rules of evidence set forth in this Guide are not intended to alter the existing law of New York evidence and shall not be construed as doing so or as precluding change in the law when appropriate."

The Guide to New York Evidence is presently comprised of the following articles:

1. General Rules & Court's Role
2. Judicial Notice
3. Presumptions
4. Relevance and Its Limits
5. Privileges
6. Witnesses and Impeachment
7. Opinion Evidence
8. Hearsay
9. Authenticity and Identification
10. Best Evidence Rule
11. [Reserved]
12. Appellate Review

For easy comparison with the FRE, the first ten articles correspond to the structure of the FRE. Unlike the FRE, there is an Article 12, "Appellate Review," which includes New York's rules on the preservation of a purported error of law for appellate review. And there will be an Article 11 for the publication of rules relating to demonstrative evidence. There is also an index, listing the rules in alphabetical order, along with each rule's section number.

Publication of the Guide to New York Evidence on the internet permits the bench and bar to carry it in various electronic devices and thereby have free, ready access to New York's law of evidence wherever they may be, including in court.

An additional anticipated benefit of the Guide to New York Evidence is that it will serve as a catalyst for the courts to consider the areas of the law of evidence that need clarification and thereby fulfill the promise of the common law.

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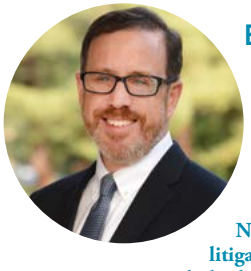
1. *See New York's Evidence Guide: The Court System's 'Best Kept Secret,'* New York Law Journal, September 10, 2019.
2. State of the Judiciary (Feb. 20, 2017).

Administration of Special Needs Trusts: Development of an Improved Approach (Part III)

By Edward V. Wilcenski
and Tara Anne Pleat



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*This certification is not granted by any governmental authority within the State of New York.

This is the third and final installment of a three-part article published in the NYSBA Journal *beginning in March 2019.*

The authors wish to express thanks to NAELA Fellow Ron M. Landsman for his willingness to offer insight and comment on the ideas expressed in this article. His piece in the Spring 2014 issue of the NAELA Journal, When Worlds Collide: State Trust Law and Federal Welfare Programs, NAELA Journal Volume 10, No. 1 (Spring 2014), remains one of the most important writings in the area of special needs trust practice in many years.

In Part I we discussed the different standards of review courts use to assess the work of supplemental needs trust (SNT) trustees. In Part II we provided a number of procedural and administrative recommendations, which if implemented would support a finding that the trustees reasonably exercised discretion.

Both of the prior articles referenced two New York decisions that received significant attention within the fiduciary community. Those decisions involved surcharge (or the threat of surcharge) against a trustee for failing to fulfill its responsibilities under the terms of a supplemental needs trust – one for spending too little, the other for spending too much. In this final installment we revisit those decisions to see how the courts

approached the standard of review discussed in Part I, and we consider whether the implementation of some of the procedural recommendations outlined in Part II might have led to a different result.

IN RE JP MORGAN

In *In re JP Morgan*,[1] the court criticized the trustee of a well-funded third party SNT for collecting commissions while trust funds sat dormant. The beneficiary lived at a residential school for individuals with disabilities in upstate New York. The beneficiary's mother funded the trust upon her death in 2005, appointing her attorney and a bank as co-trustees. The attorney later petitioned to become the beneficiary's guardian, and in connection with that proceeding the court directed the trustees to petition for judicial settlement of their accounts.

The court learned that in the five years subsequent to the mother's death, no distributions were made for the beneficiary. Neither co-trustee visited the beneficiary nor contacted staff at the school to inquire of his needs. Neither co-trustee notified school staff of the existence of the trust. The bank co-trustee testified that it lacked the "institutional capacity to ascertain or meet the needs of this severely disabled, institutionalized young man."[2] Both co-trustees took their commissions.

The co-trustees satisfied the basic obligations of fiduciary conduct.

The decision suggests that the trustees satisfied their traditional fiduciary responsibilities: they invested the funds in the trust, filed tax returns, and were able to fully account when directed by the court.[3]

The co-trustees failed to establish a protocol for communication or a plan to assess and review programs and services.

Satisfying the basic responsibilities of fiduciary conduct was not enough. In the words of the court:

> It was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets. The trustees here were affirmatively charged with applying trust assets to [the beneficiary's] benefit and [were] given the discretionary power to apply additional income to [the beneficiary's] service providers. Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of [the beneficiary's] condition, needs, and quality of life, and to utilize trust assets for his actual benefit.[4]

The judge directed the trustees to hire a care manager to investigate, report and facilitate distributions for the beneficiary. The care manager visited the beneficiary, attended team meetings, provided the co-trustees with

quarterly reports, made purchases, and served as an intermediary between residential staff and the trustees.[5] The care manager made a number of recommendations, including a consultation with a "non-Medicaid neurologist" who recommended medication that was not covered by Medicaid but had fewer side effects, the purchase of computer equipment and software for adaptive communication, recreational equipment, and gift certificates for local merchants so that the beneficiary could experience the outside community. The beneficiary made "extraordinary – and heartwarming – progress"[6] as a result of these expenditures.

The drafting attorney attempted to limit the trustees' obligation to account.

The attorney co-trustee drafted the SNT and apparently tried to limit the trustees' obligation to account to its beneficiaries, something which the court held:

> violates public policy and cannot be enforced, where, as here, the beneficiary is a person under a disability, and no one is protecting the beneficiary's interests.[7]

The decision does not provide any insight into why the drafting attorney tried to limit the accounting requirement. The provision might have been taken from a standard discretionary trust and intended to limit administrative costs. Regardless, had the trust included a provision requiring the trustees to prepare an informal accounting on an annual basis, it is likely that a representative of the residential program would have become aware of the trust and could have provided the trustees with information on the beneficiary's needs.

THE COURT CLEARLY ARTICULATED A STANDARD OF REVIEW.

The Court held that the trustees' actions – or, more specifically, their inaction – constituted an abuse of discretion:

> Courts will intervene not only when the trustee behaves recklessly, but also when the trustee fails to exercise judgment altogether ("even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion").[8]

In *In re JP Morgan*, the trustees' mistake was not necessarily the failure to make expenditures for the beneficiary's benefit. Rather, the trustees failed to promptly establish a protocol for communicating with the beneficiary's staff and assessing his needs. Had the trustees retained the private care manager promptly upon being appointed, they would have had the information needed to enhance his quality of life by supplementing the care and support he was receiving at the residential school.

Alternatively, the care manager's report might have reflected that the beneficiary was thriving, that the beneficiary's mother (who died just a few years earlier) had already purchased many items to enhance her son's quality of life, and that – at the moment – the beneficiary needed for nothing. On these facts the accounting might have looked substantially the same, but the trustee would have been able to document that it met all of its traditional fiduciary obligations, and it would also be able to show that its decision *not* to spend funds over the past few years was not an abuse of discretion, but rather an *informed decision* made after a comprehensive review.

IN RE LIRANZO

In *In re Liranzo*,[9] a bank serving as corporate trustee of a first party supplemental needs trust funded with litigation proceeds sought to settle its account and terminate the trust. The trust was initially funded with just over $420,000. Six years later, the trust had approximately $3,200 remaining. The accounting showed that the largest expenditures were for private caregivers and taxi service for the beneficiary.

The trustee failed to satisfy some basic obligations of fiduciary conduct.

There did not appear to be any credible analysis of the long-term financial impact of the level of spending undertaken by the trustee.[10] Additionally, the trustee authorized "each and every discretionary disbursement requested by the infant plaintiff's mother"[11] rather than exercising independent judgment on the propriety of those distributions. The trustee maintained communication with the beneficiary's family member.

In *In re Liranzo* there *was* an involved parent – the beneficiary's mother – and the trustee was in regular communication with her.[12]

The trustee did not adequately assess the availability of Medicaid-funded services.

Regarding the private caregivers, a representative from the bank trustee testified that an "advocate for the [beneficiary]"[13] communicated with the local Medicaid agency about the availability of Medicaid-funded staff and informed the trustee that Medicaid funded aides were unavailable. The trustee also testified that it "consulted with [the beneficiary's mother] and social workers that concluded private caregivers were in the best interest of [the beneficiary]."[14]

While there were a number of hearings and conferences, the decision does not reference testimony from the "advocate for the [beneficiary]" or any of the social workers upon whom the trustee relied in deciding to pay privately for caregivers. The decision suggests that the trustee communicated primarily with the mother and

did not retain its own professional to corroborate the information that the mother was providing.

Similarly, the court held that the trustee should have "further investigated" the mother's representation that riding in a taxi helped ease the beneficiary's stress before agreeing to spend more than $50,000 on the expense over a six-year period.[15]

The court did not clearly articulate a standard of review.

In Part I of this article we reviewed the various explanations that the court used in finding that the trustee breached its fiduciary duty to the beneficiary. The decision begins with the statement that the trustee breached its fiduciary duty by "failing to make decisions based on the long-term needs of the beneficiary that would extend the life of the Trust for as long as possible."

In surcharging the trustee for payments made to the taxi service, the court found that such payments "do not appear to be a responsible use of Trust fund monies consistent with prolonging the life of the Trust."

Later in the decision the court criticizes the trustee for making distributions which "could have either been avoided or were unreasonable" or reflected a failure to administer the trust in the "sole interests of the beneficiary."

At no point did the court clearly articulate the standard it was applying in assessing the trustee's conduct. As a result, the decision does not provide any practical guidance beyond the specific (and admittedly concerning) facts of the case.

An abuse of discretion analysis would provide the same result with better guidance.

If the court applied an abuse of discretion analysis, it could have reached the same conclusion, but with better guidance for SNT trustees.

The trustee's failure to consider the long term impact of paying for private caregivers and taxi rides would support a finding that it abused its discretion under the basic rules of fiduciary conduct which require a trustee to balance the immediate needs of the beneficiary with probable future needs.[16]

The trustee's blind reliance on representations made by the beneficiary's mother would support a finding that it abused its discretion by failing to independently investigate its beneficiary's needs.[17]

The trustee's failure to thoroughly investigate Medicaid-funded alternatives would support a finding that it abused its discretion by failing to follow the terms of the governing document, which require consideration of public benefits and services before expending trust funds.[18]

The trustee's biggest mistake was the failure to promptly obtain an independent assessment of its beneficiary's needs.

Upon being appointed, the trustee should have promptly investigated the availability of Medicaid-funded goods and services and determined whether they were adequate, or whether they should be supplemented by expenditures from the trust. Had the trustee retained a private care manager to conduct an independent assessment, it might

have learned that there were indeed Medicaid funded home care programs that would have provided aides for its beneficiary, and it might have learned of other, less expensive but equally effective therapeutic alternatives to riding in a taxi to calm the nerves.

Alternatively, the trustee might have decided to spend money in the same way. For example, the care manager's report might have disclosed that the beneficiary was approved for Medicaid-funded staff but was unable to find aides willing to work at the Medicaid payment rate. The report might have disclosed that the beneficiary had unique and complicated behavioral issues, and that the privately paid aide (who did not accept Medicaid) was the only one capable of managing those behaviors. The report might have disclosed that taxi rides did indeed calm the beneficiary, but without the debilitating side effects caused by the anti-anxiety medication he would otherwise have to take. Finally, the report might have disclosed that the beneficiary had a shortened life expectancy and the mother wanted him to have the best quality of life possible in his final years.

Based on the care manager's report, the beneficiary's limited life expectancy, and the support of the mother, the decision to aggressively apply income and principal to pay for private caregivers and taxi services rather than rely on Medicaid funded supports would not necessarily be an abuse of discretion, notwithstanding the fact that it depleted the trust in a short period of time, [19] and notwithstanding the fact that the Court might have made a different decision on the same set of facts.

A petition for advice and direction would have insulated the trustee from liability.

Even with a comprehensive assessment from a private care manager and the support of a parent, a prudent trustee should be concerned about spending so much in such a short period of time. To mitigate risk, the trustee could seek prior court approval of its proposed distribution plan.

A court might refuse to consider the application, as it is essentially a request to substitute the court's judgement for that of a trustee with full discretion under the terms of the governing document. But in such a case, the trustee would have a record of its attempt to secure court approval. While not binding in a subsequent proceeding for settlement of its accounts, it would buttress the argument that the trustee's exercise of discretion was encouraged by the court and should be upheld over later objections.

CONCLUSION

The need for professional advocates for individuals with disabilities will continue to grow with each passing year. With aging parents increasingly unable to provide support to their sons and daughters with disabilities, and with disability service providers stretched thin by cuts in government funding, professional caregivers and fiduciaries will be asked to take on greater responsibility in serving the needs of those who cannot care for themselves.

In recent years many otherwise capable financial institutions have declined to administer supplemental needs trusts, in large part because of the uncertainty over how their conduct will be measured after the fact. Cases like *In re JP Morgan* and *In re Liranzo* reinforce these concerns.

The well-established body of law governing discretionary trusts is more than capable of accommodating the unique aspects of supplemental needs trust administration. The failure to apply the abuse of discretion standard has discouraged the development of commonly accepted "best practices" which, if followed, would better serve beneficiaries of supplemental needs trusts, and help insulate trustees from the risks associated with this type of administration.

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1. *In re JP Morgan Chase Bank N.A. (Marie H.)* ("*In re JP Morgan*"), 38 Misc. 3d 363 (Sur. Ct., N.Y. Co. 2012).
2. *Id.* at 370.
3. While the trustees were able to account for funds held in the SNT, the court questioned the accuracy of the accounting for the prior estate and the initial SNT funding amount. *In re JP Morgan* at 379.
4. *Id.*
5. *Id.* at 371. It is important to note that the beneficiary resided in a Medicaid-funded residential program with round the clock staffing and related support. The court nonetheless directed the co-trustees to retain and pay a private care manager to monitor those supports, and in some cases provide services that would otherwise have been provided by Medicaid-funded staff, such as scheduling doctors' visits or consulting with specialists. The case illustrates the difference between the baseline or "floor" provided by public benefit programs and the optimal level of services and support that might be available through the proactive expenditure of funds from an SNT. *See Foote v. Albany Med. Ctr. Hosp.*, 71 A.D. 3d 25 (3d Dep't 2009), *aff'd,* 16 N.Y. 3d 211 (2011).
6. *In re J.P. Morgan*, 38 Misc.3d at 370.
7. *Id.* at 377, citing *In re Malasky*, 290 A.D. 2d 631 (3d Dept 2002), and *In re Shore,* 19 Misc. 3d 663 (Sur. Ct., N.Y. Co. 2008).
8. *Id.* at 377, quoting Restatement (Third) of Trusts, § 50, comment b.
9. *Liranzo v. L.I. Jewish Ed./Research* ("Liranzo"), No. 28863/1996 (Sup. Ct., Kings Co., June 25, 2013).
10. *Id.* at 4.
11. *Id.* at 5.
12. The decision does not say whether the mother was also a court-appointed guardian.
13. *Liranzo*, *supra* n.9, at 5.
14. *Id.* at 6.
15. *Id.* at 7.
16. *Estate of T. Harry Glick*, 2005 N.Y. Misc. LEXIS 7336 (Sur. Ct., Kings Co. 2005).
17. *In re Hammerschlag,* 2001-3772, NYLJ 1202597358371 (Sur. Ct., N.Y. Co. 2013).
18. New York Estates Powers & Trusts Law (EPTL) 11-1.1(a)(2).
19. New York's supplemental needs trust statute makes clear that the trustee may exhaust trust principal "even to the extent of the whole" for the benefit of the beneficiary. EPTL 7-1.12(e)(1).

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An Indispensable Resource for Commercial Litigators

A review of the *New York Commercial Division Practice Guide*, 2019 Edition

Edited by Stephen P. Younger and Muhammad U. Faridi

Reviewed by Bernice K. Leber

Bernice K. Leber is a commercial litigation partner at Arent Fox LLP. She served as a past chair of the Commercial & Litigation Section and president of the New York State Bar Association and was a member of the Task Force of the Commercial and Federal Litigation Section that recommended that the Commercial Division be made permanent and expanded throughout the New York State.

Any litigator's bookshelf of indispensable resources would have to include the newly updated *New York Commercial Division Practice Guide,* edited by Stephen P. Younger and Muhammad U. Faridi of Patterson Belknap Webb & Tyler.

Younger and Faridi are the right choices to handle the breadth of this subject matter. Both are adjunct professors at Fordham Law School. Younger clerked for Associate Judge Hugh Jones of the New York Court of Appeals, Faridi for Hon. Jack Weinstein of the Federal District Court for the Eastern District of New York, and they have handled leading commercial cases over the years (e.g., *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.,* 27 N.Y.3d 616 (2016) (common interest doctrine in commercial transactions)).

The *Guide* forms a part of the Litigation Practice Portfolio Series available from Bloomberg Law. For those familiar with the Portfolio Series, the beauty of these publications is that they provide an in-depth look at a variety of substantive subject matters, complete with practice tools, checklists and forms most commonly used in everyday practice in a single wire-bound edition. Notably, the 2nd edition of the *Guide* includes updated bench composition for every county, including the newly created Bronx Commercial Division, amended rules,

updated caselaw on jurisdiction, arbitration, management of cases, motion practice, emergency applications and appeals.

Of late, the trend in the law for space, convenience and cost is to discard multi-bound volumes and parts of or whole law libraries and move toward online sources for legal research. Here, the *Guide* is offered in a single wire-bound edition and online with hyperlinks to all cases and materials needed by litigators to practice in the Commercial Division. This particular feature enables a lawyer efficient, effective and, immediate recall of research, eliminating copying pages from tomes, which makes it especially useful and portable. The *Guide* thus reflects the reality of how lawyers practice today: in the office, after hours and at other locations including at home.

Featuring a list of the judges currently serving on the statewide 11 Commercial Divisions, their backgrounds and individual practice rules in chapter 1, the *Guide* succinctly explains their role as well as the role and rules that apply to judicial hearing officers and special referees in the Commercial Division. Jurisdiction of the Commercial Division, a helpful categorization of commercial cases and their amounts in controversy follows. There is a succinct explanation of how cases are managed including the absence of an automatic stay of discovery for dispositive motions, privilege logs, challenges to privilege and discovery and motion practice generally with emphasis, for example, on summary judgment motions, Rule 19-a requiring a concise statement of material facts not in dispute (which forms the basis for the motion) and the various judges' approaches to that rule. Presented in one place with a view toward harmonizing the rules, process, law and judges, the *Guide* is unique among treatises and is a timesaver for lawyers.

Substantively, I found the *Guide* most helpful targeting key practice areas that are so critical to achieving success for clients involved in commercial cases. The chapter on Motion Practice in particular delivers the complete compendium of rules, local rules and justices' rules one needs to consider before making a motion and, equally important, sets out certain required features to include in a motion in checklist format, as well as the mechanics for e-filing a motion and tips on avoiding pitfalls such as type size. The editors included a discussion about filing and supporting applications to file confidential documents under seal, and for the new lawyer the kinds of motions available (initial dispositive motion, discovery motion, summary judgment motion, provisional remedies and the like) and their distinctions. By demystifying motion practice in the Commercial Division, both new and seasoned practitioners will be assured that important issues are addressed and procedural minefields are deftly avoided.

Similarly, the trial section of the *Guide* provides a clear and concise overview of trial practice generally in New York Civil Practice and then substantively fills in how the Commercial Division treats the readiness calendar, witnesses and special rules governing a trial, e.g., realistic estimate of the length of the trial at least 10 days prior to trial or at such time the court may set, agreement on trial exhibits and non-contested deposition testimony, the motion *in limine*, pretrial memoranda and even the size type required for jury instructions. This chapter was again extremely valuable for rather than having to consult several trial treatises, the *Guide* covers all the issues including challenges to jurors, the method of jury selection, questions permitted to be asked of jurors whether under the "Struck Method" or "White's Method" as well as helpful reminders about the timing to challenge for cause under the "Struck Method."

I found the *Guide* particularly insightful comparing jury trials, judge trials and referee trials. The *Guide*'s reference to the arcane "long account" recalled orders of reference, the reference process as well as the required contents of such an order or stipulation so as to ensure that it sets forth the basis and method of computation. Even the coverage of the judgment is all-encompassing in order to complete an action. That these features are fairly arcane is beyond dispute but required reading before tackling these subjects.

Beyond covering the expected, the editors also included special chapters devoted entirely to emergency applications (TROs, preliminary injunctions, stays and appeals, again with practical tips), to arbitrations, mediations and special parts of the Commercial Division (accelerated adjudication actions, RMBS Litigations). Truly comprehensive yet concise in scope, the *Guide* describes mediation and the mediation process in the Commercial Division, key pertinent rules in Commercial Divisions around the state, where specific lists of mediators by county may be found online, even court telephone numbers of whom to call for information. These chapters thoughtfully cover the breadth of the work of the Commercial Division.

For many of us who have used Bender's Forms of Pleadings generally and adapted them for use in the Commercial Division, the *Guide* offers some 24 key practice tools and forms developed for use in Commercial cases specifically, including the form of Stipulation and Order for the Exchange of Confidential Material, subpoena duces tecum with instructions, the Order for Mediation and Note of Issue as well as Notices of Appeal. The forms, like the rest of the *Guide*, are fresh and up to date.

The *New York Commercial Division Practice Guide*, 2nd edition, edited by Stephen P. Younger and Muhammad U. Faridi, is published by Bloomberg Law (2019).

Induced Patent Infringement

By James A. Johnson

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INTRODUCTION

Article I, Section 8, Clause 8 of the U. S. Constitution provides, in pertinent part: The Congress shall have Power . . . . To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. Patentees have the right to exclude others from making or using their invention. A party that causes another to infringe a patent may be liable for induced infringement.

United States patent law recognizes direct infringement[1] and two forms of indirect infringement, inducement and contributory infringement.[2] 35 U.S.C. § 271(b) provides that "whoever *actively induces* infringement of a patent shall be liable as an infringer."[3] The reason for the law of inducement is that a party who brings about the infringement of a patent should not escape liability just because another party is actually using the infringing product or method.

SCIENTER

A patent inducement cause of action has a knowledge and intent element indicated by the requirement for "active" inducement in the statute. The Federal Circuit in 2006 held in *DSU Medical Corp. v. JMS Co.* that the intent requirement for inducing acts of inducement required that the alleged inducer knew or should have known his actions would induce actual infringement.[4] In addition, the inducer must have had an affirmative intent to cause direct infringement.[5] But it is not clear as to what degree the alleged inducer is required to assess the validity of the patent. Or to what degree to conduct a study to determine whether the acts of the induced party infringed any claims of the asserted patent.

The scienter element is difficult to apply in the inducement analysis. Compounding the problem is the 2011 U.S. Supreme Court's decision in *Global-Tech Appliances, Inc. v. SEB S. A.* by introducing *willful blindness* into the analysis.[6] The willful blindness test is characterized by the Supreme Court as something more than recklessness or negligence.[7] The concept of willful blindness permits the trier of fact to impute the requisite knowledge to an alleged inducer in certain situations by circumstantial evidence. This mens rea is difficult to assess particularly with communication technology companies because these entities involve a plethora of interoperating providers and users.

CIRCUMSTANTIAL EVIDENCE

Under 35 U.S.C. § 271 (a), inducement of infringement cause of action requires a degree of fault or culpability. The reliance on circumstantial evidence and inference creates a low threshold for satisfying the scienter requirement. Moreover, circumstantial evidence may be used to establish willful blindness. Therein lies the problem: the degree of knowledge the alleged inducer must have concerning the validity of the patent.

Patentees are vulnerable to inducement suits because circumstantial evidence may be used to establish not only requisite knowledge, but also specific intent.[8] Liability for inducement requires affirmative conduct by the alleged inducer and is construed broadly.[9] The U.S. Supreme Court in *Global-Tech* establishes liability for actively inducing patent infringement under 35 U.S.C. § 271(b). It is sufficient for the defendant to have taken deliberate actions to avoid confirming a subjective belief of a high probability of wrongdoing.[10] Therein lies the concept of willful blindness congruent with the established principle that the intent element for inducement may be proved by circumstantial evidence.[11] The standard set out in *Global-Tech* as to knowledge and intent is helpful to catch patent trolls or non-practicing entities, but is problematic for innocent providers of developing technology companies of computer software and hardware. Moreover, the low threshold of the scienter requirement that can be established by inference and circumstantial evidence creates a fact question for a jury to decide. Thus, a motion for summary judgment by the alleged inducer under Federal Rule of Civil Procedure 56(a) would not be successful where the dispute concerns a material fact. The court must consider all reasonable inferences in favor of the non-moving party. Therefore, a defendant accused of inducing infringement is subject to costly litigation.

In 2012 the Federal Circuit in *Limelight Networks Inc v. Akami Technologies, Inc.* established liability for inducement of patent infringement where there was no direct infringement. This was characterized as *inducement only liability.*[12]

The development of information in the rapidly advancing communication technologies presents a dilemma and an opportunity for potential patent litigants such as competitors and patent trolls. The theory of induced infringement provides opportunities for suing service and technology companies that provide service to consumers and other parties engaged in performing steps that are claimed in the method claims of a patent.

Enter *Akamai Techs., Inc. v. Limelight Networks, Inc.* Akami and Limelight are both internet content delivery networks (CDNs). In 2006, after a possible merger of Akamai's acquisition of Limelight failed, Akami filed suit for patent infringement against Limelight. Akamai tagged or designated certain components of a content provider's website to be stored on Akamai's servers. Limelight did not tag the content but rather provided instructions to its customers to tag for themselves.[13] This tagging is a step in the claimed method patent.[14]

In 2008, the Federal Circuit in *Muniauction, Inc. v. Thompson Corp* held that for direct infringement, a single party must perform every step of the claimed method.[15] Thus, the district court granted Limelight's motion for reconsideration[16] and held that since Limelight did not perform all the steps, there was no direct infringement.[17] However, the Federal Circuit reversed,[18] stating that even if no one could be liable as a direct infringer there still could be a judgment on induced infringement.[19]

Direct infringement of a patent occurs when an entity makes, uses, or performs each and every element of patent claim. Induced infringement occurs when one party encourages or aids another to infringe a patent.

The Federal Circuit on remand reaffirmed the original holding against Akamai.[20] However, the Federal Circuit en banc reconsidered the law of direct infringement and held that in a case of direct, but *divided infringement*, one entity could be found liable under two circumstances: (1) where one entity directs or controls the other entity's performance or (2) where the entities form a joint enterprise.[21]

The Federal Circuit reviewed the facts and held that Limelight was liable for direct infringement because it directed or controlled its customers' performance.[22] Limelight establishes the manner and timing of its customers performance so that customers can only avail themselves of the service upon performance of the method steps.[23]

U.S. SUPREME COURT

In 2014 the U.S. Supreme Court addressed the question of whether the performance steps of a patented method by multiple independent entities infringes the patent under 35 U.S.C. § 271(a) when no entity performs all of the steps of the method either directly or vicariously. The U.S. Supreme Court rejected inducement only liability and reversed the Federal Circuit in holding that a defendant *will not* be liable for induced infringement under 35 U.S.C. § 271(a) when no one has directly infringed the patent.[24]

DIRECT INFRINGEMENT

In order to understand indirect infringement, one must understand what constitutes direct infringement. Direct infringement is defined under 35 U.S.C. § 271 (a) as "whoever without authority makes, uses offers to sell, or sells any patented invention within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent." Direct infringement is determined by first properly construing the asserted patent claims and then comparing the claims to the accused process or device. If the accused process literally meets each and every claim limitation or its substantial equivalent, the claim is directly infringed. Thus, direct infringement is a strict liability tort. The motives of the direct infringer that he or she made a mistake or lacked knowledge of the patent are irrelevant to the determination of liability.

To infringe a patent under 35 U.S.C. § 271(a), one must without permission make use, offer to sell or sell a patented invention. In the context of a method patent the induced infringer must perform all the steps of the claimed method, either personally or through another acting under his direction or control.[25] In order to show that a party is liable for induced infringement, a plaintiff must show first that the patent was directly infringed and then that the accused party aided or abetted in the infringement. Now, induced infringement may only arise if and only if there is direct infringement.[26] This decision changes how companies evaluate infringement risk. Before *Akamai*, a company had to evaluate not only whether it was directly infringing but also whether it was an induced infringer. A company had to look at the steps being performed by its customers or by its suppliers in conjunction with the steps the company was performing.

ATTORNEY FEES

Also, in 2014 the U.S. Supreme Court addressed the question of the availability of attorneys' fees to prevailing parties under 35 U.S.C. § 285 in two cases. In *Octane Fitness v. ICON Health & Fitness, Inc.* [27] and *Highmark Inc., v. Allcare Health Management System, Inc.*[28] the court clarified the meaning of exceptional. An exceptional case is one "that stands out from others with respect to the substantive strength of a party's litigating position . . . . or the unreasonable manner in which the case was litigated," and should be decided on a case by case basis in the district court's discretion, considering all the circumstances.[29] The Court substantially lowered the requirement to meet the statutory threshold that a case be "exceptional" to justify an award of fees from clear and convincing to a mere preponderance of the evidence. It also held that district judges' decisions on whether this standard was met were to be reviewed only for abuse of discretion and not de novo. Justice Sotomayor writing for the unanimous Court held that the abuse of discretion standard is to be used to review all aspects of a district court's determination of the award of attorney's fees under the Patent Act.[30]

The U. S. Supreme Court in 2016 decided in *Halo Electronics, Inc. v. Pulse Electronics* that § 284 of the Patent Act provides, in a case of infringement, courts may

increase damages up to three times the amount found or assessed.[31] The Supreme Court emphasized the use of the word "may" should not be subject to a rigid formula as set out *In re Segate Technology*.[32]32 In sum, § 284 allows district courts to punish the full range of culpable behavior. They should take into account the particular circumstances of each case and reserve punishment for egregious cases typified by willful misconduct.

The U. S. Court of Appeals for the Federal Circuit on March 20, 2019 provided guidance on willful infringement in *SRI International, Inc. v. Cisco Systems, Inc*. It vacated and remanded the district court's jury finding of willful infringement and enhanced damages because it was not supported by substantial evidence. The standard for factual finding by a jury for willful infringement is only sustainable if the conduct rose to the level of wanton, malicious and bad faith behavior.[33]

The U.S. Supreme Court in *Limelight Networks, Inc. v. Akamai Techs., Inc*. reversed the federal circuit's decision and held that active inducement cannot occur without direct infringement.[34] Thus, a party will not infringe a patented method by active inducement when it performs some steps of the method and absent direct infringement, merely encouraging another party to perform the remaining steps.[35]

PATENT CLAIM CONSTRUCTION

Claim construction is the process by which the meaning of terms in a patent claim are determined. It is central to every patent case. Both validity and infringement hinge on the meaning of the patent claims. Claim construction is the single most important issue in patent litigation. It drives the argument in what has become known as *Markman* hearings in the Supreme Court's decision giving judges, not juries, responsibility for interpreting a patent's claim.[36] Patent claims are generally given their customary and ordinary meaning from the prospective of a person having ordinary skill in the art.[37]

The district court must ascertain the proper legal scope of a patent's coverage before the fact finder determines whether the patent is infringed. The U.S. Supreme Court in 2015 assessed the standard for reviewing a district court's claim construction in *Teva Pharmaceuticals USA, Inc. v Sandoz, Inc*.[38] The court held that the "*clear error*" standard under Federal Rule of Civil Procedure 52 (a)(6), not the de novo standard, must be applied to a district court findings of fact when construing patent claims.[39] Moreover, the Court said that a judge, not a jury, is solely responsible for construing a patent claim and that the ultimate issue of the proper construction of a patent claim is a question of law to be reviewed de novo.[40]

In 2017 the U. S. Supreme Court narrowed the venues in which a patent holder could file a case alleging patent infringement. In *TC Heartland LLC v. Kraft Foods Group Brands, LLC*, the court held that for domestic corporations, the term "resides" under 28 U.S.C. §1400 means only the defendant's state of incorporation. Previously a corporation could be sued for patent infringement anywhere it sold or offered an accused product for sale. Now it can only be sued in its state of incorporation or where it commits infringing acts and has a "regular and established place of business."[41]

The Federal Circuit in the case *In re Cray* provided substantial guidance on the issue of what can be argued to constitute a "regular and established place of business" under the § 1404(b) second option. The Federal Circuit provided three general requirements relevant to the inquiry:

- There must be a physical place in the district;
- It must be a regular and established place of business; and
- It must be the place of the defendant.[42]

In 2018 the Federal Circuit issued three opinions that further clarified a patent plaintiff's venue options. In *In re Big Commerce*,[43] the court held that in a state that has multiple districts only the district where the company has its principal place of business or registered office is a proper venue. In *In re HTC*,[44] the court held that nothing in *TC Heartland* changed the longstanding rule that foreign companies can be sued in any federal district court. Lastly, in *In re ZTE (USA),*[45] the court held that the burden of proof to show that venue is proper on the plaintiff.

On October 10, 2018, the PTO published a rule changing the claim construction standard applied during IPR and other post-grant review proceedings. The change is from the "broadest reasonable interpretation" standard with the claim construction standard that is used for claims in civil actions in federal district court.[46]

USPTO GUIDELINES

The United States Patent Trademark Office (USPTO) has difficulty in applying the Supreme Court's Alice/Mayo test for patent subject matter eligibility in a consistent and clear manner.[47] The lack of clarity in the law with regards to patent subject matter eligibility under 35 U.S.C. § 101 has made it difficult for patent attorneys to advise their clients. Also, the case law regarding subject matter eligibility is constantly changing. In an effort to provide more consistent rulings, the USPTO published on January 7, 2019 the Revised Patent Subject Matter Eligibility Guidelines. In short, the USPTO Revised Guidelines provides a two-step process for determining whether a claim is drawn to patent-eligible subject matter. The Revised Guidelines supersede previous versions subject to the caveat that "any claim considered patent eligible under prior guidance should be considered patent eligible under this guidance."[48]

The Patent Trial and Appeal Board provides guidance on the timing of requests for Certificates of Correction in *Emerson Electric Co. v. Sipco, LLC* (IPR 2016-00984-Jan 24, 2020*).* A patent owner is permitted to request a certificate of correction in accordance with 37 C.F.R. § 1.323, which allows patent owners to ask the director to make corrections to "mistakes" in a patent. However, 35 U.S.C. § 255 does not authorize a retroactive effect after the board's final written decision. Therefore, it is best to file a request for a certificate of correction of a patent before inter partes review is instituted. After institution, the board has discretion to stay and effectively deny a patent owner's ability to request a certificate of correction.

There were no significant patent cases from the U. S. Supreme Court in 2019, but the Federal Circuit issued significant opinions. The Federal Circuit's denial of en banc review of the question whether servers are a regular and established place of business such that venue is proper under 35 U.S.C. § 1400 (b).[49]

In *Arthrex, Inc. v. Smith & Nephew, Inc*,[50] the Federal Circuit held the current statutory scheme for appointing administrative patent judges to the Patent Trial and Appeal Board (PTAB) is unconstitutional. I suspect petitions for en banc and U. S. Supreme Court review will be forthcoming.

Also, of note for Texas patent practitioners is the emergence of the patent infringement docket in the Waco Division of the Western District of Texas. In 2019 patent infringement filings were substantially increased.

CONCLUSION

The application of circumstantial evidence and inference coupled with the willful blindness standard lowers the threshold for establishing scienter for inducement. Until the rejection of the inducement only rule by the U.S. Supreme Court, information technology companies such as providers of hardware and software together with end users were vulnerable to inducement lawsuits.

Direct infringement of a patent occurs when an entity makes, uses, or performs each and every element of patent claim. Induced infringement occurs when one party encourages or aids another to infringe a patent. One of the key requirements that sets indirect infringement apart from direct infringement is that liability for indirect infringement has a scienter requirement.

In 2014 the U.S. Supreme Court reversed the Federal Circuit in holding that a defendant will not be liable for induced infringement under 35 U.S.C. § 271(a) where no one has directly infringed the patent. In order to show that a party is liable for induced infringement, a plaintiff must show first that the patent was directly infringed and then that the accused party aided or abetted in the infringement. A plaintiff must show that the accused inducer performed some offensive conduct with the requisite intent. Thus, a party will not infringe a patented method by active inducement when it performs some steps of the method and absent direct infringement, merely encourages another party to perform the remaining steps.

Today a company needs to consider only the steps it performs and no longer can it be found to infringe under induced infringement by performing some steps while its customers or suppliers performed other steps. The Supreme Court rejected inducement-only liability as the basis for liability in patent law. In 2017 the court held that for domestic corporations, a patent holder can only sue an accused infringer in its state of incorporation or where it commits infringing acts and has a regular and established place of business. In 2018 the Federal Circuit further clarified patent plaintiff's venue options.

In 2014 the U. S. Supreme Court addressed the question of attorneys' fees to prevailing parties under 35 U.S.C. § 285 in clarifying the meaning of exceptional. An exceptional case is one that stands out from all others with respect to the substantive strength of a party's litigation position or the unreasonable manner in which the case was litigated. The standard to meet exceptional was lowered from clear and convincing to a preponderance of the evidence. In addition, the U.S. Supreme Court in June 2016 in *Halo v. Pulse* relaxed the standard for enhanced damages of infringement under Section 284 to the court's discretion. The court may increase damages up to three times the amount found or assessed in egregious cases typified by willful misconduct.[51]

In 2017 the U. S. Supreme Court in *Lexmark v. Impression Products* dramatically upended long-established Federal Circuit precedent regarding exhaustion of U. S. patent rights for products sold either domestically or internationally, irrespective of any conditions of sale. When a patentee sells one of its products, the patentee can no longer control the item through the patent laws. Its patent rights are said to exhaust.[52] When a patentee sells an item, that product is no longer within the limits of the patent monopoly. That product becomes the private individual property of the purchaser. The patentee may be able to enforce restrictions under contract law but may not be able to do so through a patent infringement lawsuit.

In 2018 the U. S. Supreme Court held that patent owners may recover lost profits when the infringing party exports parts from the United States for assembly in foreign countries, so long as the relevant infringing conduct occurred in the United States.[53]

In an interesting aside, on March 4, 2019, the U. S. Supreme Court resolved a circuit split regarding copyright infringement. It held that with limited statutory exceptions, the issuance of a registration from the Copyright Office is a prerequisite to filing a claim of infringement.[54]

1. 35 U.S.C. § 271(a); *WesternGeco LLC v. Ion Geophysical Corp.*, 138 S. Ct. 2129, (2018) (under § 271 (f)(2) a company can recover lost foreign profits where components are shipped overseas to be assembled there).

2. *Id.* § 271(b)–(c).

3. *Id.* § 271(b) (emphasis added).

4. 471 F.3d 1293, 1304 (Fed. Cir. 2006).

5. *Id.* at 1306.

6. *Global-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754, 759–766, 769 (2011).

7. *Id.* at 769.

8. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1322 (Fed. Cir. 2009).

9. *Tegal Corp. v. Tokyo Electron Co.*, 248 F.3d 1376, 1379 (Fed. Cir. 2001).

10. *Global-Tech*, *supra* n. 6, at 769–70.

11. *Commil USA LLC v. Cisco Sys., Inc.,* 720 F.3d at 1366 (Fed. Cir. 2013); *Commil USA, LLC v. Cisco Sys., Inc.,* 135 S. Ct. 1920, 1925, 1928 (2015).

12. *Akamai Techs. Inc. v. Limelight Networks, Inc.,* 692 F.3d 1301, 1307 (Fed. Cir. 2012), *rev'd*, 572 U.S. 915 (2014).

13. *Limelight Networks, Inc. v. Akamai Techs., Inc.,* 572 U.S. 915,917–19 (2014).

14. *Id.*

15. *Muniauction, Inc. v. Thomson Corp,* 532 F.3d 1318, 1329 (Fed. Cir. 2008).

16. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 614 F. Supp. 2d 90, 123.

17. *Id.* at 122.

18. *Akamai Techs., Inc. v. Limelight Networks*, *Inc.*, 692 F.3d 1301, 1319 (Fed. Cir. 2012) (per curiam), *cert. dismissed sub nom. Epic Sys. Corp. v. McKesson Techs.*, 133 S. Ct. 1520 (2013), *and cert. dismissed,* 133 S. Ct. 1521 (2013), *and cert. granted,* 134 S. Ct. 895 (2014), *and rev'd*, 134 S. Ct. 2111 (2014), *and cert. denied,* 134 S. Ct. 2723 (2014).

19. *Id.* at 1309.

20. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 786 F.3d 899, 903 (Fed. Cir. 2015).

21. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015).

22. *Id.* at 1024–25.

23. *Id.* at 1025.

24. *Limelight Networks, Inc. v. Akamai Techs., Inc.,* 572 U.S. 915, *supra* n. 13.

25. *Id. See Barry v. Medtronic, Inc.*, 1:14-cv-00104 (U.S.D.C. E.D. TX. Nov. 14, 2016) (jury found that Medtronic "actively induced" infringement of Dr. Barry's vertebrae alignment patents & awarded $20.3 million in damages).

26. *Limelight*, 572 U.S. 915, *supra* n. 13.

27. *Octane Fitness, LLC. v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 548–49, 551–54 (2014).

28. *Highmark Inc., v Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 559–562(2014).

29. *Octane Fitness*, 572 U.S. at 554.

30. *Highmark, Inc.*, 672 U.S. at 564.

31. *Halo Elects., Inc., v Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016).

32. *In Re Segate Tech. LLC.*, 497 F.3d 1360, 1371 (2007).

33. *SRI Int'l, Inc. v. Cisco Sys., Inc.,* 918 F.3d 1368, 1379–82 (Fed. Cir. 2019).

34. *Akamai, supra* n. 13, 572 U.S. at 915.

35. *Markman v. Westview Inst.*, 517 U. S. 370 (1960).

36.*Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005).

37.*Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 318–19 (2015).

38.*Id.* at 324–28.

39.*Id.*

40.*TC Heartland LLC v. Kraft Foods Grp. Brands, LLC.,* 137 S. Ct. 1514 (2017).

41. *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017).

42.890 F.3d 978 (Fed. Cir. 2018).

43.889 F.3d 1349 (Fed. Cir 2018).

44.890 F.3d 1008 (Fed. Cir. 2018).

45. https://www.bigmoleculewatch.com/2018/10/10/pto-replaces-broadest-reasonable-interpretation-claim-construction-standard-in-ipr-pgr-cbm-proceedings/

46. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217–218 (2014) citing *Mayo Collaborative Servs v. Prometheus Labs., Inc.,* 566 U.S. 66 (2012).

47. Revised Guidelines,. p. 7.

48. *In Re Google* , 914 F. 3d 1377 (Fed. Cir. 2019).

49. No. 2018-21-2140 (Fed. Cir. Oct. 31, 2019)

50. *Halo Electronics, Inc. v Pulse Electronics, Inc.,* 136 S. Ct. 1923 (2016).

51. *Lexmark v. Impression Products,* 137 S. Ct. 1523 (2017).

52. *WesternGeco v. ION Geophysical*, 138 S. Ct. 2129 (2018).

53. *Fourth Estate Public Benefit Corp. v. Wall-Street.Com, LLC*, 139 S. Ct. 881 (2019).

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DEAR FORUM,

I am an attorney practicing in the arena of civil litigation. I am currently representing a client who I am consistently at odds with. It seems that no matter what I do the client refuses to follow my advice. For example, the client has sent numerous emails to opposing counsel regarding issues in the case despite my insistent instruction not to do so. What's more is that the client refuses to follow my trial strategy and insists that I decline all reasonable extension requests from the adversary. Unfortunately, I feel as if our attorney-client relationship has broken down beyond repair requiring me to withdraw as counsel. Am I permitted to do so under the circumstances I have described? If so, what are my professional responsibilities? Do I have any ethical obligations to the client and/or the court in the process?

Very truly yours,
Tami Terminated

DEAR TAMI TERMINATED,

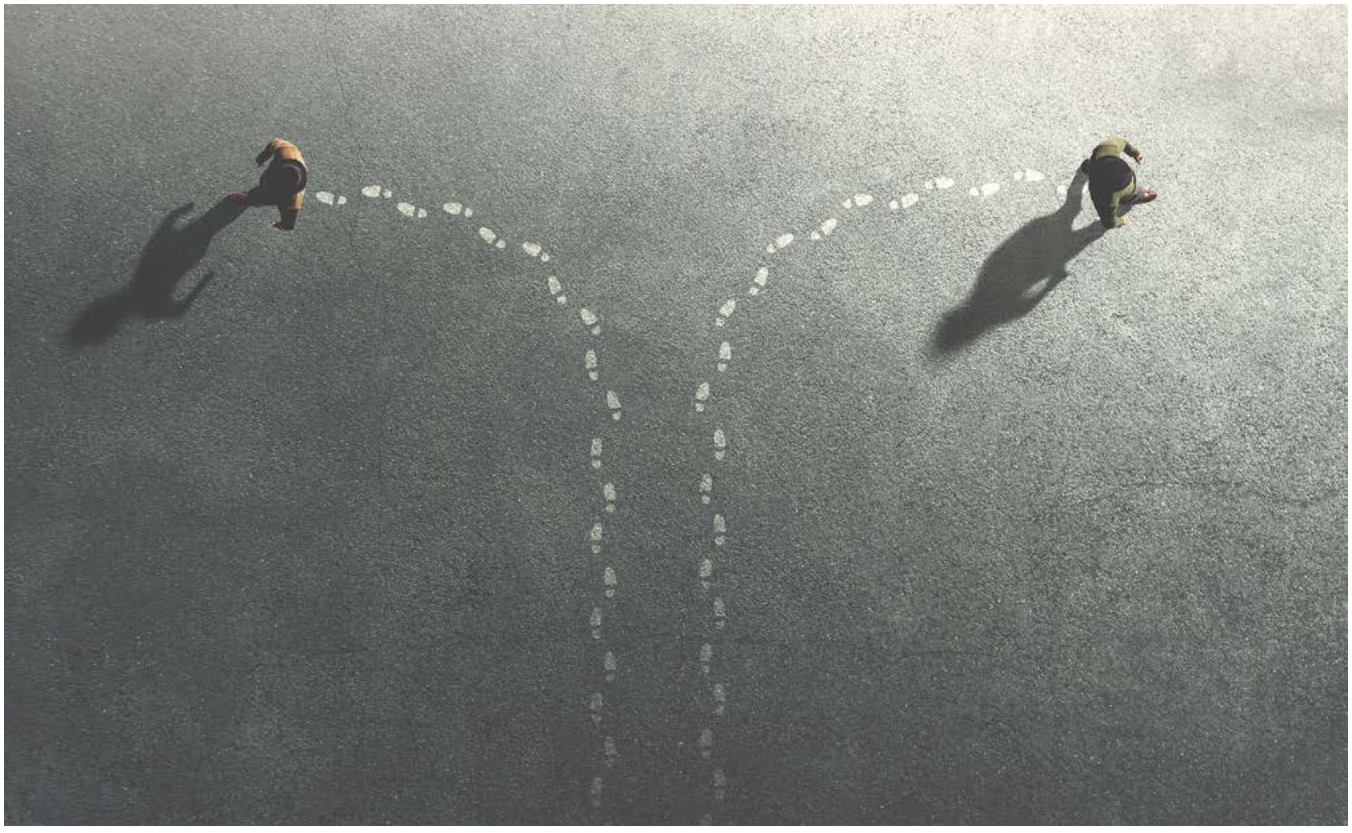
Dealing with difficult clients is always a challenging minefield for lawyers to navigate and, unfortunately, something that most lawyers will often experience during the course of their careers. So what should a good lawyer do? When a "communication" breakdown does occur, it is important that you approach the problem with professionalism and do your best to resolve matters amicably. However, if you reach a point where the relationship becomes irreconcilable such that representation cannot be carried out effectively, you may be permitted to withdraw. If you believe that this is the direction your relationship with the client is heading, you should take care to keep the following Rules of Professional Conduct (RPC) in mind.

First, with respect to your client directly contacting opposing counsel, as we have discussed in a prior *Forum*, RPC 4.2 (the "no-contact rule") governs communications with persons represented by counsel. *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., September 2012, Vol. 84, No. 7. RPC 4.2(a) provides that in representing a client, "a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." RPC 4.2(a). While the plain language of the rule does not directly address your client's repeated communications with your opposing counsel, Comment [3] tells us that RPC 4.2(a) applies regardless whether the represented party initiates it, requests it, consents to it or tells the lawyer he/she does not feel the need to have his/her lawyer included. RPC 4.2 Comment [3] gives a lawyer only one choice: "[a] lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by the Rule." *Id.*

It is important to keep in mind that lawyers have a professional obligation to respect the legal system and those who serve it, including, judges, other lawyers and public officials. In that light, lawyers should not close their eyes when clients misbehave or engage in offensive behavior that threatens the integrity of the legal system. If your client crosses a line that threatens someone or makes a mockery of the system, doing nothing is not an option. Put plainly, a lawyer should not condone bad behavior. Thus, if your client's refusal to cease contacting your adversary rises to the level of harassment, as difficult as it might be, you should strongly consider withdrawing under the rules discussed below.

Turning now to your client's refusal to follow your recommendation that you consent to a reasonable adjournment, RPC 1.2 generally requires that a lawyer seek the client's objectives and abide by the client's decisions concerning the objectives of the representation. *See* RPC 1.2. However, lawyers are permitted to make decisions in certain areas of the client's legal representation that do not affect the merits of the case or substantially prejudice the rights of the client. *See* Roy Simon, *Simon's New York*

Rules of Professional Conduct Annotated, at 83 (2019 ed.). Generally speaking, decisions concerning whether to grant reasonable extensions to your adversaries belong to the lawyer, and doing so against the client's direction are not a violation of your ethical obligations. In fact, paragraph (g) of RPC 1.2 specifically affirms that "a lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process." RPC 1.2(g). The commentary to Rule 1.2 is also instructive; it provides that in accomplishing the client's objectives, the lawyer is not required to be offensive, discourteous, inconsiderate or dilatory. *See* RPC 1.2 Comment [16]. Furthermore, RPC 3.4 governs "fairness to opposing party and counsel" and provides that when dealing with an opposing party and the opposing party's counsel, an attorney must act with fairness and candor. *See* RPC 3.4. Accordingly, you should exercise your professional judgment in deciding whether to grant a reasonable extension at the request of your adversary.



For example, typically an adversary's first request for an adjournment and/or extension of time should be granted as a reasonable request. Though not a rule of ethics, we should also be guided by the Standards of Civility (22 NYCRR § 1200, Appendix A) that apply to all New York lawyers and state that reasonable requests for an adjournment should be granted particularly if it is a first request. In our experience, from a practical standpoint, the kind of behavior that your client expects from you is not smart advocacy and creates a risk that the judge on your case may not look favorably on you and your client.

With regard to the overall breakdown in your relationship with the client, RPC 1.2 offers little guidance on how to handle disagreements with the client on a variety of issues. *See* RPC 1.2 Comment [2]. Rather, the commentary's general advice is that the lawyer should consult with the client to seek a mutually acceptable resolution of the disagreement. *Id.*

RPC 1.16 recognizes certain situations in which the breakdown in communications between the lawyer and the client is so significant that continued effective representation is impossible. *See* RPC 1.16; *see also* Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9. Specifically, under RPC 1.16, a lawyer *must* withdraw from representing a client, in circumstances where "the lawyer knows or reasonably should know that the representation will result in a violation of the [RPC] or of law …" RPC 1.16(b)(1). Additionally, a lawyer is required to withdraw from representation when the lawyer knows or reasonably should know that "the client is bringing the legal action, con-

ducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person." RPC 1.16(b)(4). For example, if your client is a serial vexatious litigant, frequently harassing the courts, and third parties with litigation for the purpose of extorting settlements, and harming his/her adversaries, the lawyer according to RPC1.16(b)(4), is required to withdraw as counsel.

Your question does not give us the details on the content of the numerous e-mails your client sent to opposing counsel and we do not have the facts necessary to determine whether they were sent for the purpose of harassing your adversary. If you are able to conclude that the emails are an attempt to harass your adversary and you are unable to get your client to stop sending them, RPC 1.6(b)(4) requires in our view that you withdraw as counsel. However, as discussed below, even in the absence of a reasonable belief that your client's communications were sent for the purpose of harassing the adversary, you may be permitted to withdraw from the representation where your requests that your client cease such communications have been ignored.

RPC 1.16(c) identifies other circumstances under which it is *permissive* for a lawyer to withdraw from representing a client. As an initial matter, except as provided in RPC 1.16(d) (discussed below), a lawyer is always permitted to withdraw from representation when: "(1) withdrawal can be accomplished without material adverse effect on the client's interests; and (2) the client knowingly and freely assents to termination of the employment." RPC 1.16(c)(1), (10); *see also* RPC 1.16 Comment [7]. Moreover, paragraphs (c)(4), (c)(7), and (c)(13) of RPC 1.16 allow an attorney to withdraw from a representation where the client: (1) insists upon taking action that the lawyer has a fundamental disagreement; (2) fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively; or (3) insists that the lawyer pursue a course of conduct which is illegal or prohibited under the RPC. *See* RPC 1.16(c)(4), 1.16(c)(7), 1.16(c)(13), respectively.

One should note, however, that establishing that your client refuses to cooperate in the representation so as to render the representation unreasonably difficult for the lawyer under RPC 1.16(c)(7) is a high burden. *See* RPC 1.16(c)(7). To withdraw under this rule, a lawyer must show not just that their client's behavior was unpleasant, but rather, that it was so egregious that the lawyer can no longer provide competent representation. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 847. Professor Simon identifies several circumstances that may render the representation unreasonably difficult under RPC 1.16(c)(7) including: (1) a client's repeated failure to provide information the lawyer has requested; (2) a client's repeated failure to follow the lawyer's advice; and (3) a client's abusive or threatening communications to the lawyer. *Id.* Such behavior by the client allows the lawyer to withdraw, regardless of whether the behavior is deliberate, negligent, or beyond the client's control. *See* NYSBA Comm. on Prof'l Ethics, Op. 1144 (2018).

For example, in *Bankers Trust Co. v. Hogan*, 187 A.D.2d 305, 305 (1st Dep't 1992), defendant's attorney was permitted to withdraw as counsel of record where the court found that the client's conduct rendered the lawyer's representation of the client unreasonably difficult. The client's conduct included continually questioning the lawyer's work, blaming the attorney for adverse decisions, making verbal threats against the firm, insisting that the firm pursue legal theories and arguments at trial directly contrary to law and counsel's professional judgment, and exhibiting a total lack of trust and confidence in the firm. *Id.*

If all else fails, RPC 1.16(c) contains a catch-all provision in paragraph (12), which allows a lawyer to withdraw as counsel where the lawyer believes in good faith that "that the tribunal will find the existence of good cause for withdrawal." RPC 1.16(c)(12). Thus, in proceedings before a tribunal, a lawyer may move to withdraw based on any truthful reason the lawyer thinks a court would accept. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 851. Typical examples of "good cause" are the lawyer's desire to accept a new job or move to a different state, however, courts have found that a complete breakdown in communications between an attorney and client constitutes good cause for withdrawal. *Id.*

Since your matter is pending before a tribunal, it is imperative that you check the individual rules of the tribunal you are before, as it may be necessary to obtain court approval in order to withdraw, notwithstanding having met the permissive withdrawal standards of RPC 1.16(c). *See* RPC 1.16(d); *see also* RPC 1.16 Comment [3]. Pursuant to RPC 1.16(d), "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." In any case, notwithstanding the existence of good cause to terminate the representation, RPC 1.16(d) further provides that the court may deny the attorney's motion to withdraw and order counsel to continue to represent the client, and, in such circumstances the attorney must continue to represent the client. *See* RPC 1.16(d); *see also* RPC 1.16 Comment [3].

If you must seek permission from the tribunal to withdraw on the basis that your client demands that you

engage in unprofessional conduct, you must take precautions to ensure that you do not breach your duty of confidentiality to the client. *See* RPC 1.16 Comment [3]. Even where the court requires an explanation for the withdrawal, the lawyer is still bound to keep confidential the facts that constitute such an explanation. *Id.* The lawyer's statement that professional considerations require termination of the representation are ordinarily sufficient to bypass this issue, yet, if the court requires more information, you should be aware of what is appropriate to disclose. *Id.* To avoid running afoul of your duty of confidentiality to the client, it is critical that you strike an appropriate balance between your obligations to your client and your commitment of candor toward the tribunal.

RPC 1.6(a) provides that "a lawyer shall not knowingly reveal confidential information…or use such information to the disadvantage of a client." RPC 1.6 defines "Confidential Information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Paragraph (b)(6) to RPC 1.6 provides a carve-out for compliance with a court order. *See* RPC 1.6(b)(6). All of that said, we call your attention to an opinion of the NYSBA's Committee on Professional Ethics which states that "if the court orders the lawyer to disclose information the lawyer believes is confidential, Rule 1.6(b) permits the lawyer to comply to the extent the lawyer reasonably believes necessary without violating his ethical obligation to protect a client's confidential information …" NYSBA Comm. on Prof'l Ethics, Op. 1057 (2015). This is essentially a balancing act and we call your attention to Comment [14] to Rule 1.6 which further suggests that disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. *See* RPC 1.6 Comment [14]. We discussed an attorney's obligation to maintain client confidences in greater detail in a prior *Forum*. *See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., January/February 2019, Vol. 91, No. 1.

This is not the end of the analysis. Even when the requisite standards to withdraw as counsel are satisfied or an attorney has obtained approval from the tribunal to terminate the representation, the lawyer must still take reasonably practicable steps to avoid foreseeable prejudice to the rights of the client by: (1) giving reasonable notice to the client, allowing time for employment of other counsel; (2) delivering to the client all papers and property to which the client is entitled; and (3) refunding any portion of an advanced fee that has not been earned by the lawyer. *See* RPC 1.16(e). It is worth noting as an entirely separate matter, if the client has an outstanding balance, you may be permitted to assert retaining and/or charging liens, which, of course, is another subject. *See* RPC 1.8(i)(1); *see also* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., June/July 2019, Vol. 91, No. 5.

All things considered, the ethics of withdrawing as counsel are complex and it is important that attorneys maintain professionalism and civility when working through disputes with clients.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

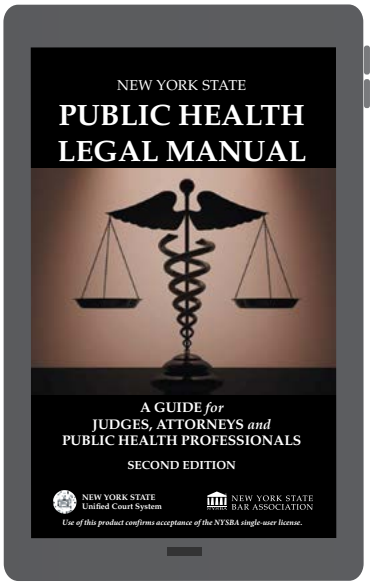
DEAR FORUM,

I am trying to diversify and expand my matrimonial practice by coming up with a flat rate structure that might appeal to couples working towards filing for an uncontested divorce. My thought was that I would charge a flat rate for mediation services with the intention of filing an uncontested divorce packet at the conclusion of the mediation. My contract with the couple would provide, however, that if the parties discontinue my services before resolving all of their issues, I would be paid at an hourly rate for my mediation services performed and any unused amounts would be returned to the couple. Is this permissible under the Rules of Professional Conduct? For example, am I allowed to file legal papers on behalf of the couple if they both agree to it? Are there any issues I should consider if I do pursue this plan when it comes to advertising? Also, when I was discussing this idea with my wife, she said that her psychiatry practice does a lot of couples-counseling and they could offer a free counseling session to couples if it looked like they were going to try to stay together. Can I ethically refer that couple to my wife?

Very truly yours,
Mary Split

PUBLICATIONS

New York State Public Health Legal Manual:
A Guide For Judges, Attorneys and Public Health Professionals, 2nd Ed.



In times of public health emergencies, including the current coronavirus outbreak, state and local governments and public health professionals are able to respond more effectively and efficiently if they understand the lines of authority and the diverse roles that governments and individuals play, and the governing laws that affect their actions. This important resource clarifies these issues by sorting through the myriad statutes and rules governing public health. The New York State Public Health Legal Manual is the result of a collaboration between the New York State Unified Court System, the New York State Bar Association, the New York State Department of Health and the New York City Department of Health and Mental Hygiene.

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Thoughts on Legal Writing from the Greatest of Them All: Joseph M. Williams — Part I

"It's good to write clearly, and anyone can."[1]

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we highlight the advice of a great writing teacher, Joseph M. Williams, from his preeminent book, *Style: Lessons in Clarity and Grace*. In Part I of this column, we'll address his lessons in clarity. In Part II, we'll address his lessons in grace.

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For her research he thanks Jingru Li (NYU School of Law), his judicial fellow.

Williams was an English professor and linguist at the University of Chicago for 34 years. He pioneered the University's writing program, known as "The Little Red Schoolhouse," which focused on advanced academic and professional writing. He was also an influential writer in the field of language and writing pedagogy. His best-known work is probably *Style*. Now in its twelfth edition, *Style* is tailored to expert writers, giving them a methodology to write clearly and gracefully.[2]

Williams cared about the reader's perspective. He believed that writers can create clear and graceful prose if they understand how readers will respond to a document's features. In *Style*, Williams abstracted patterns and prin-

ciples that characterize good writing. He also streamlined a virtuous circle that writers can follow to approach good writing — from a sentence to an entire document, from being clear to being graceful, and from writing well to thinking well. For his lifetime contributions to legal writing, Williams received the Legal Writing Institute's Golden Pen Award in 2006.[3]

Williams died in 2008 at 75. But his legacy continues. After Williams's passing, Joseph Bizup, an Associate Professor of English at Boston University, has edited *Style*'s eleventh and twelfth editions.[4] Here are our favorite favorites from Williams and Bizup's *Style*.

STYLE AS CHOICE

"The more clearly we write, the more clearly we see and feel and think."[5]

Writing is all about choice. Williams believed that choice is at the heart of clear and elegant writing. Good writers carefully choose what and how to write, what words to use, and how to arrange words in a well-organized text that readers find readable. After all, readers must understand the writers' claims before accepting them. What Williams aimed to do in *Style* is to explain how to make sound choices to craft prose that's clear to readers.[6]

Correct grammar isn't everything. Williams recommended that writers make "the choices that define not 'good grammar' but clarity and grace."[7] In his opinion, good writers don't blindly obey all grammatical rules. Blind adherence to grammar undermines the efficiency of writing.[8] Instead, good writers choose which rules to observe and which to ignore.[9] Williams distinguished real grammatical rules from folklore. He thought that real rules define the fundamental structure of English (e.g., to use standard verb forms).[10] By contrast, writers should ignore folklore (e.g., not to begin a sentence with *and* or *but*).[11] In between are elegant options from which writers can choose to get the effect they want (e.g., to split or not to split infinitives).[12]

CLARITY

"Clarity is not a property of sentences but an impression of readers."[13]

Use subjects and verbs to tell stories well. All writers, including legal writers, have a story to tell. Different writers tell the same story differently. Williams explained that good writers deliver well-told stories by identifying the main characters in subjects and expressing the characters' actions in verbs.[14] That's how good writers meet readers' expectations of what clear and direct prose tell them: who the main characters are, and what they're doing. Williams recommended a three-step procedure to detect and revise unclear sentences.[15]

- **Analyze:** Stand in a beholder position to spot unclear sentences. For example, naming abstract nouns as simple subjects or using too many words (say seven or eight) before a verb signals unclarity that requires revision.[16]
- **Assess:** Find the main characters and locate nominalizations (nouns derived from verbs or adjectives, often ending in suffixes like *-tion* and *-ing*) that name the characters' actions.[17]
- **Rewrite:** Turn nominalizations into verbs. Make the characters the subjects of these verbs. Use subordinating conjunctions to connect the segments logically.[18]

Keep useful nominalizations. Williams urged writers to avoid nominalizations. They make sentences dense.[19] For example, write "The committee INTENDS to improve morale"[20] rather than "The INTENTION of the committee is to improve morale."[21] But he also reminded writers about the exceptions. He suggested keeping nominalizations when they "refer to a previous sentence,"[22] "replace an awkward *The fact* that,"[23] "name what would be the object of a verb,"[24] or "name a concept so familiar to your readers that it is a virtual character."[25] In these situations, nominalizations make sentences clear, concrete, and cohesive. For example, write "I do not know HER INTENTIONS,"[26] not "I do not know WHAT SHE INTENDS."[27]

Choose between the active and passive voice. Williams wrote that the active voice is often better than the passive, but not always.[28] He recommended using the passive when "the agent of an action is self-evident,"[29] when "it lets you replace a long subject with a short one,"[30] or when "it gives your readers a coherent sequence of subjects."[31] In these cases, the passive voice creates clear, concise, and cohesive sentences. For example, write "The president WAS REELECTED with 54% of the vote," not "The voters REELECTED the president with 54% of the vote."[32]

Carry information from old to new to create cohesion. Williams considered this "old-to-new" principle essential to achieving cohesion. He explained that cohesion is "a sense of flow"[33] that makes a passage "hang together."[34] To create cohesion, good writers do two things. They start a sentence with old and simple information and end it with the new and complex.[35] Then, they begin the next sentence with the information appearing in the last few words of the last sentence and end it with idea new.[36] In this way, good writers help readers create a sense of cohesive flow. There's also a balance in a passage's overall

cohesion and the clarity of individual sentences. Williams prioritized cohesion.[37]

String topics consistently to create local coherence. Williams defined "local coherence" as "a sense of the whole"[38] that allows readers to make sense out of the whole passage.[39] He explained that readers find a passage coherent when writers help them accomplish two tasks: to spot the topics of individual sentences quickly, and to recognize how these topics string together as a set of related ideas.[40] Williams further described how good writers create local coherence. They put consistent topics in subjects toward the beginnings of sentences so that readers can get to the topics quickly.[41] Then they sequence the sentences in a logical flow of connected ideas so that readers can easily understand what the whole passage is about.[42]

CLARITY OF FORM

"Get beginnings straight, and the rest is likely to take care of itself."[43]

Raise a problem; then offer a solution. Williams believed that to encourage readers to read on, good writers must do two things when they introduce prose. They "let readers know what to expect so that they can read more knowledgeably,"[44] and they "motivate readers so that they want to read carefully."[45] He thought that the best way to do those things is to introduce a problem readers want to see addressed, and then address it.[46] Stimulated by a problem they care about, readers will willingly press on until they figure out how the writer solves the problem.[47] He also explained that a motivating introduction includes three parts: a shared context that offers some background, a problem that raises a troublesome condition and its resultant costs, and a solution that demands a change in action or understanding.[48]

Forecast themes and show relevance. Williams argued that besides local coherence, good writers pay attention to global coherence to help readers understand the entire prose without extra effort.[49] He also summarized how good writers create overall coherence. Good writers open each unit — the section, the subsection, and the whole — with a relatively short introductory segment to forecast the theme that follows, and then they present the unit's point.[50] They always show the relevance of each unit and the whole.[51] They also organize all the units into a chronological, coordinate, or logical order that "best helps . . . readers understand them."[52]

The Legal Writer will continue in the next edition of the *Journal* with Williams's insights on writing gracefully.

1. Joseph M. Williams & Joseph Bizup, *Style: Lessons in Clarity and Grace* 2 (12th ed. 2016).
2. Joseph M. Williams, Professor Emeritus of English and Linguistics, 1933–2008, UChicago News, Feb. 28, 2008, https://news.uchicago.edu/story/joseph-m-williams-professor-emeritus-english-and-linguistics-1933-2008 (last visited Jan. 6, 2020).
3. In Memoriam: Joseph M. Williams, 1933–2008, Thomson Reuters, Spring, 2008, https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2008-spring/2008-spring-7.pdf (last visited Jan. 6, 2020).
4. Joseph Bizup, Boston University Arts & Sciences, https://www.bu.edu/cas/profile/joseph-bizup/ (last visited Jan. 6, 2020).
5. Williams, *supra* note 1, at 8.
6. *Id.* at 3–8.
7. *Id.* at 26.
8. *Id.* at 10.
9. *Id.* at 13.
10. *Id.* at 11–12.
11. *Id.* at 13–16.
12. *Id.* at 16–18.
13. *Id.* at 35.
14. *Id.* at 29–30.
15. *Id.* at 35.
16. *Id.* at 35–36.
17. *Id.* at 36.
18. *Id.*
19. *Id.* at 41.
20. *Id.* at 44.
21. *Id.*
22. *Id.* at 41.
23. *Id.* at 42.
24. *Id.*
25. *Id.*
26. *Id.* at 45.
27. *Id.*
28. *Id.* at 53.
29. *Id.* at 63.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 66.
34. *Id.* at 65.
35. *Id.* at 67.
36. *Id.*
37. *Id.* at 68.
38. *Id.* at 69.
39. *Id.*
40. *Id.* at 70–72.
41. *Id.* at 72.
42. *Id.* at 75.
43. *Id.* at 118.
44. *Id.* at 95.
45. *Id.*
46. *Id.* at 106.
47. *Id.* at 95.
48. *Id.* at 96–101.
49. *Id.* at 110.
50. *Id.* at 110–13.
51. *Id.* at 113–14.
52. *Id.* at 114.

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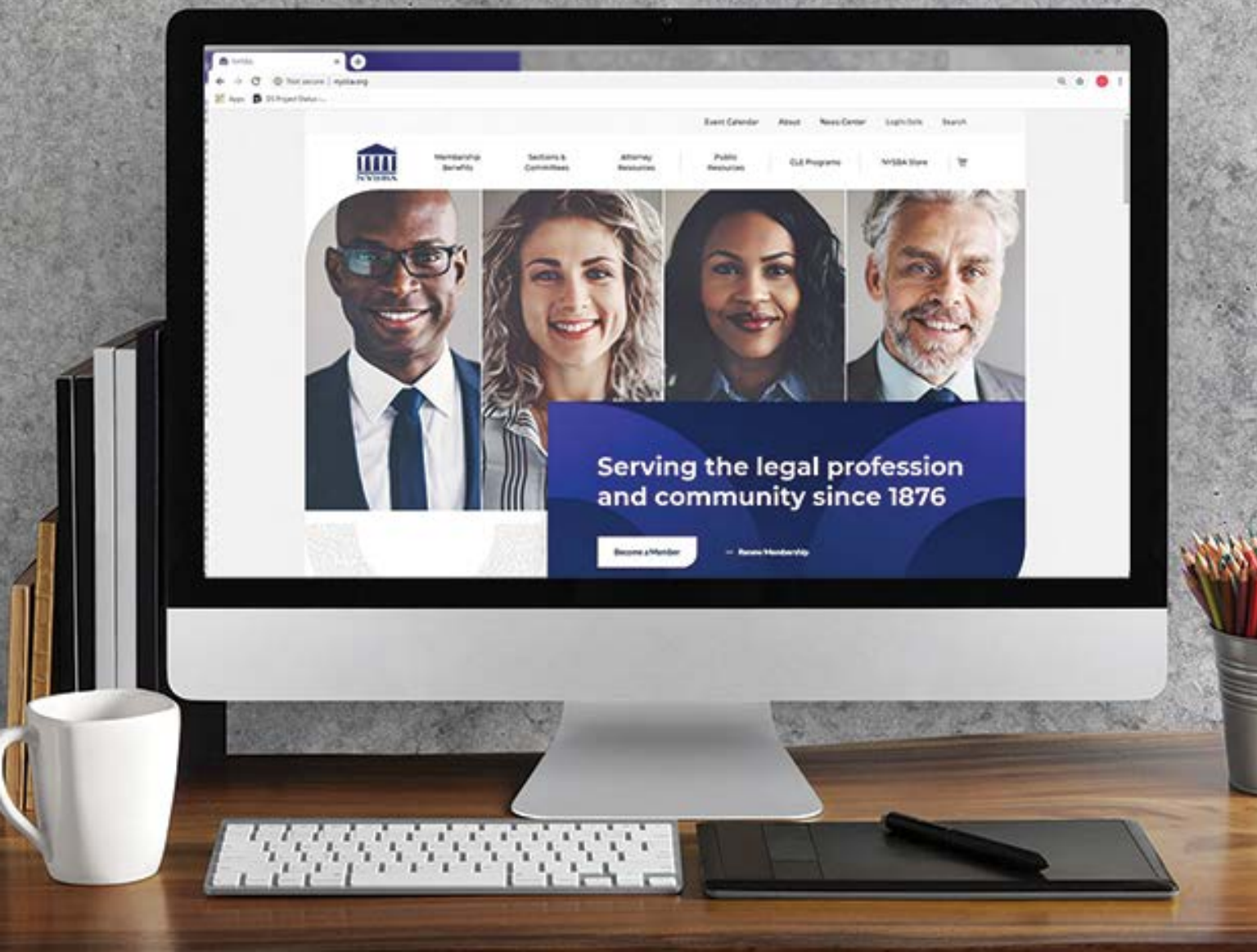

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