NEW YORK STATE BAR ASSOCIATION
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JUNE/JULY 2020
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David Lat's Fight Against COVID-19

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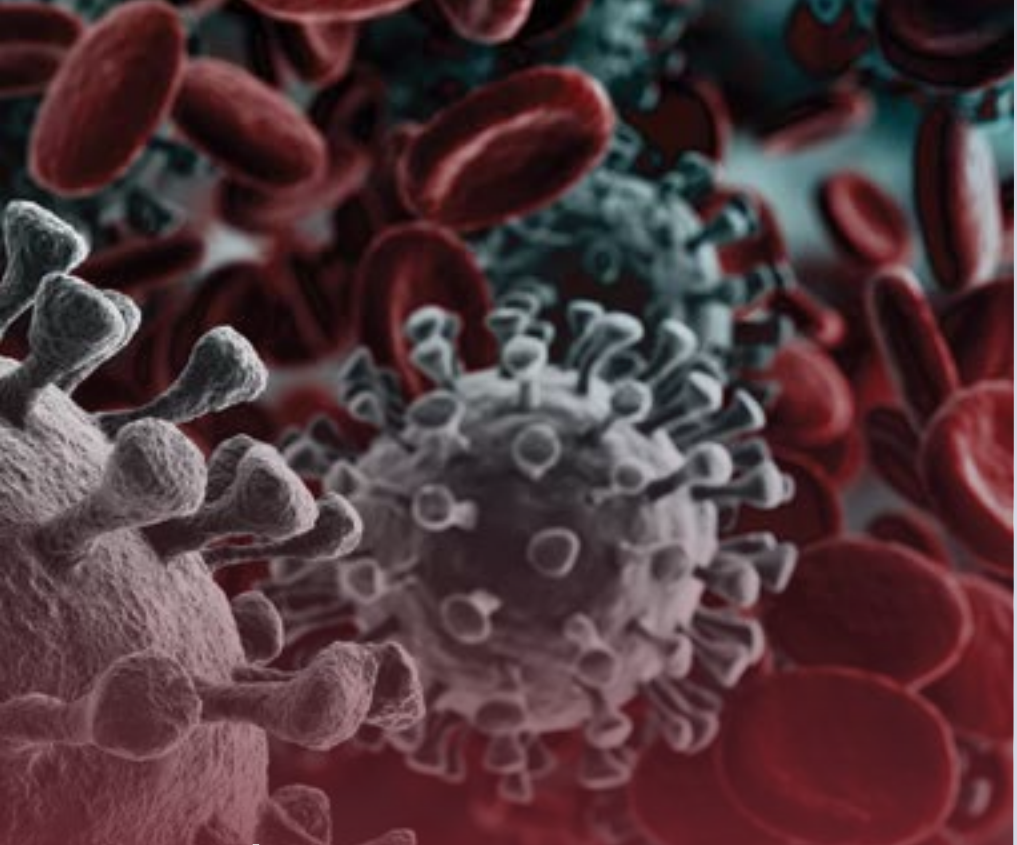

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by Christian Nolan

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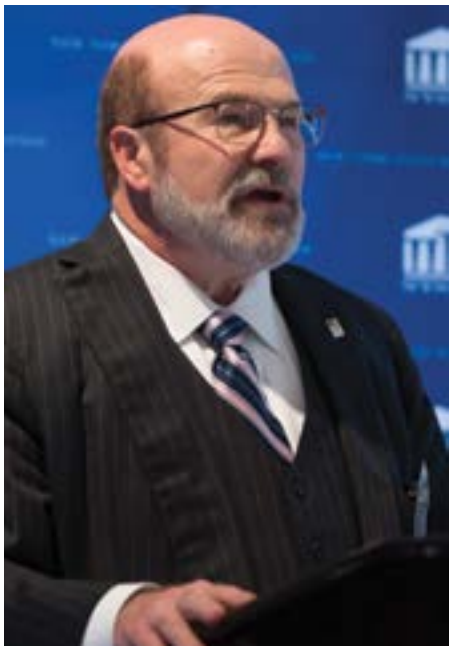
Leadership and Service in the Age of COVID-19



When I sought the nomination as president-elect of the New York State Bar Association in 2018, and even when I assumed that office in 2019, I could not have imagined that when I became NYSBA's 123rd president on June 1, 2020, I would do so under the cloud of a pandemic. Indeed, none of us could have imagined the situation in which we all find ourselves today as the result of the coronavirus public health crisis. It has upended our world and every aspect of our lives, and the legal community has not been spared.

But there is one thing that has not changed and will not change: NYSBA will continue to be your professional home and to provide you with valuable information, services and networking opportunities. We will continue our work to shape the laws of New York State. And we will continue to advocate for our profession, the rule of law and equal access to justice.

ADDRESSING THE IMPACTS OF COVID-19

Right now, however, our top priority is addressing the many difficult issues affecting our members and the New York legal community by reason of COVID-19.

More than half of NYSBA's members work as solo practitioners or at small firms. Under the leadership of my predecessor, Hank Greenberg, we established the Emergency Task Force for Solo and Small Firm Practitioners in March to assist these attorneys with immediate and long-term needs. The group is chaired by solo practitioners Domenick Napoletano of Brooklyn – NYSBA's treasurer – and June Castellano of Rochester.

In the short time the task force has been in existence, Domenick, June and task force members have worked diligently and done a phenomenal job. Among its accomplishments, the task force has obtained badly needed clarification from Empire State Development on the scope of restrictions imposed on attorneys during New York's shutdown. Also, the task force successfully advocated for interim payments to assigned counsel and attorneys for children when cases are not yet concluded, thereby lessening the financial burden on those attorneys.

The task force is providing NYSBA members with practical information on grant programs and communications technology. The group is also tracking issues that concern all small businesses, such as the when and how "New York on Pause" rules will be modified or lifted, the availability of federal grants and loans to lawyers and their clients and proposals for commercial rent or property tax deferrals.

NYSBA has also created a Working Group on Reopening Law Firms, chaired by Marian Rice of Garden City, which is collaborating with representatives of law firms of every size around the state to make recommendations on how to bring lawyers and staff back to their offices safely and efficiently as Gov. Andrew Cuomo eases the stay-at-home restrictions.

Our societal response to COVID-19 has revealed critical issues which demand the attention of our association, including the statutory and regulatory framework under which our state's nursing homes operate and the question of when liability shall be imposed for injuries alleged to

be coronavirus-related. We will study and report on both of these important issues.

COVID-19 has led to major disruptions in the lives and plans of students graduating law school this year, including postponement of the July bar examination and a huge reduction in the number of seats available for the rescheduled dates in September. NYSBA has been working with the court system to ensure that all law school graduates will have a path by which they can start their careers, even if they are delayed in taking the bar exam.

NYSBA continues to offer hundreds of top-quality CLE programs, both live webinars and on-demand programs, all available to you from your computer desktop or other device. The programs cover timely topics relating to COVID-19 and its impact on the legal system, including practical guides for how to handle matters through New York's virtual courts.

A RANGE OF IMPACTS ON DIFFERENT AREAS OF THE LAW

One of the most ironic twists of the COVID-19 public health crisis is how its impact on lawyers differs dramatically depending on area of law practice. For example, lawyers who concentrate in labor, employment, trusts and estates or insurance issues report that they are swamped with inquiries from clients trying to navigate through the crisis. Litigators who are currently struggling to make progress on cases because courts are limited to "essential" matters only are relatively idle now, but may soon be flooded with work as the crisis eases and clients need to sort out business and personal obligations.

Amid questions about impacts on the economy in the coming weeks and months, real estate attorneys may be facing renegotiated or scuttled deals, while those who deal with divorce and family law may be searching for ways to serve clients who are struggling to make child support payments or adjust visitation schedules.

TAKING BETTER CARE OF OURSELVES

There is one thing that most of us have in common right now: To help limit the spread of COVID-19, the state has required us to stay largely confined to our homes in recent months. Many of us have found ourselves practicing law from our dining room tables, while fending off distractions from family – including dogs, cats and other non-human family members – as well as the television and the refrigerator. Clearly, we all need to be thinking about our own well-being.

Lawyers have never been especially good at taking care of ourselves. Studies have shown rates of mental illness, fatigue, physical health problems, and substance abuse for attorneys that far exceed the national averages for other professions. These problems take a heavy toll on our bodies and our personal lives. It is also vitally important for all of us to recognize that the well-being of attorneys is critical to the effective practice of law, protection of the public trust, and the vibrancy of our profession.

NYSBA has long offered support and services for members struggling with these issues and we will continue to do so. However, my vision for the coming year is for a holistic and even more robust approach to attorney well-being.

To that end, I have established a Task Force on Attorney Well-being, which is co-chaired by Libby Coreno of Saratoga Springs and the Hon. Karen Peters of Woodstock. The task force will encompass nine working groups: Emotional Well-being; Physical Well-being; Substance Abuse and Addiction; Law Culture and Employment; Law Education; Bar Associations; Judiciary and the Courts; Public Trust and Ethics; and Continuing Legal Education. I have charged the group with making recommendations for how we can implement well-being strategies throughout New York's legal community.

OUR EXTRAORDINARY TECH TRANSFORMATION

Thanks in large part to the remarkable vision and hard work of immediate past President Greenberg, NYSBA has undergone an extraordinary technological transformation over the past year. Many of you are already familiar with our new user-friendly website, which is fully integrated with new e-commerce and membership information systems. Along with comprehensive updates to NYSBA's videoconferencing capabilities, the new site helps make it easier than it has ever been for our members to connect with each other, whether they are around the corner or across the globe.

Over the past couple of months, many of us – including myself – have gone through our own personal tech transformations as well, from learning how to use Skype for Business to make video court appearances to participating in countless Zoom meetings with colleagues, clients and fellow bar leaders.

I have never considered myself especially tech savvy and I still don't, but I am proud to note that – thanks to training and generous assistance from NYSBA staff – I am the first chair in the history of the association's House of Delegates to preside over a completely virtual meeting of the House. We debated, voted and accomplished a great deal of business without experiencing any significant

technical glitches in the more-than-four-hour gathering, and with 207 participants it was the best-attended HOD meeting ever.

A COMMITMENT TO ACCESS TO JUSTICE FOR ALL

One of the hallmarks of my legal career has been a deep commitment to ensuring access to justice for all. I have often spoken of lawyers as "guardians of justice" because we alone have the skills and licenses that enable us to seek justice for others. Coupled with that is my abiding belief in the importance of voluntary pro bono work. I was a founder of the Suffolk Pro Bono Foundation and I am currently vice chair of the board of directors of Nassau Suffolk Law Services, a provider of free civil legal assistance to Long Island's indigent population.

I have been pleased to work with NYSBA leadership and the court system to launch a pro bono partnership to help those in need address the many legal issues that have arisen the wake of COVID-19. In the coming year, NYSBA will continue and expand our important work training and deploying pro bono attorneys to provide assistance to New Yorkers who need help securing unemployment benefits through the appeal process, resolving matters relating to housing and eviction, and dealing with other legal issues that arise as result of the pandemic.

We are living in an extraordinary and difficult time, one that should inspire all of us to extend ourselves to do whatever we can to help others. That is why I encourage all of my NYSBA colleagues – including those in leadership positions – to take on some kind of pro bono work in the coming year. To set an example, I pledge to take on a pro bono matter during the year of my presidency.

Perhaps you will sign up for the pro bono partnership described above. You can work with a local legal services provider or other non-profit service organization. Or maybe you can simply share needed legal insights and expertise with a struggling friend or neighbor. Lawyers are consensus builders and problem solvers, and those skills are needed now more than ever.

WHAT IT MEANS TO BE A LEADER

As Americans, we are blessed with certain inalienable rights. But it has become clear that not all Americans understand that those rights also come with responsibilities. As lawyers, we can and must play an important role in advancing that understanding, and I am pleased that NYSBA will be collaborating with the court system in the coming year on a wide-ranging civics education effort.

Working closely with New York Court of Appeals Chief Judge Janet DiFiore and Associate Judge Michael J. Garcia, we will present a civics convocation in spring 2021 to bring students and educators together with lawyers and judges to explore ways in which to enhance the level of civics education in our state. This will be an ongoing multi-year effort that we expect will also include student trips to courthouses as well as visits to classrooms by judges and lawyers. Our goal is to foster greater awareness of how our laws and our legal system are essential building blocks of our society, and how every New Yorker and every American has a role to play in supporting civil society.

Advancing civics education, working to address the many challenges of COVID-19 for attorneys, volunteering our time and expertise – all of these are elements of leadership. Problem solving and planning for the unknown and the unexpected are part of leadership, too.

It is clear to me that my year as president of NYSBA is not going to be what I planned or envisioned, but that really doesn't matter now. What does matter is this: I commit to you that I will be a thoughtful, dynamic and diligent advocate and leader as we navigate through the coronavirus public health crisis, advance the interests of NYSBA and our members, and support the rule of law and access to justice.

It is the greatest honor of my professional career to serve you as NYSBA president, and I thank you all for giving me this opportunity. I don't know what the coming year will bring – none of us do – but I do know that I'm looking forward to working with you all on Zoom, Skype, FaceTime and maybe even in person.

SCOTT KARSON can be reached at skarson@nysba.org

NYSBA Issues Guidance on Reopening Law Firms

By Christian Nolan

The New York State Bar Association (NYSBA) has developed a model reopening plan that will help law firms get back to work as quickly as possible while protecting employees and clients alike.

"These guidelines include vitally important information and are a valuable resource for law firms of all sizes around the state as they prepare to reopen and adjust to the new normal," said NYSBA President Scott M. Karson. "I'm grateful to the talented and dedicated members of our working group, who consulted with law firm managers, general counsels, health authorities and labor experts to establish recommendations for the safest and most efficient ways for firms to resume operations."

This guidance will help law firms prepare for phase two of Gov. Andrew M. Cuomo's reopening plan, which includes law firms. The NYSBA working group's recommendations on reopening law firms will be made available to all the association's 70,000 members.

THE GUIDE INCLUDES THE FOLLOWING RECOMMENDATIONS:

- Develop a testing plan for employees and implement strict rules for sick or at-risk individuals, including enforcing quarantines when necessary. Also, require mandatory self-reporting and self-isolation upon known virus exposure.
- Emphasize social distancing, including no in-person meetings in the office for at least a specified time. Encourage the use of technology for remote mediations, hearings, arguments and depositions.
- Wear masks – both at work and when traveling to and from the office. Discourage the use of mass transit.
- Decide which employees will return to the workplace and encourage those who can continue to work effectively from home to do so until the governor announces that the threat has sufficiently passed to allow for a more general return.
- If scientific data supports immunity, persons who were diagnosed with and recovered from COVID-19 may be exempt from the general work-from-home recommendation.
- Limit the number of people coming into the office at the same time, limit unnecessary employee movement within the office and develop one-way foot traffic patterns if possible.
- Stagger workstations, limit touchpoints and install barriers for employees at locations with heavy foot traffic. Develop sanitizing and cleaning protocols in accordance with recommended CDC and OSHA guidance.
- Develop strict client and visitor policies, including restricting visitors from branch offices. Lawyers and staff should bring their own food.
- Establish reasonable restrictions on use of restrooms and restrict the use of office common areas including joint refrigerators and office printers and copiers.

These guidelines will be amended as new challenges arise and strategies develop.

NYSBA recently hosted a "Reopening Your Law Office" webinar outlining key steps for law firms to take to foster a safe return to the office. See www.nysba.org/reopeningcle for more information on how you can access this online.

NYSBA and N.Y. Courts Partner to Create Pro Bono Network to Address Impacts of COVID-19

By Dan Weiller

It is too soon to know all of the effects of the COVID-19 public health crisis on lawyers, the legal community and the justice system. However, legal observers already foresee a surge in lawsuits and other actions stemming from the impacts of the pandemic, and predict a huge need for pro bono assistance for New Yorkers facing landlord-tenant disputes, probate issues, disputed claims for government financial assistance and other matters.

The New York State Bar Association (NYSBA), in partnership with the state court system, launched a COVID-19 Recovery Task Force in April to develop and support a pro bono network of lawyers to ensure that New Yorkers who require legal assistance can get it – regardless of their ability to pay.

"The New York legal community has always risen to the task in times of crisis," said Chief Judge Janet DiFiore. "I am grateful to NYSBA for its leadership on this vital effort, and to our bar leaders and members throughout the state for their ongoing generosity in response to the immense legal needs of New Yorkers resulting from the pandemic."

"New Yorkers are suffering through the most serious economic downturn of their lives, and the lowest-paid New Yorkers have been hit the hardest," said NYSBA President Scott M. Karson. "It is clear that there will be unprecedented need for legal representation on a range of issues, and the aim of our pro bono partnership is to make sure that it is available to all, regardless of their economic situation."

The pro bono network is currently providing training for volunteer attorneys and then matching them with clients on two issues related to the impacts of the coronavirus:

- Helping individuals appeal denial of unemployment benefits.
- Helping family members and loved ones settle small estates of those whose death was a result of COVID-19.

In addition, a working group is looking at alternative means to settle landlord-tenant disputes.

"Ensuring access to justice for all New Yorkers is paramount right now, and New York attorneys have stepped up to help make that happen," said former Chief Judge Jonathan Lippman, who is chairing the task force. "We are focused on helping unemployed New Yorkers get the benefits they need and are entitled to providing assistance to struggling families to settle the estates of loved ones lost as a result of COVID-19 and finding solutions that address the needs of both landlords and tenants."

APPEALING DENIAL OF UNEMPLOYMENT BENEFITS

NYSBA developed an innovative website resource, www.nysba.org/legalhelp, to provide resources for filing an unemployment claim. Individuals whose claims are unsuccessful can register for assistance online and are matched with pro bono attorneys.

More than 625 unemployed New Yorkers have been matched with an attorney to help them appeal denied unemployment insurance claims since NYSBA launched its pro bono network in late April.

Some 15 NYSBA staffers from the departments of public interest, government relations, section and meeting services, lawyer assistance, lawyer referral and publications are working diligently to help fulfill this vital need for assistance, with support from NYSBA's communications, marketing and digital business operations teams.

NYSBA has matched over 500 clients with individual attorneys and the remainder have been referred to civil legal services organizations. The association has provided training for volunteer lawyers and some attorneys have taken on more than seven clients.

SETTLING ESTATES OF THOSE WHO DIED AS A RESULT OF COVID-19

New uncontested estate cases involving individuals who died from coronavirus-related conditions are now deemed essential and can be filed in Surrogate's Court. COVID-19 has taken the lives of tens of thousands, and as a result New York courts are bracing for a wave of estate cases.

The pro bono network will match attorneys with family members and loved ones who need to settle small estates through the online portal at www.nysba.org/legalhelp. Attorneys interested in volunteering can register at www.nysba.org/probonosignup.

The volunteer effort is led by Michael Miller, past NYSBA president and a long-time trusts and estates attorney.

RESOLVING LANDLORD-TENANT DISPUTES

With housing courts closed and a statewide moratorium on evictions in effect until August 20, NYSBA formed a landlord-tenant working group to come up with ways to help sick or financially stressed tenants reach agreements with their landlords through

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Being Resilient During the Pandemic: "You Call This a Storm?"

By Robert Herbst

The U.S. Surgeon General has called the coronavirus pandemic "our Pearl Harbor moment." My mother sees it as a bit of *déjà vu* because she spent the three years after the Pearl Harbor attack rationing sugar and shoes and living behind blacked out windows at night in case the Germans decided to bomb the aircraft engine plant near her home. Meanwhile, my grandmother kept getting telegrams about her soldier son – my father – but each one told her that he was only wounded, not killed, so things were okay.

My mother and grandmother were part of a very resilient nation. We are resilient too; we just have not been tested. My parents and grandparents were coming off 12 years of the Great Depression, so they were hardened. We have been living in a 12-year bull market that has meant economic good times for many of us. The lead-up may be different, but the implications are similar – we have within us the ability to deal with the enormous challenges of COVID-19 and the many ways in which it impacts our lives.

Things are not going to be "normal" for the foreseeable future. We are going to need to be resilient to get through the remainder of being locked down and to cope with the changed economy and legal and social landscapes we will find ahead. With an unrelenting news cycle giving us the latest infection and death figures, we will be under constant stress. Even as things start to open up, it will be hard to relax. As in World War II when posters warned that "Loose Lips Sink Ships," we will always be on guard as a masked server tells us the specials at a restaurant and we sit in half empty theatres and stadiums under the specter of social distancing.

To cope with this stress, we will need to be resilient. As an attorney, you are already resilient. You have stuck with it through three years of law school, the bar exam, and countless challenging issues and deadlines. Now you need to draw on that experience.

The key is to remain positive. You should embrace the concept that in putting up with restrictions, we are helping to protect the elderly, children, and those who may have underlying health conditions. As attorneys, it is our duty to protect those who need protection. You should also take comfort in the belief that ultimately civilization will get through this. The very fact that we are here proves that our ancestors have survived countless wars, famines, natural disasters, and plagues.

Resilience can be trained like a muscle, because it is a type of strength. The more you respond to situations with resiliency, the easier it will become. A good way to be more resilient is to push yourself during physical exercise until you are uncomfortable. Sprint the last 100 yards of your run or the last 20 seconds on your stationary bike. Do two more pushups than the 10 your routine prescribed. Then add two more to that the next day. Do not back off, even if it hurts. It feels good to blow it out and achieve a happy fatigue.

The more times you successfully deal with discomfort, the more confidence you will gain and the more pushing through and overcoming will become a habit. You will learn to embrace the challenge and see it not as something to be avoided, but as an opportunity to excel. The mental toughness born from exercise will carry over into how you deal with adversity in the financial, professional, personal and other aspects of your life. You will have an inner strength and be tough and resilient for all purposes. As Christopher Robin reassured Winnie the Pooh, "You are braver than you believe, stronger than you seem."

Exercise is also one of the best ways to reduce stress. It does not even have to be exercise in the traditional sense of running or lifting weights. Any movement will do. Your body does not know the difference between reaching down to pull out a weed in your garden and using an expensive machine at a boutique health club. All it knows is that it is stretching and pulling as it was designed to do.

If you are a regular gym goer, you should anticipate that gyms will not be the same, at least initially, so prepare yourself for some disappointment. They will likely allow in fewer people, impose time limits, and be ultra vigilant about wiping down equipment. Do not let that be a source of stress. Instead, deal with it. It is still better than having the gym be closed, so use it to the extent you can and find other ways to move.

If going to the gym is problematic or you want to enhance your current exercise program, you can do a mindful stretching routine where you focus on your breathing. As you stretch, concentrate on inhaling and exhaling to a count of three while staying in the moment. It will lower your stress, improve your flexibility, and get you centered so that you can take on the challenges of the day.

You *will* be able to withstand the pandemic and its aftermath. Like Rocky Balboa in "Rocky 3" as he was being pummeled by Clubber Lange, you can taunt back: "You ain't so bad, you ain't so bad, you ain't nothin'….I ain't breathing heavy."

Robert Herbst is chair of the Physical Well-being Working Group of NYSBA's Task Force on Attorney Well-being, and a former chair of the Committee on Courts of Appellate Jurisdiction. He is a 19-time world champion powerlifter and a member of the AAU Strength Sports Hall of Fame.

NYSBA 2020-2021 Officers

Scott M. Karson, President

Scott M. Karson of Stony Brook, a partner at Lamb & Barnosky, became president of NYSBA on June 1, 2020.

Karson is a commercial and municipal litigator with a concentration in appellate work and has argued more than 100 appeals in the state and federal appellate courts. He also chairs his firm's Professional Ethics and Litigation Committees.

A NYSBA member for more than three decades, Karson served for three years as treasurer of the association. He has served on the Executive Committee as vice president for the Tenth Judicial District (Nassau and Suffolk counties). He is a member and former chair of the Audit Committee and is a member of the Finance Committee, the President's Committee on Access to Justice and the Committee to Review Judicial Nominations. A longtime member of the Committee on Courts of Appellate Jurisdiction, Karson worked during his time as chair to clarify court rules to create a standard price that could be charged for court transcripts.

A past president of the Suffolk County Bar Association, Karson was the county bar's delegate to the American Bar Association (ABA) House of Delegates. As president, he will be a NYSBA delegate to the ABA. He still serves on the ABA's Council of Appellate Lawyers. Karson is vice chair of the board of directors of Nassau Suffolk Law Services, the principal provider of civil legal services to Long Island's indigent population. He has twice received the Suffolk County Bar Association President's Award, in 1996 and 2011, and received the its Lifetime Achievement Award in 2018.

Before joining Lamb & Barnosky in 1987, Karson served as an assistant district attorney in Suffolk County and as principal law clerk to the late Associate Justice Lawrence J. Bracken of the Appellate Division, Second Department.

Karson earned his law degree from the Syracuse University College of Law, cum laude, and his undergraduate degree from the State University of New York at Stony Brook.

T. Andrew Brown, President-Elect

T. Andrew Brown of Rochester is founder and managing partner of Brown Hutchinson LLP. A 29-year member of the State Bar Association, he has chaired the Trial Lawyers Section and Finance Committee, was vice-president for the Seventh Judicial District, served as a member-at-large of the Executive Committee and co-chaired the Task Force on the Future of the Legal Profession in 2010 and 2011.

Since 2012, Brown has been a member of the New York State Board of Regents, which provides general supervision of all educational activities within the state and has been Vice-Chancellor of the Board since 2017.

Brown entered law practice as an associate with Nixon, Hargrave, Devans and Doyle (now Nixon Peabody). He has also served as Rochester's corporation counsel – the city's chief legal officer and head of its law department – and as deputy county attorney for Monroe County. He has been a mediator and an arbitrator on the commercial, employment and complex case panels of the American Arbitration Association for more than two decades.

Brown is a former general counsel of the National Bar Association, the largest association of attorneys and judges of color in the world. He is a past president of the Monroe County Bar Association and the Rochester Black Bar Association. He has served on many other boards and commissions and has also held adjunct teaching positions with the State University of New York.

Brown is a 1984 graduate of the University of Michigan Law School and a 1981 graduate of Syracuse University.

Sherry Levin Wallach, Secretary

Sherry Levin Wallach of Westchester is serving her fourth one-year term as NYSBA secretary. She is the deputy executive director of the Legal Aid Society of Westchester County.

A former chair of the Criminal Justice Section, Levin Wallach has served as vice president from the Ninth Judicial District to the Executive Committee, chaired the Membership Committee and co-chaired the Task Force on Incarceration Release Planning and Programs. Currently in her third four-year term on the House of Delegates, Levin Wallach serves on the Committee on Professional Discipline, the Committee on Mandated Representation, the Task Force on Parole Reform and chairs the Resolutions Committee.

Levin Wallach is co-founder of the NYSBA Young Lawyers Section Trial Academy, an annual program offering five days of intensive trial training, where she is a team leader and lecturer. Levin Wallach organizes and lectures at continuing legal education programs for NYSBA, the New York State Association of Criminal Defense Lawyers and the Westchester County Bar Association on the topics of criminal and civil trial practice, ethics and DWI. She has written a chapter on DWI defense, "Best Practices for Defense Attorneys in Today's DWI Cases," in "Inside the Minds: Strategies for Defending DWI Cases in New York," as well as articles on criminal justice issues and trial practice.

Levin Wallach concentrates her practice on criminal defense. She has also practiced in the areas of estate planning, probate and estate administration, real estate, and general civil litigation in the state and federal courts. She is admitted to practice in New York, the U.S. District Courts for New York's Southern and Eastern Districts and the U.S. Supreme Court. She serves on Westchester and Putnam counties' 18B panels under their assigned counsel plans, which provide criminal defense for indigent people.

She is a former assistant district attorney of Bronx County. Levin Wallach was principal at her law firm Wallach & Rendo, LLP for approximately 14 years, and of counsel to both Bashian Law P.C., formerly Bashian & Farber LLP and Brown Hutchinson LLP.

Levin Wallach earned her law degree from Hofstra University School of Law, now the Maurice A. Deane School of Law at Hofstra University, and her undergraduate degree from George Washington University.

Domenick Napoletano, Treasurer

Domenick Napoletano of Brooklyn is serving his second term as NYSBA treasurer.

Napoletano is a solo practitioner focusing on complex commercial litigation and appellate work while maintaining a general practice. A number of his cases have appeared in published decisions, most involving real property, and tenancy and occupancy issues. He has also spearheaded various state and federal class action lawsuits, including one against the New York City Department of Finance for its imposition of 'vault taxes.'

Among his NYSBA activities, Napoletano is chair of the General Practice Section and co-chair of NYSBA's Emergency Task Force for Solo and Small Firm Practitioners as well as the Committee on Civil Practice Law and Rules. He is a member of NYSBA's Restarting the Economy Work Group and the COVID-19 Recovery Task Force working group on landlord-tenant disputes. He has served on many NYSBA committees including Finance, Leadership Development, Bar Leaders of New York State, Animals in the Law, the President's Committee on Access to Justice, Task Force on the Evaluation of Candidates for Election to Judicial Office and the Task Force on Mass Shootings and Assault Weapons.

Napoletano also served on NYSBA's Executive Committee as vice president from the Second Judicial District, and the House of Delegates representing the Brooklyn Bar Association. He is a past president of the Brooklyn Bar Association, the Columbian Lawyers Association of Brooklyn, the Confederation of Columbian Lawyers of the State of New York and the Catholic Lawyers Guild of Kings County.

While in college and throughout law school, Napoletano worked for then–New York State Assemblyman Michael L. Pesce, who recently retired as presiding justice of the state Supreme Court Appellate Term for the Second, 11th and 13th Judicial Districts. Napoletano earned his law degree from Hofstra University School of Law and his undergraduate degree from Brooklyn College.

NYSBA AND N.Y. COURTS PARTNER TO CREATE PRO BONO NETWORK TO ADDRESS IMPACTS OF COVID-19

continued from page 8

innovative options such as alternative dispute resolution.

A surge in landlord-tenant disputes is expected when the moratorium is lifted. Many tenants are already struggling financially and are unable to afford to hire attorneys. Settling these disputes quickly also helps landlords who need income to keep their buildings safe and in good repair.

Alan Levine, senior counsel at Cooley and former chair of the board of the Legal Aid Society of New York, is the chair of the landlord-tenant working group.

EXTRAORDINARY PRO BONO EFFORTS ADDRESS UNPRECEDENTED NEEDS

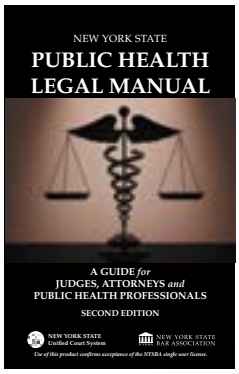
The number of jobless workers in New York and across the country has swelled during the pandemic to levels not seen since the Great Depression. Job losses have been most severe among lower-paid workers.

New York's existing network of pro bono and public defense attorneys was already strained prior to the COVID-19 public health crisis. The state court system and NYSBA formed the pro bono partnership to ensure that all New Yorkers can exercise their right to legal counsel at a time when the need for legal services will likely be higher than ever before, and fewer people will be able to afford representation.

Lawyers who are interested in joining these pro bono efforts should go to https://nysba.org/covidvolunteer/ to sign up. If you have specific questions about volunteering, please contact NYSBA via e-mail: covidvolunteer@nysba.org.

NYSBA PUBLICATIONS

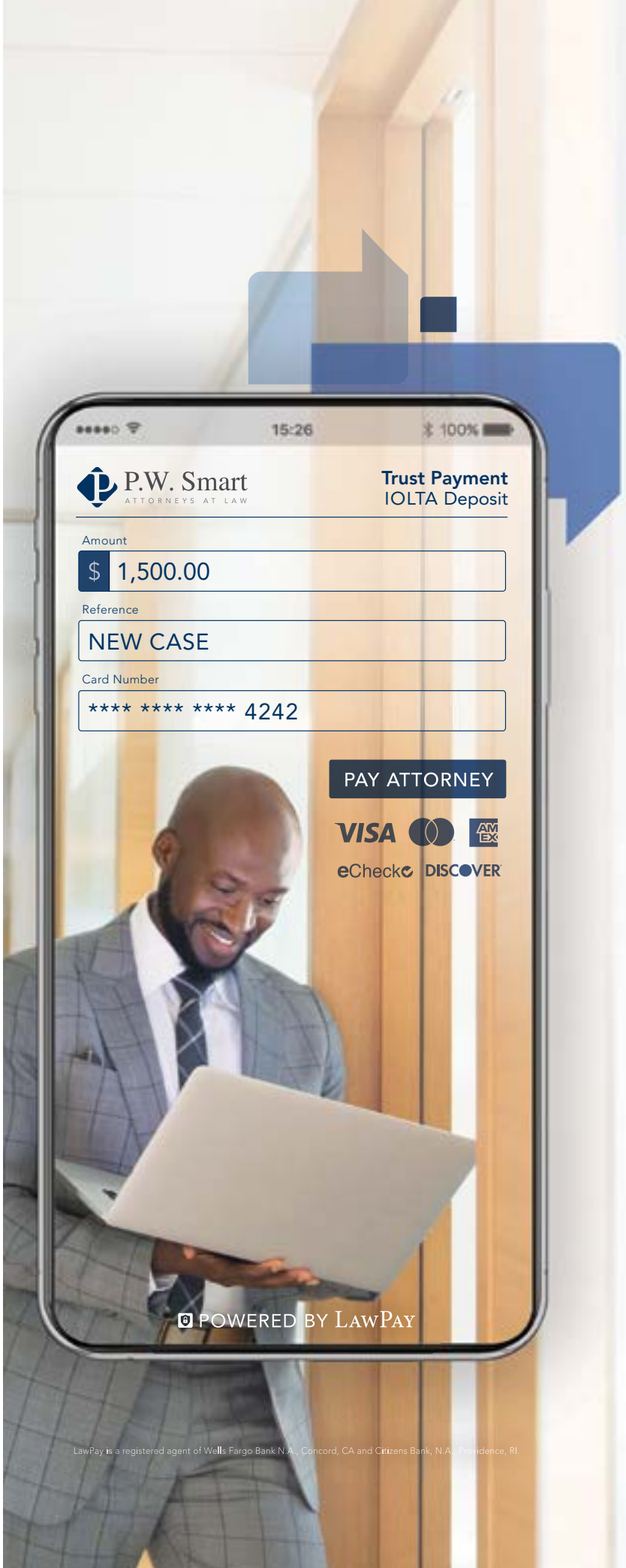
New York State Public Health Legal Manual: *A Guide For Judges, Attorneys and Public Health Professionals, 2nd Ed.*



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.

Download The Free E-Book Today!

NYSBA.ORG/PUBLICHEALTH



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David Lat's Fight Against the Coronavirus: From Terror to Hope to Transformation

By Christian Nolan

It was the first full weekend of March when David Lat and his husband were eating at one of their favorite restaurants – Blackbarn on East 26th St. – and both found the food to be strangely devoid of taste.

"We thought maybe the kitchen was having an off night because we didn't know at the time that loss of taste was a COVID-19 symptom," recalled Lat.

Over the next few days, both Lat and his husband, Zach Shemtob, came down with flu-like symptoms. For Shemtob it amounted to a week of bad flu symptoms but for Lat, it was the start of a long fight for his life.

Symptoms began with a fever, chills, and aches. Initially, Lat didn't think it was COVID-19, since there were so few confirmed cases in New York City at that time.

"It felt like a standard case of flu," said Lat.

But by Thursday of that week, he started to get a dry, hacking cough.

"This was when I began to think I might have contracted the coronavirus," said Lat.

By the weekend, he started having shortness of breath. By Sunday March 15, his symptoms were bad enough that he went to his local emergency room at NYU Langone.

However, given the scarcity of testing, the hospital would not give him a COVID-19 test. Typically, to be tested around that time, you needed to have traveled to an impacted area or been exposed to an infected person. Doctors did not think he was sick enough to be admitted, so he was sent home.

The next day, he was gasping for air and went back to the hospital.

"When you have shortness of breath, you fear that at a certain point you simply won't be able to breathe," said Lat. ". . . At that point they recognized the severity of my symptoms. They admitted me, gave me supplemental oxygen, and tested me for COVID-19. That evening, while I was lying in my hospital bed, a doctor came in and told me what I already suspected: I had COVID-19."

The next day, Lat – a legal recruiter and founder of the Above the Law blog – tweeted out a picture of himself from his hospital bed with the caption, "Oxygen is a hell of a drug."

"I am constantly weak and winded," Lat tweeted from the hospital that day. "I'm hooked up to oxygen 24/7. Even with oxygen, the simplest tasks are extremely difficult."

For instance, he said moving five feet from the bed to the bathroom left him feeling like he'd collapse if he stood too long. It took him 90 minutes to eat his lunch because he kept getting winded.

His parents are both doctors – Dr. Emmanuel Lat and Dr. Zenda Garcia Lat. He said this was particularly helpful during his hospitalization.

"When doctors came by my room to speak with me, I would call my parents on my cellphone and loop them in by speakerphone," Lat explained. "They were able to ask questions of my doctors and advocate for me to receive the best possible care.

"My mother, who is a pathologist, was especially active," continued Lat. "She would read studies in medical journals about different treatments and raise them with my care team. At times she interrogated them. It felt like an attending physician questioning residents. I worried that my doctors might get annoyed, but they were always very patient."

Lat said another challenge was that the hospital was just starting to deal with the influx of the novel coronavirus patients. He said they did have adequate personal protective equipment (PPE), "which I think was an advantage of my being an early patient," Lat said.

He said the doctors and nurses told him that they wouldn't check on him as often as usual because every time they did, they had to change their PPE and wash hands before entering and after exiting. There was a garbage pail outside of his room where they would discard their PPE after each visit.

'YOU BETTER NOT GET PUT ON A VENTILATOR'

For Lat, this was the sickest he'd ever felt in his life. He had been in overall good health, having twice completed the New York City Marathon, and still works out regularly. Lat, who turns 45 in June, said the only preexisting condition he had was exercise-induced asthma, which he said he managed well with an inhaler.

Following a few days in stable condition, by Friday, March 20 Lat had taken a turn for the worse.

His oxygen levels were dropping, and his lungs were filling with fluid. He was told he would need to be intubated.

His father had warned him about intubation just a few days earlier.

"You better not get put on a ventilator. Not everyone survives that," his father told him.

In fact, published reports indicated as high as an 88% death rate for COVID-19 patients placed on a ventilator.

"So when I heard I needed to be intubated, I was terrified," Lat said.

On a ventilator in critical condition at the intensive care unit of the hospital, Lat was fighting for his life.

Meanwhile, all his loved ones could do was wait for updates and pray.

Lat said the experience was agonizing for his parents and husband. They weren't allowed to visit, and they would only get updates from the hospital about once a day.

"They are so overwhelmed," Lat's parents said of the hospital on March 24 in an emotional Facebook post. "Today, after much effort and going through so many different channels of trying to get a call back, the physician's assistant finally called at 3:45 p.m. We had been in limbo all day."

The post explained that he was still in ICU intubated on a ventilator, heavily sedated and on the much-discussed combination of hydrochloroquine and azithromycin, along with an experimental drug to reduce inflammation in the lungs.

During his COVID-19 battle, Lat was also treated with Kaletra, an antiviral used to treat HIV/AIDS and clazakizumab, an IL-6 inhibitor for dealing with "cytokine storm," an immune response in which the body starts attacking its own cells, instead of the virus.

"It will take a while before we really see much progress but at least he is stable," Lat's parents wrote. ". . . We still need a lot of prayers so please do not stop praying for him. Prayers are our best weapon."

Meanwhile, during Lat's week on a ventilator, two publications discussed writing obituary articles about him. One went so far as to assign a reporter, who contacted a friend of Lat's. This practice is not uncommon with aging and dying celebrities and other public figures.

"I was quite flattered, and I wasn't offended," said Lat. "I was in critical condition in the ICU for a week, so I can't blame them for thinking I might have died. But I'm glad this didn't come to pass, of course."

Instead, after six days, Lat's family and friends' prayers were answered. His condition had improved, and he was taken off the ventilator. He was soon transferred out of the ICU where he continued his recovery.

"I actually don't remember the moment I was taken off the ventilator," said Lat. "I was given a lot of sedation, so the first 24-to-48 hours post-extubation are a bit of a haze. I usually write very proper text messages, but I sent this one message to my dad during this period that was barely coherent and included a dozen random emojis. I was a bit out of it."

'THANKFUL TO BE ALIVE'

To the delight of friends, family and interested-followers, Lat felt well enough to deliver a Facebook message on March 29.

"I'm doing worlds better than I was this time last week, when I was unconscious and intubated, having a machine breathe for me because I couldn't do so myself," wrote Lat. ". . . I know that I will be forever thankful for all of the prayers and thoughts that you have sent me and my family over the past few weeks. I will also be eternally grateful to all the wonderful doctors, nurses, and other dedicated healthcare professionals who are on the front lines of our battle with [coronavirus] here at NYU Langone Health and elsewhere."

At that time, Lat was grateful to be alive but also knew he was not out of the woods just yet.

"I require 24/7 oxygen, I need a nurse's help for even the simplest tasks, and I only just now progressed to solid foods," wrote Lat. ". . . A number of patients released from the hospital after seemingly successful fights with [coronavirus] have been readmitted (and some of these patients have even died)."

Lat's condition continued to improve and one night while sleeping his oxygen was removed. He was able to breathe on his own again. Lat described the hospitalized week post-ventilator as "basically learning to breathe again." The doctors gradually reduced the supplemental oxygen until he could breathe "room air."

Then on April 1, after 17 days in the hospital, he received the news he had been waiting for – he would be discharged that day. He took a smiling selfie from his hospital bed and thanked the hospital staff for saving his life.

Lat was happy to be reunited with his family again. When he and his husband came down with COVID-19, Lat's parents cared for their young son.

"We didn't really explain much to our son, who's only 2. He just knew that papa was sick. When my husband and I both started to get sick, we asked my parents, who live in the New Jersey suburbs, to pick him up. So he was in his grandparents' care for most of this time, which was a godsend."

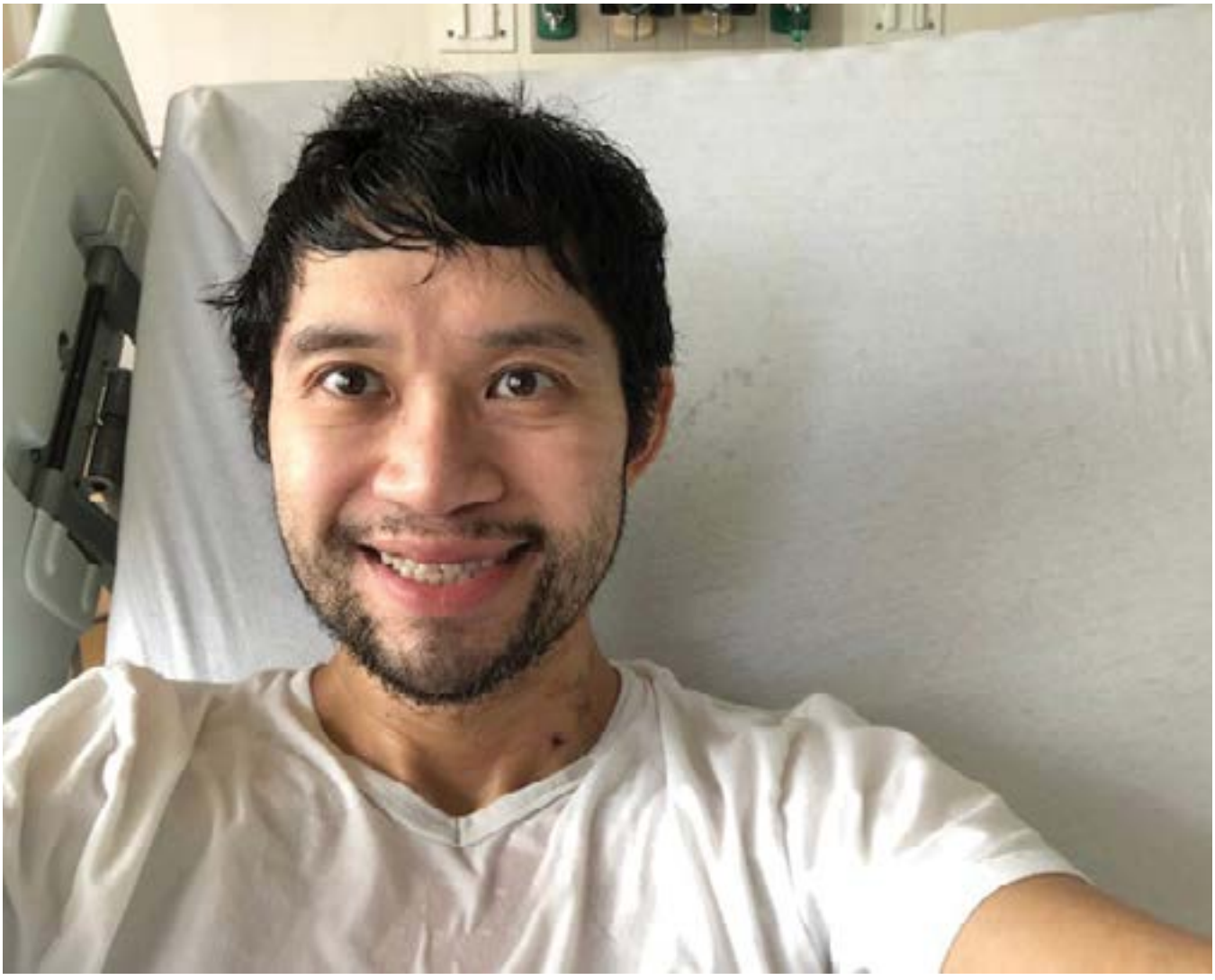
Lat is continuing his recovery and it's been a slow, steady process. He still has a residual cough and shortness of breath from mild exertion. He lost 15 pounds in three weeks but is now back eating "whatever the heck I want, at least for now.

"I'm definitely not back to exercising, other than walking -- and a hoarse voice, a result of damage to my vocal cords from the ventilator. I could have some long-term or even permanent lung damage, but my pulmonologist tells me it's too early to know. That's how it is with so many things about this disease – it's been around for just several months, so we don't know what its long-term effects are."

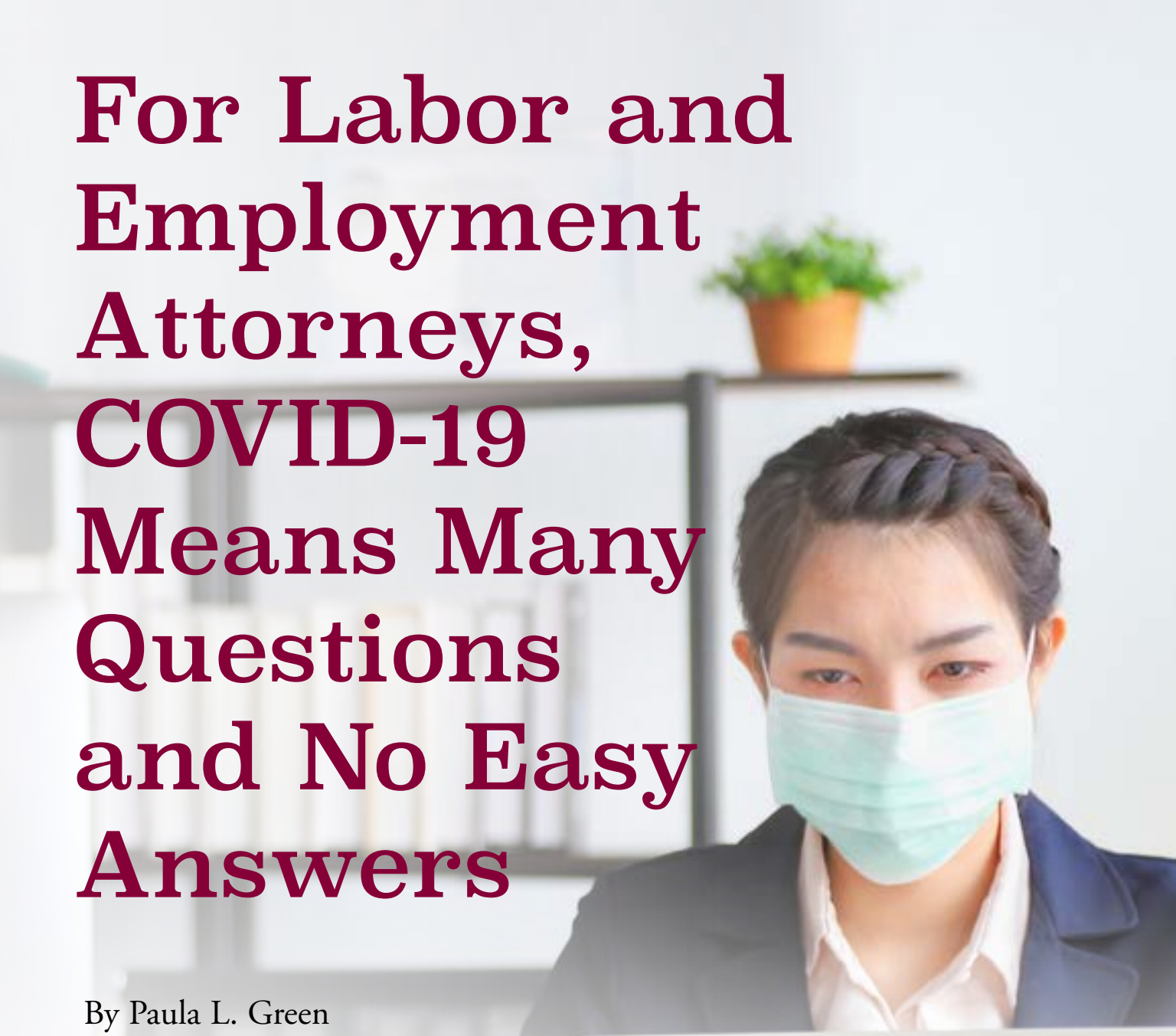
Lat, a former federal prosecutor and Yale Law School graduate who is currently managing director of Lateral Link's New York office, has a new outlook on life from the experience.

"I'm extremely grateful, thankful to be alive, and thankful for all the support I received from family, friends, and total strangers during my illness," said Lat. "I also have a better sense of perspective. I don't get upset over minor things because I know how small some things are in the grand scheme of things. I'm guessing this will fade over time, but I'm hoping I don't entirely lose it."

Editor's note: The photos included with this article were provided by David Lat and are used here with his permission.



For Labor and Employment Attorneys, COVID-19 Means Many Questions and No Easy Answers



By Paula L. Green

As stay-at-home rules meant to slow the spread of the coronavirus are lifted and employers reopen shuttered workplaces, labor and employment attorneys are guiding clients through a maze of unknowns, and these expert attorneys are troubled by the boundless potential for lawsuits filed by employees anxious about their health and bank accounts.

"The information is detailed and changing," said Douglas T. Schwarz, a partner at Morgan, Lewis & Bockius LLP. "The number one concern is the health of employees. Paying attention to the safety procedures is vital."

Restaurants, retail stores, entertainment venues and other businesses where employees interact directly with customers will encounter more elaborate safeguarding measures, and perhaps more lawsuits. Larger companies with more money and space may be better able to accommodate returning employees and use more sophisticated screening techniques. Yet every business is moving warily.

"No workplace will escape," said Schwarz, adding that the possibility of federal legislation limiting employers' liability would not remove the prospect of state lawsuits.

"The issue is how do you maintain safety in the workplace in an era of a highly transmissible virus," said Christopher A. D'Angelo, a corporate attorney and incoming chair of the association's Labor and Employment Law Section. "Plexiglass is coming up a lot."

Like many attorneys, D'Angelo expects an "explosion of litigation." Claims could arise, for example, around contractual relationships and pay requirements, including employee demands for hazardous pay. The use of force majeure, which permits exclusions for liability due to events deemed an act of God, will be challenged, he said. Colleges that cancelled classes will be facing claims as the parents of students now learning remotely seek reimbursement for room and board fees and the more narrow scope of teaching.

Timothy S. Taylor, an arbitrator and mediator working with Scheinman Arbitration and Mediation Services, sees the volatile legal landscape emerging during the pandemic as an opportunity for greater use of arbitration and other forms of alternative dispute resolutions. Claims will only increase as employers begin to open their doors and factory floors and courts unwind the backlog of cases stacking up since March.

"What we're seeing now is just the tip of the iceberg. It is difficult to predict what will happen as everything is very unsettled right now," said Taylor. "Smart lawyers will figure out ways to represent their clients with novel grievances and lawsuits."

Public sector workplaces hold sizable challenges for the attorneys guiding managers and employees of school districts and governmental bodies through the contractual obligations of union contracts. Union attorneys will also find themselves working with the claims of police, fire and other emergency service personnel exposed to the coronavirus.

For example, claims may surface from municipal government workers, who traditionally have reported to the office and find they must stay home with children no longer in school. Others, such as security guards and custodians who have worked overtime keeping properties safe and clean, may file claims for overtime or hazardous pay.

"It's a surreal time. How do we keep employees safe and get back to work on some level?" said Sharon N. Berlin, chair of the association's Local and State Government Law Section and a partner at Lamb & Barnosky. "We're in uncharted territory."

Many union contracts include arbitration clauses to help employees resolve workplace disputes. While courts are using virtual venues to handle some cases, attorneys are wary of the value of video conferences to settle sensitive cases.

"Video conferences can't replicate face-to-face interactions," said Seth H. Greenberg, who represents unions as a partner at Greenberg Burzichelli Greenberg. "They miss the richness of meaningful, personal meetings."

Using video in the arbitration process, in which attorneys typically use break-out rooms for each side to caucus or talk privately with their clients, can be fraught with its own set of hazards for attorneys. While video is technically viable, attorneys worry about possible privacy violations if mute buttons are mistakenly unset or other technical issues crop up.

"We've been trying dry runs . . . working with Zoom," says Marty Glennon, a founding partner of Archer, Byington, Glennon & Levine, LLP. "It takes a lot of navigating. It could open a whole host of malpractice issues if something goes wrong."

Attorneys also are uneasy about setting uncomfortable precedents as cases are handled via video conferencing. Yet some of the legal practices evolving during the pandemic, such as a virtual court for a procedural issue, may make sense to maintain. "Sometimes I drive an hour for a two-minute hearing before a judge," said Alyson Mathews, former chair of the association's Labor and Employment Law Section. Ms. Mathews, a partner at Lamb & Barnosky, noted that greater use of video conferencing means law firms must adjust for the lost revenue.

Turning to alternative dispute resolutions can offer everyone – employers, employees and attorneys – an effective way to untangle the certain flood of claims and counterclaims that will emerge from the pandemic.

"This may be the time to try something new – a more holistic approach – rather than a straight legal approach to resolving conflict," said Nance L. Schick, an attorney whose New York City law studio tries to keep her clients out of the courtroom.

Communication is always key in helping employers avert disputes and minimize the risk of lawsuits, Schick says. Now in the midst of the pandemic, it is critical.

"A culture of communication is essential," Schick said. "We need new roadmaps to settle employer-employee disputes."

Paula Green is a freelance writer.

How New York's Courts Use Skype for Business and What You Need to Know

By Brandon Vogel

It is imperative that litigators understand and feel comfortable with Skype for Business.

This was a key message delivered by Mark Berman (Ganfer Shore Leeds & Zauderer) and co-chair of the Committee on Technology and the Legal Profession in a recent webinar.

Since the courts moved virtually, all court video appearances are conducted using Skype for Business. Per an administrative order from Chief Administrative Judge Lawrence Marks, Skype for Business is the only supported video conferencing platform the New York state courts are authorized to use during the current pandemic.

Close to 800 attorneys attended the two webinars called "Use of Skype: Basic Tips for Communicating with the Courts and Clients." The second webinar was co-sponsored by the Westchester County Bar Association.

WHAT SKYPE IS

Sarah Gold of Albany (Gold Law Firm), co-chair of the Law Practice Management Committee, has used Skype as her phone system since she opened her practice in 2011, the same year Microsoft acquired Skype.

In its simplest terms, Gold explained that Skype lets you communicate by video or voice calls between devices across all platforms. You can text chat between Skype members and use a pay function to send and receive SMS messages through the service, rather than go through a cell phone.

"This is particularly nice when you want to be able to chat with your clients via text without having to give up your private cell phone number," said Gold. "You'd be surprised how many clients want to text you and you have no idea because you don't see the texts."

Valerie Buzzell, principal local area network administrator for the Office of Court Administration, said that the main reason that the courts chose Skype for Business is because of security. All communications on Skype for Business are encrypted. Microsoft designed the product with security in mind. It also is housed in Microsoft's government cloud and adheres to various Department of Defense security measures.

She answered some frequently asked questions from lawyers.

DO I NEED TO HAVE A SKYPE ACCOUNT OR SKYPE ID TO PARTICIPATE IN THE COURTS' SKYPE FOR BUSINESS SESSIONS?

No. You don't need a Skype ID nor Skype account. Your personal Skype account might not be compatible with Skype for Business.

WHAT DO I NEED TO PARTICIPATE?

You will need a computer with internet access and webcam or microphone (built-in or USB headset) or a smartphone.

WHAT IF I HAVE A MAC?

As long as you have downloaded the Skype for Business app, it doesn't matter if you are on a Mac and the court is on Windows.

CAN I REALLY USE MY SMARTPHONE?

Yes, but a computer desktop or laptop works better. However, do not be signed in two devices at the same time.

WHY DOES MY SKYPE FOR BUSINESS NOT WORK ON MY VIRTUAL PRIVATE NETWORK (VPN)?

Skype for Business is a cloud-based application and performs best when not connected to a VPN.

CAN I JUST PHONE IN?

Yes, but judges really prefer a video connection to see all the parties when possible.

HOW DO I KNOW IF MY EQUIPMENT WILL WORK?

Schedule a test by emailing skypetest@nycourts.gov. Include your cell phone number, email address, preferred date and time for testing during normal business hours.

HOW DO I JOIN A SKYPE CONFERENCE?

A Skype for Business meeting will be scheduled and you will receive an email invite from the court. A dial-in number may also be included if a participant has technical difficulties. You may need to install a web browser plug-in.

HOW DO I PRESENT MATERIAL?

First, speak to the judge or clerk about their procedure for presenting materials. From there, you may need to be given panelist rights to share your screen or files.

WHAT ABOUT RECORDING?

The courts continue to use court reporters and other audio recording software currently in place for arraignments, hearings and at the judge's discretion. Skype court sessions and conferences will not be recorded and preserved, and a lawyer may not record it without the permission of the court.

CAN I INVITE OTHER PARTIES TO A SKYPE MEETING?

Assuming they should be included and with permission of the court, you can forward the meeting invite or copy and paste the link. You can also invite more participants if the meeting has already started.

WHAT ABOUT PRO SE LITIGANTS?

Anyone that has a computer or smartphone can be included. The courts have been using Skype for Business for many years when necessary for out-of-state parties.

ARE THERE BREAKOUT ROOMS LIKE IN ZOOM?

Breakout rooms are not a feature in Skype for Business. Likewise, people cannot speak to each other in Skype's Virtual Lobby.

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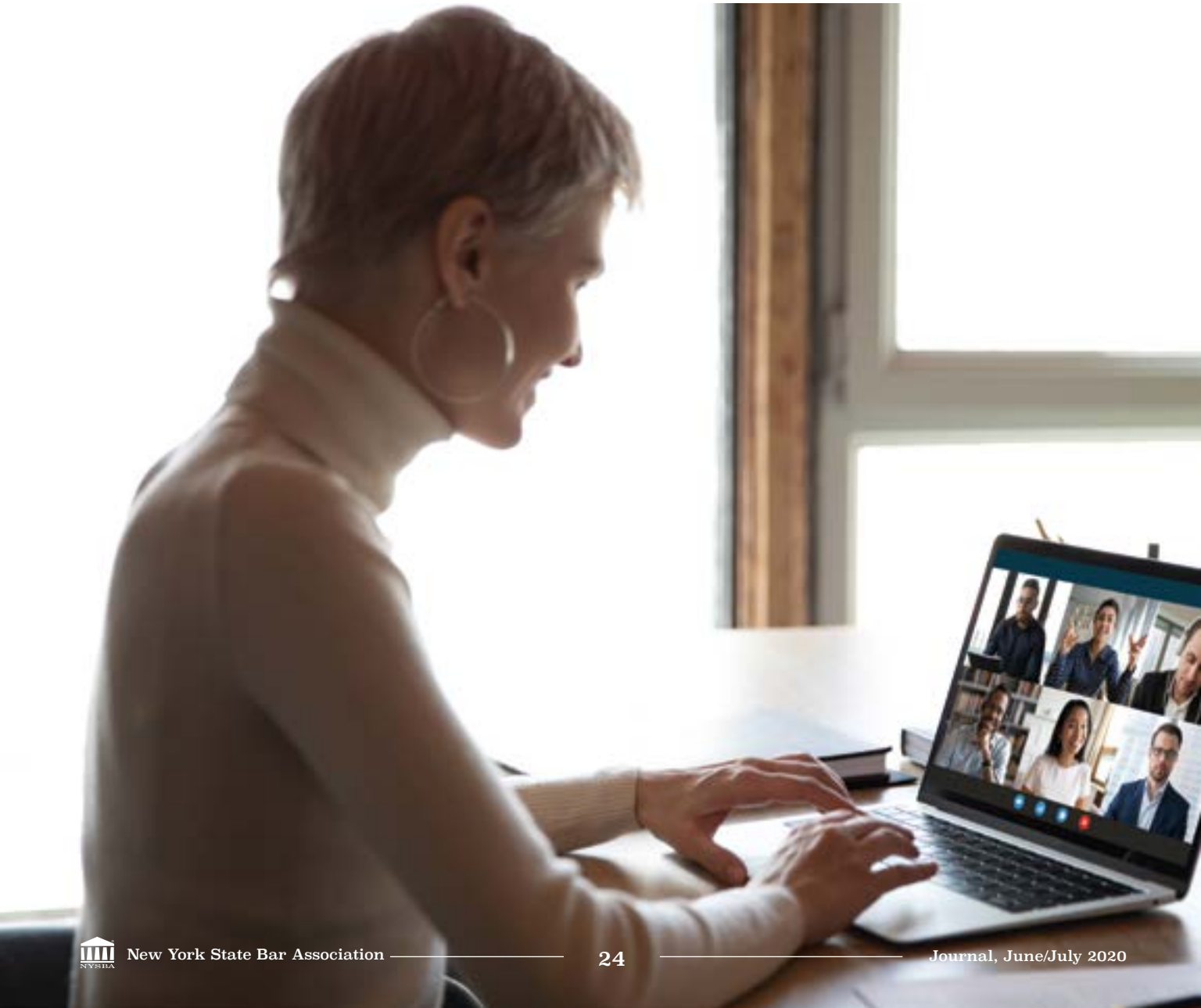
The Time for Remote Co-op Closings Has Arrived

By Margery N. Weinstein and
Jeffrey Lederman



New York City has been dramatically impacted as a direct result of the COVID-19 virus and the efforts to combat this unusually deadly disease.[1]

As a result of Governor Andrew Cuomo's "New York on Pause" orders as amended,[2] social-distancing requirements have been enacted and enforced, with non-essential businesses closing their doors and many companies requiring their employees to work from home. In order to protect the safety of cooperative apartment residents and employees during the pandemic, New York City's cooperative apartment corporations have instituted policies such as limiting entry into the buildings, restricting package deliveries, requiring the wearing of facial masks in common areas, and prohibiting or restricting moves in and moves out.[3]

The pandemic has been detrimental to New York City's real estate market. Significantly fewer real estate listings have been posted online[4] and sales have dropped[5] as people fear exposure to the virus and limitations have been placed on brokers' abilities to show properties.[6] This downturn has affected the pace of cooperative apartment sales, which came to an abrupt halt[7] as the quarantine began, partly because apartments were not fully accessible for inspection and use by purchasers, but also because cooperative apartment corporations require in-person "sit-down" closings at their managing agents' offices. Such gatherings could not occur during a time when managing agent staff worked from remote locations, and the parties to the closing were restricted by stay-at-home policies.

Rather than facilitating apartment transfers, the traditions of the "sit-down" cooperative closing became an obstacle to consummating deals.

In order to overcome that impediment during the height of the pandemic, some creative cooperative apartment corporations recognized that closings could occur remotely, via escrow. Such escrow closings accommodated parties already in contract who did not want to delay, or could not delay, closing on an apartment. These included sellers who had already vacated their apartments, estate sellers with taxes due, purchasers with either leases or loan commitments that were expiring or interest rates that would increase with delay, and purchasers who desired to close before the New York on Pause orders were fully lifted in order to prepare and file renovation plans.

Remote closings – also known as "virtual closings" and "escrow closings" – are commonplace in complicated, multi-state and multi-party real property transactions. They are typically facilitated by a title company, which receives all documents and funds and, following the carefully detailed and approved directions of the parties, disburses such documents and funds when the parties' obligations are satisfied.

In the post-New York on Pause/pre-vaccine world that we may soon be entering, managing agents and cooperative apartment corporation boards should offer remote apartment closings as an option, if not the norm. It will be both unnecessary and unwise for multiple parties to meet in one place for a cooperative apartment closing. There is readily available technology that can help make sit-down closings unnecessary. Maintaining social distancing, whether required by law or merely by volition, is prudent behavior, as the risks associated with COVID-19 exposure will remain for some time to come.[8]

TRADITIONAL VERSUS REMOTE CLOSINGS

In a traditional cooperative apartment "sit down" closing, a purchaser, a seller, the purchaser's lender (if there is financing), the payoff bank (if the seller has an outstanding loan that must be paid off) and their respective attorneys gather together at a managing agent's office to sign and exchange documents and distribute funds. Often there are ten or more persons crowded into a small conference room.

A remote escrow closing can lead to the same outcome – the payment of fees to various parties, including the cooperative apartment corporation and its managing

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agent; the cancellation of the old stock certificate and proprietary lease; the issuance of a new stock certificate and the assignment of, or issuance of, the proprietary lease to the purchaser; and the payment of the purchase price to the seller – but through a very different process.

ENLIST AVAILABLE TECHNOLOGY

For a remote closing to be successful, in addition to increased attentiveness and cooperation of the parties, 21st century innovations should be utilized to serve functions that normally would be performed in-person at a sit-down closing.

Cellular phones, facsimile machines, and electronic mail have existed for years. They should be relied on more than ever, as should videoconferencing services, all of which are essential to avoid in-person contact. Some of the common videoconferencing services include, but are not limited to, Skype, FaceTime, Zoom, WhatsApp, Microsoft Teams, Jitsi, Amazon Chime, Cisco Webex and GoToMeeting. If enhanced security is a concern, there are private companies that provide videoconferencing services as well, such as ClickMeeting.[9]

Notarization of documents using audio-visual means is allowed under the New York on Pause.[10] Provided remote videoconference notarization continues to be legally permissible, it can and should be used whenever possible to further avoid unnecessary contact in closing a transaction. This is especially important to ease the transmission of documents that must be notarized, such as the New York City Real Property Transfer Tax forms and the duplicate original proprietary leases, power of attorney documents, and other ancillary closing documents. If a lender is involved, the purchaser's attorney should confirm whether a specific secure (RON) or video online notary (VON) platform must be used and whether that platform is available.

The New York on Pause orders, however, contain provisions of only limited scope with respect to remote videoconference notarizations.[11] The pause orders only allow for notaries licensed and located in the state of New York to use videoconference technology to notarize signatures of persons physically located in the state, and they only permit the use of such remotely notarized documents for the duration of the New York on Pause orders. Also, there is no consistency among title underwriters as to the specific procedures to be followed for a remotely notarized document to be considered valid and, where applicable, insurable, as title underwriters throughout New York State have each developed their own guidelines to be followed by notaries and signatories when documents are notarized remotely.

Going forward, the New York State Legislature would be wise to follow Gov. Cuomo's lead during the pandemic and enact permanent legislation allowing for videoconference notarization of documents and establishing related procedural mechanisms for RONs and VONs. Since videoconference capabilities are not limited by state borders, the New York State Legislature may also proactively consider whether to recognize and permit remotely notarized documents with both out-of-state signatories and non-New York notaries.

OVERCOMING THE OBSTACLES

There are a number of obstacles that have, in the past, prevented remote cooperative apartment closings from becoming a popular option among practitioners and their clients, as well as cooperative apartment corporations and their managing agents.

Wet-Ink Originals. Lenders making loans in New York State, unfortunately, have not yet waived the need for "wet-ink" signatures on loan documents. In addition, cooperative apartment corporations continue to require original signatures on the stock certificate, proprietary lease, and certain ancillary transfer documents, although they may be willing to agree to counterpart original signature pages in order to facilitate a closing.

In an all-cash transaction, where the purchaser is not obtaining financing, the cooperative apartment corporation may facilitate the remote closing by permitting the purchaser to scan her signature on the co-op's transfer documents, with the caveat that "wet" signatures are to be delivered within a specified time period. Signatures on behalf of the cooperative apartment corporation may be similarly scanned. If financing is involved, however, originals are still required on the stock certificate and proprietary lease, which will be the collateral for the purchaser's loan.

Increased Timing. Given the importance of the documents, and the numbers of signatories, it is imperative that the parties are able to transmit such documents reliably. All loan documents and transfer documents generated by the managing agent on behalf of the cooperative apartment corporation need to be circulated to the parties in advance for signature and return.

The use of comparatively old-fashioned delivery services are essential at a time where minimal contact is desired, especially since certain key parties to the co-op closing continue to require the delivery of original documents. The parties or their attorneys should be prepared to utilize Federal Express, UPS or private courier services for reliable delivery of all such original documents. Delivery delays can be difficult to overcome.

The purchaser should be the first to sign the duplicate proprietary leases, and should return them to the cooperative's officer for countersignature; this will avoid circulating the partially signed proprietary leases, with the cooperative officer's signature affixed, prior to the closing. Where financing is being obtained, the parties

should note that many lenders are willing to provide the loan documents to the purchaser or her attorney only one day prior to the scheduled closing, making the timing of deliveries especially crucial to the success of the transaction.

Attorneys should, whenever possible, obtain their clients' powers of attorney in advance of the closing. This will help ensure a smooth closing process by reducing the number of signatories needed for the closing documents.

The parties must bake in sufficient time for signatures to be obtained, especially if messengers or overnight courier services are necessary.

Financing. Remote closings are more complicated when financing is involved. To date, we are unaware of any residential lenders that will accept documents containing electronic signatures and/or notarizations as collateral for a purchaser's loan. In addition, lenders have historically required the receipt of the original stock certificate and a duplicate original proprietary lease as collateral for authorizing the release of their loan proceeds for the transaction, so timing of such deliveries has become critical to the success of the remote closing.

In remote closings that have occurred during the pandemic, the standards have varied as to when such original collateral documents must be received by the lender's counsel in order for the loan to be funded. The requirements are often affected by the working interrelationships and histories among the borrower, the attorneys, and the loan officers. Some lenders continue to require the originals to be held by their attorney before they will fund, and others allow funding to occur when the escrow agent acknowledges receipt of the original collateral documents, provided that such original documents are forwarded immediately to the lender's attorney following the closing. The flexibility that some lenders have recently shown as to the timing of delivery of collateral documents may facilitate more widespread acceptance of this practice by purchasers, sellers, and cooperative apartment corporations as well, even in transactions without financing.

Increased Costs. A successful virtual closing requires diligent pre-planning by attentive parties. The purchaser and seller should determine all adjustments and the flow of funds well in advance of the remote closing.

Unfortunately, remote closings may require additional time by both the managing agent and the parties' attorneys, which may translate into additional fees payable to such parties. There also may be an escrow agent fee, especially if a neutral, third-party escrow agent such as a title company is chosen. The parties should determine in advance who is responsible for payment of all such fees, which may vary from deal to deal. In New York City, title companies serving as the escrow agent have generally charged fees ranging from $1,250 to $2,500 depending, in part, on the level of complexity of the transaction, the number of overnight mailings and/or messenger services required, and the volume of wire transfers required to be sent.

Wires, not Checks. All closing payments should be made via wire transfers. This is a major change from the current practice at sit-down closings, where exchanging bank checks is customary. Multiple wires need to be prepared, including to the seller and its payoff bank, the cooperative apartment corporation and its managing agents, the brokers and the attorneys.

In addition, safety precautions should be taken to minimize potential risks with wire transfers that do not exist with bank checks. Prudent practitioners should verify all wiring instructions over the telephone and in writing (by email) to prevent wire fraud, and as otherwise may be required by the sending bank, escrow agent or title company. Also, some practitioners have insisted on multiple parties from the same firm or company verifying instructions as a further safeguard against fraudulent changes to instructions. As wire fraud has become more prevalent, such cautious actions should become standard practice.

Given the occasional delays with the delivery of wired funds, practitioners should build in sufficient time to make sure that all wired funds reach the intended parties. If this means either adding an additional day of interest for a bank payoff, or initiating a wire transfer first thing in the morning, the parties should be prepared to make such adjustments in order for the remote closing to have a successful outcome.

THE ESCROW AGENT

To facilitate a remote closing, an escrow agent or agents, who will circulate documents and distribute funds, must be selected by the cooperative apartment corporation and the parties.

If the purchase is being financed, the lender may require that its attorney act as escrow agent, and may also have its own escrow procedures that must be followed.

Provided there is no financing, the managing agent, an attorney involved with the transaction or a title company are all possible escrow agents. Generally speaking, managing agents prefer to be in control of the original transfer documents. While they may also be comfortable having the transfer documents delivered to a reputable title company as escrow agent, most managing agents do not want, or do not have the capacity, to distribute funds between purchaser and seller, either by wire or bank check.

In some transactions, one of the parties' attorneys may be designated to handle the funds, but that situation may

be an impossibility in contentious closings, given power dynamics between the parties to the contract of sale.

Often, the best – and sometimes the only – alternative is to select a title company to serve as the escrow agent. As all parties to the transaction must trust the escrow agent to faithfully perform its responsibilities, the neutrality of a title company is a key factor in support of designating a title company for this role. The parties also want assurance that the escrow agent can diligently perform a remote closing; title companies have experience serving as escrow agents in title transfers, commercial transactions and loan financings. They are equipped to handle documents and to distribute funds, eliminating the need to have one escrow agent for the circulation of documents and a second for the exchange of money.

AN AIR-TIGHT ESCROW DIRECTION LETTER: THE KEY ELEMENT TO SUCCESS

To facilitate a remote closing, one or multiple escrow direction letters need to be signed by all parties to the transaction, designating, in detail, the obligations of the parties, when such obligations are satisfied, the distribution of documents and the flow of funds.

For an escrow direction letter to be effective, it should clearly delineate the following:

- Which documents each party must sign.
- Whether any original signatures are necessary.
- To whom the documents are to be delivered and the address for such party.
- When the various parties have parties' obligations have been met.
- When documents may be released by the escrow agent.
- The method of transmitting such documents, such as emailed copies on the date of closing followed by originals via Federal Express, courier service or otherwise.
- When funds may be released by the escrow agent.
- The method by which funds should be released, such as by wire transfer or by bank check or attorney escrow check, and if checks, the manner of delivery such as Federal Express, courier service or otherwise.
- What person(s) are authorized to communicate on behalf of the respective parties and by what means of communication.
- Deadline for the deal to be considered consummated and "closed."
- Instructions as to the return of documents and funds in the event the deadline passes and the transaction has not closed.
- An indemnity in favor of the escrow agent.

The precise details of the escrow direction letter are shaped by the ability of the parties to work together to craft an agreement where every party feels protected. An escrow direction letter will also be affected by the specific facts of the transaction. For example, a payoff bank may only agree to deliver an original stock and lease (and a UCC-3) to either a managing agent or a title company, rather than to one of the attorneys involved in the transaction; such a requirement will help determine who can serve as escrow agent in that transaction.

The escrow agent is likely to require a limitation or exculpation of liability for its actions under the escrow direc-

tion letter. However, the specific indemnity provision will vary depending upon the role of the escrow agent – a title company may be serving solely as a logistical facilitator to the transaction, whereas an attorney may be serving a dual function representing one of the parties as well as acting as the escrow agent.

Given the importance of the escrow direction letter, various local bar associations throughout the state of New York should consider developing standard forms that can be utilized for remote cooperative apartment closings; this will be especially helpful to practitioners who occasionally handle, but do not specialize in, cooperative apartment transfers. Additionally, all parties to the closing will benefit when attention to the nuances of an escrow direction letter can be streamlined by the parties' ability to work from a recognized form.

COVID-19 AND COOPERATIVE LIEN SEARCHES AND FILINGS

The New York on Pause orders have not lead to dramatic delays either in obtaining lien searches or in filing UCCs in connection with the closing of New York City cooperative apartment transfers.[12] According to various title companies, most New York counties accept e-recordings and utilize that option, so that no delays have occurred. However, a number of title companies indicate they have encountered some delays – usually a day or two – in searching the records and in filing UCCs for cooperative apartment transactions when the properties are located in Westchester, Nassau and especially Suffolk counties. These delays are mainly due to the partial staffing of clerks' offices during the New York on Pause orders.

Based on an informal poll of title companies, the escalation in the number of remote cooperative apartment closings that occurred during the pandemic has not resulted in a surge in the issuance of Eagle-9 and similar title policies, probably because few cooperative apartment closings have actually occurred. If, however, purchasers, their lenders or the cooperative apartment corporations remain uncomfortable with the practice of closing remotely, the issuance of an Eagle-9 or similar title policy may become a more widespread requirement in cooperative apartment closings.

CONCLUSION

Due to the COVID-19 pandemic, brokers, managing agents, cooperative boards and practitioners involved in cooperative apartment transfers have had no choice but to find creative ways to facilitate sales.

Brokers have used video cameras to prepare virtual listings, allowing for future purchasers to view apartments without leaving their homes. Managing agents have made board minutes available by email, rather than at the managing agent's office. Cooperative boards have proactively allowed board interviews to occur by video and other devices. Governor Cuomo has authorized document notarizations to occur remotely. And, cooperative apartment corporations have offered to hold closings remotely. In each phase of the sales process, technology has been used effectively. These difficult times have led many people to make smart adjustments. Such new practices ought to continue long after the pandemic ends.

Going forward, practitioners should proactively insert language into contracts that allows for remote escrow closings, and cooperative apartment corporations and their managing agents should continue to offer such remote closings as an option. Such flexibility may be required in order to assure the safety and health of the parties, as well as their attorneys. By eliminating one of the friction points in the sales process, remote closings may help to jump-start and strengthen the cooperative apartment market following the COVID-19 pandemic.

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1. *See* Josh Katz and Margot Sanger-Katz, *N.Y.C. Deaths Reach 6 Times the Normal Level, Far More Than Coronavirus Count Suggests*, N.Y. Times, Apr. 27, 2020, https://www.nytimes.com/interactive/2020/04/27/upshot/coronavirus-deaths-new-york-city.html.

2. N.Y. Exec. Order No. 202 (Mar. 7, 2020), https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york, *as extended and amended by*, including N.Y. Exec. Order No. 202.6 (March 18, 2020), https://ocfs.ny.gov/main/news/2020/COVID19-EO-202.6.pdf. These executive orders are referred to herein collectively as the "*New York Pause Orders*", with the 28th extension and amendment occurring on May 8, 2020, extending protections through June 6, 2020: https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency

3. Under the New York Pause Orders, moves were allowed to occur, as "residential moving services" were considered "essential businesses" pursuant to guidance provided by the Empire State Development Corporation. *Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*, https://esd.ny.gov/guidance-executive-order-2026 (last visited May 7, 2020). Nevertheless, moving prohibitions and restrictions remained widespread. *See* Tim Donnelly, *Moving in NYC during coronavirus is more nightmarish than usual*, N.Y. Post, April 1, 2020, https://nypost.com/2020/04/01/moving-in-nyc-during-the-coronavirus-is-a-nightmare/.

4. The two weeks from March 16 to March 27 saw a 72 percent decline in new sales listings from the previous two weeks, and a 75 percent drop from the same period in 2019. *See* Nancy Wu, *How Will COVID-19 Impact NYC Home Prices? Lessons from the Last Recession*, StreetEasy (Apr. 20, 2020), https://streeteasy.com/blog/covid-19-impact-nyc-home-prices/.

5. *See* Sylvia Varnham O'Regan, *Luxury contract signings plunge after brokers ordered to stay home*, The Real Deal (Mar. 30, 2020, 9:39 AM), https://therealdeal.com/2020/03/30/luxury-contract-signings-plunge-after-brokers-ordered-to-stay-home/.

6. *See* New York Pause Orders. *See also* Sylvia Varnham O'Regan, E.B. Solomont & Erin Hudson, *Cuomo orders real estate agents to stop showing homes*, The Real Deal (Mar. 20, 2020, 7:30 PM), https://therealdeal.com/2020/03/20/cuomo-orders-real-estate-agents-to-stop-showing-homes/.

7. *See* Eliza Theiss, *April Residential Sales Down 62%, Pricing Continues Upward Trajectory*, PropertyShark (Apr. 16, 2020), https://www.propertyshark.com/Real-Estate-Reports/2020/04/16/nyc-real-estate-covid19/ ("As expected, transactional activity has trended downward since the crisis began. In particular, the effects really started to show in the fourth week of March – which came in 37% below the same period last year – obliterating the month's entire year-over-year gain"); *See also* Nancy Wu, *COVID-19 and NYC Housing Market: Inventory Falls, But Prices Stay Flat*, StreetEasy (Apr. 3, 2020), https://streeteasy.com/blog/covid-19-nyc-housing-market/.

8. *See* Nicole Chavez, Jason Hanna & Faith Karimi, *States are easing coronavirus restrictions and "it's going to cost lives," researcher says*, CNN (May 1, 2020, 10:42 PM), https://www.cnn.com/2020/05/01/health/us-coronavirus-friday/index.html (cites expert report that predicts up to two more years of pandemic spread); Allyson Chiu, *Fauci's coronavirus reality check: "You don't make the timeline. The virus makes the timeline."*, Washington Post, March 26, 2020, https://www.washingtonpost.com/nation/2020/03/26/coronavirus-cnn-fauci/

9. https://www.pcmag.com/picks/the-best-video-conferencing-software; https://www.theverge.com/2020/4/1/21202945/zoom-alternative-conference-video-free-app-skype-slack-hangouts-jitsi

10. *See* New York Pause Orders.

11. https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf

12. In preparing this section, the authors consulted with senior officers at Benchmark Title Agency, LLC, Old Republic National Title Insurance Company, and TitleVest Agency, LLC.

Mitigating the Effect of Event Cancellations During the COVID-19 Pandemic

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Across the country, concerts, conferences, sporting events, resorts and theme parks of all sizes are closed, postponed or canceled as a result of the COVID-19 pandemic, and cancellations are likely to continue. Restrictions limiting large group gatherings and ongoing recommendations regarding social distancing make it impossible, impractical or undesirable for events to continue in the way they were planned or previously conducted.

The impact on the various industries that rely on group gatherings – such as sports leagues/teams, venues, conferences, convention centers, catering, theme parks, ski resorts, etc. – is already far-reaching, and the uncertainty of when the limitations on group gatherings will be lifted and when it will be safe to resume events simply adds to the uncertainty permeating each of these industries.

To be sure, group entertainment and events will come back as the virus' impact dissipates or as a vaccine or other treatments are developed, but in the interim, and for the foreseeable future, the decisions companies make now will determine the ultimate financial impact and how quickly a return to business as usual after this unprecedented time can be accomplished. Of principal importance are considerations regarding the innumerable contracts implicated by necessary event cancellations, the obligations to ancillary services such as vendors, marketing agencies, presenters, speakers, artists, and security (to name a few), and obligations to attendees/ticket holders.

THE CONTRACT IS KING

A thorough analysis of each contract impacted by event cancellations or closures is paramount to mitigating the potential impact and financial consequences of this pandemic. Preliminarily, companies should identify those contracts that can be terminated without repercussions or without cause and analyze the financial impact of any termination, including any potential litigation arising out of contract termination. Immediately, companies need to analyze whether their contracts allow for cancellation without penalty as a result of a health-related interruption and analyze the long-term impact of cancellation versus delay.

Of particular importance in each contract are provisions relating to any preconditions to termination, including any means or timing of termination and required notification for termination, whether any security deposit or down payment may be kept, whether the contract has a liquidated damages provision in the event of cancellation, whether the contract requires rescheduling in lieu of cancellation or provides a credit toward a future event, any right to postpone the event without penalty, and whether the contract contains a force majeure provision permitting termination as a result of health-related events or governmental action or mandates and the strictures of such a provision. Each such provision is discussed below.

(1) PRECONDITIONS TO TERMINATION

Even if termination is permitted under the various contracts related to the event, it is important to analyze any preconditions to termination. Common preconditions relate to timing of termination, means of termination and necessary notification provisions. Terminating a contract without strictly adhering to any preconditions unnecessarily subjects the terminating party to litigation or a claim that the termination was not valid.

• *Timing of Termination*. The majority of event contracts permit cancellation without penalty (or with minimal penalty), if sufficient notice is provided, or limit damages to the amount of the security deposit if cancellation takes place with sufficient notice before the event. It is important to identify and track any such timing provision in each contract so as to ensure compliance with these requirements. Further, many contracts will permit cancellation based on some unforeseen event only if notice is provided within a set time period after the event occurs (e.g., 10 days from the date of the occurrence). If such a limitation exists, companies should weigh the risk of cancelling an event long before the event is scheduled with the risk of losing the opportunity to terminate the contract without penalty if they wait too long. This is especially problematic in the current environment, where it is unclear when the impact of COVID-19 will pass to allow public gatherings to resume, nor is it known what form or capacity public gatherings will take when they do resume.

• *Notification Provisions*. Similarly, the majority of event contracts contain a provision outlining the means of notification of the other party. These provisions generally come into play where a party has breached the agreement, but they should generally be followed when terminating the agreement as well when a breach has not yet occurred. Alternatively, these contracts may provide a specific notification provision related to terminating based on a force majeure event (discussed below). If so, it is imperative to follow the precise parameters of the notification provision, so as to ensure the termination is valid and effective.

• *Means of Termination*. Additionally, attorneys should watch out for provisions that identify a specific means of termination. These provisions are less common than the timing and notification provisions discussed above, but they have just as much of an impact on ensuring that the contract is properly terminated.

(2) SECURITY DEPOSITS/DOWN PAYMENTS

Many event contracts contain provisions permitting the venue or vendor to maintain a security deposit, prepayment, or down payment made to secure the contract even if the contract is validly terminated or made impossible due to circumstances outside of the control of the parties. Review each contract carefully for such provisions and work with your venue or vendor to negotiate around that provision if the event is rescheduled, or reduce the amount of the deposit or down payment in exchange for future events or offer the promise of future compensation.

(3) LIQUIDATED DAMAGES

It is important to analyze whether an event cancellation becomes more costly as the date of the event nears or whether the contract contains a liquidated damages provision dictating an escalating damages scale the longer you wait to cancel the event. Such provisions are common in contracts tied to events, and the existence of such a provision changes the calculation of whether and when to postpone or cancel the event. These provisions are especially problematic in the context of COVID-19 because an end date is unknown, and it is not clear when group gatherings will be able to resume.

(4) RESCHEDULING REQUIREMENTS

Many event contracts require the parties' respective cooperation to reschedule where it becomes impractical or impossible to perform as required under the contract. In such a case, simply terminating the agreement without making an effort to reschedule may subject the terminating party to litigation. Rescheduling is particularly difficult in the current environment, however, because it is unclear when events will be permitted and can be rescheduled. Depending on the language of the agreement, however, negotiating to reschedule alone may satisfy the requirement. Contracts may similarly include provisions allowing for postponement without penalty where performance becomes impossible. In such circumstances, any agreement regarding when the postponed event will take place should be extremely broad and excuse performance entirely if performance ultimately becomes impossible or impractical.

(5) FORCE MAJEURE

Most contracts contain some sort of force majeure provision; however, the specifics of that provision will dictate whether the parties are excused from performance as a result of COVID-19 or whether termination may result in litigation. The most beneficial provision, and least likely to be written into an event contract prior to this pandemic, forgives performance based on mass health-related events. The relevant language is often written into a list of qualifying events under the force majeure clause and generally references "plague," "epidemic," "pandemic," "outbreaks of infectious disease," "mass illness" or any other "public health crisis," including "quarantine" or "other employee restrictions." Many event contracts, however, do not contain such a provision – though most likely will going forward – and as a result parties are developing theories to fit this pandemic into other categories forgiving performance. One such provision that will likely have far-reaching implications during this time is a provision excusing performance where restricted by "government regulation" or where performance of the contract becomes illegal. Courts generally interpret force majeure provisions narrowly, however, so it is important to review the relevant language closely. These provisions will no doubt result in a great deal of litigation in the next few years, analyzing what language excuses performance as a result of pandemic, but in the interim, it is important to work with an attorney to gauge the risk of litigation and the likelihood of success based on the specific provision written into each contract.

Ultimately, your goal should be to identify a path forward that reduces the risk of litigation while maximizing capital retention until group events are able to resume on a regular basis.

WORK WITH YOUR ANCILLARY SERVICE PROVIDERS AND VENDORS

Beyond the analysis of whether or not you can terminate the contract, companies need to consider the long-term impact of doing so, including the long-term financial implications of cancelling contracts with ancillary vendors or other service providers, as well as the risk of litigation from vendors where the contract does not make it absolutely clear that cancellation is authorized. Further, it is important to take stock of those ancillary services and vendors for whom you have a necessary symbiotic relationship or for which you currently maintain a beneficial contract that would have to be renegotiated. Though termination may be the most cost-effective solution in the short term, the risk of litigation and the potential to lose a beneficial relationship should be considered. If cancellation is not necessary or the most effective means of weathering this storm, it is of paramount importance that companies establish a coordinated plan across vendor groups which allows them to maintain the beneficial relationships while mitigating the burden of the pandemic.

The best solution is often negotiating with the vendor to avoid litigation and to avoid issues resuming events in the future while simultaneously allowing for a guaranteed termination without litigation if resuming events

becomes impractical or impossible. Any such agreement with a vendor or ancillary service provider should be set forth in writing and take into consideration the indefinite amount of time gatherings may continue to be put on hold. Further, any required rescheduling of the event should be calculated from the date group gatherings are allowed to resume rather than based on a set number of days or months, e.g., within a year after the government lifts mandates limiting group gatherings.

COMMITMENTS TO ATTENDEES OR TICKET HOLDERS

Finally, upon the decision to cancel or postpone an event, companies should immediately notify attendees and ticket holders. The choice to refund tickets, provide credit to ticket holders toward future events, or cancel without providing a refund largely depends on the specific provisions of the ticket agreement, any ancillary agreements with or advertisements to ticket holders and the likely public relations impact of the decision.

Over the past few weeks, several companies have been hit with a string of lawsuits as a result of event cancellations, where tickets were not fully refunded or where monthly or yearly passes were not reimbursed for unused time. In some cases, the plaintiffs allege that the ticketing company changed their policy so as to avoid providing full refunds, and in others the plaintiffs are claiming that various season passholders should have been refunded for the time period in which they could not make beneficial use of their passes.

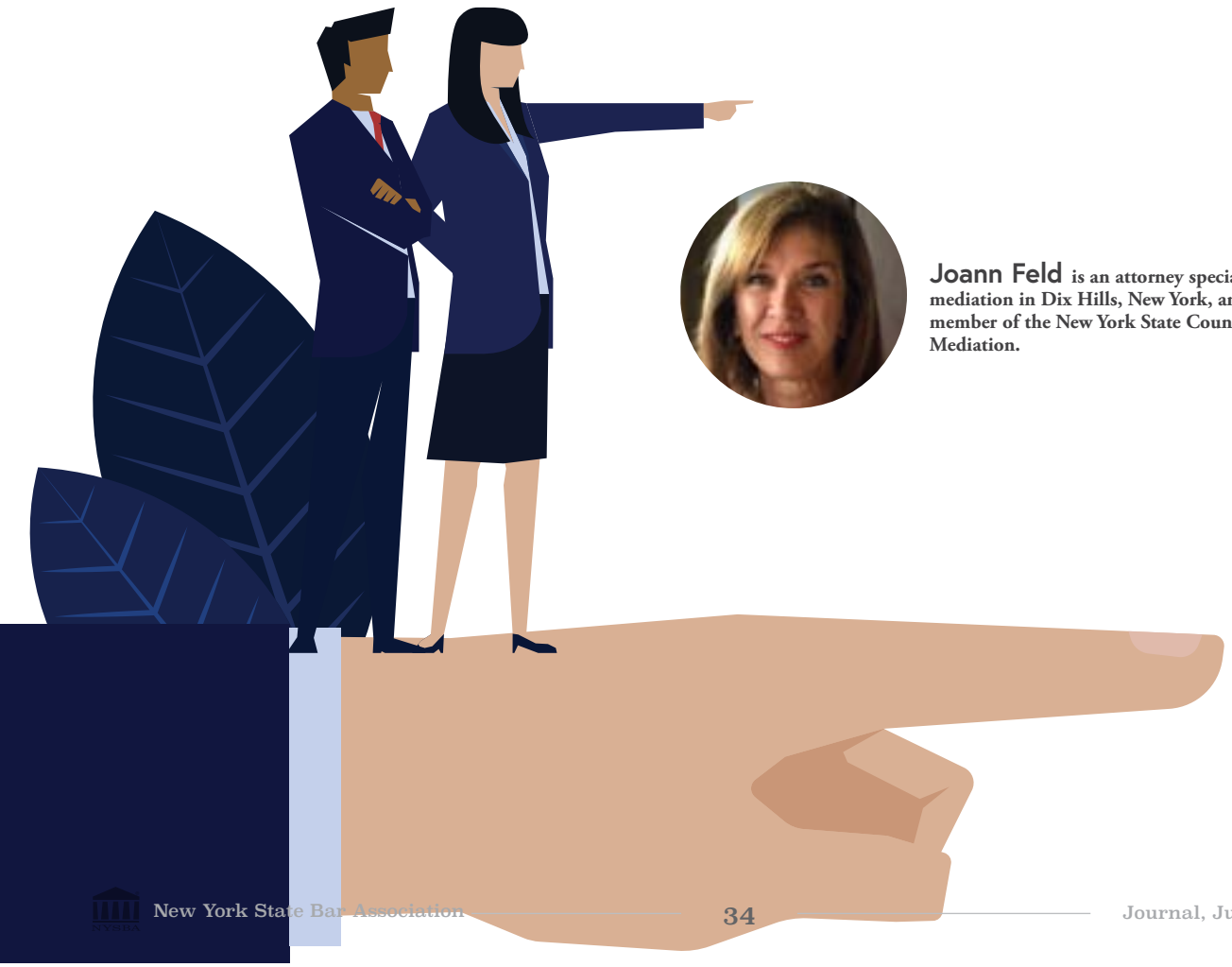
At this point, class actions have been filed against Ticketmaster Entertainment Inc. and its parent Live Nation Entertainment Co. (Derek Hansen v. Ticketmaster Entertainment Inc. et al., Case No. 3:20-CV-02685, in U.S. District Court for the Northern District of California); Major League Baseball (Ajzenman et al. v. Office of the Commissioner of Baseball et al., Case No. 2:20-CV-03643, in the U.S. District Court for the Central District of California); Stub Hub (McMillan v. Stubhub Inc. et al., Case No. 3:20-CV-00319, in the U.S. District Court for the Western District of Wisconsin); Vail Resorts Management Company (Hunt v. The Vail Corporation, Case No. 3:20-CV-02463, in the U.S. District Court for the Northern District of California); EDM festival Lightning in a Bottle (Yesenia Jimenez et al. v. Do Lab Inc., Case No. 2:20-CV-03462, and Tessa Nesis et al. v. Do Lab Inc. et al., Case No. 2:20-CV-03452, both in the U.S. District Court for the Central District of California); Six Flags Theme Parks Inc. (Rezai-Hariri v. Magic Mountain LLC et al., Case No. 8:20-CV-00716, in the U.S. District Court for the Central District of California); 24-Hour Fitness USA Inc. (Brenda Labib v. 24 Hour Fitness USA Inc., Case No. 4:20-CV-02134, in the U.S. District Court for the Northern District of California); and LA Fitness (Barnett v. Fitness International LLC, Case No. 0:20-CV-60658 in the U.S. District Court for the Southern District of Florida), among others.

Most of these lawsuits claim breach of contract, breach of warranty, violation of various state consumer fraud and consumer protection laws, negligent misrepresentation, fraud, and unjust enrichment, or some combination of those claims. Regardless of the outcome of the various lawsuits, which will largely depend on the specific language used in any ticket holder agreement, any advertising, and whether policies were in fact followed or changed as a result of the pandemic, it is clear that a continued stream of similar litigation, likely in the form of class actions, are expected to follow.

As a result, companies canceling events without providing refunds for unused tickets or unused time on season passes should be prepared to defend their decisions and should review the known claims that have already been advanced in these lawsuits. Many of these lawsuits may fail because the agreements with ticket holders disclaim liability for unused time or provide for cancellation or contain mandatory arbitration or mediation provisions; however, the expense to respond to such lawsuits, even if successful, should be part of the calculation when determining next steps and identifying means of limiting the financial impact of cancelations.

Mediation May Be the Best Option for Divorced Families Dealing With the Impacts of COVID-19

By Joann Feld



Joann Feld is an attorney specializing in law and mediation in Dix Hills, New York, and is an active member of the New York State Council on Divorce Mediation.

Attorneys have transformed their lives dramatically in the past few months to help limit the impacts of the COVID-19 pandemic, and so have our clients. For lawyers who work with divorcing or divorced couples, this disruption can lead to new challenges as families face unexpected changes in daily routines and struggle to adjust visitation, child support and other issues.

For couples seeking to divorce or to adjust the terms of a divorce, the limited ability to pursue court action on "non-essential" matters can be a real headache. In the meantime, family mediation is less adversely impacted by court closures than litigation and can be a useful problem-solving opportunity for divorcing couples regarding the arrangements for their children and their financial matters.

Mediation reduces conflict between the parties and can even improve their relationship. It saves times and money and provides the couple with the opportunity to independently reach agreement. Mediation is particularly adaptable since the parents themselves make detailed provisions for their children. Mediation generally offers a more cost efficient and time efficient means of resolving divorce disputes. And, in the time of COVID-19, mediation is especially well-suited as an effective alternative to litigation because it can be done while maintaining social distancing.

Some who are dealing with issues relating to divorce may prefer to wait for the courts to return to normal operation. Eventually, the courts will weigh in on many of these issues and consider the specific set of facts of each case, coupled with the acts and emergency measures the federal and state governments have offered. In the meantime, commencing and defending legal proceedings will add to the financial burdens of divorced families. Mediation may prove to be a better, less expensive alternative.

Since the onset of the public health crisis, I have heard from existing clients from all walks of life – including many essential workers – and they are particularly anxious about the effects of COVID-19 on their families. While the divorce settlement agreements and court orders that set out the legal obligations and rights of the parties have typically been silent as to pandemics, it is clear that COVID-19 will continue to affect standing agreements and court orders relating to a divorce and its impact on family members.

A myriad of social family issues is already escalating due to COVID-19. Many families are finding themselves

with one or both financial breadwinners out of work, while others are compelled to work from home. Those working from home may be ill-equipped to attend to the needs of their children who are now forced home due to school's closures while at the same being productive working from home. How can individuals best manage the consequences of COVID-19 stress and conflict? How can they avoid damaging intrafamily conflicts?

The wisest starting point for any divorced family whose lives have been turned upside down should be open communication that incorporates a dialogue for negotiation, whether for visitation, child support or spousal support.

Many other questions and issues can arise in the legal context during the pandemic. Here are just a few:

- Parents of children may have to struggle with closed schools.
- Access or visitation plans may have to be changed.
- Do parents have the requisite documents if they were to become ill or incapacitated?
- Do parents' current documents accurately reflect their wishes?
- Do estate documents still appoint the appropriate people to make choices on an individual's behalf?

While the divorce settlement agreements and court orders that set out the legal obligations and rights of the parties have typically been silent as to pandemics, it is clear that COVID-19 will continue to affect standing agreements and court orders relating to a divorce and its impact on family members.

The parties can contemplate making concessions and should employ compassion, giving an ex-spouse some time and space to perform obligations within a workable timeline during this unprecedented and extraordinarily difficult period. A mindful approach by divorcing or divorced spouses will present equanimity to the children, so that they will feel secure and accept that temporary arrangements are just that, and that eventually the family will return to its normal routine.

In New York, we always defer to the "best interests of the child" as the balancing standard of each parent to meet the needs of the child or children. Parents must remain truthful with one another about their social distancing, if any, the state of their health and the strides being taken to provide protection for the family.

Parents are wise to reach an understanding on the basic steps each will take to guard the family from exposure. Is it sensible for the children to move between households during the COVID-19 outbreak, or does that pose a risk of infection, not only within their own home, but also to society in general?

Thanks to social media and technology, even without physical contact, indirect contact may prove to be the right solution for some families. Consider how the courts may later interpret your approach during these exceptional times. Try to support discussions and joint decision-making, all while practicing social distancing.

- Are divorcing or divorced couples' wills in concert regarding guardianship of the children?
- Child support payments may be suspended, reduced or deferred.
- Spousal support payments may be suspended, reduced or deferred.
- When, if ever, will payments resume, or will they be forgiven?
- Will these payments be made up in the future?
- What is the period of adjustment?
- How to make up lost time spent with the child/children.
- How are other child-related expenses to be handled?
- Do current documents reflect changes to family structure?
- Are trusts being established for children and grandchildren?
- Will a newly crafted agreement be formalized or acted upon in good faith?

When appropriate, it is prudent to use mediation to work together through these trying times, as the costs and uncertainty associated with court proceedings may be higher than that of mediation. Effective communications between parties can lead to a mediated conclusion that is beneficial to all involved.

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The Unfinished Business of LGBTQ+

Five Years After Obe

By Christopher R. Riano and William N. Eskridge, Jr.

The Supreme Court of the United States announces the opinion in *Obergefell v. Hodges*, June 26, 2015[1]

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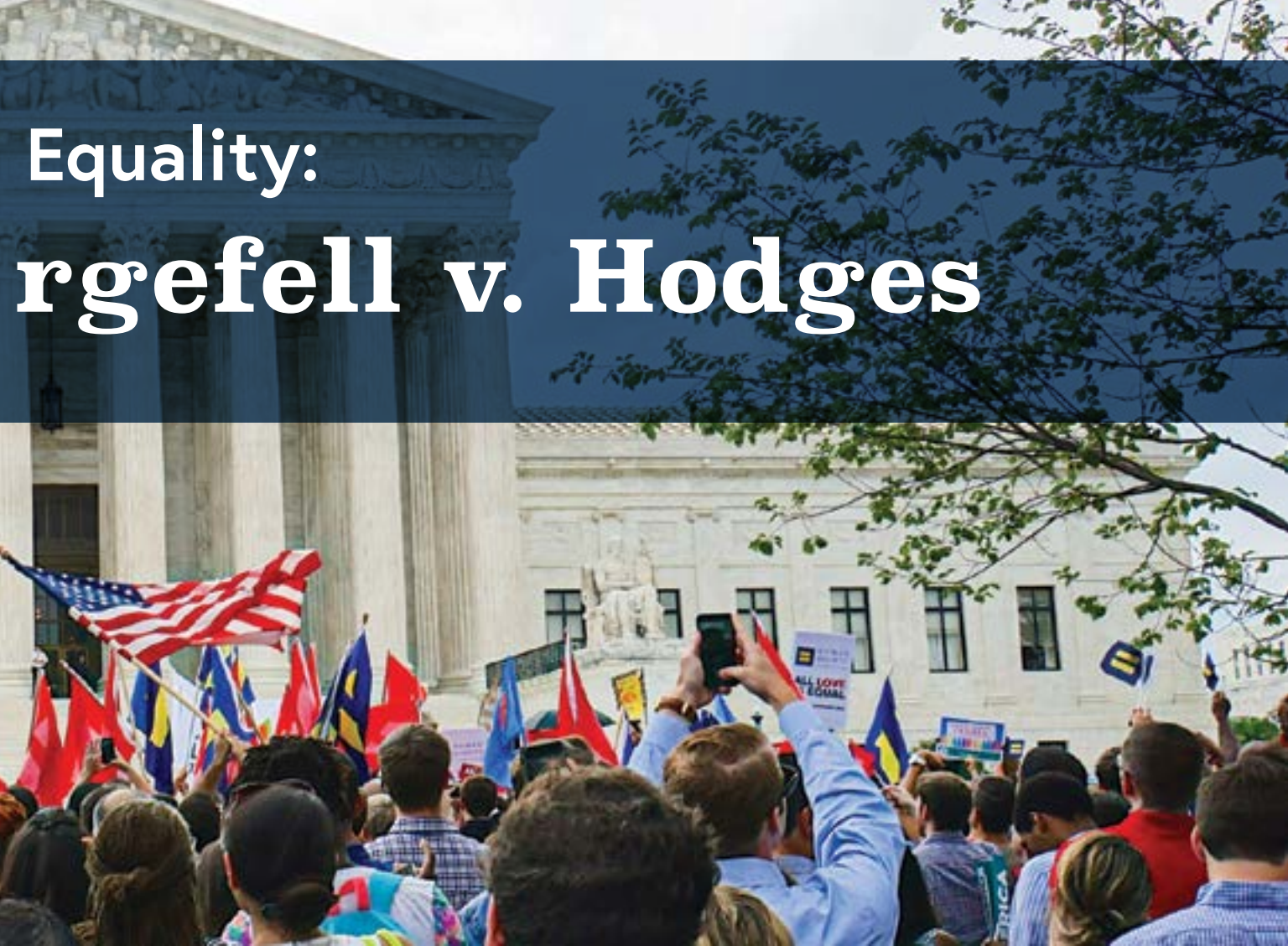
Eskridge and Riano are co-authors of Marriage Equality: From Outlaws to In-Laws, which offers the definitive account of one of the most important social movements in American history: the fight for marriage equality. It is forthcoming from Yale University Press in August 2020.

On June 26, 2015, the United States Supreme Court issued its decision in Obergefell v. Hodges, holding that the Fourteenth Amendment's due process and equal protection clauses required all states to recognize marriage equality for LGBTQ+ people. Justice Anthony Kennedy's opinion for the Court rested upon the principle that everyone is presumptively entitled to state support for his/her/their choice of spouse, to whom that person commits for life and, often, for joint child-rearing responsibilities. Moments after the decision was issued, President Barack Obama called plaintiff Jim Obergefell on live television and told him, "Not only have you been a great example for people, but you're also going to bring about a lasting change in this country."[2]

While national marriage equality was the culmination of over 50 years of changes in constitutional law, the family and religion, it will hardly be the final chapter written about the rights of LGBTQ+ people and their historic role in advancing our understanding of pluralism and equality. In the midst of grappling with the

Equality:
rgefell v. Hodges



societal shockwaves resulting from the COVID-19 crisis, it is important to take a closer look at what challenges the LGBTQ+ community currently faces, especially since marginalized communities are disproportionately vulnerable to the impacts of the illness. We want to present some of the larger, more surprising sequels to marriage equality nationwide. Five years after Obergefell, the status and recognition of same-sex marriages remains in question, even as marriage as an institution has become stronger and alternative institutions have survived. Institutions of commitment serve to bind and protect individuals and families during crises like the current COVID-19 pandemic.

THE ONGOING STRUGGLE FOR MARRIAGE RECOGNITION

Even after Obergefell, LGBTQ+ persons have faced obstacles to equal treatment on matters of matrimony. When a married woman gives birth, the law in most states requires that the name of the mother's spouse appear on the birth certificate, whatever the biological relationship to the child. However, Arkansas officials declined to include the names of both lesbian spouses. On the second anniversary of Obergefell, the Supreme Court in Pavan v. Smith[3] ruled that Arkansas's practice violated Obergefell's commitment to give same-sex couples the same "constellation of benefits that the States have linked to marriage." This was an easy case, for Obergefell explicitly held that Ohio (one of the four states defending their discriminatory laws) had to include both male spouses on the birth certificate of the son they were adopting. That three justices (Thomas, Alito, and Gorsuch) dissented from a ruling in Pavan, a result required by the narrowest understanding of stare decisis, suggests that there were in 2017 already three votes to narrow, ignore, or overrule Obergefell.

In Pidgeon v. Turner,[4] a state district judge ruled that Houston had to provide regular spousal benefits to its employees in valid same-sex marriages. In the wake of local GOP outrage, the state supreme court vacated the district court's ruling and remanded for a reconsideration of how seriously to read Obergefell. Notwithstanding

President Gerald Ford signing the proclamation for Women's Equality Day 1974. N.Y. Congressional Representative Bella Abzug (right, in hat) looks on. (Courtesy Gerald R. Ford Presidential Library).

Pavan, the court said that Obergefell "did not hold that states must provide the same publicly funded benefits to all married persons." This issue is still being litigated in Texas.

For a federal example, the immigration code provides that a child of a married couple is an American citizen if either spouse is a citizen and has resided for a period of time in the United States. Like Arkansas, the Trump Administration has rewritten the statute and denies citizenship to the child of a married same-sex couple where the citizen is not the biological parent. Like the Texas statute, this interpretation is being litigated – five years after Obergefell. It is not far-fetched to say that the next few appointments to the Supreme Court will determine whether Obergefell remains good law.

CONTINUED WORKPLACE DISCRIMINATION AGAINST LGBTQ+ PERSONS

In about half the states, an LGBTQ+ person can get married on Sunday and be legally fired from her/his/their job the next day. Notwithstanding pervasive prejudice or stereotyping, many state anti-discrimination laws do not prohibit discrimination against sexual and gender minorities. Even in New York, it was not until 2019 that the legislature passed the Gender Expression Non-Discrimination Act (GENDA), prohibiting private as well as public discrimination against people based upon their gender identity or gender expression. (A 2002 law barred discrimination because of sexual orientation.)

Federal legislation was introduced as early as 1974 by NewYork Congresswoman Bella Abzug that would have amended Title VII of the Civic Rights Act of 1964 to include marital status and sexual orientation among its workplace anti-discrimination prohibitions. The bill died in committee.[5]

After the failure of similar bills in almost every Congress for the last 45 years, the House of Representatives passed an ambitious Equality Act on May 17, 2019. However, the Senate has, as yet, failed to act on this legislation, which would bar sexual orientation and gender identity (SOGI) discrimination in employment, public accommodations, housing and credit. In the meantime, while marriage equality is the law of the land, it remains legal for someone who is part of the LGBTQ+ community to be discriminated against in numerous ways in most states, and Congress has continually failed to act on those forms of potential discrimination with federal legislation.[6]

On October 8, 2019 the United States Supreme Court heard arguments in the combined cases of Altitude Express v. Zarda and Bostock v. Clayton County, as well as R.G. & G.R. Harris Funeral Homes v. EEOC. In Zarda/Bostock, the court is considering whether discrimination against an employee based on the sex of his/her/their preferred partner or spouse is prohibited by Title VII's bar to job discrimination motivated in any way "because of sex." In Harris Funeral Homes v. EEOC, the court is considering whether Title VII prohibits discrimination against an employee because of her/his/their sex identity. In both matters, which are expected to be decided within the October 2019 term, the Court is examining a set of questions around a right that many believe is as fundamental as the right to marry, specifically the right to be free from discrimination in the workplace based upon your sexual orientation or gender identity.

EQUAL LIBERTY FOR TRANSGENDER PERSONS?

By removing sex-based classifications from marriage law, Obergefell liberated transgender persons to marry the spouses of their choice. Yet, today, transgender persons face unique challenges to their free gender expression. Gay-bashing has given way to trans-bashing all over America.

The year after Obergefell, North Carolina governor Pat McCrory signed into law the Public Facilities Privacy & Security Act, commonly called HB2. The statute changed North Carolina law to preempt local SOGI anti-discrimination ordinances and to limit public facilities to the people whose birth certificates match the gender signage on the door. This statute generated controversy as the nation's most notorious "bathroom bill," and numerous states as well as companies banned funded travel to North Carolina as a result. Following a federal lawsuit and a disciplinary threat by the National Collegiate Athletic Association, some parts of the statute were changed in 2017. Even after a settlement approved by Judge Thomas Schroeder, however, the portion of the law

preempting local SOGI anti-discrimination ordinances remains enforceable law in the Tarheel State.[7]

At the same time it has been representing wedding vendors who refuse their services for same-sex weddings, the Alliance Defending Freedom (ADF) this year filed suit against the Connecticut Association of Schools. Under the slogans of "Fair Play" and "Protect Women's Sports," the ADF seeks to prevent two transgender girls of color from competing in high school sports. Many lawsuits and proposed legislation have likewise targeted transgender athletes, some of which would require those teenagers to submit to invasive investigations into their chromosomes and/or reproductive organs.

A NEWFOUND PROMINENCE OF NONBINARY PERSONS

In 2019, the word of the year, according to Merriam-Webster Dictionary, was "they," defined as "a single person whose gender is intentionally not revealed" or "whose gender identity is nonbinary." According to Merriam-Webster, searches for the word increased 313% in 2019 over the previous year, and because the English language fails to have a gender-neutral pronoun to correspond neatly with other singular pronouns, "they" has been used for this important purpose for over 600 years.8

In the post-Obergefell world, public figures such as Academy Award-winning vocalist Sam Smith and chart-topping singer Miley Cyrus have embraced the idea of gender as a spectrum, rather than a binary choice, and in doing so have sometimes preferred to use neutral pronouns such as "they." The ways in which an individual can identify as nonbinary are incredibly diverse and varied. Those individuals who identify as nonbinary are now more often expressing themselves openly and in public, as opposed to hiding in the shadows. In part, the successful nationalization of marriage equality between those who identify as either male or female in same-sex pairs has opened the door to further liberation of those who do not identify with a single sex or gender.9

Indeed, Obergefell's reasoning speaks to the freedom sought by nonbinary persons. Rather than attack marriage restrictions based on their arbitrary sex- and sexual orientation-based exclusions, Justice Kennedy's opinion rested upon the Constitution's protection of "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." The next year, a federal district judge followed this principle to free a nonbinary person from passport sex identification in Zzyym v. Kerry.[10] As the nation responds to the identity-based claims of nonbinary persons, Obergefell – assuming it survives partisan attacks on its result and reasoning – should be a beacon.

ALTERNATIVES TO MARRIAGE ARE STILL WITH US, BUT NOT AS PROMINENT

As the struggle for marriage equality crossed the nation state by state, in a number of states, litigation or legislation resulted in a number of different alternate institutions for same-sex and also opposite-sex partners. In most of these states, the menu of these alternate institutions, like domestic partnerships, civil unions or domestic beneficiaries, has survived the recognition of marriage for LGBTQ+ couples. In practice, thus far most cohabiting couples are taking advantage of the full benefits afforded by marriage equality, and few are opting for one of the other institutions still available for structuring their relationships.

While marriage equality is the law of the land, it remains legal for someone who is part of the LGBTQ+ community to be discriminated against in numerous ways in most states, and Congress has continually failed to act on those forms of potential discrimination with federal legislation.

For example, in New York City, you can still enter into a registered domestic partnership instead of a marriage. This makes you eligible for a number of benefits, from something as simple as the right for the surviving domestic partner to purchase the chair occupied by the New York City council member (NYC Admin. Code § 3-204.2), to something as critical as providing "for the right to health insurance coverage for a domestic partner of a member of the uniformed forces of the police or fire departments who was killed as a natural and proximate result of an accident or injury sustained while in the performance of duty." (NYC Admin. Code § 12-126(b)(2)(i)) At the same time, registered domestic partnerships do not necessarily confer other benefits, and the termination of a domestic partnership is done by a filing with the city clerk, as opposed to the complex divorce procedure in front of a New York judge. While same-sex and opposite-sex couples can take advantage of this "marriage-lite" structure, people now tend to choose "regular" marriage.[11]

Yet some states are not only preserving but are expanding their domestic partnership laws. For example, in July 2019, California governor Gavin Newsom signed SB 30 into law, which eliminated the requirement that state domestic partnerships were only permissible when both parties "are members of the same sex or one or both is eligible for social security benefits and over the age of 62."[12] One reason couples would opt for domestic partnership rather than marriage is that the IRS does not treat the former as marriages, which would trigger higher taxes for some two-income couples.

CONSERVATIVE FAITH TRADITIONS HAVE MOVED TOWARD TOLERANCE AND EVEN ACCEPTANCE

Just a little over a year after Obergefell, the Church of Jesus Christ of Latter-Day Saints (LDS) launched a new public relations campaign that was intended to soften the church's tone towards the LGBTQ+ community. Furthermore, the church's website renounced "conversion therapy" and insisted upon "Kindness, Inclusion, and Respect for All of God's Children," including "His LGBTQ+ children." The site offers advice and counsel to individuals, families, church leaders and others in an attempt to move towards a tolerance of the LGBTQ+ community not only outside of the church but within.[13]

On April 4, 2019, reversing a 2015 policy, LDS President Dallin Oaks announced that children of parents who identify as LGBTQ+ could now be blessed and baptized within the church. The church further stopped their characterizing of same-sex marriage as an "apostasy." For a faith tradition that played such a central role in historically opposing marriage equality, to make such an important doctrinal shift shows the continuing evolution of faith that LGBTQ+ individuals and families are bringing to faith-based communities.[14]

Other traditional faith institutions are finding greater tolerance themselves as more LGBTQ+ families become familiar to them, embracing the Golden Rule: "Do unto others as you would have them do unto you." During our work on our book, we found a spirit of tolerance, and often acceptance, in exchanges with leading Catholics, Episcopalians, Lutherans, Latter-day Saints, Presbyterians, Reform and Conservative Jews, and Methodists. What same-sex marriage has done to open the door to these conversations has strengthened, as opposed to weakened, these faith communities because they will continue to face internal pressure from colleagues who plead for a warmer welcome for their own LGBTQ+ friends and relatives. Same-sex marriage may be changing religion, but it is happening as a result of pressure from the inside rather than from outside faith communities.

THE PROFOUND IMPACT OF COVID-19 ON MARRIAGE AND SOCIETY

In many ways, COVID-19 and the crisis created by this pandemic reinforce the importance of institutions like marriage that commit people to each other "in sickness and in health." As we see every day, spouses are the people supporting our health and medical professionals who are on the frontlines. When someone becomes ill, it is often her/his/their spouse that is able to provide care, especially since the vast majority of people who are afflicted with COVID-19 rest and recover within their homes. It is spouses and domestic partners, both same-sex and opposite-sex, who are trading off the responsibilities to ensure that health and household needs are met and that someone is handling the groceries.

It is at times like this, where the institution of marriage becomes a bulwark against the tragedy of disease, when we see most visibly the crucial role that marriage equality has played to strengthen the institution of marriage for all Americans. Furthermore, the alternative institutions of relationships we discuss above help provide societal bonds that make it possible for people to manage acute stresses and long-term disruptions. For example, the Colorado legislature in 2009 created a new institution – "designated beneficiaries" – for all couples who did not (or could not) get married but who wanted to take responsibility for one another's well-being, health and welfare. Although most Colorado couples of all orientations and gender identities have preferred marriage or civil unions, the availability of this institution is important in times of pandemic, and we urge more states to consider adoption of a designated beneficiaries law.

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1. Photo by Ted Eytan, retrieved from Wikimedia Commons at: https://commons.wikimedia.org/wiki/File:SCOTUS_Marriage_Equality_2015_(Obergefell_v._Hodges)_-_26_June_2015.jpg (accessed March 11, 2020).

2. *See* https://www.cnn.com/2015/06/26/politics/obama-calls-gay-marriage-ruling-plaintiff-jim-obergefell/index.html (accessed March 19, 2020).

3. 137 S. Ct. 2075 (2017)

4. 538 S.W.3d 73 (2017)

5. *See* https://www.congress.gov/bill/93rd-congress/house-bill/15692?q=%7B%22search%22%3A%5B%22%5C%22equality+act%5C%22%22%5D%7D (accessed March 12, 2020).Photo courtesy Gerald R. Ford Presidential Library.

6. *See* https://www.congress.gov/bill/116th-congress/house-bill/5 (accessed March 19, 2020).

7. *See* https://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf (accessed April 1, 2020).

8. The Merriam-Webster Dictionary Word of the Year for 2019, retrieved from https://www.merriam-webster.com/words-at-play/word-of-the-year/they (accessed March 14, 2020). *See also* "They," retrieved from https://www.merriam-webster.com/dictionary/they (accessed March 14, 2020).

9. The LGBT Foundation on Non-Binary People, retrieved from https://lgbt.foundation/who-we-help/trans-people/non-binary (accessed March 11, 2020).

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11. *See* https://www.cityclerk.nyc.gov/content/domestic-partnership-registration (accessed April 12, 2020).

12. *See* https://www.maplesfamilylaw.com/divorce/senate-bill-30-in-california-new-law-on-domestic-partnerships/ (accessed April 13, 2020).

13. *See* https://www.churchofjesuschrist.org/topics/gay/?lang=eng (accessed April 2, 2020).

14. *See* https://www.churchofjesuschrist.org/church/news/policy-changes-announced-for-members-in-gay-marriages-children-of-lgbt-parents?lang=eng (accessed April 3, 2020).

The Travel Journal of Alexander Stewart Scott: A Glimpse into the History of New York Courts

"… was not long in finding out the seat of Justice"

By Paul G. Schneider, Jr.

Paul G. Schneider, Jr., after a long career in public history, continues to pursue his passion for history as an independent historian. His first book, published in 2019 by SUNY Press, is "Everything Worthy of Observation: The 1826 New York State Travel Journal of Alexander Stewart Scott." A member of the National Coalition of Independent Scholars and the Organization of American Historians, he also volunteers his research capabilities at the Office of State History, New York State Museum.

Alexander Stewart Scott, a 21-year-old Canadian law student on a three-and-a-half-month trip taking him from Quebec City, where he lived, across New York State and back home, sought out "seats of justice" and legal practitioners whenever opportunities arose. As his surviving travel journal attests, he was often an unsparing but humorous critic of what he observed. Here, we share a few of his choicest legal observations included in his vividly written account now published by SUNY Press as "Everything Worthy of Observation: The 1826 New York State Travel Journal of Alexander Stewart Scott."

Having arrived in Troy, New York, on Tuesday, September 26, 1826, Scott learned that the Court of Common Pleas of Rensselaer County was in session and he hurried the few blocks from Mechanic Hall, the hotel where he

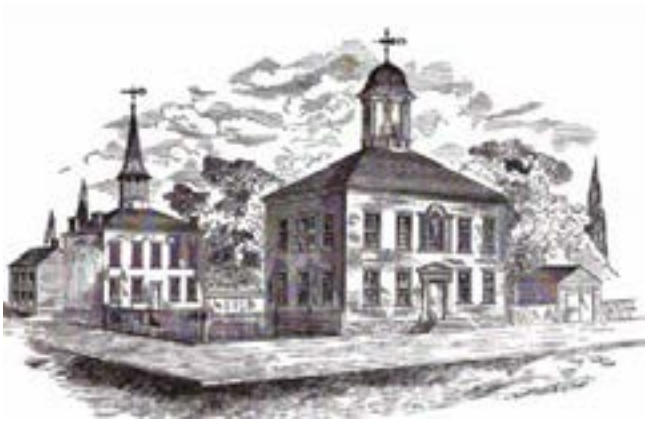
The Rensselaer County Court House as it appeared when Alexander Stewart Scott visited it in September 1826. Image from History of The City of Troy by A. J. Weise, 1876.

was staying, to the courthouse. There he spent "a couple of hours in court" observing its proceedings and listening to the cases presented. He was not impressed:

> . . . to a person accustomed to the dress and mere outward show of a British Court, an American one has but a poor appearance – neither Judges nor Lawyers wear any Gowns, nor in fact any thing to distinguish them from other persons – not one in ten has a black Coat – the Chief Justice had on a brown surtout, white Trowsers [trousers], and a black silk Cravat, and was busily engaged in chewing Tobacco.

Having disparaged the appearance of the court's officials, Scott moved on to record his reactions to the verbal presentations he witnessed: ". . . from having heard several Gentlemen of the Bar open & close cases, address Juries &c, I cannot say that I have formed any high idea of (their at least individual) Talent – very poor speakers."[1]

Barbed as his comments were, they remained private. Traveling alone, Scott kept his journal as a personal



The New York State Capitol building, where in September of 1826 Alexander Stewart Scott, after touring through the Senate and Assembly chambers, ascended to the top floor to peruse the collections of the state library. Image courtesy of the New York State Museum, H-1982.76.3.

record of his early August through mid-November 1826 travels. He undoubtedly shared it with his parents and siblings, but never intended it for publication. That his journal not only survived but ended up in the manuscript collections of the New York State Library is remarkable, particularly in light of the fact that the day before his visit to the Troy courtroom he had gone to the State Library, then located in the State Capitol building, and found its holdings "small, but as far as I am able to judge a very choice collection of Books."[2]

Born on May 18, 1805, in Dundee, Scotland, Scott immigrated to Canada with his parents, brothers, and sisters when he was between the ages of 6 and 13 (the precise date of the family's arrival is unknown). His journal suggests that he was a proud British subject and thoroughly imbued in British legal traditions, but that he was not so rigidly bound by those traditions to reject outright the opportunity to learn about differing national approaches to the law.

In fact, just two days after his overnight stay in Troy, on Thursday, September 28, while aboard the crowded steamboat Congress heading homeward to Canada, he was introduced to Edward Livingston from New Orleans, Louisiana. The introduction was made by General Guert Van Schoonhoven, himself then a serving judge of the Saratoga County Court of Common Pleas, with whom Scott had shared a stagecoach from Waterford, where the judge resided, to Whitehall where the Congress was docked.[3] Livingston, who Scott mistakenly thought was a judge of the Louisiana Supreme Court, was in fact a towering judicial intellectual with broad governmental experience at both the state and federal levels. Among his many accomplishments at the time when Scott met him were his contributions in Louisiana toward codification of its Civil Code and Code of Practice. Scott wrote of his encounter with Livingston effusively:

> . . . a most affable & pleasant Man, and who immediately upon his being made aware that I was a Law student, turned the Conversation upon that subject – from his politeness I derived a good deal of useful Information – I learned from him, that in N. O. [New Orleans] a knowledge of the *Spanish Language* is a necessary qualification previous to admission to the Bar. He seemed pleased at seeing any person from Canada related (however distantly) to his own Profession, and I was happy that my little Information about the powers *&c.* of the different Courts in Canada gave me an opportunity of enjoying more of his Conversation & Company than I otherwise might have done.[4]

Although he doesn't articulate it, Scott immediately may have grasped some of the parallels between Livingston's explanations of the difficult juxtapositions presented by the historical combination of Spanish, French, and American legal systems in Louisiana and a similar situation in the Canadian province of Quebec with French and British legal traditions. As he informed Livingston, he was a student, but he was far from a novice; in less than a month after his return home Scott became a commissioned lawyer.[5] Evidence suggests that he studied law under the direction of Joseph-Rémi Vallières de Saint-Réal, a brilliant lawyer, politician, and judge in Quebec City who trained young men for legal careers. Fluent in English and French, Scott by late 1826 would have been well acquainted with the complexities of legal practice in the province of Quebec.[6]

No doubt curious about how American fellow students prepared to become attorneys, he chanced on an occasion to find out in Utica on Thursday, August 17, when he

> . . . wandered into the Court House where about 20 Students were undergoing examination to be rec$^{d.}$ as Attornies – their appearance far from being prepossessing, and I observed that some of them had difficulty to answer the most simple practical questions – one young Gent$^{m.}$ in particular shewed [showed] his free republican spirit by clapping his feet upon the Table close to which he *sat* during the proposition of the questions – could not but admire his *sang* froid.[7]

In 1827 Scott joined Vallières's legal practice as a partner. He spent the rest of his career in Quebec City, holding increasingly responsible positions in the Canadian court system, ultimately being appointed clerk of the Court of Appeals in 1842.[8] Unfortunately he died in the prime of his life, along with his eldest daughter, in a theater fire on June 12, 1846.[9]

1. Paul G. Schneider, Jr, ed. "Everything Worthy of Observation: The 1826 New York State Travel Journal of Alexander Stewart Scott," 90–91 (Albany: SUNY Press, 2019). Hereafter cited as Everything Worthy. Alexander misstates the title of the presiding justice, who was actually designated as "first judge." The tobacco chewing first judge in Rensselaer County in 1826 was David Buel, Jr. See Franklin B. Hough, "The New York Civil List," […], 363 (Albany: Weed, Parsons & Co., 1858), HathiTrust Digital Library at: https://babel.hathitrust.org/cgi/pt?id=nnc2.ark:/13960/t2n60dj1x&view=1up&seq=389 (original from Columbia University), PDF.

2. Everything Worthy, 89.

3. For Van Schoonhoven's position as a Saratoga County Court of Common Pleas judge see E. R. Mann, "The Bench and Bar of Saratoga County," […] 377 (Ballston: Waterbury and Inman, 1876), HathiTrust digital Library at: https://babel.hathitrust.org/cgi/pt?id=mdp.35112101783837&view=1up&seq=383 (original from the University of Michigan), PDF.

4. Everything Worthy, 96. For the information on Edward Livingston see William B. Hatcher, "Edward Livingston: Jeffersonian Republican and Jackson Democrat," 284, Southern Biography Series, ed. Wendell Holmes Stephenson and Fred C. Cole (Baton Rouge: Louisiana State University Press, 1940).

5. The Montreal Almanack, or Lower Canada Register, for 1829, Being First After Leap Year, 21 (Montreal: H. H. Cunningham, 1828), HathiTrust Digital Library at: https://babel.hathitrust.org/cgi/pt?id=aeu.ark:/13960/t6252g93t&view=1up&seq=57 (original from the University of Alberta), PDF.

6. James H. Lambert in collaboration with Jacques Monet, "Vallières de Saint-Réal, Joseph-Rémi," in Dictionary of Canadian Biography, vol. 7, University of Toronto/Université Laval, 2003–, http://www.biographi.ca/en/bio/vallieres_de_saint_real_joseph_remi_7E.html (accessed April 16, 2020).

7. Everything Worthy, 50.

8. "Appendix, No. 2, to the Fourth Volume of the Journals of the Legislative Assembly of the Province of Canada, from the 28th day of November, 1844, to the 29th day of March, 1846" […] (Montreal, QC: Rollo Campbell, 1845), Appendix BBB, Return of the Names, &c. of the persons who have been appointed to any Office of Emolument in Lower Canada, from the 10th February, 1841, to the 9th December, 1843; prepared in pursuance of an Address of the Legislative Assembly, dated 4th December, 1844, no page number, HathiTrust Digital Library at: https://babel.hathitrust.org/cgi/pt?id=chi.74612090;view=1up;seq=9 (original from University of Chicago), PDF. At the time, the Court of Appeals at Quebec could hear appeals from any court in Canada, except from the Admiralty Court. Its members included the "… Governor, or Lieutenant-Governor, the members of the Executive Council, the Chief Justice of the Province, and the Chief Justice of Montreal; …" See Charles Clark, "*A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies; with the Charters of Justice, Orders in Council, &c. &c. &c.*", 401–402 (London: S. Sweet, 1834),, HathiTrust Digital Library at: https://babel.hathitrust.org/cgi/pt?id=aeu.ark:/13960/t21c3340m;view=1up;seq=430 (original from University of Alberta), PDF.

9. Everything Worthy, 119.

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Make Your Video Conferences More Productive by Incorporating Nonverbal Communication Cues

By Carol Schiro Greenwald

Carol Schiro Greenwald, Ph.D. is a marketing and management strategist, coach and trainer. She works with professionals and professional service firms to structure and implement targeted, practical growth plans. Her book, *Strategic Networking for Introverts, Extroverts and Everyone in Between* (American Bar Association, Law Practice Division, 2019) explains how to create and implement an effective strategic networking plan.

The in-person work environment of shared office space, watercooler conversations, team meetings – the Old Normal – is gone, vanquished by the coronavirus. In the New Normal, the workplace collegiality of the office has been replaced by the chaos of working from home. Even though we try to approximate the Old Normal nothing is really exactly the same. We miss the collegiality of an office.

Communication is one of the most important components of in-person work environments. At the office, we run an idea by a colleague in the next office, kibitz at

the coffee machine, and collaborate in team meetings. This need to communicate continues, but connecting remotely is not the same. Today, we are dispersed, working remotely from wherever we are sheltering in place. Under these circumstances, communication becomes more difficult and the risk of miscommunication is greater.

NONVERBAL COMMUNICATION

The difference lies in the context. Ninety-three percent of our communication is nonverbal: 55% of what we know about someone else we learn from their body language, 37% from their tone of voice, and only 7% from words. In Old Normal workplace meetings, conversation occurred within a visual context in which people understood who and what was important through participants' body language and speaking tone. They could see who was invested in the decision under discussion by the way they sat, their gestures and the intensity of their facial expressions. Body language made it easier for participants to stay involved and on task.

Now communication occurs in videoconferences, over the phone and in writing through texting or email. Even with video, most of the in-person psychological and emotional contextual information is lost. Connection via video seems less authentic, less personal and less emotionally fulfilling because of both the physical and psychological distance.

We all miss the Old Normal personal contact – the teamwork, gossip, camaraderie. Video conferences can feel stilted and awkward, filled with faces you hardly recognize and incongruous settings. Often a series of such meetings during the day leaves participants feeling drained.

We can still find fulfilling personal workplace connections if we try. We can each take intentional measures to make online connections, especially meetings, more emotionally satisfying. Let's look at some of these actions.

APPEARANCES

One of the delights of remote work is the ability to dress down. But don't take the comfort theme too far. This is still work, so you still want to be seen as professional, present, in control, a voice of clarity and preciseness during discussions. You need to dress the part.

As part of your morning routine, consider the "Friday casual" outfit you plan to wear. Comfortable but not beach party. Fix your hair as if you're going to work. Not only will you now look professional for video meetings, your actions will also tell your brain that you are preparing for the workday. Clothing, posture, and attitude combine to create a positive emotional response through our mind-body connection. When you look "put together" your brain responds in a positive, attention-focused way.

If you plan to participate in video meetings, select appropriate clothing. Dress like a news anchor. Simply cut, jewel-tone tops work well on video. Avoid white, beige or colors that clash with your visible background. Ties for men or designer dresses probably go too far these days but pants should be high-end leisure or athletic wear, not sloppy sweats.

Now consider the context in which you will be viewed. In her New York Times piece on May 4, Amanda Hess noted that "the bookcase has become the background of choice for television hosts, executives, politicians. . . . . The bookcase offers a visually pleasing surface and a gesture at intellectual depth."

When choosing your background for business video conferences, think about your message. Create a professional niche that reinforces your personal brand.

For example, my brand is as an experienced, honest, tell-it-like-it-is strategist and coach. My office was filled with personal mementoes and piles of work in process. At first, I chose a clearly fake bookcase background, then a colleague pointed out that its fakeness clearly contradicted my brand. I retired the fake books and cleaned up my office so it could be a more authentic backdrop.

Think about the perception you want others to have and create your background accordingly. There are many websites that offer free alternative backgrounds. In the work context, ignore the settings that encourage distraction such as those that move or that suggest beautiful vacation destinations.

VIDEOCONFERENCE DO'S AND DON'TS

To make online meetings more closely approximate in-person meetings, you have to consciously create space for those important nonverbal cues. Begin with these three techniques:

1. Eye contact is a key body language cue. Online, instead of looking at whomever is speaking, or at members of the group listening to you, you should approximate the impact of in-person eye contact by looking at the camera. This takes some practice, and it also requires that your camera be correctly positioned above you at eye level or higher. If you are using your phone or laptop for the meeting it is important to pay attention to the camera's position.

For example, when Susan Rice, former U.S. ambassador to the United Nations, was on PBS' "Firing Line," for the entire time she talked, her eyes were directed downward, responding to the program moderator but creating a feeling of awkwardness and disengagement among viewers. Lighting is another factor that can impact the ability to share body language cues. To eliminate shadows that hide your face, place light in front or to the side of you.

2. The same body language positioning rules apply on camera as in person. To convey authority and confidence, sit tall with your back against the chair and your feet on the ground. Lean slightly forward to indicate participation. Indicate listening by tilting or nodding your head and smiling or laughing as appropriate. Use gestures to convey meaning just as you would at in-person meetings. Position yourself in the camera frame so that some of your body language is visible. Advice varies as to your appropriate distance from the camera. If you sit four to six feet away from the camera your colleagues will be able to see you from the waist up. Remember you are always on camera and visible unless you click "stop video." So, don't multitask. Turn your phone off, remove extraneous papers, leave lunch until after the meeting. The impact of any of these activities is amplified online. Similarly, when you look inattentive, bored or preoccupied, the visual itself can become a distraction. It cancels out the attentive professional image you want to display.
3. Understand how the video conference app you are using works. Know its bells and whistles. In in-person meetings there is always the slight background noise of chairs shifting, people breathing, coughing, moving papers, etc. Online, such noises are magnified and become distractions. Know how to mute and unmute yourself so that your mike is only open when you are speaking. Use the chat box feature to demonstrate your thought leadership and your involvement in the discussion. Ask questions, offer access to relevant articles, and add your support to the ideas of the person speaking.

TAKE RESPONSIBILITY FOR THE SUCCESS OF EACH MEETING

If you are the meeting leader, create an inviting, collegial atmosphere by greeting people as they sign on and engaging in small talk. When you are speaking, aim for a friendly tone, offer authentic smiles and eye contact. Use active listening skills to improve the feeling of personal connection with meeting attendees.

- Structure the meeting to create many opportunities for participation. Use video conferencing tools such as the chat box, Q&A or polling to involve everyone. If the app offers breakout rooms, send small teams into them to work on key issues.
- At the beginning, initiate participation and set a personal tone by inviting people to introduce themselves or answer a question about what they have been thinking or feeling or doing. Direct questions to individuals rather than the whole group to avoid awkward pauses as people look for hard-to-see cues as to who should answer first.
- Speak slightly louder than you would at in-person meetings to project authority while striving for a conversational tone.

Participants have equal responsibility for ensuring the quality of a meeting. We are used to being passive observers of the entertainment or educational content on the screen. But in meetings you are the action. As such, you have to practice active listening, participate and be helpful. When participants disengage, meetings fall flat and people leave them feeling let down.

- Prepare as you would for an in-person meeting. Review the agenda, do relevant reading, think about your contribution to the meeting.
- Arrive on time.
- Dress for success.
- Be aware of ways in which you can use nonverbal language to ameliorate the tendency for online meetings to seem depersonalized, leading to negative feelings among the participants.

Yes, video conferencing can lead to depressing meetings. But you can do something about it by remembering the importance of nonverbal communication at in-person meetings. Despite the confines of the camera frame, incorporate body language including posture, eye contact, smiles and gestures to warm up the meeting environment. It may be difficult at first, but continue to practice. As it becomes more comfortable, you will leave meetings with positive feelings of accomplishment.

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TO THE FORUM:

I am the managing partner of a general practice law firm of approximately 40 lawyers and 20 staff members. In response to the ongoing pandemic, all firm employees are required to work from home. While the safety of the firm's employees is always a top priority, our management team has concerns about how our employees remain in compliance with their ethical obligations during this time. Specifically, with many of our attorneys working in close quarters to other family members, how can they best ensure they are safeguarding client's confidentiality?

Additionally, our firm has implemented a number of practices to facilitate a seamless transition when working from home. For example, we provide secure remote access protected with two-factor authentication for access to our work applications. We also provide a firm-hosted cloud-based file sharing service so that our employees can transfer multiple and high-volume files to clients as well as one another throughout the workday. Are there any specific ethical obligations we should be aware of with respect to the technology and working from home? How can our firm ensure that we are using technology safely, effectively and in compliance with our ethical obligations?

Separately and surprisingly, we have reached out to adversaries requesting extensions of deadlines, and one adversary in particular was obstinate refusing to give us an extension, despite the fact that my client was one of the many individuals who had become sick because of the pandemic, forcing us to make an application to the court. Is our adversary's conduct ethical? What principles of ethics should we adhere to when dealing with unreasonable adversaries?

Lastly, given that face-to-face communications are severely limited and individual accessibility is uncertain, what are our ethical obligations with respect to the supervision of subordinate attorneys and staff?

Sincerely,
Patty Partner

DEAR PATTY:

The global pandemic has undoubtedly forced us to steer a course through uncharted professional territory. It has created many professional and ethical challenges as lawyers have been compelled to practice law primarily in a remote work environment.

One of the most fundamental challenges that lawyers face when working from a remote location is the necessity to protect client confidences. As discussed in prior Forums, RPC 1.6 governs a lawyer's duty of confidentiality, and this duty applies in all settings and at all times.

When working at home, it is easy to adopt casual practices. Attorneys should be wary of falling into that trap. Working remotely often creates unique circumstances of having to work in close proximity to other family members. As a result, attorneys must take extra precautions to safeguard client confidences. For example, your "remote office" should be as autonomous as possible. It is best practice to avoid working in commonly used areas of your home such as the kitchen table or the living room.

However, we understand that this might not be feasible in every situation, especially for attorneys with younger children engaging in remote learning. If your circumstances do not permit you to create a designated and private workspace within your home, you should endeavor to set clear boundaries with children, partners and other members of your household as to how they should treat your workspace and work files. You also may want to consider investing in a locked filing cabinet to store sensitive information. If you do not have locked storage, we suggest that you store your work-related materials somewhere only you can access them. Attorneys should also consider practical efforts, such as not letting children or significant others access work devices for personal use and setting up a private, password-protected, Wi-Fi network specifically for your professional work. At a minimum, your work devices (laptops, tablets, phones) should always be password-protected with strong and unique passwords.

We also suggest that you do your best to become "tech-savvy" or competent in the technology you will need when working remotely. The NYSBA Committee on Professional Ethics (the "Committee") has opined that an attorney should only use technology that he or she is competent to use. See NYSBA Comm. on Prof'l Ethics, Op. 1025 (2014). Accordingly, a law firm should take appropriate steps to ensure that its attorneys are familiar with the firm's operating systems and computer programs and the firm's policies concerning the use of those systems/programs before transitioning to a fully remote work environment.

But, that is only half the battle. Attorneys also should be cognizant of the heightened risk of cybersecurity threats when working remotely. Comment [8] to RPC 1.1 states: "to maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information." As addressed in a prior Forum, attorneys and law firms have an ethical obligation to institute and maintain sound cybersecurity protocol, and to ensure that third-party vendors do the same. See Vincent J. Syracuse, Maryann C. Stallone, Richard W. Trotter & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., June 2017, Vol. 89, No. 5.

Phishing scams are an example of a common cybersecurity threat to law firms. These scams include fraudulent emails that appear to be sent from a genuine source, such as a colleague, family member or personal banking institution, for the purpose of obtaining personal information, such as passwords and banking details, and defrauding attorneys or their firms. For this reason, attorneys should be extra vigilant when reviewing emails and downloading files. It is always a best practice to double check the email address of the sender and confirm the email is legitimate, as many hackers will create fake email accounts with only slight variations to that of the individual the hacker is purporting to impersonate. Attorneys also should avoid downloading files or clicking on links from an email that they are not expecting, and immediately bring emails that appear to be suspicious to the attention of the firm's IT department for further investigation.

Furthermore, we recommend that attorneys access their firm networks remotely through a Virtual Private Network (VPN), an encrypted connection over the internet from a device to a network. The encrypted connection

helps ensure that sensitive data is safely transmitted over the internet. Firms should always keep their VPNs current and deploy all patches with updated security configurations. Moreover, it is critical to maintain proper multi-factor authentication for all VPN access to networks.

Cybersecurity threats also arise with the use of cloud-based file-sharing services to send and receive confidential client documents. A 2014 report by the Department of Homeland Security recognized that "online tools that help millions of Americans work from home may be exposing both workers and businesses to cybersecurity risks." Michael Roppolo, Work-from-home remote access software vulnerable to hackers: Report, CBS News (July 31, 2014).

In two ethics opinions issued in 2014, the Committee concluded that giving lawyers remote access to client files was not unethical, as long as the technology used provides reasonable protection to confidential client information, or the law firm informs the client of the risks and obtains informed consent from the client to proceed. See NYSBA Comm. on Prof'l Ethics, Op. 1019 (2014) and NYSBA Comm. on Prof'l Ethics, Op. 1020 (2014). In Opinion 1019, the Committee noted that "because of the fact-specific and evolving nature of both technology and cyber risks, we cannot recommend particular steps that would constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients." Id. However, Comment [17] to RPC 1.6 instructs us that "[t]he key to whether a lawyer may use any particular technology is whether the lawyer has determined that the technology affords reasonable protection against disclosure." RPC 1.6, Comment [17].

To meet the reasonable care standard set forth in RPC 1.6, attorneys should consult with their firm's IT department or service provider to investigate whether their firm's file-sharing services implement reasonable security measures to protect client confidence. Where possible, the firm should implement two-factor authentication to access its work applications and software. If after speaking with your IT provider/personnel you continue to have doubts as to security, you should obtain the client's consent before sharing any files or documents. The failure to employ basic data-security measures can have severe consequences, including civil liability for professional malpractice.

A security measure that law firms should consider implementing to protect client confidences is the encryption of files and emails sent both inside and outside the firm. Encryption is the process of converting digital information into a code, to prevent unauthorized access by outside parties

Additional best practices in addressing cybersecurity risks include: (1) understanding and using reasonable security measures, such as secure internet access methods; when accessing files remotely, attorneys should avoid logging on to unsecured Wi-Fi networks or "hotspots," which can expose both the attorney and the firm's files to malware – software designed by hackers that can infiltrate remote desktops and whose capabilities include logging keystrokes, uploading discovered data, updating malware and executing further malware; (2) training non-lawyer support staff in the handling of confidential client information and to report suspicious activity; (3) clearly and conspicuously labelling confidential client information as "privileged and confidential"; (4) conducting due diligence on third-party vendors providing digital storage and communication technology; (5) creating and implementing a data breach incident response plan; and (6) assessing the need for cyber insurance for data breaches. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 477 (May 2017).

Using secure internet access is of critical importance to avoid a man-in-the-middle attack, or "MITM" attack, which occurs when the communication between two systems is intercepted by a third party, i.e., a Man-in-the-Middle. This can happen in any form of online communication, such as email, web-browsing, and even social media. The MITM can use a public Wi-Fi connection to gain access to your browser, or even compromise your entire device. Once the MITN gains access to your device they have the ability to steal your credentials, transfer data files, install malware, or even spy on the user. To avoid the potentially significant and disastrous effects of a MITM attack, you should work off a secure Wi-Fi network and avoid using "hotspots."

Additionally, when using video-conferencing platforms such as Zoom, make sure that your meetings are password-protected to avoid a type of cyberattack called "Zoom-bombing," where strangers hijack a private Zoom teleconferencing chat and draw offensive imagery onscreen, such as pornographic images, personal information of the individuals in the chat, and even taunting them with hate speech and threats.

Turning to the part of your question regarding the civility (or lack thereof) of your adversary, the pandemic is certainly no excuse for bad behavior. As discussed in a recent Forum, 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; see also Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., April 2020, Vol. 92, No. 3. The commentary to Rule 1.2 further provides that in

accomplishing the client's objectives, the lawyer should not be offensive, discourteous, inconsiderate or dilatory. RPC 1.2 Comment [16]. And, while the RPC does not specifically address an attorney adversary's obligations under Rule 3.4 or 1.2 in the wake of a global pandemic, it is axiomatic that lawyers should be particularly sensitive to reasonable requests for extensions under such circumstances.

While your adversary's refusal to grant you a reasonable extension is not a per se violation of the RPC or a basis for a report to the Disciplinary Committee, such conduct may violate the New York State Standards of Civility (the "Standards"), particularly if this is the first time you are asking for an extension on the motion. See 22 N.Y.C.R.R. § 1200, App. A. As discussed in a prior Forum, the Standards of Civility were adopted as a guide for the legal profession, including lawyers, judges and court personnel, and outline basic principles of behavior to which lawyers should aspire. See Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2016, Vol. 88, No. 3.

The language of the Standards of Civility is clear – in the absence of a court order, a lawyer should agree to reasonable requests for extensions of time when the legitimate interests of the client will not be adversely affected. See 22 N.Y.C.R.R. § 1200, App. A. An adversary who refuses to provide a reasonable extension during the global pandemic in order to gain some tactical advantage is not just exhibiting bad form, but is creating a negative reputation and relationship with their adversary that may ultimately adversely affect their position in the litigation. By way of example, an uncooperative attorney is unlikely to get a professional courtesy in the future. Moreover, judges and juries generally do not look kindly upon attorneys that do not extend professional courtesies. In the ordinary course, reasonable requests for extensions of time should be handled by the attorneys in the case, not by the courts.

The flip side to this scenario, which is also likely to occur, is attorneys using the pandemic as an excuse for their dilatory tactics to delay the case and frustrate your client's ability to recover. As is the case with many ethical rules, the deciding factor in whether to grant or deny a request for an extension is the reasonableness of the request.

Separately, your obligations with respect to the supervision of subordinate attorneys remain unchanged. RPC 5.1 sets forth the responsibilities of law firms, partners, and managers over other lawyers. Lawyers serving in a managerial or supervisory role are required to make reasonable efforts to ensure that all attorneys comply with their ethical obligations. This duty becomes even more important in a time of disaster or emergency. See RPC 5.1. Specifically, RPC 5.1(b) requires lawyers with management or direct supervisory authority over other lawyers in the firm to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the RPC such as identifying dates by which actions must be taken in pending matters and ensuring that inexperienced lawyers are appropriately supervised. See RPC 5.1, Comment [2].

There are no bright line rules governing supervision. Comment [3] to RPC 5.1 tells us that each law firm should carefully consider the structure and nature of its practice when adopting policies governing the supervision of subordinate attorneys. See RPC 5.1, Comment [3]. For example, if the firm is relatively small and consists of mostly experienced lawyers, informal supervision and periodic review of compliance with the required policies will ordinarily suffice. Conversely, if the firm is much larger, and employs numerous junior attorneys, more elaborate measures may be necessary to place the firm in compliance with RPC 5.1. Id.

The degree of supervision required also varies on a case-by-case basis and is generally judged by what is reasonable under the circumstances. Factors that should be considered include: (i) the experience of the person whose work is being supervised, (ii) the amount of work involved in a particular matter, and (iii) the likelihood that ethical problems might arise while working on the matter. See id.

Generally speaking, it is best practice for supervising attorneys to remain apprised of subordinate attorneys' workload, implement a system for review of the subordinate attorney's work product and ensure that the subordinate attorney understands that system. In our experience, requiring subordinate attorneys to submit weekly status reports detailing the matters they are working on is a good first step to guarantee that no matter falls through the cracks.

Supervising attorneys also should establish an open line of communication with subordinate attorneys. In today's age, there are many mediums that allow for regular communication in this remote work environment, including video conferencing (via Zoom or Skype), telephone calls, email and even text messages. Therefore, in addition to communicating via email, a supervising attorney should schedule regular calls (via Zoom, Skype or telephone) with subordinate attorneys to check on their progress and review and discuss their work product and workload. How often you communicate with the individuals under your supervision will depend on the complexity of the matter and issues, and the upcoming deadlines in those matters. This too is a matter of the lawyer's reasonable judgment and care.

Notably, RPC 5.1(d) articulates a general principle of personal responsibility for acts of other lawyers in the law firm and imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. See RPC 5.1(d). Thus, lawyers acting in a supervisory or managerial role should be aware that their failure to exercise diligence in reviewing the work of subordinate attorneys may result in personal liability under RPC 5.1(d).

Whether you are working in the office or remotely, attorneys should always use their best efforts so that client communication and diligent representation continues uninterrupted. One of our prior Forums referred attorneys to RPC 1.4, which governs an attorney's obligations with respect to communicating with clients. RPC 1.4 states that attorneys are ethically obligated to promptly comply with reasonable requests for information from clients. RPC 1.4(a)(4); see Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., July/August 2016, Vol. 88, No. 6. To avoid noncompliance with RPC 1.4 while working remotely, attorneys should inform clients of the best way to reach them. If, for example, an attorney is able to forward calls from the office line to a personal cell phone, the attorney can tell clients that they may still use the office number. If attorneys do not have this ability, they need to advise their clients what alternate number they can be reached at (whether a cell phone number or home landline). In addition, attorneys should regularly check their office voicemail and email and avoid large gaps in response time.

Finally, attorneys must continue to maintain their professionalism and decorum despite working from the comfort of their homes. We have previously talked about the importance of dressing appropriately when appearing in front of a tribunal; proper dress is part of basic professionalism and a sign of respect. See Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 204, Vol. 86, No. 4. That standard still applies when participating in a virtual court conference, as well as video arbitrations and mediations. Judge Dennis Bailey of Broward County Florida recently expressed his dismay that attorneys appeared inappropriately on camera for virtual court hearings: "It is remarkable how many attorneys appear inappropriately on camera," Bailey said. "We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up that you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not." Debra Cassens Weiss, Lawyers are dressing way too casual during Zoom court hearings, judge says, ABA Journal (Apr. 15, 2020), https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says.

As always, the devil is in the details. What is deemed appropriate can be subjective, and there may not always be agreement on what should be worn when in a virtual court or ADR proceeding. Certainly, going shirtless, wearing a bathing suit or video conferencing from your bed is never appropriate. You should use common sense, and when in doubt, it is best to err on the side of caution and overdress to avoid facing the risk of having your choice of clothing overshadow the needs of your client or what you might be saying.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM:

I am an attorney in private practice focusing on personal injury law here in New York. I also do a bit of matrimonial law. My clients come from underserved communities, and many face extreme financial hardships. I've always known that Rule 1.8(e) prohibits giving financial assistance to clients in connection with a pending litigation and, as much as I have wanted to, I never gave anyone a dime. Rather, over the years, I developed a nice Rolodex with contacts at public service associations to refer these clients to so they could get their needs met. But with all this Covid-19 stuff going on it has gotten way worse and so many have now found themselves without a paycheck and are simply unable to meet their day-to-day needs. The public service organizations have been inundated, and my clients are unable to get desperately needed help. I was recently approached by a client, a young parent of two preschool-aged children, who is unable to buy groceries. And while I know that I probably shouldn't have, I figured that it would be okay to give him a few bucks for a couple of bags of groceries. He's a good kid and I know the money is going to his children. I am concerned I may have done something wrong but it really was so little to me and so much to him. What should I have done?

Sincerely,
Justa Bene Mensch

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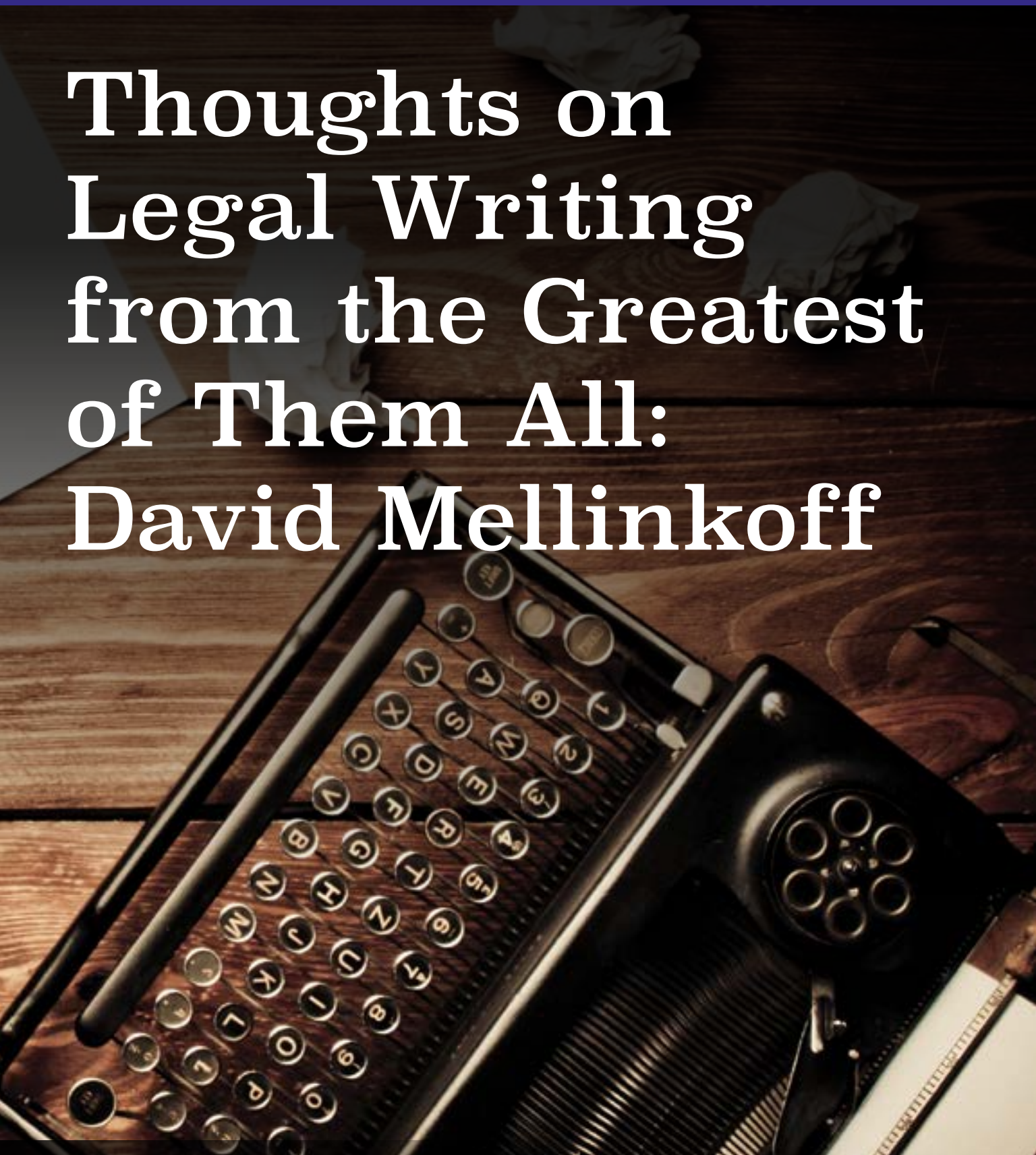
Current as of 5/20/20

Thoughts on Legal Writing from the Greatest of Them All: David Mellinkoff



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

> *"After six hundred years of lawsuits caused by language atrocities, a terrible suspicion is born. Maybe the lawyers don't understand each other."*[1]

David Mellinkoff, late Professor of Law at UCLA School of Law, is best known for authoring a series of books that decried the use of impenetrable language by lawyers and which contributed to a revolution in the use of language in teaching and practicing law.[2] A graduate of Stanford and Harvard Law School, Mellinkoff began his career as a Beverly Hills attorney. After the publication and success of his monumental 1963 book *The Language of the Law*, UCLA invited Mellinkoff to teach, a position he kept for 20 years. He continued writing until his death at age 85 in December 1999.[3]

Mellinkoff hated traditional legalese. He argued it fostered ambiguity and rendered legal documents, legislation, and scholarship inaccessible to lay people and attorneys. His disdain manifested in myriad ways, including a willingness to mock the sacred cows of legal scholarship. Legalese Cardozo declared "magisterial" Mellinkoff restyled as "pompous."[4] In his work, Mellinkoff wove a broad and extensive knowledge of linguistics, history, and Latin, French, and English into a sophisticated analysis of the origins of the American legal lexicon, and mapped out a future to give clarity to the writing that defines American law and legislation.

Although less recognized than *Language of the Law*, Mellinkoff's 1982 book *Legal Writing: Sense & Nonsense* is perhaps his writing ethos fully realized — a shorter, more instructional version of *Language of the Law*. *Legal Writing: Sense & Nonsense* mostly forgoes the extensive research of *Language of the Law* for a set of seven relatively brief, easily understood rules, a section of stepwise exercises breaking down wordy and unclear legal language, as well as a set of appendices that provide Modern English translations for Latin, French, and English legal terms of art.[5] This column explores the utility of *Legal Writing: Sense & Nonsense*.

STYLE

> *"lawsick n: a peculiar, English-like language commonly used in writing about law; peculiar in habitual indifference to ordinary usage of English words, grammar, and punctuation; and in preferring the archaic, wordy, pompous, and confusing over the clear, brief and simple; persists chiefly through a belief of its writers that these peculiarities lead to precision."*[6]

1. Distinguish peculiar language from precise language. Many common legal words are imported directly from Latin, French, and Old or Middle English — words that are foreign and otherwise meaningless in Modern English, however. Merely because a word is ancient or borrowed from another language and is otherwise meaningless in common English doesn't mean the word has any greater precision in expressing the writer's intent. Common English is more effective than esoteric legal words.

Merely because a word is ancient or borrowed from another language and is otherwise meaningless in common English doesn't mean the word has any greater precision in expressing the writer's intent. Common English is more effective than esoteric legal words.

2. Beware the consequences of imprecise writing. Precise writing isn't an absolute. All legal writers must marshal their resources, including "a discriminating use of terms of art; spelling things out when explanation helps to remove uncertainty; correct use of English, punctuation, and typography; and a planned sequence of ideas," to provide the best, most precise result possible.[7] Conversely, interpreting poor writing occasions the use of the "clichés of construction."[8] These rules, including the plain-meaning rule, the intent rule, and *contra profenterem* construction (even Mellinkoff couldn't fully escape Latin) guide judges and other readers to discern (and sometimes create) meaning from the ambiguous and sometimes meaningless words lawyers present.[9]

3. Don't abandon correct grammar for legalese. Mellinkoff is punchiest here. He rejected the traditional mixed-up Latin word order in legal documents that simultaneously gives legal writing an air of pomposity and unreadability. He admonished those lawyers and judges who delight in writing meaningless words to excess. Mellinkoff then broached the ever-prescient topic of pronouns in legal writing. He contended that modern legal writing is inherently sexist, and that substituting

plural pronouns, gender-neutral pronouns, or doubled pronouns as a remedy often results in excessively long or ungrammatical writing; in other words, the bane of Mellinkoff's mission. Mellinkoff failed to articulate a workable solution beyond being both grammatical and non-sexist, but he managed to end with a joke plucked right from 1982: "Neither male chauvinism nor anti-sexism ought to tolerate nonsense."[10]

4. Elect to use clear language. "Choose ordinary words over law words."[11] There's no need to use ancient languages and foreign words to express simple ideas the average person must understand. Authority isn't imparted by overly complicated terms of art; where possible, use ordinary English, Mellinkoff insisted.[12] Additionally, consider formatting; to Mellinkoff, footnotes are the manifestation of laziness, the instrument of authors who want to avoid the heavy burden of weaving research and thoughts into their writing. He even claimed that footnotes are more "devious than lazy" — that the author's intent is to conceal weaker material and arguments from the unsuspecting reader. Agree or not, footnotes distract the reader from the substance of the writing above the line. Use them sparingly, he intoned.[13]

5. Write law clearly. This is perhaps the trickiest part of strong legal writing. Mellinkoff ceded, especially to non-lawyers, that changing the language of the law without the substance may be dangerous. Further, eliminating excess language without deleting key elements of a law, contract, or other legal document bears risks. Mellinkoff's lawsick has so thoroughly infected legal writing and thought that it's difficult to sound like a legitimate source of law unless one is speaking in that arcane and ambiguous language.[14] Ultimately, omitting unnecessary law language and articulating the target audience strengthen legal writing. Tread carefully before trimming it away.[15]

6. Begin with a plan. The greatest threat to good writing is haste. We should expect something fast but anticipate that it'll be delivered in a poor state. Allot enough time to allow a thoughtful and considered piece, Mellinkoff opined. In the same vein, working from an outline allows the writer to lay out all ideas, tie down the strongest ones, and spot the bad ones before they develop into full arguments.[16]

7. "Cut it in half!" Wordiness is the final enemy in preparing comprehensible legal writing. Extra words weaken precision and clarity and foster mistakes. Mellinkoff helpfully offers up a list of 15 categories of extraneous, confusing, or otherwise unnecessary words to cut. Finally, rewrite what's been prepared; Mellinkoff advocated deleting and rewriting up to 50 percent of any legal writing. Regardless of the writer's motivation to undertake drastic revision, a significant cut will allow a lawyer to view the core intent of the piece.[17]

"BLUNDERS AND CURES"

> *"Whether it's your legal writing or someone else's, THE QUESTION is always in order: 'Does it have to be like this?'"*[18]

The second section of *Legal Writing: Sense & Nonsense* contains a set of sample edits to legislation, contracts, and a specimen taken from a corporate law. Mellinkoff took each sample, in at least one instance just a single sentence, and applied his rules, dissecting, outlining, rewriting, and reformatting until he achieved the desired effect. Here, Mellinkoff's approach receives the practical treatment it deserves. He wrung from his samples meaning out of every word, phrase, and punctuation mark, and discarded the rest.

The final appendices are less a reference than a curiosity. Mellinkoff takes Old and Middle English words, old formalisms, Law Latin and Law French, as well as various legal terms of art and translates the words and phrases into Modern English. Mellinkoff also provides an overview of Plain Language Laws, with references, and a bibliography for those who need a review of the rules of grammar.

Not truly a reference book, *Sense & Nonsense* conveys Mellinkoff's humor and vast knowledge of history, language, and law through frequent anecdotes and examples. Mellinkoff's antidote to lawsick may have been to sweep away the ancient and brainless language repeated by generations of lawyers, but his scholarly work retained its reverence for history and language.

The Legal Writer will continue its series on what we can learn from the great writing teachers — lawyers and non-lawyers.

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1. David Mellinkoff, *Legal Writing: Sense & Nonsense* xi (West Publishing Co. 1982) (Sense and Nonsense).
2. Douglas E. Abrams, *Legal Writing: Sense and Nonsense*, 74 J. Missouri Bar 94 (2018).
3. Myrna Oliver, *David Mellinkoff; Attorney Advocated Plain English*, Los Angeles Times (Jan. 4, 2000),

https://www.latimes.com/archives/la-xpm-2000-jan-04-mn-50558-story.html.

4. David Mellinkoff, *The Language of the Law* 27 (Little, Brown and Co. 1963).
5. Sense and Nonsense, *supra* note 1.
6. *Id.* at xii.
7. *Id.* at 15.
8. *Id.* at 17.
9. *Id.* at 15–19.
10. *Id.* at 51.
11. *Id.* at 62.
12. *Id.* at 63.
13. *Id.* at 94.
14. *Id.* at 105.
15. *Id.* at 101.
16. *Id.* at 123.
17. *Id.* at 130–32.
18. *Id.* at xiii.

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