

NEW YORK STATE BAR ASSOCIATION Journal



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**Momentum Grows for
NYSBA-Backed Bill
To Repeal NY's Law
Office Requirement**
Christian Nolan

Supreme Court Takes Gun Law Case for the
First Time in a Decade

Georgia vs. New York on Voting Rights:
No Contest

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**LAW PRACTICE
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THE IMPORTANCE OF
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THE NEW NORMAL



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by Christian Nolan

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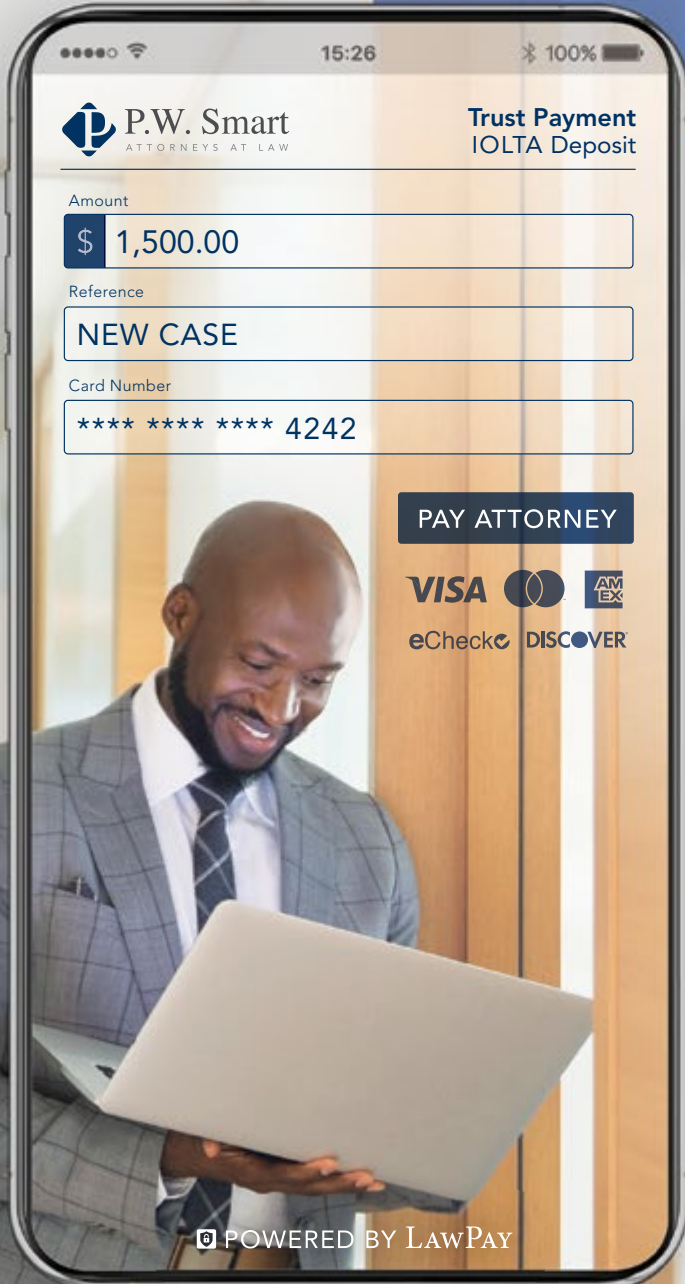
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The Past Year Offered Unique Opportunities for Transformation; Let Us Boldly Seize Them and Not Shy Away From Change



The past year has taxed us – our nation, our state, our profession and our society – in ways no one could have predicted or desired. The twin crises of the coronavirus pandemic and social justice as they relate to law enforcement combined to expose longstanding inequities, and it is far past time to address them.

As eager as we may be to put this trying time behind us, it is imperative that we do not close our eyes to the revelations and lessons it brought, no matter how difficult they may be. We find ourselves on the cusp of a great opportunity to take what we have learned and change things for the better.

These changes will not come easily. In many cases, entire systems – policing, health care, education and even our courts – require significant reimagining and retooling to meet the needs of the so-called new normal. But we must rise to the challenge. As lawyers, we are uniquely positioned to assist in this endeavor, and we must start by getting our own house in order.

The restrictions imposed as a result of the COVID-19 crisis exacerbated the already considerable difficulties faced by some of the most vulnerable members of our society, including access to justice, which is the very foundation of our democracy. Shuttered courts and virtual proceedings presented additional barriers to those who do not have easy access to the internet, cannot afford legal representation or for whom English is not their first language.

But there are also advantages to expanding virtual proceedings in the legal profession, particularly when it comes to reducing administrative burdens for court

employees and attorneys alike. Now that there is light at the end of the pandemic tunnel, and the availability of vaccines has facilitated the reopening of our courts and offices, it is time for us to take stock of the changes that occurred over the past year and determine what worked and what did not.

One of my top priorities during my year as president will be to establish a task force on the post-pandemic future of the legal profession, whose members will be charged with determining how collectively we should move forward to maximize the opportunities and overcome the hurdles presented by our new way of life.

In addition, I will convene a task force on racism, social equity and the law, with an eye toward building on the work the association has undertaken to address some of the most intransigent regulations, laws and structures that are collectively holding us back as a society from achieving true equality. We will strive to see every issue we tackle this year through the lens of equity, as we know all too well that racism and injustice pervades almost every aspect of our lives.

And that effort will extend beyond race to also include individuals who suffer stigma and abuse as a result of their sexual or gender orientation. Across the nation, we are seeing an alarming rise in efforts to curb the rights of individuals simply because of the way they choose to express themselves. Advocates say that 2021 was a record-breaking year for anti-transgender legislation, with 33 states introducing a variety of bills targeting the freedom of this vulnerable population. This cannot stand. With its reputation as a progressive leader, New York can and

should speak out against these prejudicial efforts and set the standard for true equitable treatment of all individuals under the law.

State-level initiatives like those that target transgender Americans are born at the ballot box. The free and unfettered ability to vote is a fundamental right, and it, too, is under attack. The past year has brought an alarming rise in efforts to undermine this inalienable right – starting with a pre-presidential push by the former administration to discredit the outcome of the 2020 election, followed by the unprecedented Jan. 6 attack on our nation's Capitol by those bent on overturning the very bedrock of our democracy and our nation.

Now we see states across the nation engaged in a wholesale push to restrict voting access. Again, this cannot stand. New York, thankfully, has worked in recent years to improve and broaden access to the ballot box. We should be a beacon of hope and a shining example of how to encourage participation in democracy, not limit it. The association has a role to play here as well, putting the considerable expertise and experience of our members at the disposal of lawmakers who seek to protect and preserve this important tenet of our society.

I am aware the agenda I have outlined above is both far-reaching and ambitious. And there will undoubtedly be additional issues that arise over the coming year that we will be compelled to address. But I firmly believe now is the time for us to tackle difficult and intractable issues or risk being left behind as the world races ahead.

The events of the past year upended and unsettled us, but also accelerated and mandated changes that arguably would have taken much longer to accomplish. Now that we are here, we must take advantage and reinvent ourselves as a profession and certainly as an association. There is no turning back.

To remain relevant, we cannot continue doing things the way we have always done them before.

Some of you are progressive and liberal and others are deeply conservative in your views. However, we can still speak to the importance of the issues and we can find points of commonality, even if we do not yet have clearly established NYSBA positions.

I look forward to working with you all.

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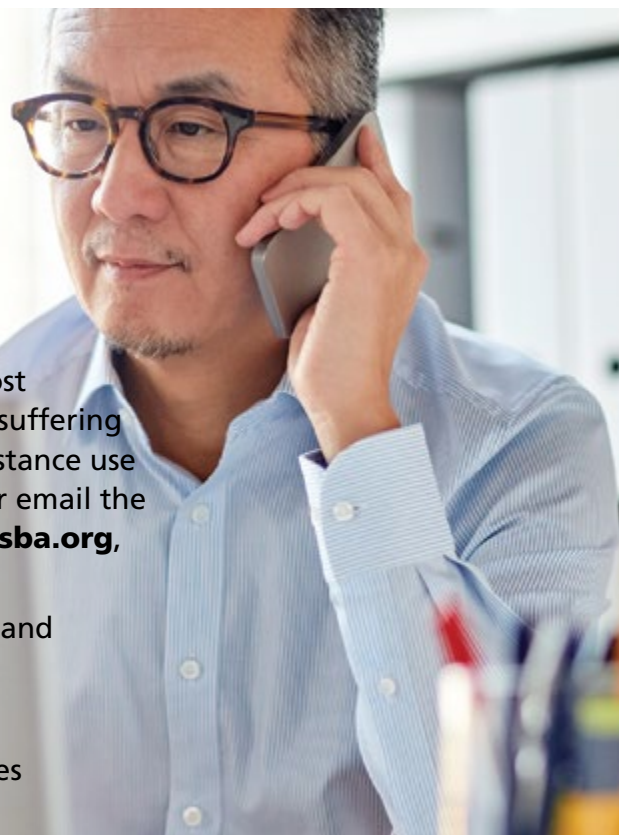
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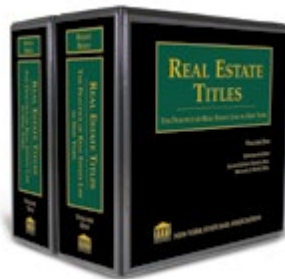
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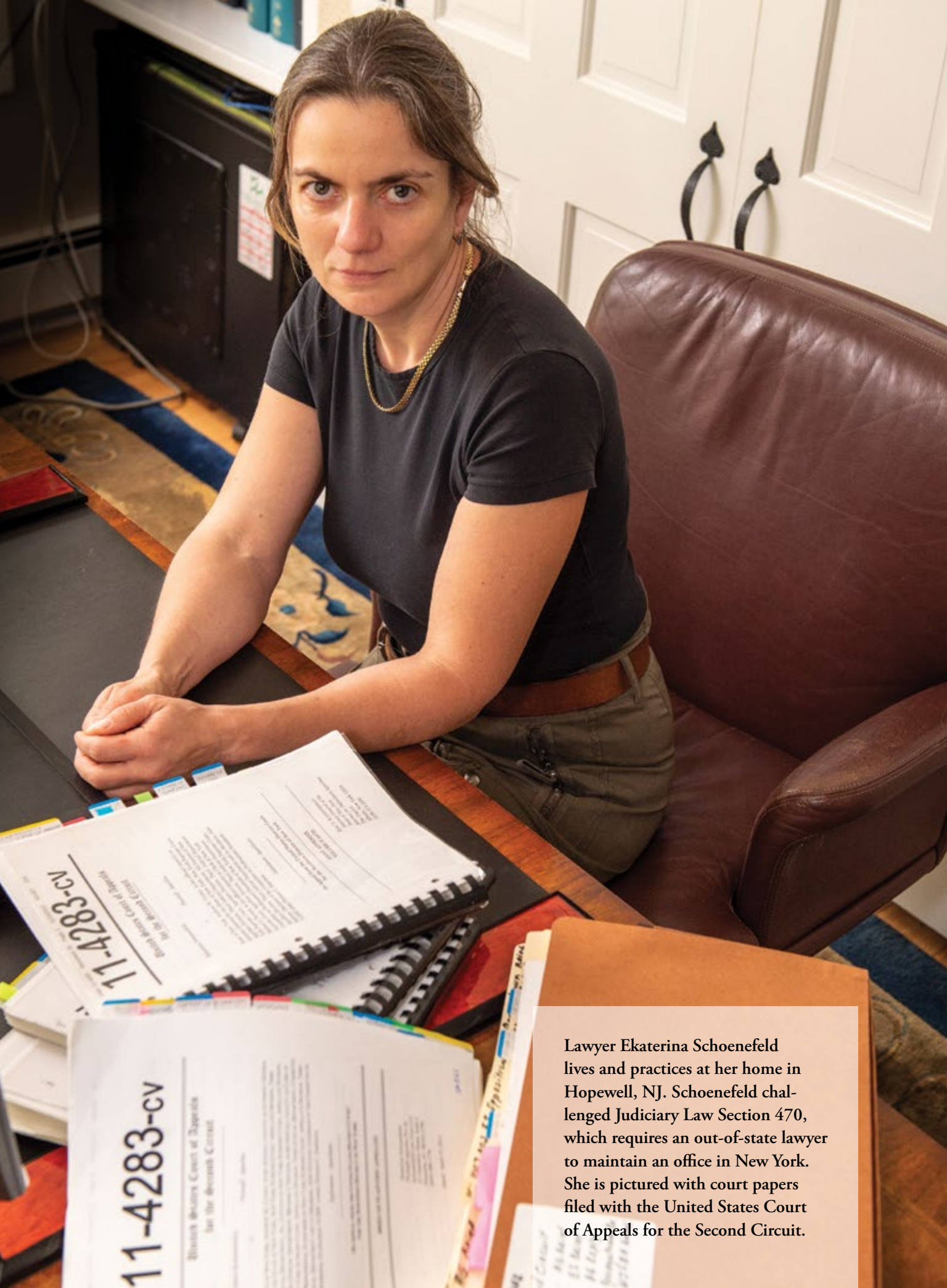
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Lawyer Ekaterina Schoenefeld lives and practices at her home in Hopewell, NJ. Schoenefeld challenged Judiciary Law Section 470, which requires an out-of-state lawyer to maintain an office in New York. She is pictured with court papers filed with the United States Court of Appeals for the Second Circuit.

Momentum Grows for NYSBA-Backed Bill To Repeal NY's Law Office Requirement

By Christian Nolan

When Ekaterina Schoenefeld was considering opening her own law firm about 15 years ago, she attended a New York State Bar Association CLE course called “Starting Your Own Practice,” where she first learned about Judiciary Law Section 470, which requires lawyers admitted to practice in New York – but residing in other states – to maintain a brick-and-mortar law office in New York State.

“That neither made sense nor did it sound right to me,” said Schoenefeld, who resides in New Jersey and is admitted to practice in her home state and in New York.

After she opened her firm in October 2007, she did some research and decided to challenge the constitutionality of Section 470. What came next was nearly a decade of litigation closely watched by the legal community – especially from nearby out-of-state residents who hoped the outdated law would no longer impede their practicing in New York without an office.

“I’m glad I tried,” said Schoenefeld, noting that she feels her case brought the issue to light. “It wasn’t a literal win, but once the repealing of the statute passes, I would consider it a win.”

While the court challenge was ultimately unsuccessful, Schoenefeld is hopeful that NYSBA-backed legislation to repeal the controversial statute will eventually be approved. While there was disappointment that the Assembly did not vote on the bill this past session, there is optimism going forward. Support for repeal went further this year than ever before. The New York State Senate unanimously approved the legislation, and the New York State Assembly’s Judiciary Committee voted to advance the bill.

“The New York State Bar Association enthusiastically supports the repeal of this antiquated law,” said Immediate Past NYSBA President Scott M. Karson, who submitted written testimony to lawmakers in March in support of the legislation.

NYSBA has long supported efforts to repeal the law as nearly 25% of its members reside or practice outside the state of New York.

“In our rapidly modernizing legal world, the profession has adapted with electronic filing of documents in the courts, virtual conferences and court proceedings, along with already established standards for perfecting service.

Russ DeSantis Photography and Video





Our laws must continue to adapt with the times too,” said Karson. “Judiciary Law Section 470 places an onerous burden on rural and underserved communities and limits the availability of legal services simply because of where an attorney chooses to call home.”

IMPACT ON THE PROFESSION

As far back as 1862, New York State required practicing attorneys to be state residents. The statute recognized as Section 470 was enacted in 1909. The law was passed because the New York State Legislature then believed that a nonresident attorney without an office in New York would be more difficult to find when serving notice of a legal action.

In 1981, the New York Court of Appeals struck down the residency requirement on the ground that it violated the federal Constitution, but the New York Legislature did not amend the language of Section 470. Thus, if non-resident lawyers do not maintain a law office in New York, then they are in violation of Section 470.

As technology has continued to evolve in recent decades, the law has only grown increasingly more outmoded. For Ronald B. McGuire, a solo practitioner who lives in New Jersey and practices there and in New York, staying compliant with the law has been a struggle for over 30 years.

“If you are not working out of a traditional law office, it’s impossible to know from the case law and the statutory law exactly what the minimum requirements for an office are,” said McGuire. “The cases are inconsistent, and the statute is completely vague to the issue.”

McGuire said if there was no Judiciary Law Section 470, he would have worked out of his home office in New Jersey and saved the costly expense of renting out office space in New York City.

The lack of clear guidance on what constitutes a law office after all these years particularly bothers McGuire. He started his career at a large law firm and did not have to worry about compliance with Section 470 until

starting his own practice. He soon discovered a dearth of information on what constituted a law office for the purposes of the statute. He said every single case on the issue had been decided on an ad hoc basis, and that no court has articulated a bright-line rule on what the minimum requirements of a law office are: Does it require being open certain hours? Does the office need to be open, requiring him to hire a staff member while he is away on vacation? Must it have a fax machine, phone, etc.?

“It’s clear that whatever a law office was in 1909, it’s not that anymore,” said McGuire. “We need 21st century rules for a 21st century law practice.”

While the Schoenefeld case was pending, Georgetown University Law Center’s Institute for Public Representation submitted an amicus brief detailing the struggles lawyers have had navigating Section 470.

For instance, with regard to the financial burden, one lawyer paid \$2,436.40 per month to rent a Manhattan office in addition to her New Jersey office – an expense she could no longer afford. She was only able to do this temporarily by not paying for a legal assistant. Another paid \$10,000 per year to rent a New York office in addition to maintaining his New Jersey office.

Maintaining an office address in New York and forwarding the mail to out-of-state locations has also been a burden. Some lawyers pay to have their mail sent by FedEx daily from the New York office to the out-of-state office. This is quite costly. For others – who do not receive the mail in as timely a fashion – it has been costly as well, with one lawyer reporting missing a deadline in a case.

Many other lawyers reported turning down cases in New York or refraining from practicing law in New York altogether due to the costs associated with acquiring office space.

Andy Chen, a California lawyer in Silicon Valley (who was not part of the amicus brief), is also admitted to practice law in New York but refrains from doing so due to Section 470.

“If [Section] 470 went away, I think it would allow me to change my current practice to include more people who have legal issues involving hybrids of New York and California law or to actually help those clients in New York,” said Chen. “Right now, I think it’s a circular thing. In other words, I don’t have any clients in California requiring New York law knowledge because I haven’t bothered to seek those clients out because Section 470 means I wouldn’t be able to take those clients anyway. So, it’s pointless to even go after them.”

CONSTITUTIONAL CHALLENGE

Schoenefeld – knowing that courts have long held that one’s residency cannot be a prerequisite for admission to the bar of any state and that federal courts may not

require an attorney to maintain an office in the state where a district court is located – challenged the constitutionality of Section 470 in federal district court in 2009.

In *Schoenefeld v. State of New York*,¹ the U.S. District Court for the Northern District of New York ruled in 2011 that Section 470 violates the Privileges and Immunities Clause of the U.S. Constitution. The state Attorney General appealed and during the appeal process in 2014, the U.S. Court of Appeals for the Second Circuit asked the state Court of Appeals to clarify the meaning of Section 470.²

In a 2015 opinion written by then-Chief Judge Jonathan Lippman, the state Court of Appeals replied, “We hold that the statute requires nonresident attorneys to maintain a physical office in New York.”³

By 2016, the Second Circuit upheld Section 470, holding that the statute did not violate the Privileges and Immunities Clause.⁴ Schoenefeld filed a petition for certiorari to the U.S. Supreme Court, which was denied in 2017.

In 2016, after the Second Circuit opinion, then-NYSBA President David P. Miranda formed the Working Group on Judiciary Law Section 470 to address concerns from members about the law. Past NYSBA President David M. Schraver was appointed to lead the 12-member working group.

In January 2019, NYSBA’s House of Delegates approved a resolution calling for the outright repeal of the law as recommended in the report of the working group.

“The working group has concluded that Section 470 is no longer necessary to ensure that a nonresident attorney who is a member of the New York bar may be served with process,” the group wrote in its report. “Moreover, the requirement of a physical office is often onerous to non-resident attorneys, but there is no nondiscriminatory basis for imposing that burden.”

The report acknowledged that the most frequent consequence of Section 470 has been dismissal of actions brought by nonresident attorneys who do not maintain a physical office within New York State.

Recent cases further illustrate this. In *Arrowhead Capital Finance v. Cheyne Specialty Finance Fund*,⁵ defense counsel hired an investigator who discovered the plaintiff’s lawyer’s failure to maintain an office in New York. The case was then dismissed, and the appellate court affirmed the dismissal without prejudice because of the Section 470 violation.

In *Marina District Dev. Co. v. Taledano*,⁶ the case was dismissed because plaintiff’s counsel did not maintain a physical office in New York. The lawyer, with a Philadelphia office and phone number, unsuccessfully argued

that his virtual office at the New York City Bar Association satisfied the requirements of Section 470.

“By definition, a virtual office is not an actual office,” the Supreme Court in New York County wrote in its ruling. That ruling had relied on *Law Office of Angela Barker, LLC v. Broxton*,⁷ where the appellate court similarly was unconvinced by the notion of a “virtual office.”

“Plaintiff’s counsel’s use of a ‘virtual office’ at a specified New York City address, instead of maintaining a physical office for the practice of law within New York at the time the action was commenced, was a violation of Judiciary Law Section 470, and requires dismissal of the underlying action,” the court wrote.

ACCESS TO JUSTICE

John B. Sheehan, who serves on NYSBA’s Membership Committee and was also part of the Working Group on Judiciary Law Section 470, said that the coronavirus pandemic has only further illustrated how antiquated the law really is. During the pandemic, most every lawyer had a “virtual office.”

“Considering the experiences we’ve all gone through over the past year and seeing the wheels of justice continue to move forward with conference calls and Zoom, it shows it can be done,” said Sheehan. “You don’t need to be sitting in one location What it comes down to is access to justice.”

Regarding access to justice, NYSBA members have noted that the law restricts retired lawyers from pursuing New York pro bono work if they now live in another state.

After Sheehan retired, he moved five minutes over the border to the Berkshires in Massachusetts. Suddenly, he could not help clients who had also moved from New York and still had legal needs. Sheehan, who now lives in Vermont, said he has had to refer cases due to Section 470.

“It’s not a big hardship on me but if people want you to represent them, then it should be up to them to choose,” said Sheehan. “. . . It’s not like I’d be throwing up billboards on the [New York State] Thruway if 470 was repealed.”

1. *Schoenefeld v. New York*, 907 F. Supp. 2d 252 (N.D.N.Y. 2011), *rev’d*, 821 F.3d 273 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1580 (2017).

2. *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014).

3. *Schoenefeld v. New York*, 25 N.Y.3d 22 (2015).

4. 821 F.3d 273.

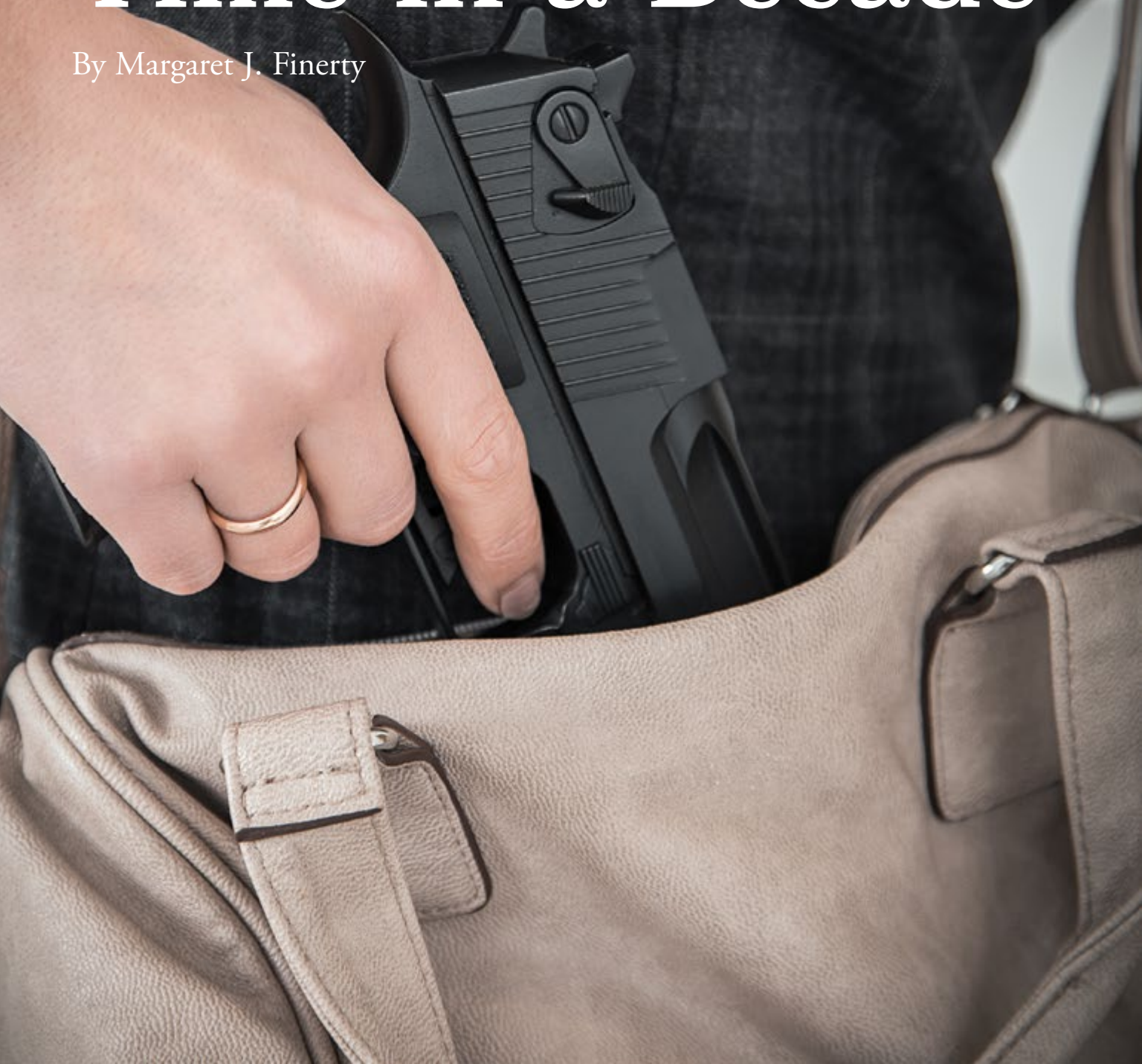
5. *Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 N.Y.3d 645 (2019).

6. *Marina Dist. Dev. Co. v. Taledano*, 60 Misc. 3d 1203(A) (Sup. Ct. N.Y. Co. 2018), *rev’d*, 174 A.D.3d 431 (1st Dep’t 2019). A reviewing court later noted that rather than dismiss the action, the court should have given the plaintiff an opportunity to cure by, say, engaging a co-counsel.

7. *Law Off. of Angela Barker, LLC v. Broxton*, 60 Misc. 3d 6 (1st Dep’t 2018).

Supreme Court Takes Gun Law Case for the First Time in a Decade

By Margaret J. Finerty



INTRODUCTION

Last November the New York State Bar Association's House of Delegates adopted the report and recommendations of the Task Force on Mass Shootings and Assault Weapons, which I co-chaired with NYSBA Past President David Schraver. In its report, "Reducing the Epidemic of Mass Shootings in the United States – If Not Now, When?"¹ the task force set forth several concrete recommendations for legislative change that would go a very long way toward reducing not only mass shootings but gun violence in general, as well as suicides, in the United States. NYSBA has included the recommendations set forth in the Task Force Report in its 2021 federal legislative priorities and is actively reaching out to lawmakers in Congress to achieve their enactment.

The Task Force Report addressed some of the major court decisions that have passed on various gun control legislation enacted throughout the country over the last several years. These include the key United States Supreme Court decisions of *District of Columbia v. Heller*² and *McDonald v. City of Chicago*.³ Not until January 22, 2019, in the case of *New York State Rifle & Pistol Association v. City of New York*, did the Supreme Court agree to take up the first review of a Second Amendment challenge since *McDonald*. The case was ultimately deemed moot, vacated and remanded in a per curiam opinion on April 27, 2020,⁴ after New York City amended its rule that had previously limited the circumstances under which a handgun could be removed from a premise and transported, where the owner had a license to possess it on that premise. On June 15, 2020, the Supreme Court continued the trend by declining to review a total of 10 Second Amendment cases pending on its docket. This was surprising to many who follow Second Amendment developments since these cases involved significant issues, and some displayed a split among the circuit courts. Also, four of the court's conservative members – Justices Thomas,⁵ Alito,⁶ Gorsuch,⁷ and Kavanaugh⁸ – all expressed concerns that lower federal and state courts have not been applying the court's Second Amendment precedent correctly, and it only takes four justices to grant a petition for a writ of certiorari. Commentators posit that the justices may have believed the timing was not right to take up these cases in light of the political climate and uncertainty whether there would be a majority that would support a loosening of gun restrictions.⁹

In light of this background, it is noteworthy that on April 26, 2021, the Supreme Court decided to review the New York law that imposes strict limits on carrying guns outside of the home, in the case of *New York State Rifle & Pistol Association v. Corlett*. This law has been on the books for a very long time and requires that individuals who want a license to carry a gun outside of their home

demonstrate a "proper cause." Some legal experts believe that the court may have decided that now is the time to take up a Second Amendment case in light of the change in the composition of the justices.¹⁰ With the death of Justice Ruth Bader Ginsburg, and the addition of Justice Amy Coney Barrett, whose decisions¹¹ as a judge on the Seventh Circuit suggest that she shares the conservatives' concerns about the scope of the Supreme Court's Second Amendment decisions, there may be more confidence that a majority decision in favor of loosening gun restrictions can be achieved.

CASE BACKGROUND

*New York State Rifle & Pistol Association v. Corlett*¹² is a challenge to New York's concealed carry law. The New York law¹³ at issue requires applicants to demonstrate "proper cause" to obtain an unrestricted license to carry a concealed firearm outside the home. Two men, backed by the New York State Rifle & Pistol Association, challenged the law in the Northern District of New York, arguing that it violates the Second Amendment. The district court¹⁴ rejected the challenge to the law in 2018, and in 2020, the Second Circuit, relying on its 2012 decision in *Kachalsky v. County of Westchester*,¹⁵ affirmed by summary order the district court's rejection of the challenge.¹⁶ In *Kachalsky*, the Second Circuit had occasion to consider the constitutionality of the New York law. There, the court applied intermediate scrutiny and held that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention," and "the proper cause requirement is substantially related to these interests."¹⁷ The Supreme Court granted certiorari to determine the specific question of "whether the state's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."¹⁸ The case is scheduled to be argued in the fall, with a decision expected sometime next year.

The Second Circuit is not the first appellate court to grapple with this issue, and the split in the circuits is no doubt a significant reason that certiorari was granted.



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Getnick & Getnick associate Nico Gurian contributed to this article.

The First,¹⁹ Third,²⁰ Fourth,²¹ and Ninth²² circuits have analyzed similar laws and, like the Second Circuit, held that they pass constitutional muster. By contrast, the D.C. Circuit²³ and the Seventh Circuit²⁴ have held that similar “proper cause” laws are unconstitutional under *Heller*.

Highlighting this split in the Courts of Appeals, the law’s challengers urged the Supreme Court to weigh in. On the substance, petitioners argue that the text, structure, and purpose of the Second Amendment all confirm that its protection of the right to bear arms extends to public spaces. They argue that the Second Circuit “distorted the holding of *Heller*” and that *Heller* itself also supports an expansion of gun rights beyond the home.²⁵ In opposing certiorari, New York’s attorney general argued that, in fact, none of the Courts of Appeals to engage with this issue held that the Second Amendment right to bear arms was *necessarily* limited to the home.²⁶ At the same time, however, the New York attorney general noted that all of these courts, in line with Supreme Court precedent, acknowledged that “the right to carry firearms in public is not unlimited and can be subject to regulatory measures consistent with longstanding limitations.”²⁷ In addition, the attorney general argued that New York’s law “directly advances the State’s compelling interests in protecting the public from gun violence.”²⁸

GUN VIOLENCE CONTINUES TO PLAGUE THE UNITED STATES

Despite the global coronavirus pandemic, our country has continued to endure a relentless scourge of mass shootings and gun deaths.²⁹ Tragic examples include the March 16 mass shooting this year during which eight people were killed and one person seriously injured at three massage parlors in and near Atlanta, Georgia. Six of the eight victims killed were women of Asian descent.³⁰ Almost a week later, on March 22, 10 people, including a police officer, were killed in a grocery store in Boulder, Colorado, when a shooter opened fire using an AR-15-style pistol with an arm brace.³¹

Closer to home, on May 8 of this year, two brothers who worked as sidewalk CD peddlers in the Times Square area of New York City had an argument, during which one brother, who has a lengthy arrest record, fired at the other. Instead of the bullets hitting the intended target, three innocent bystanders were shot, two women and a four-year-old girl.³² These three Times Square victims are just a few of the hundreds of people who have been shot in New York City in 2021. New York Police Department statistics indicate that as of May 9 of this year, 505 people have been the victims of gun shootings, the most that the city has suffered since 2010.³³

In light of this ongoing national crisis, both Congress and the Biden Administration have advanced initiatives to attack the problem. In March, the House of Representatives passed two bills that would close loopholes in the gun background check system (that legislation is awaiting action in the Senate).³⁴ These proposals correspond to recommendations in the Task Force Report.³⁵ In April, President Biden called on Congress to go further and ban assault weapons and high-capacity magazines.³⁶ In addition, President Biden announced that the Department of Justice would be implementing various new rules to reduce gun violence.³⁷ Many of the President’s proposals were also recommended in the Task Force Report.

The concerns regarding people carrying guns in public do not just apply to individuals who, under the law, do not have a right to purchase or possess them. The more people who are allowed to carry concealed firearms in public, the greater the risk to public safety and harm to individuals. The American Bar Association has issued policy³⁸ on concealed carry laws that give discretion to enforcement authorities to determine whether a permit or license to engage in “concealed carry” should be issued in jurisdictions that allow the carrying of concealed weapons, and opposes laws that limit such discretion. The report noted the increased risk of injury and death from carrying loaded and concealed firearms in public:

The carrying of loaded, concealed firearms in public increases the risk of gun-related deaths and injuries. The danger posed by criminals who engage in this conduct is obvious. However, public safety is threatened even where persons carry concealed guns pursuant to a state permit or license. Such carrying increases the chance that everyday disputes will escalate into deadly encounters, and the risk that accidental shootings will occur where large numbers of people are gathered. The concealed carrying of firearms also places law enforcement officers at heightened risk of gun violence.³⁹

SUPREME COURT PRECEDENT AND PAST COURT DECISIONS

The Task Force Report noted that the Supreme Court cautioned in *Heller* that the Second Amendment right it recognized, that law-abiding citizens may possess an operable handgun in the home for self-defense, is “not unlimited,” and does not confer a “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁴⁰ Significantly, the court said that “prohibitions on carrying concealed weapons were lawful under the Second Amendment” and identified a non-exhaustive list of “presumptively lawful regulatory measures,” including “prohibitions on the possession of firearms by felons and the mentally ill,” laws forbidding

guns in “sensitive places” like schools and government buildings, and “conditions and qualifications” on the commercial sale of firearms.⁴¹ In *McDonald*, the Supreme Court, while invalidating a Chicago law that generally prohibited the possession of handguns, repeated that a broad spectrum of gun laws remain constitutionally permissible.⁴²

Although *Heller* did not address the issue of government regulation of carrying guns in public, many courts indicate that the Second Amendment does apply to gun possession outside of the home. There is a consensus among these courts, however, that the government has broad authority to regulate guns in public where firearms may endanger third parties. An August 25, 2020 Giffords Law Center report⁴³ found that courts in general affirm the constitutionality of laws that restrict carrying guns in public. Except in cases where laws prohibit all people from carrying guns in all circumstances, most courts have rejected challenges to laws that regulate carrying guns outside of the home.⁴⁴ The report notes that courts have decisively upheld laws that require someone to have a license to carry a gun outside of the home as well as conditions on such licenses, such as: “Requiring an applicant for a license to carry a concealed weapon to show ‘Good cause,’ ‘proper cause,’ ‘need,’ or to qualify as a ‘suitable person.’”⁴⁵

The appropriate level of scrutiny in Second Amendment cases depends on the nature of the conduct being regulated and the degree to which the challenged law burdens Second Amendment rights. In general, a consensus has emerged that intermediate scrutiny, which examines whether a law is reasonably related to an important or significant government interest, is appropriate in the majority of Second Amendment cases. Under “intermediate scrutiny,” courts will uphold the challenged law upon finding it furthers an important government interest and does so by means that are substantially related to that interest.⁴⁶ A simple preponderance of evidence standard should be applied, except in the narrow class of cases in which a challenger can show that the law “substantially” or “severely” burdens a core Second Amendment right.⁴⁷

CONCLUSION

The Supreme Court has made it clear that the important Second Amendment right to keep and bear arms, like other constitutional rights, is subject to reasonable limitations. A proper and necessary balance between rights protected by the Second Amendment and the fundamental interests of public safety must be maintained for the public good. There is a long history in our country of allowing states to decide this proper balance in passing



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concealed carry laws. Now, a newly constituted Supreme Court will be taking up this question. This significant Supreme Court decision will have a momentous impact on the safety and well-being of not only New Yorkers, but the entire nation. All of us will be watching and waiting.

1. An online version of the task force report is available at <https://nysba.org/app/uploads/2020/11/12-Final-Report-11.5.2020-Task-Force-on-Mass-Shootings-and-Assault-Weapons-With-cover-FINAL.pdf>.

2. 554 U.S. 570 (2008). The Supreme Court in a 5–4 decision held for the first time that the Second Amendment protects an individual right of law-abiding citizens to possess an operable handgun in the home for self-defense. Significantly, the court cautioned that this right is “not unlimited” and that certain regulations and limitations are “presumptively lawful.”

3. 561 U.S. 742 (2010). The Supreme Court in a 5–4 decision held that the Second Amendment right set forth in *Heller* is incorporated in the Due Process Clause of the Fourteenth Amendment and binds the states as well as the federal government.

4. 140 S. Ct. 1525 (2020); <https://casetext.com/case/new-york-state-rifle-pistol-assy-inc-v-city-of-new-york>.

5. See, e.g., *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J. dissenting from the denial of certiorari) (arguing that the court should have granted certiorari in a case challenging New Jersey’s handgun-carry-merit laws because the case “gives [the court] the opportunity to provide guidance on the proper approach for evaluating Second Amendment claims; acknowledge that the Second Amendment protects the right to carry in public; and resolve a square circuit split on the constitutionality of justifiable-need restrictions on that right.”).

6. See, e.g., *New York Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Alito, J. dissenting) (explaining that most lower courts “have failed” to properly apply the Supreme Court’s decision in *Heller* and *McDonald*).

7. See, e.g., *id.* (Justice Gorsuch joined Justice Alito’s dissent in full).

8. See, e.g., *id.* (Kavanaugh, J. concurring) (explaining that he “share[s] Justice Alito’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*,” and expressing a belief that “[t]he Court should address that issue soon.”).

9. Amy Howe, *Court To Take Up Major Gun-Rights Case*, SCOTUSblog (Apr. 26, 2021, 10:50 AM), <https://www.scotusblog.com/2021/04/court-to-take-up-major-gun-rights-case/>; Cody J. Wisniewski, *Why Did the Roberts Court Punt on Ten Second Amendment Cases?*, National Review (June 19, 2020), <https://www.nationalreview.com/2020/06/why-did-the-roberts-court-punt-on-ten-second-amendment-cases/>.

10. As Professor Adam Winkler, a law professor at the University of California, Los Angeles, and the author of *Gunfight: The Battle Over the Right to Bear Arms in America* (2013) explained in *The New York Times* recently, “Trump’s appointments to the Supreme Court have created a likely strong majority in favor of curtailing America’s gun laws.” See Adam Liptak, *Supreme Court to Hear Case on Carrying Guns in Public*, *N.Y. Times* (Apr. 26, 2021), <https://www.nytimes.com/2021/04/26/us/supreme-court-gun.html>.

11. See, e.g., *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J. dissenting) (arguing that the Second Amendment only permits legislatures from banning individuals shown to be dangerous – but not all felons categorically – from owning guns, and expressing that the majority’s holding treated the Second Amendment as a “second-class right”).

12. The original defendant, George P. Beach II, was replaced by Keith Corlett after Corlett succeeded Beach as New York State Police Superintendent upon Beach’s retirement. Beach was named as a defendant in his official capacity in the district court.

13. Under New York law, the only way to lawfully possess a firearm is to obtain a license pursuant to N.Y. Penal Law § 400.00. Section 400.00(2)(f) – the section now at issue before the Supreme Court – provides that such a license “shall be issued to . . . have and carry [a firearm] concealed . . . by any person when proper cause exists for the issuance thereof.” New York courts have held that to establish “proper cause” for a license without any restrictions (e.g. not for target practice, hunting, or self-defense), an applicant must “demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Klenosky v. N.Y. City Police Dep’t*, 75 A.D.2d 793 (1st Dep’t 1980), *aff’d on op. below*, 53 N.Y.2d 685.

14. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Beach*, No. 1:18-cv-00134 (BKS) (ATB) (N.D.N.Y.) (order granting motion to dismiss, filed Dec. 17, 2018).

15. 701 F.3d 81 (2d Cir. 2012).

16. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Beach*, No. 19-00156 (2d Cir.) (opinion affirming judgment of district court, issued Aug. 26, 2020).

17. *Id.* at 97.

18. <https://www.supremecourt.gov/qp/20-00843qp.pdf>; See Liptak, *Supreme Court To Hear Case on Carrying Guns in Public*, *supra* note 10.

19. *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018).

20. *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013).

21. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

22. *Young v. Hawaii*, No. 12-17808 (9th Cir. 2021) (en banc).

23. *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

24. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

25. Petition for Writ of Certiorari at 23, *New York Rifle & Pistol Ass’n, Inc. v. Corlett*, No. 20-843. There are strong reasons to doubt this interpretation of *Heller*. *Heller*’s holding is explicit that an individual has a constitutional right to possess a handgun “in defense of hearth and home” which, on its own terms, does not include public spaces. See *Heller*, 554 U.S. at 652.

26. Brief in Opp. to Certiorari at 8–10, *New York Rifle & Pistol Ass’n, Inc. v. Corlett*, No. 20-843.

27. *Id.* at 9.

28. *Id.* at 18.

29. See Nigel Chiwaya, *Gun Violence Is Up. It’s Been Up for More Than a Year*, NBC News (Apr. 26, 2021), <https://www.nbcnews.com/news/us-news/compare-gun-violence-2021-n1265201>.

30. Derrick Bryson Taylor and Christine Hauser, *What To Know About the Atlanta Spa Shootings*, *N.Y. Times* (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/us/atlanta-spa-shootings.html>; the shooter was captured by police, with a 9mm gun found inside his vehicle; he had been a customer of the two Atlanta spas and had previously sought treatment for sex addiction.

31. Ray Sanchez, Paul Murphy, Blake Ellis, Amir Vera, *Here’s What We Know About the Boulder, Colorado, Mass Shooting Suspect*, CNN.com (Mar. 24, 2021), <https://www.cnn.com/2021/03/23/us/boulder-colorado-shooting-suspect/index.html>; the shooter was wearing a bullet proof vest and carrying a 9mm handgun; he had a prior arrest record for assault.

32. Ashley Southall and Ed Shanahan, *Times Square Shooting Suspect Arrested in Florida*, *N.Y. Times* (May 12, 2021), <https://www.nytimes.com/2021/05/12/nyregion/times-square-shooting-arrest.html>; fortunately the victims’ injuries were not life-threatening; the shooter was later apprehended in Florida.

33. *Id.*

34. See *House Passes Bill To Expand Background Checks for Gun Sales*, Politico (March 11, 2021), <https://www.politico.com/news/2021/03/11/house-passes-bill-to-expand-background-checks-for-gun-sales-475329>.

35. *Supra* note 1.

36. See President Biden’s announcement here: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/>.

37. *Id.*

38. See Policy 11A115, Policy and Resolution, with the accompanying report issued by the ABA’s Standing Committee on Gun Violence, Aug. 2011, https://www.americanbar.org/groups/public_interest/gun_violence/policy/11A115/#:~:text=The%20carrying%20of%20loaded%2C%20concealed,in%20this%20conduct%20is%20obvious.&text=The%20concealed%20carrying%20of%20firearms,heightened%20risk%20of%20gun%20violence.

39. *Id.*

40. 554 U.S. 570, 626 (2008).

41. *Id.* at 626–27, 627, n. 26.

42. *Supra* note 3 at 785–86.

43. Giffords L. Ctr., *Post-Heller Litigation Summary* (Aug. 2020), *Post-Heller Litigation Summary* | Giffords.

44. *Id.*, see notes 40–42; See, e.g., *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89, 94 (2d Cir. 2012) (holding that “the Amendment must have some application” outside the home, but “[t]he state’s ability to regulate firearms and, for that matter, conduct, is qualitatively different in public” where “firearm rights have always been more limited” and there is a “tradition of states regulating firearm possession and use,” and *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense” (citations omitted)).

45. *Id.*

46. *Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 106, 119 (3d Cir. 2018) (“[U]nder intermediate scrutiny[,] the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary.”) (quoting *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013)).

47. *Supra* note 11 at 125–26 for a further discussion; see also *supra* note 43.

The Beleaguered Sport of Thoroughbred Horse Racing

By Bennett Liebman



BACKGROUND

Thoroughbred horse racing for much of the 20th century was the most popular spectator sport in America.¹ In recent years, the popularity of the sport has diminished greatly. Gambling opportunities are now abundant throughout the country, and racing has been perceived as indifferent to the goal of preventing animal abuse. Yet, the Kentucky Derby remains the signature horse race in America. This race for three-year-old thoroughbreds, which starts off the Triple Crown series of races, is the most viewed race in America.² The 147th running of the Kentucky Derby was held at Churchill Downs on May 1, 2021. Finishing first in the race was the 12-1 longshot Medina Spirit. Medina Spirit was trained by Bob Baffert, and this would have marked Baffert's record seventh victory in the race.

Nonetheless, a week later, it was disclosed that the horse had tested positive for the corticosteroid betamethasone. The drug test found 21 picograms of betamethasone measured per milliliter of blood. Baffert eventually acknowledged that his horse had been treated with the ointment Otomax to prevent dermatitis. Otomax contains betamethasone. As a rule, drug positives are not revealed publicly until such time as a second split sample test of the specimen confirms the positive. The Baffert positive was announced – although not by the Kentucky Racing Commission – before any testing of the split sample. On June 2, a story in *The New York Times* reported that a second, independent lab confirmed the positive test of the horse's blood. Bob Baffert was suspended for two years from the Kentucky Derby, but it remains to be seen if Medina Spirit will be stripped of the Kentucky Derby crown.

In the wake of these developments, Churchill Downs announced that it was excluding Baffert from participation in racing at its racetrack. Pimlico Racetrack in Baltimore would only permit Baffert to run Medina Spirit in the Preakness if the horse passed pre-race drug tests. The horse passed these tests and finished third in the race, thereby ensuring that there would be no 2021 Triple Crown winner. Two days after the Preakness, the New York Racing Association, which conducts thoroughbred racing at Belmont Park, Aqueduct Racetrack and Saratoga Race Course, announced that it would temporarily exclude Baffert from its tracks.

BOB BAFFERT

For nearly 25 years, Bob Baffert has been the most famous thoroughbred trainer in America.³ In 2015, his horse American Pharoah became the first horse to win the Triple Crown since Affirmed in 1978. He repeated his Triple Crown success in 2018 with Justify. He has won 17 Breeders' Cup races, at least six Kentucky Derbies, seven Preakness Stakes, and three Belmont Stakes. He has become "the face of American horse racing."⁴

Controversy has often followed Baffert. In 2000, there was a positive for morphine.⁵ Starting in 2011, seven horses trained by Baffert in California died suddenly over a 16-month period.⁶

Yet, the main Baffert questions started in 2019 when *The New York Times* reported that Baffert's 2018 Triple Crown winner Justify had tested positive for the drug scopolamine in the 2018 Santa Anita Derby.⁷ After a long dispute, the California authorities determined that the positive was caused by environmental contamination in the feed of the horse, and there was no reason to disqualify Justify or to punish Baffert.⁸

In 2020, Baffert accumulated four positives. His Eclipse Award-winning filly Gamine tested positive on two occasions. At the Kentucky Oaks, Gamine finished third and tested positive for betamethasone. The horse was disqualified, and Baffert paid a \$1,500 fine. She had previously tested positive for the local anesthetic lidocaine in an allowance race at Oaklawn Park. Also, at Oaklawn Park, Baffert's Charlatan tested positive for lidocaine. Baffert claimed that a lidocaine patch worn by an assistant was responsible for the positives. The Arkansas Racing Commission in 2021 largely absolved Baffert of the positives (although it fined him \$10,000) and did not disqualify his horses. Baffert's horse Merneith also finished second in a race at Del Mar and was found to have excessive amounts of dextrorphan in her blood.⁹ Baffert asserted that a staffer was taking the cough syrup containing the drug. Merneith was not disqualified. Baffert, while not suspended, was assessed a fine of \$2,500.¹⁰

While each incident standing separately might be considered a coincidence, and mistakes are made in the administration of therapeutic medication, rarely has there been such a confluence of drug positives involving as prominent a trainer as Baffert. Also, far out of the ordinary was the fact that Baffert's penalties for these drug violations were minimal, and the horses (save Gamine in the Kentucky Oaks) were not disqualified. Horses in California have occasionally tested positive over the past quarter century for scopolamine. While there always was the potential for contaminated feed, the trainers were given small penalties, and the horses were disqualified.¹¹ Lidocaine positives were frequent in the mid-1990s when lidocaine was added to antibiotic ointments but have been relatively few since then. Again,

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with the Baffert exception, lidocaine positives resulted in disqualifications.¹²

RACING REGULATION

In America, state governments regulate pari-mutuel horse racing. The governing structure is determined by state legislation and regulation. Regulation is overseen by individual racing commissions. The commissioners are all part-timers who receive minimal pay.

3. For the non-elite trainer, there is little chance for beating the trainer responsibility rule. Even the top 1% of successful trainers have had little success combating the trainer responsibility rule. Except for Baffert, they have been able to delay imposition of penalties rather than defeat the penalties.¹⁵

Most drug violations are caused by human error, not by intentional or willful misconduct. The trainer – or a groom or veterinarian – administered the wrong drug or

The legislation is the result of a decade-long attempt to bring national uniformity to thoroughbred racing's drug policies.

The rules governing racing are generally similar among jurisdictions but are not identical, making for occasional discrepancies between states.

DRUG REGULATION

The commissions test horses for drugs in both blood and urine. In 2018, the racing commissions tested 266,300 samples.¹³

Drug regulation is the major cost of state racing commissions. They employ the individuals who conduct the urine tests, the veterinarians who take blood from horses, and the individuals who record and ship the drugs. The commissions pay the chemists and laboratories that conduct the actual tests.

Again, the drug rules for each commission are similar but not identical. The similarities include the following factors:

1. The one drug allowed for race-day administration is lasix. While other racing countries do not permit lasix to be utilized on race day, United States jurisdictions have legalized it. The groups supporting lasix believe that lasix promotes equine health by limiting bleeding – exercise-induced pulmonary hemorrhage – in racehorses.
2. The trainer responsibility rule applies to drug testing. “The doctrine of trainer responsibility means that the trainer is responsible for the physical condition of his or her horse. In practice, it requires that when a horse tests positive for a prohibited medication, the trainer bears the responsibility for the drug test.”¹⁴ While in some jurisdictions, the insurer rule only creates a rebuttable presumption of trainer liability, it is most difficult for a trainer to defend against the responsibility rule.

wrong medication to the wrong horse on the wrong day. While such negligence does require penalties, the major problem in horse racing stems from efforts to find and distribute illicit performance-enhancing drugs that cannot be successfully tested by racing's laboratories. This was illustrated by the massive 2020 federal indictment of a network of 27 individuals who systematically doped horses and avoided any positive drug tests.¹⁶ That has been the most consistent threat to the integrity of racing: individuals with the ability to use major performance-enhancing drugs which could not be detected by drug testing.

THE DRUG PENALTIES

For much of the 20th century, stewards – the in-game officials at the track – hearing officers, and racing commissions simply used their discretion to determine the length of the penalties assessed to trainers found guilty of drug violations. This process has changed over the last 15 years. The full racing industry created the Racing Medication and Testing Consortium, a group researching the effect of drugs and proposing model rule proposals for drug regulation. Working with the Association of Racing Commissioners International, the umbrella organization representing state racing commissions, they have developed model rules for drug testing and punishment. The penalties are determined by a classification of the drug (based largely on its therapeutic use in horses and the effect of the drug on overall performance) and the prior record of the trainer. They have also developed threshold levels for drugs that are frequently used as therapeutics in horse racing. If the amount of the drug found by the laboratory is below the threshold level, no positive is declared.

The ARCI's rules are frequently updated. The most recent rules were last updated in December of 2020.¹⁷ Individual commissions need not follow model rules.

Yet, many racing commissions have started to utilize the model drug rules of the ARCI. The one major issue has been the delays involved in a racing commission adopting model rules. The requirements of the doctrine of incorporation by reference mandate that a racing commission would need to separately promulgate any new ARCI model rule for it to become effective.¹⁸

The ARCI's rules require that a positive should not be announced until the trainer is given an opportunity to have a split sample of the specimen tested by an approved laboratory.¹⁹ The requirement is the case in Kentucky, but there is no formal split sample requirement in New York's rules.²⁰

Betamethasone

Betamethasone is a steroidal anti-inflammatory drug. It is a class 4 drug, and class 4 drugs are primarily therapeutic medications. Because of its anti-inflammatory action, betamethasone may reduce pain and can have a limited ability to influence performance. Class 4 drugs are in the "Category C" penalty stage. The recommended penalty for a first-time use is a fine up to \$1,000 for the trainer with a disqualification of the horse. For a second violation by a trainer within 365 days (this would apply to Baffert's betamethasone positive for Gamine), the suggested penalty would be a "minimum fine of \$1,500 and 15-day suspension absent mitigating circumstances."²¹

Baffert claimed that the small level of 21 picograms of betamethasone found in Medina Spirit should be a mitigating circumstance. However, in Kentucky any amount of betamethasone is considered an offense. In Maryland and in New York, the threshold level for betamethasone is set at 10 picograms. Accordingly, this betamethasone finding would also be a violation in all the Triple Crown jurisdictions. Finally, there have been no penalties for betamethasone positives in New York since 1991.

HELPING THE BETTORS

If Medina Spirit is eventually disqualified, will bettors who hold tickets on the presumed winner, the 27-1 Mandaloun, be paid for their wagers? The short answer is no. Payouts are made on the declared order of finish when the race is made official. New York's rule states, "Rulings of the stewards with regard to the award of purse money, made after the result has been declared official, shall in no way affect the mutuel payoff."²²

EXCLUDING BAFFERT

Both Churchill Downs and the New York Racing Association have indicated their plans to exclude Baffert from their racetracks.²³ The question is whether a racetrack has the authority to exclude an individual from racing who possesses a valid license from the racing commission. In Kentucky the courts have been expansive in their treatment of the common law powers of racetrack owners to

exclude individuals.²⁴ The NYRA situation is far cloudier depending on whether a NYRA exclusion is considered state action. There have been constant reconstructions of NYRA's board in the 21st century. Given the uncertainties about NYRA's status,²⁵ NYRA will likely act gingerly in its dealings with Baffert and provide him with some manner to contest the length of any penalty. On the other hand, Baffert races sparingly in New York, and it might not be worthwhile to contest any NYRA penalty.²⁶

THE FUTURE OF DRUGS IN THOROUGHBRED RACING

The future of drug use in thoroughbred racing will be determined by the Horseracing Integrity and Safety Act (HISA). The act was part of the huge omnibus Consolidated Appropriations Act, 2021.²⁷ HISA is Title XII of Division FF of that legislation, and its effective date is July 1, 2022.

The legislation is the result of a decade-long attempt to bring national uniformity to thoroughbred racing's drug policies. It places all thoroughbred drug policy and all thoroughbred racing's safety policy within the purview of an independent, private horseracing integrity and safety authority. The authority will contract with the United States Anti-Doping Agency to enforce the anti-doping and medication control program. The Federal Trade Commission will serve as the oversight body which approves the rules of the authority and determines appeals from decisions issued by the authority.

Thus, there will be uniform national drug rules for thoroughbred racing.²⁸ It establishes a single agency with a dedicated mission where the buck should stop. After a three-year period, only a unanimous vote from the authority board would continue the use of race-day lasix.

Yet, it's never that simple. The grass is not always greener. The best plans for racing often falter, so to speak, at the eighth pole. There are legal challenges to the constitutionality of HISA. The leadership behind HISA has actually called for less testing but more "intelligence-based testing."²⁹ USADA has no expertise in handling equine matters and will be obligated to use the labs and testers that are frequently the subject of the current criticism. Will the FTC act with proper diligence? Is there any way to resolve the inevitable jurisdictional clashes that will emerge from the states, the authority, the FTC and the racetracks? The status quo is always the favorite in horse racing. The underdog may win, but that's not how you bet them.

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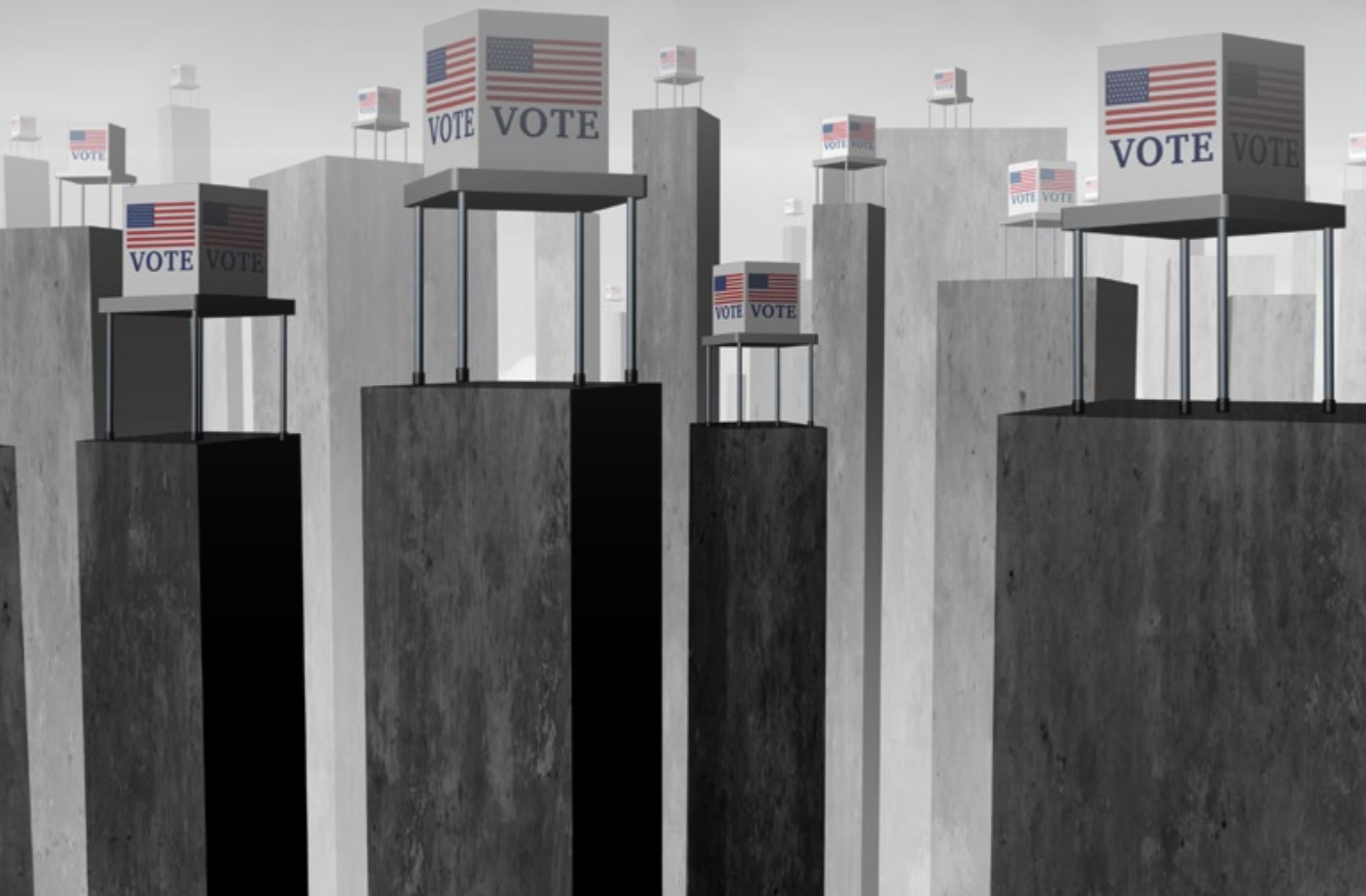
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25. Contrast *Galvin v. New York Racing Association*, 70 F. Supp. 2d 163 (E.D.N.Y. 1998) with *Murphy v. New York Racing Association Inc.*, 76 F. Supp. 2d 489 (E.D.N.Y. 1999).
26. From 2017–2019, Baffert raced only 32 times in New York, which constituted 3.2% of the starts his horses made. His horses only started twice at Aqueduct. In fact, the frequently glib Baffert allegedly remarked after NYRA banned a trainer for a period which encompassed the Aqueduct meeting, “That’s not a penalty; that’s a present.”
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Georgia vs. New York on Voting Rights: No Contest

By Brad Karp and Robert A. Atkins



There is an unprecedented outcry against the voter suppression laws spreading across the country, from Georgia to Texas to Florida to Arizona. Since January, 361 bills have been introduced in more than 40 states, many with anti-voting provisions and many transparently aimed at disenfranchising Black and Brown voters.¹ The growing chorus of opposition is coming from not only traditional voting rights advocates and civil rights groups, but from business executives, corporations, and leaders of the private bar, as well.

Defenders of the new laws recycle the same debunked allegations of voter fraud and bogus claims of election “irregularities” that underlie the Big Lie: the falsehood that the previous president was reelected and the current president is illegitimate. One of the most common canards is that the voter suppression legislation in Georgia (SB 202) is no worse than New York election law.²

In truth, the two states are moving in the opposite direction: Georgia is restricting access to the polls, in a manner that appears aimed toward depressing African-American turnout, while New York is moving to increase voter participation. The goal in Georgia is not to make voting easier or more secure, but to use targeted legislation to reverse the political will evidenced in the recent presidential and Senate elections. As one prominent Republican admitted in a moment of candor, the Georgia Legislature needed “to change the major parts [of the election law] so that we at least have a shot at winning.”³

In response to the secretary of state’s declaration that Georgia “had safe, secure, honest elections” in 2020, the Georgia Legislature stripped the secretary of his vote on the state election board. It then passed a litany of measures to make voting more burdensome for communities of color and especially for the working people of Atlanta. In a state that was one of the first to enact a poll tax, and where outright racist election practices ended only after the U.S. Supreme Court declared “one person, one vote” to be the law of the land,⁴ these and other voter suppression provisions are dragging Georgia backwards:

- Voters merely requesting an absentee ballot must submit state-issued identification. This disproportionately affects minority, elderly and indigent voters. As many as 25% of Black and Brown voters, for example, have no government-issued photo identification, compared to 11% of voters of all races.⁵

- Portable or mobile voting facilities are essentially banned. This is aimed directly at Fulton County, which deployed mobile voting units throughout Atlanta in 2020, each with 8 to 10 voting stations. Unless Governor Kemp declares a state of emergency – unlikely for obvious partisan reasons – there will be no mobile voting in Atlanta.

- Absentee ballots can be submitted in drop boxes *only* in government buildings and *only* during daytime business hours. Twenty-four-hour access and outdoor drop boxes have been eliminated. This too was passed with Atlanta and its neighboring counties in mind: the 94 drop boxes available in 2020 will be reduced to 23 (or fewer).⁶ Black and Brown voters, many with multiple jobs and unavoidable childcare obligations, often are unable to vote during the day. It is estimated that the number of drop boxes in Fulton County will shrink from 38 to 8.⁷

- Absentee ballot applications may not be sent automatically to all voters, as they were in 2020 in response to the COVID-19 pandemic. It is now illegal for state or county election officials to mail applications to voters who have not requested one. And the time period for requesting an absentee ballot has been cut by more than half, from 169 days to 67 days. This will depress voting by mail, which again will disproportionately impact Black and Brown voters, who voted by mail at historic levels in 2020 and did so more often than white voters.

- Non-poll workers are forbidden to give food or drink – even water – to voters waiting on long lines. To provide such aid is now a crime. This, again, targets communities of color: in Georgia, the average waiting time after the polls closed in neighborhoods that are at least 90% white was six minutes, while the waiting time in places that are at least 90% nonwhite was more than eight times longer (51 minutes).⁸

- Unlimited voter eligibility challenges – a notorious means of intimidating minority and immigrant voters – not only are permitted, but they also must be heard by county officials no matter how frivolous. If a voter fails to appear to defend her vote, it may be treated as an admission that she was ineligible. Counties that do not comply are subject to sanctions.



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Alexander Butwin also contributed to this article.

- Eligible voters who go to the wrong precinct – an increasingly common occurrence as the state has closed numerous polling places – will not be allowed to cast a provisional ballot if they arrive before 5 p.m. Instead, they will have to travel to the correct precinct, but if they do not have the luxury of time to make that trip, they will not be allowed to vote.

- The secretary of state is no longer a voting member of the state election board, which has been granted the power to suspend and replace county election officials. Now, election officials might be subject to the whims and preferences of those serving on the state election board, who can suspend or replace anyone they deem to have committed three violations, or gross negligence in consecutive elections. And by removing the secretary of state from serving, the partisan state Legislature can gain more influence over county and local elections based on their choice of the “nonpartisan” state election board chairperson.

So what can be said about New York? Yes, many of its election laws are antiquated. New York still lacks no-excuse absentee voting. It still does not allow for mobile voting centers. But much of that is changing and the state is moving forward to expand the franchise for all voters, not restrict it for poor, immigrant and Black and Brown voters.

New York has enacted automatic voter registration for those applying for a driver’s license, Medicaid, unemployment, public housing and other government services. New York has added online voter registration, as well as preregistration for teenagers starting at age 16. New York also has enacted permanent early voting. The Legislature recently voted to permit election-day registration and no-excuse absentee ballots, which will now go before voters in November for a final vote before they can be added to the constitution. And the governor signed into law a bill that restores voting rights to people upon release from prison, including those on parole supervision. Georgia, in another vestige of Jim Crow, prohibits individuals with felony convictions from voting while in prison, on parole or on probation – disenfranchising over 200,000 voters.

Some point to the fact that Georgia requires more early voting days than New York, but they hide the legislative details. Early voting in Georgia is now limited to working hours and is forbidden before 7 a.m. or after 7 p.m., a change designed to curtail voting by urban voters and those who cannot leave their jobs to vote. While it is correct that early voting on Saturdays is required in Georgia, early voting on Sundays conspicuously is not, leaving counties free to limit ballot access to Black parishioners who traditionally vote after church on Sundays. Compared to Georgia, New York offers more days of weekend voting, including two Sundays.⁹

When it comes to protecting and expanding the franchise, Georgia and New York are worlds apart. Georgia is aligned with the states hurriedly passing voter suppression laws like Arizona, where one lawmaker declared that he is opposed to vote-by-mail because “everybody shouldn’t be voting.”¹⁰ In Georgia and too many other states, legislatures are selectively limiting the right to vote

When it comes to protecting and expanding the franchise, Georgia and New York are worlds apart.

to reverse recent political trends and imposing carefully targeted burdens on the right to vote. New York is not one of those states. Taking into account all the facts, and considering the starkly opposite directions in which each state is headed with respect to ballot access, the Georgia Legislature is focused on voter suppression and the New York Legislature on voter access. The two states cannot be equated when it comes to their approaches to voter participation.

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Voting Rights



The Supreme Court and Voting Rights: Time To Intervene

By Michael Glanzer

The past half-century has witnessed wide philosophical swings of the Supreme Court as the court's constituency has changed. Conservatives invoking the doctrine of "originalism" have steadfastly resisted the judicial implication of "penumbral" rights not in their view promulgated expressly in the Constitution. More moderate and liberal justices have embraced a different approach, attempting to identify core principles and extrapolate what the Constitution means in a modern society. The difference mirrors those between literalists and others in biblical exegesis. One area, however, which has largely eluded that philosophical debate is voting rights, as justices conservative and liberal have consistently punted, construing the 10th Amendment's reservation of residual power to the states to embrace electoral

systems and otherwise declaring the topic "political." The result has been that the states and Congress have been left to sort out myriad voting systems that give rise to debates and inconsistencies over who gets to vote, how voting may take place and how voting districts are constructed.

This article argues that originalism is a reason for the court to enunciate voting rights parameters rather than avoid the topic, that various paths of review and ongoing political dynamics present a realistic opportunity for the court to do so, and that a fair range of reasonable parameters fashioned by the court, even with its current conservative majority, would help to resolve the growing disarray and inconsistency among states that contribute to the undermining of confidence in the democratic process.

THE GUARANTEE CLAUSE

If originalism is the source for constitutional doctrine and interpretation, then *all* portions of the Constitution should be logically given effect. And one that has particular import for voting rights issues but has been largely ignored is the provision in Article IV, which “guarantees” that all state governments be “republican” in form. No principle was more central to the Constitution than that government be based on popular sovereignty. The entire legitimacy of the political system depends on this popular participation and sanction. Defending the Constitution, Alexander Hamilton observed that a true republican form of government “derives all of its powers directly or indirectly from the great body of the people.” This notion of popular sovereignty is reflected in other provisions of the Constitution, from the identification of the “People” as the ones that “ordain” and “establish” the Constitution to the ones who have their rights “reserved” and “retained” to alter or abolish the Constitution. Although later edited for stylistic reasons, the draft of the Second Amendment initially described the “militia” as “composed of the body of the People.”

As students of history, the country’s founders were mindful that republics had a history of being subverted. Quoting Montesquieu, Madison in the Federalist No. 43 noted that Greek democracy was subverted when the Macedonian King Phillip was rewarded with two seats among the Amphictyons for assisting in the defeat of the Phoenicians, introducing an autocrat into a democratic forum and ultimately resulting in the subordination of the Greeks to the Macedonians following the battle of Chaeronea. Our founders gave us a means to protect ourselves from the erosion of republican government, even if the political process has been corrupted and failed. So important was this provision that neighboring state republics were to aid an individual state in preserving its self-government. In this way, fellow state republics would be protecting themselves and the collective nation, as a form of government that was not republican in form – e.g., a tyranny or oligopoly – would be a threat to its neighbors. Not only does Article IV guarantee each state’s commitment to a republican form of government, but it also provides protection from “Invasion” or “domestic Violence” initiated by a neighboring state. This would suggest that other states have a cognizable interest in fair elections.

Indeed, a non-republican form of government would arguably undermine and subvert the republican character of the federal government. Federal institutions, such as voting for federal seats and functions, rest on state law foundations. Accordingly, if a state government were to engineer voting laws that corrupted the integrity of that state’s elections to the House, Senate or Electoral College, then harm would be inflicted on the citizens of another state whose represen-

tatives would not be legislating with democratically elected representatives from the offending state.

Accordingly, the “guarantee” clause represents a constitutional mandate that, while states have reasonable latitude under the 10th Amendment to craft their respective electoral systems, they may not do so in a manner that threatens their “republican” form of government and in turn the federal republican infrastructure. Yet under current judicial rulings, the constitutional “guarantee” provision has as much weight as provisions in the Russian constitution. To the extent the Supreme Court has discussed its scope, the context has been to respect states’ freedom to fashion disparate systems, rather than enunciating fundamental standards and principles for any “republican” form of government.

In the seminal and now quite ancient case addressing the guarantee clause, *Luther v. Borden*, the Supreme Court simply found that it could not rule on the provision because it presented a “political” question. The Rhode Island state government was controlled by landowners under a charter from the English monarchy. Citizens in the state organized a constitutional convention, and a majority of all registered voters under the charter voted in favor of the new constitution. A new governor, who received a majority of the votes, was elected under this new constitution. At the request of the charter government, the president then threatened the deployment of federal troops and forced out the newly elected government. Subsequently the chartist government was able to have a new constitution approved by less than one-third of the voters and less than half the registered voters. The particular case came to the Supreme Court because Borden had forcibly entered Luther’s house under orders from the chartist government and Luther sued for trespass. So the question turned on whether Borden was acting as a representative of a lawful government. The court declined to determine which of the two regimes was lawful.

The court might have sought to inquire whether the chartist government met some test sufficient to qualify it as “republican” in form. Or the court perhaps could have explored whether the means undertaken by those supporting the new constitution was legally sufficient. The court did neither, however, and the *Luther v. Borden* decision has since therefore stood for the proposition that the

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“guarantee” in Article IV is essentially non-justiciable. After the Civil War, the court chose to avoid being drawn into any case challenging a reconstructionist Congress implementing republican governments in the defeated southern states. But the court has, in recent voting cases, signaled that it would not consider the provisions of Article IV and has steered clear of weighing in on individual election results (except in *Bush v. Gore*, in which the court perhaps without being particularly persuasive was careful to declaim any precedential import).

GIVING MEANING TO THE GUARANTEE

To the extent the court’s judicial philosophy is to give meaning to the actual constitutional text, it is hard to see how it can choose to simply not adjudicate the very same text. By actually addressing and effectuating the words of Article IV, the court could set the overall constitutional minimum ground rules for voting rights. States would still have latitude under their 10th Amendment reservation of powers to fashion their own systems, but they would at least have notice of the goalposts and limits.

First and foremost, the court could establish parameters for access to voting. In order to have voting be meaningful, people need to have access to the polls. Safe harbors could be established for how to identify and register, how to vote in different media, polling booth concentrations for different population densities and remoteness. Correlatively, an insufficient number of voting stations or hours in a densely populated area or the absence of voting machines on a reservation would arguably violate the basic guarantee of popular sovereignty. These are in some senses logistical issues but ones that keep recurring. Inevitably, it is more likely the dispossessed who need to challenge the status quo, thereby placing a financial burden on those least likely able to bear it. So setting several different modes of accommodating the obligation to satisfy the means of producing a republican government would seem wise. This might not foreclose other means of satisfying the mandates of republican government but might at least narrow areas of contention.

Additionally, the court has been asked to rule on a variety of voting district cases, most recently in Wisconsin, Ohio and Maryland, but as a practical matter has let existing gerrymandering stand. The court and litigants typically approach these cases under 14th Amendment analyses. It would be much simpler and more just to have at it directly. Modern demographic computer analysis has been able to devise voting districts that vastly amplify the voting preferences of citizens of a particular state to such a degree that it distorts the basic preferences of the group in the selection of representatives. As the incumbent political party often sets up the voting districts, it typically does so to amplify its own electoral advantage, which means distorting the vote.

RANGES OF "REPUBLICAN" FORM

To be fair, the precise definition of what it means to be a republican form of government probably falls with a range of acceptable answers. We would all agree that the U.S., the U.K., France and Germany are democracies, although the exact form of that democracy varies from place to place. In the same way, there might be any number of ways a state government might qualify as having a republican form of government.

In this light, the court again could enunciate safe harbors for meeting the mandate of Article IV. One way might be for the state to have a non-partisan election commission establish voting districts. Another might be to allow voting districts to be established based on geographic proximity with all voters in all districts not to be further than a prescribed distance from one another subject to the reasonable exigencies of geography. A third might be to allow the legislatures to establish voting districts subject to the constraint that the proportions reflected the allocation of representatives by party affiliation would need to be within a prescribed number of points of the percentages of total voting in the state with the risk that the election would be invalidated if it fell outside those boundaries.

Obviously, the precise safe harbors and parameters may shift with the composition of the court. If the Roberts court mustered a 5–4 majority in *Shelby County v. Holder* to find the 2006 congressional extension of the Voting Rights Act unconstitutional in the context of the current environment, an even more conservative court – broadly characterized as 6–3 today – would arguably scrutinize any similar congressional limitations on state voting systems. And the current more conservative court may be inclined to accord greater latitude to states to the extent their strictures and qualifications are directly challenged.

But the point is not where the parameters are precisely drawn as the court composition shifts. Rather, what is important is that the court recognize and accept the need for establishing parameters, rather than dodging voting issues as “political” or intermittently weighing in only when state systems are constrained by federal intervention, which merely encourages greater state activism and inconsistency.

PATHS TO SUPREME COURT REVIEW

A fair question is when and how the Supreme Court might accept a case or cases to develop the law in the ways suggested and if so, how such cases might be decided. The issues are interrelated.

What seems most clear is that the court has no appetite to get involved in individual election results. The court has studiously steered clear of the morass of litigation spawned by the most recent presidential election.

Nonetheless, growing public debate and frustration arising from voting rights issues will inevitably gain the justices’

attention, as they are not hermetically sealed off from the body politic despite functioning in a unique environment. The current political environment has revealed severe structural strains in the constitutional fabric. While rare, we have had a recent election in which the Electoral College legitimately delivered the presidency to the candidate lacking a majority of the popular votes. This structural feature would seem to require one party to effectively garner between 5 to 7 million more votes than the other party in order to claim the White House. That oddity is not lost on the public. In addition, the Senate now is constructed such that senators representing a minority of the population effectively control at least 50% of the votes. In other times less polarized that might not be problematic, but that is not the case today. Beyond the setting of public policy these arrangements have real-world economic impacts on people in different constituencies. It has been the case for some time – Senator Moynihan used to complain about this issue – that blue states have been transferring funds to red states. Kentucky, for example, reportedly receives some \$80 billion more from the federal government than it pays in taxes. Those funds come from places like New York and California. The recent tax law changes that capped state and local tax exemptions largely affected blue states and de facto raised federal taxes on them even further. In our history the refrain “no taxation without representation” has been known to carry some weight. The court’s decisions relating to campaign financing have also had the effect of heightening the impact of large donor funding, further straining the constitutional system by calling into question the integrity of the voting process. Notwithstanding the impact of small donors through the internet, the main funding still comes from large dollar donors. The court may well consider it appropriate to alleviate all these pressures and anomalies on the constitutional system by providing guidance on voting rights issues which is at least in its ambit.

Accepting voting rights cases for review would allow the court’s majority to advance their philosophy of originalism. The court’s more conservative majority can underscore its philosophical view that it is bound by the actual words in the Constitution, as the guarantee is as explicit as one could imagine. Here is their opportunity. That should be sufficient. The more liberal minority also can embrace review as an opportunity to advocate broader voting rights. Either way, review is entirely consistent with, not repugnant to, originalism.

Still, appropriate cases must work their way to the court, even assuming its appetite to get involved. Several paths to review are possible.

As the *Shelby* case demonstrated, one path for review arises from congressional efforts to limit state freedoms. With growing efforts in many states to impose voting qualifications and strictures, some response from the Democratic Congress is to be expected. Indeed, such

efforts may be seen as effectuating the guarantee. Having admonished Congress that any burden on state determinations must be justified by compelling and current needs, an even more conservative court would likely subject new federal restrictive legislation to judicial scrutiny.

Otherwise, the paths to the Supreme Court must emanate from challenges to individual state systems. In that respect, given the latitude of the “guarantee” clause, the particular fact pattern will need to be extreme and elicit broad attention. Examples that the court might consider as being beyond the reasonable latitude to be afforded the states might be the limitation of voting stations in relationship to the populations served or limits in voting times or methods that are unduly constrained or seem to lack a substantial and substantiated state interest. It was reported that on one Native American reservation, no polling booth was available other than by driving hours away, and most residents did not have transportation or the means to do so. In another recent media report, newly enacted voting restrictions would reduce the number of voting boxes from 38 to eight in an urban area. These seem to be beyond that which the state needs to for voting integrity. Although the court has declined to interject itself with respect to gerrymandering if the incumbent party is attaining representation far in excess of its actual voting percentage, this should also be challengeable under the “guarantee” clause as compared to other constitutional provisions. Having cited these more extreme examples it should be clear that challenging voter identification and other ministerial issues absent some demonstration of extraordinary harm would be seen as falling outside of the “guarantee’s” protections. The court is due to rule on certain cases that challenge more ministerial aspects of voting, and it is hard to imagine that the court will be inclined to overturn such state statutes and regulations.

It is also possible that the court could be attracted by a threat to the integrity of federal elections occasioned by extreme variations in state systems. While state systems may vary within the “republican” form of government without offending the overall federal integrity, one can imagine such widespread deviations and disarray that the court feels duty bound to weigh in to restore some sense of confidence and order.

Another way that a case might find itself before the court is if one state sued another over its voting mechanisms. As reflected in the court’s recent dismissal of the case brought by the attorney general of Texas, among others, relating to results in Pennsylvania and other states, the court is not likely to be amenable to such claims. The case might be different had there been any substantive evidence offered of fraud of sufficient order of magnitude and so it remains a possibility albeit a distant one in the future. In addition, a number of the justices have expressed the view that merely because there is a dispute between states the court

may not be obligated to accept such a case for disposition. This may be concerning for other reasons but also may limit this pathway to the court.

A final traditional path to court review might come from a federal circuit split. If the Supreme Court will not readily enunciate parameters and safe harbors, perhaps circuit courts will do so, resulting in conflicts inviting Supreme Court review.

Whichever path proves fruitful, the result is not preordained in favor of unfettered state sovereignty even with the current 6–3 conservative composition. While the court is broadly understood to have a conservative majority, there remain different strands of thought even under that banner, and several newer justices who are still solidifying their philosophies. In the recent immigration case of *Niz-Chavez v. Garland*, those commonly identified as the conservative justices split over the interpretation of the statutory phrase “a notice,” with some holding that meant a single notice and others several notices that had all the relevant information. Those who predicted the unconstitutionality of the Affordable Care Act were gravely disappointed. Indeed, even in striking down the coverage formula of the Voting Rights Act in *Shelby*, the majority did not foreclose a less burdensome alternative, offering that “Congress may draft another formula based on current conditions.” There is no reason to believe that

a compromise consensus would not emerge on such critical issues for the nation’s citizens and future.

CONCLUSION

Every once in a while, democracy gets stuck with political authorities trapped in a dead end. Our country is wracked now by concerns relating to the validity of voting and reflexive measures to impose qualifications on voter eligibility. The court could and should render a real service in helping alleviate such instability. The Warren court did so for civil rights when needed (or even long after it was needed). It’s not often and the court is well advised to exercise caution before weighing in. Yet we are now at one of those junctures where the court needs to play its critical role.

While from time to time there are surprises in electoral outcomes for select offices (as in the recent close Georgia senatorial races) most states have effectively turned into a one-party state, including by effecting voting rules that serve to perpetuate those in power, thereby throttling competition and innovation. It is possible these parties might voluntarily relinquish power, but history cautions against such hope. As suggested here, it is time for the court to give effect to that explicit constitutional provision to prevent effective disenfranchisement and to promote a more constructive democratic dialogue in a way that is consistent with its efforts to get decision making focused on the political branches of government.

Farrell Fritz congratulates our friend and colleague, **James M. Wicks**, on being named a United States Magistrate Judge for the Eastern District of New York.



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Beyond Surrogacy: Parentage Under the Child Parent Security Act

By Mariette Geldenhuis



The surrogacy provisions of the Child Parent Security Act (CPSA)¹ have generated much attention and media coverage, to the point that the CPSA is often referred to as “the Surrogacy Bill.”² However, the surrogacy provisions are just one aspect of the CPSA, which contains groundbreaking substantive and procedural components related to parentage of children conceived through assisted reproduction. The enactment of the law was the culmination of many years of advocacy on behalf of same-sex and opposite-sex parents who conceive their children through assisted reproduction (AR).

The CPSA determines parentage of children conceived through AR and provides a procedure to obtain a judgment of parentage. However, the judgment is not necessary to establish parentage. It is a confirmatory judgment that proves parentage when parents travel or move to states where their parentage is not acknowledged by the laws of that jurisdiction.

Two key concepts permeate the CPSA: intent and consent. Biology is no longer the sole basis for determining parentage in New York. The parentage provisions of the CPSA are not entirely new and codify case law that developed over the last three decades to protect the parent-child relationship of non-genetic parents.

Prior to the enactment of the CPSA, New York lagged far behind most other states in the area of assisted reproduction. The only statutory provision was Domestic Relations Law § 73(1), which provided:

Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.

This limited donor statute left non-genetic parents vulnerable. There are countless instances of parents and children who never saw each other again after the parents separated, based on the Court of Appeals’ 1991 ruling in *Alison D. v. Virginia M.*³ that the non-biological parent has no standing to seek custody or visitation of the child. Over the years, a patchwork of cases extended protection to non-genetic parents. Courts interpreted the donor statute to apply to same-sex parents,⁴ applied the marital presumption of parentage once same-sex parents were able to marry,⁵ and used principles of comity where parents entered into a civil union or domestic partnership in another state.⁶ *Alison D.* was not overruled until 2016, when the Court of Appeals recognized “intended parents” for the first time in *Brooke SB v. Elizabeth ACC.*⁷

Where spouses consent to conception of a child through AR with the intent to be parents, both of them are the legal parents of the child. The definition of a “spouse” includes partners in a civil union or domestic partnership. This is a helpful expansion of the law’s reach, par-

ticularly for same-sex couples, although far fewer couples now enter into such unions because marriage has been available in all states since the United States Supreme Court’s decision in *Obergefell v. Hodges.*⁸ Many states no longer offer civil unions or domestic partnerships, and others converted them to marriages.

Consent to AR is presumed where the intended parents are spouses, with limited exceptions (if they have signed a separation agreement, have lived apart for three years, or if it is shown by clear and convincing evidence that a spouse conceived a child through AR without the consent of the other parent). Unmarried parents are not left out in the cold and can prove consent with a “record” (defined as “information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form”). It is notable that a written agreement is not required. Examples could include birth announcements naming both parents, documents the intended parents signed at a fertility clinic, emails to family and friends announcing the pregnancy and birth, or text messages between the parents. This is a welcome expansion of the ways to prove consent. If no such record exists, the non-genetic parent must show consent by clear and convincing evidence. This latter standard is a codification of *Brooke SB*.

Consent and intent govern donors as well. A donor who is not a spouse and donates gametes (eggs or sperm) or embryos with “donative intent” is not a parent. Proof of consent and donative intent is easiest for an unknown donor, and a document from the gamete storage facility confirming the donation will suffice. There is one important exception to donative intent resulting in the donor not being a parent. If the donor makes a donation to his or her spouse, he or she is a parent. This is a necessary exception to address AR procedures where one spouse donates gametes. Co-maternity is one example (where one mother donates an egg, which is inseminated with donor sperm, and the resulting embryo is implanted in the other mother, who carries the child).

The requirements for known donors are more stringent, yet the CPSA has some flexibility. There needs to be a record signed by the donor and the gestating intended parents before a notary, two witnesses or a health care practitioner. A carefully crafted Donor Agreement would meet these requirements. It is best practice for clients



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to enter into such an agreement before the AR process starts. In the absence of such an agreement, a consent that meets the statutory requirements needs to be drafted and signed.

All is not lost if there is no such document. The intended parents could establish by clear and convincing evidence that the donor agreed prior to conception that the donor has no parental or proprietary interest in the embryos or gametes.

Given the risk that a known donor will decide to assert parentage, and the additional proof required to show consent and donative intent, it is tempting to advise clients to only use unknown donors. However, how our clients choose to form their families is an intensely personal decision, and couples who choose a known donor make this choice after careful consideration. It is our role to advise clients of the risks so that they can make informed decisions, and to carefully draft all necessary documents to protect the intended parents, the donor and the child.

The CPSA brings New York into the 21st century in its approach to parentage based on intent. There are still gaps, such as parentage when a spouse or partner becomes an intended and functional parent after the birth of the child. This scenario was specifically not addressed in *Brooke SB*, and the CPSA unfortunately did not extend protection to non-genetic parents in these circumstances. As a result, a partner or spouse could co-parent a child for many years and still be denied standing to seek custody or visitation if the parents separate. In order to determine parentage in the best interest of a child, a parent-child bond formed after the birth of a child cannot be ignored.

JUDGMENT OF PARENTAGE

A judgment of parentage is not necessary to establish parentage, but it offers important protection particularly for same-sex couples, whose parentage of a child may be questioned if they travel or move to another state or country where a non-genetic parent's parentage is questioned or not recognized.

The availability of a pre- or post-birth judgment of parentage is a welcome and overdue development in New York law. Judgments of parentage are final judgments of a court and are therefore entitled to recognition and enforcement anywhere in the United States under the full faith and credit clause of article IV, section 1, of the United States Constitution.

A pre-birth order establishes parentage before a child is born and gives parents peace of mind that the non-genetic parent will be able to assume parental responsibilities for the child, which could be particularly important if the gestating intended parent is unable to act or dies. Parents can also seek the order after the birth of the child.

Thus far, petitions for judgments of parentage have been assigned to the support magistrates in family court. The CPSA details the information that must be included in an application for a judgment of parentage, but no forms are available yet. Here are a few practice tips:

- Draft a joint petition, signed and verified by both intended parents.
- Where there is an unknown donor, a letter from the gamete storage facility will suffice and can be attached to the petition.
- For a known donor, in the absence of a Donor Agreement that meets the requirements of the statute, it will be necessary to draft a consent signed by the donor and the gestating intended parent, and it is recommended that the gestating and non-gestating intended parent sign it.
- Submit a proposed judgment of parentage that adjudges the intended parents to be the parents of the child and declares that the donor is not a parent. If it is a pre-birth order, it will take effect upon the birth of the child. Refer to the child as “a child expected to be born on or about _____ [due date].” If the parents have selected a name, add “and expect to be named _____.”
- Where there is a known donor, refer to him or her as “the donor referred to in the petition” to protect his or her confidentiality. Although the files are sealed (with limited exceptions), the parents will need to show the judgment of parentage to third parties, so it is important to omit the known donor's name from the judgment.
- Submit an attorney's affidavit which outlines the requirements for a judgment of parentage and how they are met in the application.
- Submit a proposed judgment of parentage that meets the statutory requirements with the petition, so that the application can be granted on submission.

The statute includes strong language indicating that the process is intended to be simple and smooth. Family Court Act § 581-202 (c) directs that where the petition includes the required statements, the court “shall adjudicate” the intended parent to be the parent of the child. FCA § 581-202(g) further provides that the court “shall issue” a judgment of parentage where the provisions of FCA § 581-202(c) are met.

No appearance by the parties is necessary. Support magistrates in Tompkins and Albany counties have granted judgments of parentage on submission, which is in accordance with the intent of the CPSA.

JUDGMENT OF PARENTAGE OR SECOND-PARENT ADOPTION?

Prior to the enactment of the CPSA, the only avenue for a non-genetic parent to establish legal parentage of a child was through the process of second-parent adoption. This raises the question whether parents should obtain a judgment of parentage, second-parent adoption, or both. Adoption is the “gold standard,” which is recognized in all states and countries, and efforts to deny recognition of a same-sex adoptive parent have been unsuccessful. Although a judgment of parentage is final judgment of a court and valid and enforceable in all states of the United States, it is not nearly as well known and understood. If parents were in a state or country that is hostile to same-sex parents, they could face possible delay or even need to seek court intervention to ensure recognition of parentage. This could be particularly problematic in a medical emergency of other time-sensitive circumstances.

The second-parent adoption process is much more complicated, costly, time-consuming and invasive than an application for a judgment of parentage. Most counties require a home study (often at the expense of the parents), and the “adoptive” parent is subject to fingerprinting and background checks. Clients find this baffling and insulting when they have been involved in every aspect of AR with their partner and have co-parented their child from birth. While attorneys may lean toward second-parent adoption as the safer, more secure option, in my experience, clients overwhelmingly prefer the judgment

of parentage route for its simplicity, less intrusive nature and lower cost. It is our responsibility to advise our clients of the pros and cons of each process and leave it up to them to make an informed decision. For example, clients who do not anticipate moving to another state, do not travel much internationally, and whose families live in New York are much less likely to run into difficulties with the recognition of a judgment of parentage than parents who frequently travel outside the United States to visit their families or have careers where a move to a more hostile state is a strong possibility. Ideally, the day will come when the parentage of all parents who conceive their children through AR will be recognized worldwide without the need for further judicial proceedings. Until then, parents will need wise legal counsel to weigh their options and protect their families.

1. The CPSA was enacted as Article 5 of the Family Court Act, §§ 581-101 through 581-704, entitled Judgments of Parentage of Children Conceived through Assisted Reproduction or Pursuant to Surrogacy Agreements, and took effect on February 15, 2021.
2. See Joseph R. Williams, *New Surrogacy Law Brings Opportunities, but Practitioners Beware*, NYSBA Journal, March/April 2021, Vol. 93 No. 2, p. 20, for an analysis of the surrogacy provisions of the CPSA. This article will focus on the other provisions.
3. 77 N.Y.2d 651 (1991).
4. *Counihan v. Bishop* 111 A.D.3d 594 (2d Dep’t 2013); see also *dicta Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016).
5. *Wendy G-M. v. Erin G-M.*, 45 Misc. 3d 574 (Sup. Ct., Monroe Co. 2014).
6. *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010).
7. 28 N.Y.3d 1 (2016).
8. 576 U.S. 644 (2015).





Using Technology To Assist Treatment Court Participants in the Age of COVID-19

By Susan Sturges and Steven Helfont

Susan Sturges and **Steven Helfont** are both employed by the New York State Unified Court System's Office for Justice Initiatives, Division of Policy and Planning, under the direction of Deputy Chief Administrative Judge Edwina G. Mendelson. Sturges serves as opioid court project director. Helfont is director of the division of policy and planning.



It is no secret that the COVID-19 pandemic had an immediate, drastic and, in some respects, permanent impact on the New York State Unified Court System. For New York's hundreds of treatment courts that are built upon close judicial monitoring, specialized services, comprehensive case management and frequent random drug and alcohol testing, this impact was viewed by some as insurmountable. But they were wrong. The dedicated judges and professionals who work in these courts were not deterred and have overcome significant challenges to continue their work remotely and provide critical services to New Yorkers with substance use disorders and mental illness.

In early 2020, court administrators began to rethink and reinvent operations at every level. Led by Chief Judge Janet DiFiore, the UCS quickly transitioned from in-person to virtual operations when the outbreak began. Treatment courts, which provide defendants with substance and/or mental health disorders an opportunity to participate in court-supervised behavioral health treat-

Treatment court staff universally and immediately recognized that the stress, anxiety and uncertainty brought on by the complexities of this crisis would adversely affect many of their participants, especially those who were dealing with comorbid health and/or mental health disorders. Participant struggles were further complicated by obstacles accessing treatment services. Quarantine and social distancing mandates disrupted the systems of care needed to provide substance abuse and mental health treatment, life-saving medications, and supportive services to participants. This disruption in care, combined with the emotional distress and social isolation caused by the pandemic, further exacerbated their struggles and contributed to relapses.

Concerned about the sudden lack of structure and diminished accountability for participants, treatment courts throughout the state adjusted operations toward helping those who needed it most and using remote technology to connect with and help participants navigate these challenging times. For those participants with

Knowing that the pandemic will eventually come to an end, treatment courts are now hard at work trying to find the ideal balance between virtual services and the need for in-person interventions.

ment and supportive services to address the underlying issues that brought them into the criminal justice system, were particularly well-positioned to meet the challenges of operating in this new environment, thanks to a 2018 federally funded grant project designed to incorporate technology into the courtroom. As a result, prior to the pandemic, several jurisdictions were already using teleservices to help participants in residential treatment programs appear remotely for court hearings. This existing framework allowed treatment courts to swiftly shift operations to connect with and support participants when the COVID-19 outbreak began.

Notwithstanding, operating treatment courts remotely has been challenging. From the beginning, the pandemic intensified problems faced by many New Yorkers and resulted in heightened emotional distress due to fear, isolation and loneliness. In addition, statewide stay-at-home orders left many participants struggling to meet basic needs. Hit hard by the financial impact of the pandemic, many participants quickly became focused on finding ways to put food on the table and maintain housing. Difficulties meeting their basic needs led some to prioritize their survival over the recovery process.

access to a computer or smartphone, case managers communicated using Skype and Microsoft Teams. Participants without internet access were contacted via phone. Regardless of the method of communication, court staff were determined to find the best way to hold regular meetings with participants and conduct wellness checks about their health and treatment regime.

Today, more than a year after this transition process began, a gradual return to in-person operations is underway, but technology remains a useful tool to integrate compliance monitoring and critical treatment services. Staff use tablets to help new participants sign consent forms and virtually monitor their progress and compliance. Conducted remotely, initial assessments determine eligibility and inform treatment planning while reassessments of existing participants allow staff to identify a change in symptoms or needs. Based upon these assessments, treatment court staff refer participants to treatment and/or social services to help them stay engaged in their recovery process and advance through the various phases of treatment court.

Beyond wellness checks, treatment courts also use remote technology and teleservices to host official court proceedings and hearings. These court appearances, which are the backbone of judicial monitoring, serve as a forum for participants to discuss their progress and receive encouragement from the judge and treatment court team. Prior to COVID-19, participant progress and treatment court graduation ceremonies were celebrated in-person, but court staff have worked to ensure that their virtual versions are just as meaningful. In fact, virtual graduation ceremonies have allowed participants' friends, family and loved ones, who would not otherwise be able to attend, to join the proceedings.

In addition to leveraging technology to conduct court proceedings and support treatment court participants, the Office for Justice Initiatives' Division of Policy and Planning (DPP) is using technology to support treatment court staff and help them adapt to these unprecedented times. Under the leadership and guidance of Deputy Chief Administrative Judge Edwina Mendelson, DPP oversees and provides technical support to more than 300 problem-solving and accountability courts throughout the state, including opioid and drug courts, veterans' courts, domestic violence and integrated domestic violence courts, family treatment courts, impaired driving courts, mental health courts and human trafficking intervention courts. This work never stopped, even when the pandemic was at its peak. Working with community partners last spring, DPP staff hosted several virtual training series to provide treatment court staff with the skills and resources they need to supplement their work in this changing environment. For example, over 150 treatment court staff and community partners participated in a virtual training of two evidence-based cognitive behavioral interventions: Interactive Journaling and Moral Reconciliation Therapy. Both interventions can be conducted virtually to engage participants in the treatment process and promote a change in attitudes and behaviors.

To maximize resources and find new ways of engaging with participants, DPP also organized a series of webinars for court staff on the importance of peer recovery support services. With assistance from the nonprofit research and consulting organization, Altarum, the Office of Addiction Services and Supports and the Alcoholism and Substance Abuse Providers of New York, experts shared strategies to incorporate peers into opioid courts and discussed how to utilize technology to support peer services.

Knowing that the devastating consequences of the opioid epidemic were only exacerbated by the COVID-19 pandemic, several courts also began to host virtual stakeholder meetings to develop specialized services for those at high risk of overdose. In fact, the Unified Court System opened five opioid courts since the pandemic started,

most recently in Beacon, New York. The convenience of remotely connecting to stakeholder meetings has allowed for greater participation in the planning process from the court system's community partners, including prosecutors, defense attorneys, law enforcement and probation. It has also allowed DPP to move forward with the development of treatment courts in order to expeditiously reach at-risk and underserved populations.

Technology has been especially helpful to the volunteers who work with our veterans' treatment courts. Referred to as mentors, these veterans, many of whom have recovered from their own substance abuse issues, have dedicated their time to assist and support other treatment court veterans in their recovery. Since the pandemic began, DPP staff have worked directly with veteran mentors to teach them how to engage with court participants virtually. Initially, some mentors had difficulty accessing and utilizing our virtual platforms. However, with technical assistance from court staff, all the mentors became comfortable using the technology. Participants were also provided with technical assistance to help them connect with their mentors and court staff for support.

Again, working remotely has presented its challenges, but it has not slowed down the remarkable work of treatment courts or the resolve of their team members. Recognizing the enduring impact that the pandemic has already had on our communities, but knowing that the pandemic will eventually come to an end, courts are now hard at work trying to find the ideal balance between virtual services and the need for in-person interventions. What matters is that our treatment courts *never* stopped serving as a source of support and structure for justice-involved individuals in need of drug treatment and mental health services. To the contrary, embracing technology allowed treatment court staff to maintain contact with participants and monitor progress and compliance through virtual hearings. Training and education programs continued as well. Capitalizing on the convenience of technology and the ease of joining meetings remotely, courts have been able to reach a more comprehensive group of stakeholders and move forward in the planning of opioid courts and other problem-solving courts.

Technology has been instrumental in keeping treatment courts functioning during this health crisis, but it has also opened new opportunities for community engagement. As we continue to adjust to these changes and incorporate technology into court operations, treatment courts will continue to find innovative ways to reach participants and help save lives.

The Importance of Communication in the New Normal

By Carol Schiro Greenwald



People have naively assumed that after the traumas of the pandemic we would return to normal, meaning life as we knew it in 2019.

But we won't. After a year of working remotely, employees have tasted the freedom of flexibility and many won't want to give it up. In addition, facing death for a year has caused people to reckon with big questions related to the meaning of life and work, their work-life balance and a concern for big-issue, societal imbalances. "The new normal will be different. It will have to accommodate not only what companies need from employees but also what employees want from their employer."¹

THE SITUATION

The choice of where to work is often simplified down to the choice of staying remote, requiring everyone to return to the office or a hybrid combination of in-office and remote work. But that basic choice encompasses a broad range of strategically important decisions such as:

- the purpose, size and design of new normal offices;

- synchronization of work done in the office and work done remotely;
- retention of talent and recruiting for a diverse workforce;
- employee demands for transparency and open communication; and
- the relationship between technology, automation and current occupations and business processes.

We will focus on the need for new forms of communication in hybrid offices and suggestions for how to create a new-normal communication culture that acknowledges and reinforces the benefits attached to our human need for connection.



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For law firms, like other service businesses, there is no one-size-fits-all. Many solo and small firms gave up offices and moved everything into their home offices. Many larger firms want everyone to come back to the office, while other firms are opting for a hybrid approach. The hybrid approach sounds like a solution that gives everyone something they want. But creating an effective hybrid structure raises many strategic questions:

- What is the purpose of the office?
- How will teams working on the same matter or for the same client be staffed?
- How will scheduling requirements be addressed?
- What kind of communication channels do we need to support our culture?
- How will we encourage creativity and innovation?
- What is your plan for this transition?

In an article at *Reworked*, Dan Hawley notes:

It's going to take time for organizations, teams and individuals to find the balance that is right for them. We're going to need grown-up conversations which acknowledge the advantages and disadvantages to working both in offices and at home. We need approaches and choices at the center of each decision and recognize that what works for one person, team or even organization might not work for another.²

THE NEW BALANCE

Answers to the questions above require firms to rethink their communication strategies in order to balance the needs of in-office and remote workers. "Continued communication is key as are transparency and finding safe ways for people to become reacquainted with interpersonal routines."³

Leaders have a major role to play in creating a communication plan that is seen as authentic. Employees want empathy. Leaders need to practice emotional intelligence and prioritize real listening with a sense of curiosity, compassion and purpose.

To reinforce and support the new normal, change leaders need to be "[a]ttentive, focused, mindful and in the moment in a way that communicates value and respect to others and offers the broadest access to the messages being shared and the opportunities they present."⁴

Leaders should embody the transparency their employees want by communicating the how and why behind their key decisions about new rules and changes to firm operations. They can help teams remember how to build broad collaborative relationships across the organization. As leaders listen, they will hear opportunities to be proactive – to develop ideas and create synergies between people in different parts of the firm.

For example, consider three basic office norms people are unsure about as they return to the office:

1. **How can we greet each other?** Ask employees what they are comfortable doing and then create a policy so everyone will know what is acceptable.
2. **What is the dress code?** Ask employees what feels right to them and incorporate their input into a policy. Include your rules for mask wearing.
3. **How will we incorporate the spontaneity we missed during working from home in 2020?** Consider adding 10 minutes of agenda-free time before or after meetings which people can use for casual conversations.⁵ Offer online and in-office opportunities for fun activities.

Reconfigure office spaces, replacing large conference rooms with nooks and crannies for quiet one-on-one conversations. Move the coffee room to a central location to encourage spontaneous gatherings. Rearrange employee's offices so that teams sit together, because research shows that proximity increases collegiality.

At the same time, encourage cross-fertilization to help teams avoid getting mired down in group think. This also helps individuals expand their knowledge base and provides opportunities for them to show that they can work well with others, which is often a precondition for promotion.

COMMUNICATION SOLUTIONS FOR REMOTE WORKERS

Various studies agree that over half the workforce, especially younger workers, want to continue to work remotely because they view it as key to their work-life balance. This is especially true in hybrid companies where workers can choose their schedules. Yet this choice may not be a good career choice. "Research shows that home workers – however productive – suffer from a lack of facetime with colleagues and managers, which negatively impacts promotions, and ultimately may stall careers."⁶

"It's not what you know, it's who you know," as the old saying goes. On the first page of *The Wall Street Journal*, May 24, 2021, an article on blockages impeding career advancement for remote workers came to the same conclusion: "Many bosses said they want people in the office because they worry about losing the creativity and spontaneous collaboration that comes with physical proximity. Some also fear a too-remote workforce won't be able to put in the face time with clients to win business and be competitive." And some old-fashioned bosses still measure productivity by desk time rather than results.

Microsoft's annual Work Trend Index (2021) found that the 2020 shift to remote work shrunk people's networks within their organizations to a small group of close connections. They conclude:

Ensuring tomorrow's workplaces are engaging, innovative, creative and inclusive will depend on creating structures and policies that support social connections at work. The organizations for the future, the ones people will be most excited to work for will be those that foster supportive social ties for those in the room, and also those who are not.⁷

The result of this exclusion is company silos, a problem that many full-service law firms run into. The antidote is to plan activities that encourage diversity of relationships. Here are some suggestions:

- Expose teams to different perspectives by bringing in a speaker or holding joint meetings with other teams.
- Encourage employees to reach across the organization to people they would like to get to know. Create a reward system to showcase employees who spend the time "to build on and support the work of others."
- Create workday space and time for employees to build their social capital by decreasing workloads, eliminating unnecessary meetings, and balancing resources "so people have time and energy to make workplace relationships a priority."

The remote work inequity dilemma has led to a variety of solutions. One of the most pragmatic addresses the question of scheduling. The suggestion is to keep all members of a team, including executives, on the same schedule so that they are all in or out of the office on the same days.⁸

Other suggestions center on communication issues:

- If remote workers are isolated in team meetings it can often be the leader's fault. To level the playing field is to literally share the screen to include remote workers at the table. Call on remote workers first. Make sure conversations are seamlessly integrated. Add back the social chit chat that is often eliminated from virtual meetings and, in combined meetings, be sure to provide opportunities for the remote workers to chime in. Leaders can also remind participants of the remote workers' contributions by referencing it in their comments.
- Special attention should be paid to new employees and younger workers. Companies need robust onboarding and training programs. They should be assigned mentors who can help them understand the informal culture and guide their networking initiatives.



- Remote workers also have to help themselves. They should make sure to let their bosses know the effort that went into their finished work product. They should ask for regular face time with their bosses and pursue the opportunity to introduce subjects other than their current assignments. They need to take advantage of the chit-chat opportunities being created to jump start relationships similar to those around the water cooler.⁹

In order for the new workplace order to succeed, executives need to emphasize restoring the employee interactions lost during the pandemic lockdowns and working from home. "Organizations should understand that being nice to each other, chatting, and goofing around together is part of the work that we do. The spontaneous, informal interactions . . . foster the employee connections that feed productivity and innovation."¹⁰

1. Kevin Sneader and Shubham Singhai, *The Next Normal Arrives: Trends That Will Define 2021 – and Beyond*, McKinsey & Company, January 2021.

2. Dan Hawley, *It's Time for an Adult Conversation About the Hybrid Workplace*, Reworked, April 12, 2021, <https://www.reworked.co/digital-workplace/its-time-for-an-adult-conversation-about-the-hybrid-workplace>.

3. Julie Winkle Giulioni, *Returning To Work: How Listening Can Help*, SmartBrief, April 8, 2021, <https://www.smartbrief.com/original/2021/04/returning-work-how-listening-can-help>.

4. *Id.*

5. These three questions and answers are from: Esther Choy, *Avoid Post-Lockdown Business Communication Blunders*, Leadership Story Lab, May 7, 2021, <https://www.leadershipstorylab.com/post-lockdown-business-communication-blunders>.

6. Kate Morgan, *Why In-Person Workers May Be More Likely To Get Promoted*, BBC, March 7, 2021, <https://www.bbc.com/worklife/article/20210305-why-in-person-workers-may-be-more-likely-to-get-promoted>.

7. Nancy Baym, Jonathan Larson, and Ronnie Martin, *What a Year of WFH Has Done to Our Relationships at Work*, Harvard Business Review, March 22, 2021, <https://hbr.org/2021/03/what-a-year-of-wfh-has-done-to-our-relationships-at-work>.

8. Kate Morgan, *supra* note 6.

9. These ideas are discussed in Baym, et al., *supra* note 7.

10. *Id.*

On Capitol Hill, It's Already 2022



Election Day, November 5, marked the end of the unprecedented 2020 election cycle, but also the beginning of the 2022 election cycle. As the outgoing president questioned the validity of the outcome of the election and civil unrest began to foment, erupting into a riot on January 6, state legislatures across the country began to propose, and enact, legislation to restrict Americans' access to the ballot box. In reaction, Congress began to debate in earnest a sweeping measure designed to combat what Senate Majority Leader Chuck Schumer calls "the greatest contraction of voting rights since the end of reconstruction and the beginning of Jim Crow." NYSBA is monitoring federal legislation currently being proposed, and its potential impact on redistricting, in

order to advocate for the preservation of this fundamental aspect of democracy: the right to vote.

On January 4, the For the People Act was introduced in the U.S. House of Representatives as H.R.1. The nomenclature denotes the prominence the House Democratic majority ascribes to this issue. On March 3, the measure passed on a largely party-line vote of 220–210. This nearly 800-page bill is designed to provide a nationwide floor on election and voting requirements and prevent states from restricting voting access. States would be permitted to go further or, theoretically, jurisdictions could ignore the rules for state and local elections, but this would be difficult to implement. Democratic congressional action has been spurred by legislative proposals



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in state legislatures across the country. According to the Brennan Center for Justice, in the first three months of 2021, 361 bills with provisions restricting voting were introduced in 47 states. The proposed federal legislation covers such wide-ranging issues as access to the ballot, campaign finance and ethics reform. I will highlight a few below.

VOTING PROVISIONS

The bill would mandate that states do the following:

- Provide no-excuse absentee voting and same-day voter registration.
- Accept mail-in ballots up to 10 days after Election Day.
- Allow a minimum of 14 consecutive days of early voting.
- Accept a sworn statement in lieu of an ID for voting, with exceptions for some first-time voters.
- Restore voting rights to felons who have completed their sentences.
- Notify voters at least a week before an election if their polling places have changed, and order steps to reduce long lines.

The above issues have been cited by activists as key to ensuring full and robust participation in the voting process. The lack of these protections has particularly impacted traditionally marginalized voters.

CAMPAIGN FINANCE

The legislation also addresses money in campaigns by creating an optional system under which \$6 in public funds are provided for every \$1 a candidate raises from donors giving less than \$200. Those funds would come from additional assessments, or surcharges, on fines already paid by tax cheats or companies fined for criminal or civil penalties.

ETHICAL STANDARDS

Ethics and voting are inextricably linked politically. The bill creates new ethical requirements for those drafting the laws, those advocating for legislative changes and those adjudicating the laws: lawmakers, lobbyists and Supreme Court justices. And in a reflection of the debate over the last four years, it would require presidential and vice presidential candidates to disclose 10 years' worth of tax returns.

REDISTRICTING

The decennial census was completed last year amidst the pandemic. The results are used to determine, among other things, the number of Congressional representatives each state has in Congress. According to the recently

released data, New York will lose one congressional seat, decreasing its representation in Congress from 27 to 26 House members. Therefore, congressional district lines must be redrawn in time for the 2022 mid-term elections.

Currently, states employ their own methods for determining these new districts. Under the proposed federal legislation, so-called "partisan gerrymandering" would end. The bill would require that non-partisan commissions, not state legislatures, draw the districts. The goal is to remove political influence from the most political of activities. This is no small feat and one that many states have been unwilling or unable to achieve. And not all Democrats are in support of this provision. Members of the Congressional Black Caucus worry this proposed new system could reduce their representation in Congress if it results in majority-minority districts being redrawn. While congressional leadership has reportedly tried to assure members there are adequate protections, House Homeland Security Chairman Bennie Thompson (D-MS) still voted against the measure, despite being a co-sponsor of the bill.

Like so many other measures, the real fight for this legislation will happen in the Senate. Also denoted as S.1 in the Senate, the bill faces an uphill battle. With an evenly divided Senate, Democrats need to have all of their caucus members supporting the bill, in addition to 10 Republicans, to get it over the 60-vote filibuster threshold for passage.

Designed to protect the rights of the minority in the Senate, the 60-vote filibuster rule effectively has prevented most liberal priorities from advancing in Washington, despite Democratic control of the White House and Congress, albeit by a slim majority. Interestingly, the filibuster has been used in the past to block voting rights measures such as the Civil Rights Acts of 1957 and 1964.

Will this be the bill that finally kills the filibuster? There are a few other bills that may force the issue before this, including legislation to create a bipartisan commission to investigate the January 6 Capitol uprising, a China competition measure, policing reform, and an infrastructure package. The magical 10 Republicans that would be needed to pass legislation out of the Senate remain elusive. While there are the perennial Republicans who occasionally cross the aisle to vote with their Democratic colleagues, they are not consistent and there are not 10.

Election and voting reform measures are not unique to this session of Congress. The House and Senate have debated measures over the years to address voting access, the redistricting process and to reform money in elections. Will this time be any different? Possibly. There may be a perfect storm of issues coming together that forces change: recent state legislature bills that some see as essential for curbing perceived voting irregularities

and fraud and others see as modern-day Jim Crow laws; an unprecedented infusion of money into political races at the local, state and national levels; and the upcoming 2022 mid-term elections whose outcome could change political control of the Senate. But, the dark cloud of the filibuster still hangs over the process.

If the filibuster does remain in place, is there a way to still get consensus on a streamlined voting reform package? Senator Joe Manchin (D-WV) is advocating for this approach. He favors passage of the more narrowly tailored John Lewis Voting Rights bill, named in honor of the civil rights icon. This measure was introduced in response to the Supreme Court's 2013 decision in *Shelby County v. Holder*, which eroded key provisions that protected voters from racial discrimination and intimidation under the 1965 Voting Rights Act (VRA). The John Lewis Voting Rights bill would restore parts of the VRA, including the requirement that some jurisdictions get federal approval before changing election laws. Many Democrats support this legislation, but in tandem with H.R.1, not in lieu of the broader election and voting reform measure. The New York State Bar Association has been supportive of this bill in previous Congresses. It is important to note that broader legislation, such as H.R.1 and S.1, were not viable bills in previous years in a different political environment in Washington.

Many Democratic elected officials and activists are hoping to see legislation enacted by the end of the summer. With the 2022 midterm elections looming on the horizon, states would need time to implement these proposed sweeping changes. But, as with many political issues, debate will likely continue on in the halls of Congress and in the corridors of state legislatures for many months to come.

The New York State Bar Association is positioning itself to engage with our congressional delegation on voting issues. The right to vote is a key tenet of the Association's mission, as well as our federal Constitution. NYSBA President T. Andrew Brown plans to appoint a task force on voting rights that will look for ways to improve access to the ballot box nationwide. Brown commended New York State for being a leader on voting rights.

"We should be a beacon of hope and a shining example of how to encourage participation in democracy, not limit it," Brown wrote in his president's message in this issue of *The Journal*. "The Association has a role to play here as well, putting the considerable expertise and experience of our members at the disposal of lawmakers who seek to protect and preserve this important tenet of our society."

Please continue to check the NYSBA website and our Government Relations page for updates on voting and other legislative issues.

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TO THE FORUM:

I am the founder and managing partner of a boutique criminal defense firm. An old law school classmate of mine who works for a not-for-profit public defender's office that represents criminal defendants as part of the county's assigned counsel program recently contacted me to tell me that the county has defunded the public defender's office and is moving to an alternate program. While many of their pending cases are being transferred to the new alternate program, the program has limited capacity, and he asked that I take on one of the outstanding client matters pro bono. I am always looking for an opportunity to help the underserved community through pro bono work and would be interested in taking on the matter, provided I am ethically permitted to do so. Do I have any ethical obligations with respect to taking on such representation?

In addition, my firm has been asked to represent another criminal defendant for the limited purpose of preparing for her upcoming trial. Given that I anticipate that the pro bono matter will substantially monopolize my time in the foreseeable future, I'd like the matter to be handled by an of counsel attorney at my firm. The engagement agreement would be limited in scope to obtaining a pretrial deposition and state that representation of the client at trial requires the client to separately engage the of counsel attorney for that purpose, and we would pay him a flat fee for his services. Is such a limited scope retainer and flat fee payment permissible under the ethical rules? If so, are there any special precautions I must follow to make sure our firm is complying with the rules of professional conduct?

Sincerely,
Amy Advocate

DEAR AMY:

Your desire to take on pro bono legal work is admirable, as pro bono representation is an important service offered by lawyers. Based on your question, there doesn't appear to be any ethical reason you would be prohibited

from taking on such representation. In fact, the Rules of Professional Conduct (RPC) encourage every lawyer to provide at least 50 hours of pro bono legal services each year to poor and indigent clientele. *See* Rule 6.1(a)(1). As a general matter, pro bono representation is no different from representing a paying client, and you must consider your ethical obligations when undertaking such pro bono representation. The RPC does not have specific or separate ethical rules that an attorney must follow when representing pro bono clients; the entire gamut of the RPC applies to the representation. We would need additional facts to give you a complete list of the ethical rules that would be implicated during your representation; however, discussed herein are a few important rules that appear to be relevant to your specific situation as we understand your question.

WHAT TO CONSIDER WHEN TAKING ON PRO BONO CASES

First, you must carefully consider whether taking on such representation conflicts with your representation of an existing or former client, which means that you should run an internal conflict check before agreeing to represent a pro bono client. Put differently, "undertaking pro bono legal work does not exempt lawyers from the rules governing conflicts of interests." *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1411 (2019 ed.). We discussed an attorney's obligations to a former client at length in a prior *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelman & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., November 2020, Vol. 92, No. 8.

As we have discussed in several prior *Forums*, RPC 1.7 governs conflicts of interest related to current clients, while RPC 1.9 governs an attorney's ethical obligations to former clients and provides, among other things, that a lawyer may not represent a client adverse to a former client in a matter that is the same or substantially related to the matter in which the attorney represented the former client. *Id.*; *see also* Vincent J. Syracuse, Maryann C.

Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2021, Vol. 93, No. 2.

Determining whether a conflict exists early on is especially important in criminal cases, because in criminal matters conflicts of interest have the potential to implicate the client's Sixth Amendment right to effective assistance of counsel. Conflicts in criminal matters can arise in different ways. For example, we see this issue in successive representations where you or someone from your firm previously represented a prior witness or cooperator. Given the complexities of conflicts of interest in criminal matters, certain conflicts must be raised with the court so that the judge can independently verify whether the conflict so impedes the effective assistance of counsel that it overcomes a defendant's right to counsel of his or her choosing. In some cases, the conflict cannot be waived because representation is prohibited by applicable law, and we call your attention to the fact that there are federal criminal statutes that prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. *See* RPC 1.7, Comment [16].

As discussed below, under certain circumstances, RPC 6.5 allows a lawyer to bypass a conflict check when the scope of the engagement is specifically limited, even in criminal matters where limited scope engagement is permitted. However, that limited exception does not appear to be relevant to the first part of your question. Accordingly, we recommend that you run a robust internal conflict check before agreeing to take on the representation.

ENSURING COMPETENT REPRESENTATION

Next, when taking on a pro bono matter, you should carefully consider whether you are competent to represent the client with regard to the specific subject matter that may be involved. RPC 1.1(b) explicitly prohibits a lawyer from representing a client in a legal matter that "the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." RPC 1.1(b). In determining whether a lawyer has the requisite competence to handle a matter, the lawyer should consider factors such as "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." RPC 1.1 Comment [1]; *see also* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelman & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., November 2020, Vol. 92, No. 8.

Given that you have noted that you are the managing partner of a boutique criminal defense firm and have provided little detail as to the specific subject matter of the

proposed pro bono representation, we will assume, for purposes of your question, that you have the competence required by RPC 1.1(b) to handle this specific matter. However, if, for some reason, the matter you receive is outside the scope of your general expertise, you may still be ethically permitted to represent the client provided that you have the ability and opportunity to consult with an experienced attorney who has the skill and ability to handle the matter. *See* RPC 1.1 Comment [2]. For example, if you have experience representing criminal defendants in pre-trial matters but have little experience trying criminal matters before a jury, you may be required to consult with an experienced trial attorney to comply with your ethical obligations and avoid prejudicing your client's position.

Next, you must obtain the client's informed consent in order to proceed with the representation. Because the matter at issue was previously being handled by another attorney and legal services program, the client must consent to your representation. Indeed, the RPC gives great deference to the client's right to choose his or her counsel. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelman & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., November 2020, Vol. 92, No. 8. The fact that your representation is free of charge does not diminish the client's fundamental right to choose his or her counsel.

Once you have determined that there are no conflicts, that you have the requisite skill and experience to handle the matter and that the client has consented to your representation, we see no reason why you would not be permitted to proceed with the representation. However, keep in mind that, as with any matter, other ethical issues might arise during your representation.

Now, turning to the second part of your question, which we assume is completely unrelated to the pro bono matter discussed above, we are not aware of any ethical prohibition on law firms entering into agreements with clients identifying an individual of counsel attorney who will be handling the client's representation, provided, however, that the of counsel attorney is competent to perform the agreed-upon services. *See* RPC 1.1(b). Nevertheless, there are a number of ethical rules that a lawyer must consider when the retainer agreement provides for a limited scope of *pretrial* representation *only*. As an aside, although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In any case, an attorney wishing to undertake limited scope representation must consider RPC 1.2, which pro-



vides that a lawyer “may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” See NYSBA Comm. on Prof’l Ethics, Op. 1215 (2021). Essentially, the key to appropriate (and ethically compliant) limited scope representation is transparency.

INFORMED CLIENT CONSENT

With respect to the issue of informed client consent, Comment [6A] to RPC 1.2 is instructive: “A lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation.” In making such disclosures, consider whether additional representation might be required and, if so, it is prudent to explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense and complications.

Thus, in your situation, you would first need to disclose what matters would be *excluded* from your limited representation. In our view, such exclusions might include selecting a jury, delivering an opening statement and calling witnesses at trial. In addition to disclosing what information is excluded, you will need to disclose the reasonably foreseeable consequences of that limitation, including the potential risk that a trial court might deny the firm’s motion to withdraw from the representation if the case were to proceed to trial.

It is important to keep in mind that even if a lawyer validly obtains a client’s informed consent to withdraw after a discrete stage, the lawyer must also comply with

RPC 1.16(d), which provides that “if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission and when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” In your situation, once you have entered an appearance in the criminal matter, you are likely to need the consent of the tribunal to withdraw.

There is also a possibility that a court might deny that defendant’s application to substitute successor counsel, despite compliance with the retainer agreement, if that application is made too close to trial. If a motion to withdraw or to substitute other counsel is denied, the client’s representation could be impacted because the trial would then proceed with the defendant represented by the originally retained lawyer, notwithstanding the understanding of the lawyer and the client to the contrary in the retainer agreement.

Even if you provide all the disclosures required, RPC 1.2(c) permits limited scope representation only if the limitation is reasonable under the circumstances. Determining whether the limited scope representation is reasonable under the circumstances requires a close look at your specific facts. Comment [7] to RPC 1.2 provides some further insight: “If . . . a client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer’s services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely.”

However, as noted in NYSBA Comm. on Prof’l Ethics, Op. 1215 (2021), in many criminal matters, a bright line cannot be drawn between pretrial work and trial work. Prop-

erly conducting witness interviews and exploring potential defenses fall under the aegis of the constitutional right to effective assistance of counsel. In addition, decisions about which legal defenses to present at trial are often made long in advance of trial. In fact, many of the provisions of the criminal procedure law require notice to be provided in advance of trial for things such as defendant's intent to proffer psychiatric evidence at trial (CPL § 250.10).

In our view, based on the foregoing, limiting the scope of criminal defense legal services to pretrial work would ordinarily be unreasonable in most criminal matters, especially where there is more than a small possibility that the case will actually proceed to trial.

In any case, as a practical matter, many criminal cases end up turning on facts that are unknown at the time the criminal defendant is arrested and charges are initially filed. Accordingly, it is very difficult to predict, at the beginning stages of a criminal matter, the likelihood of a negotiated disposition prior to trial. For example, information obtained from the police and other law enforcement authorities post-arraignment through pretrial discovery may reveal a basis for a successful motion to suppress eyewitness testimony, admissions or physical evidence. Perhaps one way to limit the scope of representation while still preserving the client's rights is to ensure that the agreement limiting the scope of the representation to pretrial matters requires the attorney to take the necessary steps to ensure that successor counsel is able to provide all the defense services that are necessary to the provision of competent and effective representation until the final deposition of the case.

Finally, with regard to whether you are ethically permitted to pay a flat fee to of counsel attorneys associated with your firm for the representation of such criminal defendants, we are not aware of any provision of the RPC preventing you from doing so, with a few caveats. First, it is important that you and your firm be honest with the of counsel attorney about the reality of their representation; namely, that if the client fails to engage successor trial counsel, and if the court denies the of counsel lawyer's motion to withdraw, then the obligation of defending the client at trial may fall to the of counsel lawyer. This is of crucial importance if the of counsel lawyer does not have much experience representing criminal defendants at trial, as such representation may breach the duty of competence set forth in RPC 1.1(b). The fully informed of counsel then has the ability to accept the limited scope representation or insist upon additional payment from the law firm if required to continue the representation through trial.

In sum, your desire to provide legal services to the underserved community pro bono is commendable but not without ethical considerations. Be sure to consider your

own professional limitations that may inhibit your ability to competently represent the client before agreeing to take on such representation. And, as in nearly all cases of client representation, transparency is critical.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT FORUM:

TO THE FORUM:

I am a mid-level associate at a small general practice litigation firm where I am routinely tasked with helping clients fight traffic violations. While I enjoy representing clients before the Traffic Violations Bureau because it allows me to hone my litigation skills, my firm has recently encouraged me to generate business and expand my practice, but I have no idea how to do that.

A colleague told me about a lawyer-matching service called Legal Lynk, which matches potential clients facing traffic violations with attorneys willing to represent them. The way the Legal Lynk platform works is that the potential client uploads their traffic ticket and pertinent information relating to the violation. Then, Legal Lynk's proprietary algorithm matches the potential client with the "best local traffic lawyer" for their case based on a variety of factors such as geographic location, fee schedules, success rates, local competition and customer service. In addition, Legal Lynk quotes a legal fee that is determined by the lawyer selected by the algorithm. Once the fee is paid, the client is paired with the lawyer, who has 24 hours to accept the case, or the client is referred to another lawyer determined by the algorithm. If the lawyer accepts the case, the legal fee is transferred by Legal Lynk to the lawyer minus a service charge, which is retained by Legal Lynk for providing the service.

When I mentioned the idea to my mentor, she recommended that I review the Rules of Professional Conduct to make sure that such a service is ethically permissible. Specifically, she expressed concern with respect to the service charge retained by the company. Is there any ethical rule that would prohibit me from using Legal Lynk's service?

Sincerely,
Ann E. Bitious

State Bar News

Escrow Account Rules: Protect Your Practice and Avoid the Grievance Committee

By Brandon Vogel

Of his current caseload representing lawyers in front of the state's grievance committees, attorney Scott Bush estimates that half of them involve escrow account issues.

"Every time you have funds that belong to a third party or a client, those go into an escrow account not an operating account. That's where you get in trouble; that's comingling of funds and there's a prohibition against that," said Bush of Corrigan McCoy & Bush. "If you are holding funds for a client, you are a fiduciary. You know the Rule we're talking about is [RPC] 1.15. It's in black and white, basically everything you have to do."

His clients that appear before the Grievance Committee:

- (1) do not understand the rule;
- (2) haven't read it; or
- (3) don't care.

"It's the latter ones that are really going to get themselves in trouble," said Bush on the CLE webinar "Escrow Accounts: The Dangers and Pitfalls."

He explained that grievance committees get involved with an attorney in one of three ways: bouncing an escrow check; holding funds for a client or third party and not turning over the funds; or stealing the money.

"To be honest, there's not much I can do for them," said Bush about clients who steal escrow funds.

According to Bush, the three biggest things grievance committees do not like are: being ignored after receiving a complaint; being lied to; and, above all, depriving clients of funds from escrow accounts.

He said that if you have a settlement check, make sure that you have an endorsement from the client or something in writing authorizing you to deposit it on their behalf. The grievance committee wants to see that everything is in writing.

With few exceptions, an escrow account has to be set up in a New York state bank. The banks are required to report any bounced checks. If the check bounces, the bank sends a letter to the Lawyers' Fund for Client Protection, and the Lawyers' Fund sends a letter to the grievance committee.

"That's one of the major ways that you get involved with respect to the committee," said Bush.

Attorneys will then receive notification and be asked to provide up to six months' worth of bank statements, deposit slips and cancelled checks. In addition, the committee will pick a date and ask for proof of how much money was in the escrow account at that time.

"That's going to start the process with respect to the committee," said Bush.

Failure to respond in a timely manner will result in a notice to testify. If that fails, the committee will make an application to suspend you from practicing pending the investigation.



Bush noted that it's usually small firms and solo practitioners who get into trouble.

"Even if it was an interim suspension, what are you going to do? You can't practice law. You've got clients. You've got to turn over your files. You've got to tell the clients what's going on. If you can't practice, it's not good business."

Bush said attorneys are required to keep bank statements for seven years, but he has seen instances where some clients do not have statements from a year ago.

"A lot of attorneys say, 'Well, I rely on my staff or my accountant to keep track of this material,'" said Bush. "That's all well and good, but you've got to remember one thing: they're your client; it's your client's funds."

He clarified that retainer fees should go into an operating account or a separate retainer account; it is not required to go into an escrow account. "Retainers are not clients' funds; that's the distinction."

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Former U.S. Attorney General Loretta Lynch Calls on Lawyers To Speak Out Against the Assault on Voting Rights

By Brendan Kennedy

Former United States Attorney General Loretta Lynch has a message for minority law students: “Embrace being different.”

Lynch, the first African American woman to serve as U.S. Attorney General, gave remarks after receiving the Robert L. Haig Award from New York State Bar Association’s Commercial and Federal Litigation Section on Friday, May 7.

“Every minority in this country knows the experience of moving between cultures and that fluidity of experience, that flexibility of thought,” Lynch said. “It is a skill well-suited to navigating the waters of our current political and cultural landscape, which requires the ability to see and understand people different from oneself.”

The former attorney general, who is now a partner at Paul, Weiss, Rifkind, Wharton & Garrison, spoke about the need for diverse voices in the legal

profession, which is especially needed given the state of our current political climate.

“We need young lawyers of all backgrounds to help us move through the challenges of today,” Lynch said. “We need their energy, we need their optimism, we need their commitment to reason and debate. The exploration of ideas is a pathway to the truth, and we need this now, as the very concept of truth is under assault.”

She also discussed the responsibility that lawyers have to speak out against efforts to suppress voting rights, as is currently happening in Florida, Texas and Georgia. She applauded the work of her fellow partners Brad Karp and Bob Atkins, as well as the general counsel of several prominent corporations based in states where these bills are being signed into law.

“The vote is the hallmark of our democracy,” Lynch said. “It is time for the legal community to stand up



against the renewed cynical efforts to undermine our Constitution and to fight to protect the voting rights of all Americans.”

The award is given each year to a long-standing member of the legal profession who has rendered distinguished public service. Haig, a litigator at Kelley Drye in New York City, was the founder and first chair of the section.

ESCROW ACCOUNT RULES: PROTECT YOUR PRACTICE AND AVOID THE GRIEVANCE COMMITTEE

continued from page 47

There are times when honest mistakes happen with escrow accounts, such as staff depositing funds into an operating account. Even if you take care of it immediately but the check bounces, the Lawyers’ Fund notifies you, which then involves the grievance committee.

He said that paralegals and third parties cannot have access to your escrow.

“You as the attorney are responsible for it. It is you. It is your license on the line. It is your responsibility,” said Bush. “Grievance committees want to know that you are looking at your monthly statements, you are balancing your checkbook, you are taking care of your clients.”

He recommended that attorneys have a report for each client for monies that go into and out of the escrow account. “That’s what they want to see. They want the paper trail for that entire time period.”

Bush was succinct: “There is no excuse for an attorney using client

funds for their own benefit. That is going to get you suspended no matter what.”

Various forms of discipline can include more private matters such as a letter of advisement or an admonition or more serious public charges such as censure, suspension or disbarment that will run in the newspaper.

Bush also reminded the audience of Rule 8.3, which requires lawyers to report the wrongdoing of other attorneys. “If you know that your partner is screwing around with the escrow account, you are obligated to report your partner.”

Member Spotlight: Tsugumichi Watanabe

By Brendan Kennedy

Who are your heroes in the legal world?

I admire Ralph Nader for his persistence in causes that he believes are right.

If you didn't become an attorney, what career path would you have pursued and why?

Before going to law school, I intended to be a college professor. Many of my relatives were teachers and I enjoyed both making written presentations intended to persuade as well as sharing with others what I know – so teaching seemed to be a natural fit. I use many of these same skills as a lawyer and in many ways the two professions are similar.

If you could dine with any lawyers – real or fictional – from any time in history, who would it be and what would you discuss?

Nelson Mandela. I am curious about how his legal training and background as a Christian enabled him to endure 27 years of imprisonment as well as formed his political thinking and strategy in helping South Africa overcome apartheid after his release.

What is your favorite book, movie and television show?

- John Hersey's "Hiroshima," a short book that describes brilliantly the strength of the human spirit and the sense of community in the face of a shared disastrous experience.
- Akira Kurosawa's "Rashomon," an engrossing, well-acted film that shows how human self-interest affects a person's ability to discern the truth about factual events.

- The Late Show with David Letterman: The show's zany sense of humor and comedic timing combined with Letterman's ability to both ask probing interview questions and elicit honest responses made this a perfect way to unwind at the end of a busy day.

How did you decide on your practice area?

My first law firm had a rotation program for first-year associates before picking a practice area. Getting a sense for a group's practice based on a short rotation was not easy, so I picked corporate as that was the closest to my law school studies. Shortly after starting, I was sent to the Tokyo office where banking and finance were the main practices. So, I transferred to banking and finance, later adding project finance to my principal areas of practice.

What is the best life lesson that you have learned?

You should try to have a plan for your life but expect that almost never will things go according to plan and that dealing with the unexpected can



Watanabe is a partner at Morgan, Lewis & Bockius.

often be the most rewarding experience.

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**T. ANDREW BROWN,
PRESIDENT**

T. Andrew Brown of Rochester, founder and managing partner of Brown Hutchinson, became president of NYSBA on June 1, 2021.

A NYSBA member for 36 years, he was chair of the Trial Lawyers Section and Finance Committee,

vice-president for the 7th Judicial District, a member-at-large of the Executive Committee and co-chair of the Task Force on the Future of the Legal Profession in 2010 and 2011.

In response to the protests motivated by the murder of George Floyd, Brown was appointed co-chair of the NYSBA Task Force on Racial Injustice and Police Reform. He moderated three panel discussions with members of law enforcement, prosecutors, public defenders, and judges that examined the issues contributing to police brutality. The task force will deliver its report and recommendations on how to end deleterious policing practices that disproportionately impact persons of color to NYSBA’s House of Delegates on June 12.

For nine years, Brown was a member of the New York State Board of Regents, which provides general supervision of all educational activities within the state and was vice-chancellor of the board since 2017. He stepped down in 2020 to prepare for his role as president of NYSBA. He 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 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. 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 earned his law degree from the University of Michigan Law School, and his undergraduate degree from Syracuse University.



**SHERRY LEVIN WALLACH,
PRESIDENT-ELECT**

Sherry Levin Wallach is the deputy executive director of the Legal Aid Society of Westchester County.

A former chair of the Criminal Justice and Young Lawyers Sections, Levin Wallach served as NYSBA secretary for four terms, was a 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. Levin Wallach serves on the Committee on Professional Discipline, the Committee on Mandated Representation and the Task Force on Parole Reform. She is chair of the Resolutions Committee, a member of the new LGBTQ Law Section, and is co-founder of the Young Lawyers Section Trial Academy.

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 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 for approximately 14 years and of counsel to both Bashian Law, formerly Bashian & Farber, and Brown Hutchinson.

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.



**TAA GRAYS,
SECRETARY**

Taa Grays is vice president and associate general counsel of information governance, MetLife Legal Affairs. As the lead of information governance, Grays is responsible for the strategic management of MetLife's global Information Lifecycle Management Program.

She leads an eight-person team that develops, implements and manages the information governance strategic plan.

Grays is co-chair of the NYSBA Task Force on Racial Injustice & Police Reform. She is a member of the Business Law, Corporate Counsel and Women in Law Sections, as well as the Task Force on Autonomous Vehicles and the Law. She previously served as vice president of the First Judicial District on the Executive Committee. She previously chaired the New York State Conference of Bar Leaders and the Committee on Women in the Law (now the Women in Law Section). She received NYSBA's Diversity Trailblazer Award in 2008.

Prior to her current role at MetLife, Grays served as the chief of staff to the general counsel since 2010. She started with MetLife in 2003 in the litigation section. Before joining MetLife, Grays was an assistant district attorney with the Bronx district attorney's office in its rackets bureau for five-and-a-half years.

Grays has been recognized as one of 100 Leading Women Lawyers in New York by Crain's New York Business in 2017, a Visionary Leader in Litigation by Inside Counsel in 2016, among the Most Influential Black Lawyers in 2015, and R3 – 100: Ready to Rise to become a general counsel in 2013 and 2015.

Within the legal community, the New York City Bar Association recognized her as a Diversity Champion in 2015. The Metropolitan Black Bar Association recognized her dedication and leadership to the bar in 2010 by honoring her with its inaugural Bar Leaders of the Year Award.

Grays earned her law degree from Georgetown University Law Center and received her undergraduate degree from Harvard College.



**DOMENICK
NAPOLETANO,
TREASURER**

Domenick 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 the immediate past 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, the 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 2nd, 11th and 13th Judicial Districts. Napoletano earned his law degree from Hofstra University School of Law and his undergraduate degree from Brooklyn College.

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Daughter of the Empire State: Lessons in Legal Writing From New York Chief Judge Judith S. Kaye

Gerald Lebovits (GLEbovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks Matthew Goldstein (Columbia Law School), his judicial fellow, for his research. This is Judge Lebovits's final column. He has served as the Journal's Legal Writer for 20 years.



Judith S. Kaye¹ was born in 1938 in rural Sullivan County, New York. Forty-five years later, Governor Mario Cuomo appointed her associate judge of the Court of Appeals, New York's highest court.² A decade later, in 1993, Kaye took charge of the court — and with it New York's court system — as the court's first female chief judge.³ From Monticello High School through her retirement from the judiciary in 2008, Kaye established herself as a litigator, a firm partner, and a prescient judge.⁴ Her opinions, majorities and dissents alike, survive with a

clarity and force typical only of America's greatest judges.⁵ Her familiarity with the law was complete, even at home: Stephen Rackow Kaye, her husband of 42 years with whom she had three children, was a Proskauer Rose partner who wrote "the definitive work on commercial litigation in New York State."⁶

The chief judge was respected across the nation. President Bill Clinton considered her both for attorney general and to fill the Supreme Court seat left open by Justice Byron White's 1993 resignation.⁷ Kaye declined both positions,

citing her post as chief judge—at the time, less than one month old and yet, in her words, a “commitment and responsibility” and “magnificent opportunity.”⁸ She would spend the next 23 years making good on that commitment. She asked of herself and the entire state, “[H]ow can we do better?”⁹ Her consequent administrative and logistical remodeling of the New York court system was, like her jurisprudence, a testament to her thoughtful, systematic, and thorough nature.

Kaye was also a scholarly writer with an effective—and affecting—pen. The consummate New Yorker, she tried throughout her career to publish in as many New York legal publications as possible.¹⁰ The written word was a natural refuge for the judge, who had a “lifelong desire to be a world-class journalist.”¹¹ After editing her high school newspaper and serving as editor-in-chief of Barnard College’s campus *Bulletin*, Kaye began her career reporting for the *Hudson Dispatch* out of Union City, New Jersey.¹² Only the “thought that a law degree would enhance her chances of becoming an international reporter”¹³ compelled Kaye to attend New York University School of Law, her beloved alma mater. The lessons of journalism, no less than the experience of law, informed her every written work. “[M]y success in law school,” she said, “was largely attributable to skills I honed as a journalist, like diagnosis—what are the core issues, what’s most important, what’s the lead paragraph—and clear, articulate expression in the English language.”¹⁴

Kaye’s articles, essays, and speeches tackled issues ranging from state constitutionalism and jury reform¹⁵ to women’s progress in big law firms¹⁶ to legal education and scholarship.¹⁷ She inspired significant revisions to New York’s official legal-style manual, the *Tanbook*,¹⁸ and was America’s leading advocate for gender-neutral language in the law.¹⁹

Sometimes the subject of Kaye’s writing was legal writing itself.²⁰ But perhaps even more varied than the subject matter of her writings is the style: “Some of her articles are highly theoretical, some are intensely practical, some are intensely personal.”²¹ At all times, though, her writing is lucid and accessible. It’s hard enough to convey one complex point in one writing style. Yet from the beginning to the end of her career, Kaye succeeded in conveying complex points in different styles, each precisely chosen and perfectly suited to the issue that prompted her publication. Words, to Kaye, are “critical to the practice of [law]; the better used the better the practice.”²² Few used them better. By the time of her death in 2016, Judith Kaye’s words had not only furthered the law, but also taught others—from students writing papers²³ to judges writing opinions²⁴—how to do just that. Not bad, the chief judge might say, “for a girl who grew up in Monticello.”²⁵

Here’s what the chief judge wrote about legal writing.

KNOW YOUR CASE; KNOW YOUR AUDIENCE

*“It hardly seems necessary to underscore the importance of written and oral communication in the law—especially for the audience gathered here this afternoon.”*²⁶

Kaye understood that legal writing is often meant to persuade and that persuasion comes in different flavors. Lawyers seek to persuade courts to adopt this rule of law and reject that one; judges seek to persuade readers of their opinions that their decisions are correct.²⁷ Authors of law review articles seek to shape what lawyers and judges do.²⁸ Even if they advance the same position, the advocate’s argument before the bench should not resemble the academic’s argument before a committee of student journal editors. At all times, legal writers must keep in mind *what* and *before whom* they argue.

On the topic of effective brief writing, Kaye advised legal writers to avoid “irrelevant fact recitations . . . and ‘kitchen sink’ legal argument”²⁹—that is, reciting each and every possible argument. “You get no extra points” for doing so, she said, “and your best arguments may disappear.”³⁰ Good, focused brief writing “condition[s] the reader to feel that justice is on your side” and includes only those facts that “advance the legal argument you plan to make.”³¹ Kaye’s advice frequently centered on appellate briefing, but her lessons are universal. No matter the context, if lawyers don’t know their “objectives, and the major points leading to them,”³² how can they expect to persuade their readers of anything beyond the profession’s need for remedial writing courses?

A piece of legal writing should take shape in view of what it aims to achieve and with due regard for its audience. The advocate before a court, for example, “can safely assume that all judges have a lot of briefs to read,” and should therefore aim to compose a “clear, concise, cogent presentation of the pertinent facts and contentions.”³³ That cogent presentation is also a matter of structure. As Kaye said, “I never resent being told what the brief writer plans to say . . . and finally being gently reminded of what the writer has established.”³⁴

But that’s just step one. Kaye advised advocates to take note of the forum for which they write; for example, “[a]n argument resting solely on ‘fairness’ . . . cannot carry the day” in a court of law with “no ‘interest of justice’ jurisdiction.”³⁵ And, finally, a piece of legal writing must account for the constraints and pressures on its audience—especially an audience like Chief Judge Kaye’s Court of Appeals. An appellate opinion “resolves a controversy between litigants to be sure, but it also purports to lay down a rule, establish a principle, give guidance to others in similar circumstances.”³⁶ An appellate advocate’s brief may provide a resolution to the instant case

that a judge “can follow easily and have confidence in,”³⁷ but Kaye recognized that it will not win the day if the rule of law it proposes is not “stable, sensible, and predictable . . . [and] equal to the demands of a changing, maturing, progressing society.”³⁸

Or, at least, those demands as the audience sees them.

THINK AGAIN . . . AND AGAIN

“An effective brief is fully thought through before a word is set to paper.”³⁹

To avoid destruction by earthquakes, houses built near geologic fault lines must be sturdy from the foundation up. Kaye believed that a piece of legal writing, too, must be built on solid foundations, lest it crumble amid another seismic event—an experienced lawyer’s close reading. For the legal writer, words put to the page should follow, not precede, a full understanding of the propositions to which they are meant to give effect. In Kaye’s view, words are “how I clothe my thoughts.”⁴⁰ Without a clear initial view of the thoughts that words are meant to clothe, how can legal writers ever be sure that their diction best fits the occasion of writing?

Legal writing, unlike some other written forms, is intensely goal oriented. Through it, the lawyer tries to effect a specific result: promoting justice,⁴¹ extolling the virtues of court reform,⁴² or winning a case. Without understanding what they seek to accomplish, legal writers cannot know how best to accomplish it. Kaye thought it was better to confront this problem early on, before uncapping her pen. Otherwise, what hope does the legal writer have to “hold [a judge’s] attention . . . establish credibility, win confidence, and ultimately persuade that judge”⁴³ that her conclusion is the correct one?

KEEP IT SHORT, KEEP IT CLEAR, AND KILL YOUR DARLINGS

“A brief is a private oral argument, your time alone with the judge.”⁴⁴

Reading is a solitary activity. Particularly in the law, however, it is a conversation between writer and recipient—whether advocate and judge or petitioner and respondent. Kaye’s advice therefore directs legal writers to ask themselves what their writing would look like if they were standing before its intended reader and making their case in person. Would they use “humor,” “sarcasm,” or “wild rhetoric”?⁴⁵ Likely not.⁴⁶ In person, they would likely be “clear and communicative,” as their “[w]riting should be.”⁴⁷

Kaye knew that in addition to style, “[b]revity and clarity are also essential ingredients to strong writing.”⁴⁸ Generally, and especially in the lives of busy lawyers, “as the length of writings grows, the number of people who actually read them likely dwindles.”⁴⁹ A clear, cohesive

brief, Kaye said, “will rivet my attention, tend me to the writer’s position, and linger in my mind.”⁵⁰ Recalling her days as a journalist, Kaye pointed to clarity done right: “Incomprehensible though the news may sometimes be, you don’t see a lot of semicolons and Latin on our front pages.”⁵¹ Indeed, Kaye’s own “front pages”—the first few sentences of her opinions—briefly and clearly “answer[ed] the question that has beset readers for generations: What is going on here?”⁵²

Clarity also means cutting fat.⁵³ No matter how sweetly a favorite sentence sings, the legal writer should not be afraid to excise it. After all, according to Kaye, styles “come and go, and therein lies a danger in reaching for immortal phrases.”⁵⁴ How can the legal writer avoid this pitfall? Put a draft “aside for a day or two”—it’ll help “to insure against those literary flights that shouldn’t survive the blue pencil.”⁵⁵ Yet Kaye reserved a role for style in legal writing: “[A]ppellate judges must struggle to find the elusive phrase, the expression that will capture and fix the principle that controls the case. To make a rule and make it memorable,” she said, “occurs only at the intersection of law and literature.”⁵⁶

SWEAT THE SMALL STUFF

“Why risk losing a judge’s confidence, or patience, on account of mechanical matters that are wholly within your control?”⁵⁷

Courts create and enforce generally applicable legal rules, but they also have rules of their own.⁵⁸ These rules are exacting. The legal writer may, for example, confront a requirement that each page number in an appendix must be “preceded by the letter A,”⁵⁹ or that each heading in an argument section must be “distinctively printed.”⁶⁰ These rules warrant strict adherence. Judges may not notice if a submission belongs in a museum of modern design, but “they surely do notice one that is sloppy.”⁶¹ With all the time required to draft a legal document, Kaye reasoned, “you might as well spend the minimal extra time required to do it right.”⁶²

The demand for perfection extends beyond the brief writer. Kaye also had advice for other judges, who she said must pay scrupulous attention to every word and piece of punctuation in their opinions lest a “careless comma, a stray phrase, a fanciful footnote . . . come back to haunt in the cases and years ahead.”⁶³ Further, no legal writer, whether student or chief judge, “can afford to fudge the facts.”⁶⁴ Doing so is “suicidal” if it offers the writer’s opponent unearned opportunities.⁶⁵ And it’s downright homicidal if it foists false conclusions on “appellate judges . . . [who] shape the law and sometimes even make” it.⁶⁶

Like those judges, Judith Kaye changed the law. But, as she herself wrote about Chief Judge (and later Justice) Benjamin N. Cardozo, Chief Judge Kaye also “changed

the way many thought about the law.”⁶⁷ The lasting appeal of her writing makes it clear she still does. And if it’s true of a judge’s work that “what is good in it endures,”⁶⁸ she will for a long time to come.

1. Though her middle name was Ann, Kaye—née Smith—published with the initial S.
2. Governor Cuomo’s confidence in Kaye was so complete that when he declined President Clinton’s overtures to appoint him to the Supreme Court, he recommended Kaye in his place. See Jon Lentz, *Setting a Precedent: A Q&A with Judith Kaye*, New York Nonprofit Media (Jan. 6, 2015), <https://nynmedia.com/articles/personality/interviews-and-profiles/setting-a-precedent-a-q-and-a-with-judith-kaye.html> (“And did you hear that when he withdrew, he told them to call me?”).
3. See generally Sam Roberts, Judith S. Kaye, *First Woman to Serve as New York’s Chief Judge, Dies at 77*, N.Y. Times (Jan. 7, 2016), <https://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html>.
4. See *Hernandez v Robles*, 7 N.Y.3d 338 (2006) (Kaye, Ch. J., dissenting) (characterizing as a “misstep” the Court’s decision to uphold New York’s prohibition on gay marriage just seven years before the Supreme Court, in *United States v. Windsor*, 570 U.S. 744 (2013), held a federal heterosexual-only definition of marriage unconstitutional as an equal-protection violation).
5. See *id.*; Janet DiFiore, *A Tribute to Chief Judge Judith S. Kaye*, 81 Brook. L. Rev. 1379, 1380 (2016) (listing “elegantly written, well-reasoned opinions” in “so many . . . critical areas”).
6. The Associated Press, *Stephen R. Kaye, 75, Litigation Lawyer, Dies*, N.Y. Times (Nov. 3, 2006), <https://www.nytimes.com/2006/11/03/nyregion/03kaye.html>.
7. *Kaye Rules Out Supreme Court Post*, Washington Post (Apr. 8, 1993), <https://www.washingtonpost.com/archive/politics/1993/04/09/kaye-rules-out-supreme-court-post/78e6f30f-4f72-4800-abe8-7906d24d1cbf/>.
8. *Id.*
9. Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 Fordham Urb. L. J. 1925, 1926 (2002).
10. The journals in which she published range from the New York Law School Law Review, see Judith S. Kaye, *Juvenile Justice Reform: Now is the Moment*, 56 N.Y.L. Sch. L. Rev. 1300 (2011–2012), to the Albany Law Review, see, e.g., Kaye, *infra* note 43. Her work is found in journals and reviews upstate, downstate, and everywhere in between.
11. Judith S. Kaye, *Reflections on Opportunity in Life and Law*, 81 Brook. L. Rev. 1383, 1384 (2016).
12. Steven C. Krane, *Judith Smith Kaye*, Historical Society of the New York Courts (2007), <https://history.nycourts.gov/biography/judith-smith-kaye/>.
13. *Id.*
14. Judith S. Kaye, *James P. White Lecture on Legal Education: A Chief Judge’s After-Life: Reflections on Educating Lawyers Today*, 45 Ind. L. Rev. 291, 300 (2012) [hereinafter *Educating Lawyers Today*].
15. See, e.g., Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John’s L. Rev. 399 (1987) (arguing that state constitutional jurisprudence need not parallel federal courts’ interpretations of the federal Constitution); Judith S. Kaye, *Rethinking Traditional Approaches*, 62 Alb. L. Rev. 1491, 1494–96 (1999) (explaining New York’s improvements to its jury system during Chief Judge Kaye’s tenure).
16. See, e.g., Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 Fordham L. Rev. 111 (1988); Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 Fordham L. Rev. 1941 (2008) (revisiting and revising Kaye’s earlier work in light of new literature and statistics).
17. See, e.g., Kaye, *Educating Lawyers Today*, *supra* note 14; Judith S. Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. Legal Educ. 313 (1989) [hereinafter *Law Review Writing*].
18. In her foreword for the 2002 Tanbook, Kaye “applaud[ed]” the edition’s “decisive step toward clearer, cleaner, more readable decisions, unencumbered by needless, distracting material.” Gerald Lebovits, *New Edition of State’s “Tanbook” Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8, 8 (Mar.–Apr. 2002) (quoting New York Law Reports Style Manual Foreword at iii (2012)). During Kaye’s tenure, and “with [her] enthusiastic support . . . the Tanbook began its evolution from an in-house style sheet to” a comprehensive citation and style guide. William J. Hooks, *The Tanbook: A Guide and a Resource*, 90 N.Y. St. B.J. 62, 62 (Oct. 2018). (The current edition of the Tanbook can be found at <http://www.nycourts.gov/reporter/style-manual/2017/2017-SM.htm>).
19. See Judith S. Kaye, *Perspective, A Brief for Gender-Neutral Brief-Writing*, N.Y.L.J., Mar. 21, 1991, at 2, col. 3 (“[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize.”); Judith S. Kaye, *Effective Brief Writing*, New York Appellate Practice 625, 625 (N.Y. St. B. Ass’n 2013), <https://nysba.org/NYSBA/Coursebooks/Fall%202013%20CLE%20Coursebooks/F2013NYAppellateMelvilleRochesterAlbany/F2013MelvRochAlbany.NYAppellate.Coursebook.pdf> [hereinafter *Brief Writing*] (“Gendered” writing . . . [is] so unnecessary.”). Because of Chief Judge Kaye, New York courts strongly encourage gender-neutral language in judicial opinions. See N.Y. St. Jud. Ctrec. on Women in the Courts, Fair Speech: Gender Neutral Language in the Courts (2d ed., N.Y. St. Unified Ct. Sys. 1997). The Legal Writer has long championed the chief judge as America’s most important advocate for gender-neutral language in the law. See Gerald Lebovits, *He Said—She Said: Gender-Neutral Writing*, 74 N.Y. St. B.J. 64, 64 (Feb. 2002).
20. See, e.g., Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10 (Nov. 1997) [hereinafter *Wordsmiths*].
21. Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 Alb. L. Rev. 1977, 1984 (2011).
22. Kaye, *Educating Lawyers Today*, *supra* note 14, at 300.
23. See *id.*
24. See Kaye, *Wordsmiths*, *supra* note 20, at 10.
25. Jeanne Sager, *Judge Kaye’s Judicial Legacy Is Assured*, Sullivan County Democrat (Jan. 22, 2010), <https://www.scdemocratonline.com/news/002February/17/kaye.htm>.
26. Kaye, *Educating Lawyers Today*, *supra* note 14, at 300.
27. Kaye, *Wordsmiths*, *supra* note 20, at 10.
28. Kaye, *Law Review Writing*, *supra* note 17, at 321 (“As Judge Hand observed, judges ‘furnish the momentum, [academics] the direction; but each is necessary to the other. . . .’”).
29. Kaye, *Brief Writing*, *supra* note 19, at 625.
30. *Id.* at 626.
31. *Id.* at 627.
32. *Id.*
33. *Id.* at 626.
34. *Id.* at 627.
35. *Id.* at 626.
36. Kaye, *Wordsmiths*, *supra* note 20, at 10.
37. Kaye, *Brief Writing*, *supra* note 19, at 627.
38. Judith S. Kaye, *These Are the Days: Lawyering Then and Now*, 82 N.Y. St. B.J. 28, 28 (Jul./Aug. 2010) [hereinafter *These Are the Days*].
39. Kaye, *Brief Writing*, *supra* note 19, at 627.
40. Kaye, *Wordsmiths*, *supra* note 20, at 10.
41. See Kaye, *These Are the Days*, *supra* note 38, at 30.
42. See generally Judith S. Kaye, *Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 Alb. L. Rev. 831 (2006).
43. Kaye, *Brief Writing*, *supra* note 19, at 625.
44. *Id.*
45. *Id.* at 626.
46. Kaye “could be howlingly funny,” but she never made jokes during oral argument or at the expense of others, behavior she “would likely call . . . aggravated vanity in the first degree.” Albert M. Rosenblatt, *Judith Kaye: Beyond Scholarship, to the World of Style and Mirth*, 92 N.Y.U. L. Rev. 93, 95 (2017).
47. Kaye, *Wordsmiths*, *supra* note 20, at 10.
48. Kaye, *Educating Lawyers Today*, *supra* note 14, at 300.
49. Kaye, *Wordsmiths*, *supra* note 20, at 11.
50. Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Leg. Writing 1, 12 (2001–2002).
51. Kaye, *Educating Lawyers Today*, *supra* note 14, at 300.
52. Rosenblatt, *supra* note 46, at 93. Rosenblatt, *id.* at 94, notes that in one of her earliest cases, Kaye simply and clearly set out the rule in her first sentence: “A stipulation of a settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.” *Hallock v. State*, 64 N.Y.2d 224, 228 (1984).
53. Kaye furnished a lighthearted example of this principle in recounting her appearance at oral argument before the Second Circuit in 1975. Before she could get out even six words, she was interrupted from the bench: “[I]t will not be necessary to hear further argument. We have decided to affirm.” In retrospect, Kaye wrote, “I have come to believe that this was my best oral argument ever, brief and to the point: ‘May it please the Court. Thank you, Your Honor.’” Judith S. Kaye, *The Best Oral Argument I (N)ever Made*, 7 J. App. Prac. & Process 191, 192 (2005).
54. Kaye, *Wordsmiths*, *supra* note 20, at 11.
55. *Id.*
56. Judith S. Kaye, Review: *Cardozo: A Law Classic*, 112 Harv. L. Rev. 1026, 1045 (1999) [hereinafter *Cardozo*]. Kaye’s colleagues also recognized her idiosyncratic writing style—for example, her use of the dash as a “stylish substitute for the comma.” Rosenblatt, *supra* note 46, at 94.
57. Kaye, *Brief Writing*, *supra* note 19, at 625.
58. See, e.g., CPLR 5528–5529 (prescribing formal rules for appellate briefs in New York courts).
59. *Id.* R. 5529(b).
60. *Id.* R. 5528(a)(4).
61. Kaye, *Brief Writing*, *supra* note 19, at 625.
62. *Id.*
63. Kaye, *Wordsmiths*, *supra* note 20, at 10.
64. *Id.*
65. Kaye, *Brief Writing*, *supra* note 19, at 627.
66. Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 Cornell L. Rev. 1004, 1013 (1988).
67. Kaye, *Cardozo*, *supra* note 56, at 1038.
68. *Id.* at 1042.



In Honor of the Man Behind “The Legal Writer”

Over the past 20 years and 150 issues of the Journal, Hon. Gerald Lebovits has educated us lifelong learners on the finer points of legal writing with practical, real world advice in his column, “The Legal Writer,” that concludes each issue of the Journal.

Through his wise and incisive writing, he has demonstrated how to draft winning arguments, tighten sentences, eliminate awkward language, remove redundancies, and strive for clarity. He has inspired our readers with styles as diverse as Supreme Court Justice Ruth Bader Ginsburg’s literary technique, Pulitzer-Prize winning author Toni Morrison’s poetic prose, horror writer Stephen King’s emphasis on storytelling and Supreme Court Justice Antonin Scalia’s straightforward approach.

His last column, on our treasured former Chief Judge Judith S. Kaye’s uncanny ability to write with such clarity and attention to detail, ranks among his very best columns, which is no small feat. He carefully examines her legal scholarship and advice on how to write for the intended audience.

“The Legal Writer” has been so popular that it has been turned into not one, but two NYSBA reference publications: *The Legal Writer: Writing It Right* and *The Legal Writer: Drafting New York Civil-Litigation Documents*. His large following extends beyond New York, as other bar associations frequently share the latest “Legal Writer” column on their social media pages.

But that’s not all.

Judge Lebovits has also written for the Journal on judicial wellness and other issues. He has contributed 20 articles to our section publications, including the New York Real Property Law Journal and the International Law

Practicum. He was the lead co-author of 13 editions of the NYSBA publication *New York Residential Landlord-Tenant Law and Procedure*, as well as nine editions of the LEGALese pamphlet “Tenant Screening Reports and Tenant Blacklisting.”

He has been a speaker on hundreds of well-attended continuing legal education programs ranging from persuasive legal writing to landlord-tenant issues to professional ethics. Whenever he is asked to present, Judge Lebovits’ answer is always yes. He once took his vacation week and presented CLE programs for NYSBA on legal writing across the state in Buffalo, Rochester, Syracuse, Westchester, Albany, Long Island and New York City.

Lebovits also has been an adjunct professor of law for 32 years, currently at Columbia, Fordham and NYU. The students at Fordham, New York Law School, and St. John’s have each elected him Adjunct Law Professor of the Year. Some of his publications are required or recommended reading at many American law schools.

How he served as an adjunct professor at three law schools, was a judge, and wrote so prolifically is a question many readers had, but naturally Judge Lebovits made it look easy. He simply viewed all this work as his personal contributions to the bench and bar, which are nothing short of outstanding. The fact that he is as well known for his sense of humor and the ability to make everyone feel at ease underscores his accomplishments even more.

Judge Lebovits once said, “I’ll be happy if my readers come away appreciating the importance of legal writing—an importance not merely to their clients but also to the honest and good administration of justice.”

On behalf of NYSBA's 70,000 members and many happy readers, we have.

From "The Legal Writer" to your engaging CLE presentations to teaching so many law students and law clerks, you have taught us all and made us better lawyers. There is no more prolific writer in the State Bar's history and no member has contributed more to our continued legal education. This is truly the end of a remarkable era. I hope your free time is now spent with your beloved family and enjoying a long, well-deserved ride on your motorcycle.

Your legacy in the New York State Bar Association and the practice of law is assured. I thank you for your indelible contributions to the NYSBA Journal and the practice of law, your uncommon collegiality and your peerless dedication to the association. You are a pillar of the legal profession.



T. Andrew Brown
President, NYSBA

Longtime Readers Reflect on Judge Lebovits and "The Legal Writer"

"The Legal Writer" has been one of our most loved and well-read columns of the Journal. A few longtime devoted readers shared how Judge Lebovits' sage advice affected their work and made them better writers. Thank you, Judge Lebovits.

According to the timeless U.S. poet Ezra Pound, "Good writers are those who keep language efficient. That is to say, keep it accurate, keep it clear." I could think of no better quote to open this tribute to Judge Gerald Lebovits as he retires from writing his regular column "The Legal Writer" in the association's flagship journal.

In fact, for many, many years, headings such as "Clarity," "Wordiness," "Professional Tone," "Be Concise," "Be Scrupulously Honest," and "Write Simply" have appeared in his columns. Readers who have absorbed and internalized Judge Lebovits' guidance on effective and efficient legal writing – whether from his own experience or in his more recent "Thoughts on Legal Writing from the Greatest of Them All" series – will be all the better for having done so, both in their personal and professional writing.

As the outgoing chair of NYSBA's Committee on Communications and Publications (which oversees, among other things, the Journal), our work has been made easier by knowing that each issue would have Judge Lebovits' informative and vital column as its concluding piece. I do not envy the task of the next chair, and that of the committee members and publications staff, in having to find a suitable replacement.

The Belgian-born U.S. literary critic Paul de Man once said, "The writer's language is to some degree the product of his own action; he is both the historian and the agent of his own language." Indeed, Judge Lebovits, through his column, has provided wonderful guidance to multitudes of attorneys concerning how to be effective and efficient legal writers while being the agents of their own

language, professionalism and ideas. For that, we thank him, as we wish him all the best in the years to come.



Prof. Michael L. Fox
Mount Saint Mary College
Chair, Committee on Communications and Publications (2018-2021)

I was dismayed to learn that the Journal is publishing Justice Lebovits' last column on language. I have always turned to his column first each month, and despite my own rarefied skills as a writer and editor, I never failed to learn something – and to smile.

The best teachers I've had, whether in law or other spheres of knowledge, have combined instruction with a dash of levity – and Justice Lebovits cooked up his monthly column with the same mixture of ingredients.

Whether drawing examples of powerful writing from the best jurists or the best science-fiction writers, Justice Lebovits never failed to teach, enlighten and entertain. I will miss his column. I hope its finale represents a merely temporary respite from the hard work of showing us lawyers how to write well.

Not bad for a French Canadian, Your Honor, not bad at all.



Roger A. Levy
Brooklyn, NY
Levy & Nau

Writers learn best from other writers. I've had the pleasure of learning from a few great ones, and Judge Gerald Lebovits has been one of my favorites. In his regular legal writing column, Judge Lebovits has imparted writing wisdom from some of New York's best legal writers, including Chief Judges Benjamin Cardozo and, most recently, Judith Kaye.

Throughout it all, Judge Lebovits' own writing advice shone through: remember your audience, write clear, short sentences, and revise, revise, revise. I try to remember his advice each time I sit down to write and have become a better writer for it.



Rob Rosborough
Albany, NY
Whiteman Osterman & Hanna

As lawyers we derive our power from words. And we often make our greatest difference using the written word. Thus, the most valuable skill a lawyer can acquire is mastery of the language and the art of writing. To that end, Judge Gerald Lebovits has been an inspiration and mentor to many.

Anyone can write a stream of consciousness piece that reads smoothly but offends those who value precision. Alternatively, one may write precise prose that is dense as molasses and even harder to digest. Clear, succinct prose, however, brings joy to the reader and clarity to the subject. It requires the writer to crystallize her thoughts and, therefore, does a better job of persuading the reader. Achieving it requires skill, knowledge and a good deal of effort.

Judge Lebovits in his column shared with us his love of clear writing, his knowledge of the rules controlling clever lawyering, and the recipe for combining the two into powerful advocacy. We all will continue to benefit from his work and guidance.



Chaim Steinberger
New York, NY

Thank you

It's been a privilege of a lifetime to write the Journal's "Legal Writer" column for the past 20 years.

I thank my readers. I hope they enjoyed the columns. But I'd be happy if the columns did nothing but inspire among my readers some thought and debate over the most important skill a lawyer must have: good legal writing and analysis.

Many NYSBA staff members helped me with editing, production, and other projects. I thank Howard F. Angione, David C. Wilkes, Joan Fucillo, Katherine Suchocki, Dan Weiller, Daniel McMahon, Susan DeSantis, Brandon Vogel, Kate Mostaccio, Pamela Chrysler, Alyssa Colton, Naomi Pitts, Lori Herzing, Erin Corcoran, Christine Ekstrom, Reyna Eisenstark, Alexander Dickson, Howard Healy, Kimberly Francis, Katherine Calista, and Kirsten Downer. For their research and counsel on dozens of columns, I also thank Alexandra Standish, my (former) law clerk of many years, and my judicial interns.

I'm grateful to them all!

Gerald Lebovits



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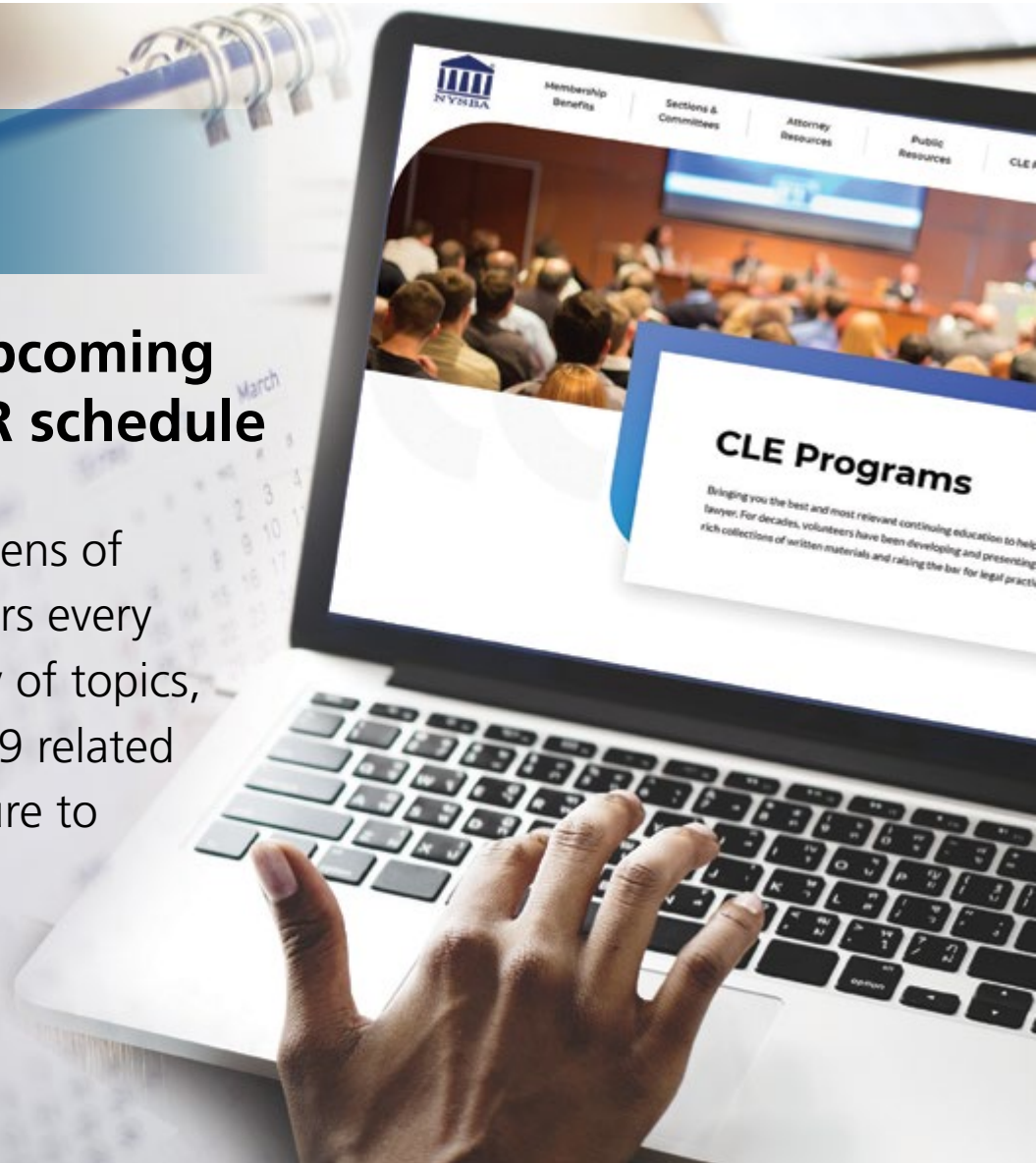
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