



October 25 2021

To: Members of the House of Delegates

Re: October 30, 2021 meeting

Enclosed are the agenda and related background materials for the upcoming meeting of the House of Delegates scheduled to begin at **9:00 a.m.** on Saturday, October 30, 2021, via a Zoom webinar. Participation instructions have been forwarded to you by e-mail.

We look forward to seeing you virtually on October 30, 2021.

T. Andrew Brown
President

Sherry Levin Wallach
President-Elect



**NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
THE OTESAGA, COOPERSTOWN, NEW YORK
AND REMOTE MEETING
SATURDAY, OCTOBER 30, 2021 – 9:00 A.M.**

AGENDA

1. Approval of minutes of June 12, 2021, meeting 9:00 a.m.
2. Report and Recommendations of Committee on Bylaws
– Mr. Robert T. Schofield IV 9:05 a.m.
3. Report of Treasurer – Mr. Domenick Napoletano 9:15 a.m.
4. Report and recommendations of Finance Committee re proposed
2022 income and expense budget – Mr. Michael J. McNamara 9:25 a.m.
5. Report of President – Mr. T. Andrew Brown 9:40 a.m.
6. Report and recommendations of Task Force on Attorney Wellbeing
– Ms. M. Elizabeth Coreno and Hon. Karen K. Peters (Ret.) 10:00 a.m.
7. Memorial for Past President Robert L. Ostertag
– Ms. Kathryn Grant Madigan 10:30 a.m.
8. Report and recommendations of Emergency Task Force on Solo
and Small Firm Practitioners – Ms. June M. Castellano and
Mr. Domenick Napoletano 10:40 a.m.
9. Report of Nominating Committee – Mr. Michael Miller 11:05 a.m.
10. Report and recommendations of Committee on Standards of Attorney
Conduct – Messrs. James B. Kobak, Jr., Ronald C. Minkoff,
and James Q. Walker
A) New Comments to Existing Rule 5.6
B) New Rule 5.9 and Comments (Informational Presentation Only)
C) Proposal on Regulation of Legal Intermediary Referral and
Information Services (Informational Presentation Only) 11:10 a.m.
11. Report and recommendations of Committee on Immigration
Representation, Committee on Legal Aid, Committee on Mandated
Representation, and Criminal Justice Section –
Ms. Joanne Macri and Mr. Hasan Shafiqullah 11:40 a.m.

12. Report of The New York Bar Foundation – Ms. Carla M. Palumbo 12:00 p.m.
13. Administrative items – Ms. Sherry Levin Wallach 12:10 p.m.
14. New business 12:15 p.m.
15. Date and place of next meeting:
TBD

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
JUNE 12, 2021
REMOTE MEETING**

PRESENT: Abneri; Adigwe; Alomar; Alsina; Bahn; Barreiro; Bascoe; Battistoni; Baum; Beltran; Ben-Asher; Berlin; Berman; Brown; Bunshaft; Burke; Buzard; Caceres; Carbajal-Evangelista; Chambers; Chandrasekhar; Chang; Choi; Clouthier; Cohen, B.; Cohen, D.; Cohen, O.; Crawford; D'Angelo; Dean; Degnan; Doerr; Doyle; Dubowski; DuVall; Eberle; Effman; Eng; Engel; England; Fallek; Fellows; Fernandez; Filabi; Filemyr; Finerty; First; Fox, G.; Fox, M.; Friedman; Frumkin; Genoa; Gerbini; Gerstman; Getnick; Gilmartin; Gold; Good; Grays; Greenberg; Griesemer; Griffin; Gross; Gutekunst; Haig; Harper; Hartman; Harwick; Heath; Hill; Himes; Hoffman; Holder; Holtzman; Houth; Islam; Jaglom; James; Jamieson; Jimenez; Joseph; Kamins; Kapnick; Karson; Katz; Kean; Kelley; Kelly; Kendall; Kenney; Kiernan; Kimura; Klass; Klugman; Kobak; Kretser; Kretzing; LaBarbera; LaRose; Lau-Kee; Lawrence; Leber; Leventhal; Levin; Levin Wallach; Levy; Lewis; Lindenauer; Lisi; Loyola; Lugo; MacLean; Madigan; Marinaccio; Markowitz; Maroney; Marotta; Martin; Mathews; Matos; Mazur; McElwreath; McGinn; McGrath; McNamara; Meyer, H.; Meyer, J.; Middleton; Miller, C.; Miller, M.; Milone; Minkoff; Miranda; Montagnino; Moretti; Morrissey; Mukerji; Muller; Mulry; Napoletano; Newman; Nielson; Noble; Nolfo; Nowotarski; O'Brien; O'Connor; O'Connell, B.; O'Connell, D.; Owens; Palermo, A.; Palermo, C.; Pappalardo; Parker; Pitegoff; Porzio; Pruzansky; Purcell; Quaye; Quinones; Radick; Ranni; Raskin; Ravin; Reed; Riano; Richman; Richter; Rivera; Rosenthal; Russ; Russell; Ryan; Safer; Samuels; Santiago; Scheinkman; Schofield; Schram; Schrauer; Schwrtz-Wallace; Sciocchetti; Scott; Seiden; Shafiqullah; Sharkey; Silkenat; Silverman; Slavit; Smith; Sonberg; Starkman; Stephenson; Stoeckmann; Strong; Strenger; Swanson; Sweet; Tambasco; Taylor; Triebwasser; van der Meulen; Vaughn; Vigdor; Wan; Ward; Warner; Washington; Watanabe; Waterman; Weis; Weldon; Wesson; Westlake; Wimpfheimer; Wolff; Woodley; Yeung-Ha; Younger; Zweig.

Ms. Levin Wallach presided over the meeting as Chair of the House.

1. Call to order, introduction of new members. The meeting was called to order and the Pledge of Allegiance was recited, and Ms. Levin Wallach welcomed the new members of the House.
2. Minutes of April 10, 2021 meeting. The minutes were accepted as previously distributed.
3. Installation of President. Mr. Brown was formally installed as President. The oath of office was administered by Hon. Janet DiFiore, Chief Judge of the State of New York.
4. Report of President. Mr. Brown addressed the House with respect to his planned initiatives for his term as President. His President's Report is appended to these minutes.
5. Report of the Treasurer. Domenick Napoletano, Treasurer, updated the House with respect to the results of operations for the first four months of 2021. Items covered included dues

revenue of \$8,996,000; CLE net revenue of \$709,300; and Annual Meeting net revenue of \$466,000. The report was received with thanks.

6. Report and recommendation of Lease Negotiation Committee and Finance Committee. David P. Miranda, chair of the Lease Negotiation Committee, and Sandra Rivera, chair of the Finance Committee, reported on the negotiations between the Association and The New York Bar Foundation with respect to a potential transfer of One Elk Street from The Foundation to the Association. They reported that a Memorandum of Understanding (MOU) between the parties had been executed, by which ownership of One Elk will be transferred from the Foundation to the Association; the Association would provide office space for Foundation staff and in-kind services to the Foundation; the Association would bear responsibility for renovation and maintenance costs of One Elk; and the Association and Foundation would work closely in joint fundraising in order to meet common goals. The MOU is contingent upon approval of the Association's House, the Foundation's Board, and the New York State Attorney General. After discussion, a motion to adopt the following resolution was approved:

Whereas, the New York State Bar Association and The New York Bar Foundation are parties to a lease, as tenant and landlord respectively, for property at One Elk Street, Albany, New York, that ends on December 31, 2021; and

Whereas, the Association and Foundation have concluded negotiations regarding future use of One Elk Street; and

Whereas, the Association President signed a Memorandum of Understanding with the Foundation on May 20, 2021 calling for the transfer of One Elk Street from the Foundation to the Association subject to, inter alia, the approval of the Association's House of Delegates;

Now, therefore, it is

Resolved, that the House of Delegates hereby approves the May 20, 2021 Memorandum of Understanding, subject to the terms and conditions set forth therein and the provisions of this Resolution:

Further resolved, that the Association President is authorized to conduct necessary due diligence, including but not limited to obtaining the written opinions of counsel regarding any tax implications, fundraising matters, and approval of the Attorney General concerning the proposed transaction;

Further resolved, that the Association President is authorized to enter into a final agreement regarding the property transfer as outlined in the Memorandum of Understanding.

7. Report and recommendations of Task Force on Racial Injustice and Police Reform. T. Andrew Brown and Taa R. Grays, co-chairs of the Task Force, outlined the Task Force's

recommendations with respect to 21st century policing; improving policing at key stages; and additional accountability within the criminal justice system. After discussion, a motion was adopted to approve the report and recommendations.

8. Report and recommendations of Task Force on Free Expression in the Digital Age. Cynthia S. Arato and David E. McCraw, co-chairs of the Task Force, reviewed the Task Force's recommendations on (a) amendment of the Freedom of Information Law (FOIL); (b) the advancement of government transparency outside of FOIL; (c) the growth of nonprofit journalism; and (d) the expansion of legal services for news organizations. After discussion, a motion was made to approve the report and recommendations, following which a motion to amend to eliminate from the report Recommendations III.C.1-4 concerning FOIL and Recommendations IV.B.1-3 concerning the Open Meetings Law was approved. Seven members abstained from voting on the motion to amend. The motion as amended was then approved.
9. Report and recommendations of Task Force on the New York Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, outlined the Task Force's report on the remote administration of the exam and the long-term future of the New York bar examination, together with its recommendation that New York replace the Uniform Bar Examination with its own examination. After discussion, a motion was adopted to approve the report and recommendations.
10. Report and recommendations of Committee on Standards of Attorney Conduct. On behalf of the Committee on Standards of Professional Conduct, Debra Raskin and Prof. Ellen Yaroshefsky reviewed proposed amendments to Rule 8.4 of the Rules of Professional Conduct with respect to discrimination in the practice of law to prohibit improper behavior in the practice of law; expand the protected classes to conform to New York anti-discrimination law; define and prohibit "harassment"; and eliminate the requirement to exhaust administrative remedies. After discussion, a motion was made to approve the report and recommendations, after which a motion to eliminate "severe and pervasive" from the definition of harassment failed. The motion was then approved.
11. Report and recommendations of Task Force on Nursing Homes and Long-Term Care. Hermes Fernandez and Sandra Rivera, co-chairs of the Task Force, reviewed the Task Force's report on the effect of the pandemic on the long-term care sector and its recommendations for protecting public health; preparing for emergencies; providing clear guidance; preventing the spread of communicable diseases; collecting and disseminating information; and allocating resources. After discussion, a motion was adopted to approve the report and recommendations.
12. Report of Task Force on the Uniform Rules. Richard C. Lewis, chair of the Task Force, together with members Sharon Stern Gerstman and Matthew J. Kelly, provided an informational report on the Task Force's work to date, including four hearings it had held on the impact of the rules. The report was received with thanks.

13. Report of The New York Bar Foundation. Carla M. Palumbo, President of The Foundation, presented an informational report on The Foundation's fundraising and grantmaking activities. The report was received with thanks.
14. Administrative items. Ms. Levin Wallach reported on the following:
 - a. New Finance Committee members. At its June 11, 2021 meeting, the Executive Committee had confirmed the appointment of Drew Jaglom and Michael McNamara. Pursuant to the Bylaws, the House is required to ratify the selection of these members. A motion was adopted to ratify the members' selection.
15. New Business.
 - a. Certification of judges. House member Steven Richman made a motion that the Association urge the Governor to sign legislation to eliminate the discretionary denial of re-certification of New York Supreme Court Justices. The motion was ruled out of order by the Chair; an appeal from the Chair's ruling failed.
16. Date and place of next meeting. Ms. Levin Wallach announced that the next meeting of the House of Delegates would take place on Saturday, October 30, 2021 at the Otesaga in Cooperstown.
17. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Taa R. Grays
Secretary



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #2

REQUESTED ACTION: Subscription to the Bylaws amendments proposed by the Committee on Bylaws to allow for their consideration at the Annual Meeting of the Association.

Attached is a memorandum from the Committee on Bylaws proposing the removal of gender-specific language from the Bylaws. Under procedures established in the Bylaws, the proposed amendments must be subscribed to by a majority of all members of the House of Delegates in order to be considered at a meeting of the Association. Subscription can take place at this meeting to allow for consideration of these proposed amendments at the Annual Meeting of the Association on January 22, 2022.

The report will be presented at the October 29 meeting by Robert T. Schofield, IV, Chair of the Committee on Bylaws.



COMMITTEE ON BYLAWS
ROBERT T. SCHOFIELD, IV

Chair
Whiteman Osterman & Hanna LLP
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Albany, NY 12260
518/487-7616
rschofield@woh.com

October 20, 2021

To: Members of the House of Delegates

Re: Report on Proposed Bylaws Amendment

INTRODUCTION

At the request of President-elect Levin Wallach, the Bylaws Committee reviewed the Bylaws to weed-out any remaining instances of gender-specific language. The Committee has been sensitive to this issue for several years, so most such language has previously be excised. Nevertheless, three lingering instances were identified by our most recent review and it is our recommendation that the Bylaws be amended to remove these last examples of gender-specific language.

For ease of reference, our proposed amendment is set forth below. New language is indicated by underlining, and deleted language is indicated by strikethrough.

REMOVAL OF GENDER SPECIFIC LANGUAGE

The Committee proposes the Bylaws amendments set forth below:

Article VIII, Section 1(A)(6)(a)

VIII. NOMINATING COMMITTEE AND NOMINATIONS FOR OFFICE

Section 1. Nominating Committee.

A. * * *

6. Election of New York State Bar Association Delegates to the American Bar Association House of Delegates. Delegates to the American Bar Association House of Delegates shall be nominated and elected pursuant to the following procedures:

(a) Ten delegates to the American Bar Association House of Delegates, or such number as the Association may be entitled to select from time to time, shall be elected, each for a term of two years commencing at the adjournment of the Annual Meeting of the American Bar Association House of Delegates. The term of such delegates shall be alternated beginning with an even numbered year, so that the terms

are staggered as equally as possible, in accordance with the appropriate provisions of the American Bar Association Constitution and Bylaws. In addition, one lawyer less than thirty-five years of age at the beginning of ~~his or her~~ the lawyer's term shall be elected as Young Lawyer Delegate in even-numbered years for a term of two years commencing at the adjournment of the Annual Meeting of the American Bar Association House of Delegates.

Article IX, Section 2(B)(1):

IX. FINANCE, AUDIT AND COMPENSATION COMMITTEES

Section 2. Audit Committee.

B. Members. * * *

(1) The members being appointed in any given year shall serve for two-year terms. All appointments shall be subject to confirmation by the Executive Committee and ratification by the House of Delegates. The Executive Committee shall determine that each appointee is free from any relationship that in its opinion would interfere with the exercise of ~~his or her~~ independent judgment while serving as a member of the Audit Committee. Members completing their terms shall be eligible for reappointment.

Appendix B, Section I(2):

Appendix B AUDIT COMMITTEE COMPOSITION, DUTIES AND RESPONSIBILITIES

I. The Audit Committee shall consist solely of "Independent Members." An Independent Member is person who must satisfy all three of the following criteria:

1. * * *
2. The individual and ~~his or her~~ the individual's relatives have not received compensation or other payments exceeding a total of \$10,000 during the last three fiscal years of the organization from the Association or its affiliate, other than compensation for services provided in the capacity as a member of the Executive Committee or Audit Committee or reimbursement for expenses reasonably incurred as a member of the Executive Committee or Audit Committee; and

CONCLUSION

Our committee believes that the foregoing amendments, which we are recommending, foster the Association's continuing efforts to encourage diversity and the inclusion of all people in connection with the affairs of the Association. We commend them to you for your consideration and subscription at the October 30, 2021 meeting of the House of Delegates. If subscribed, the above amendment will presented for discussion and adoption at the 2022 Annual Meeting.

Respectfully submitted,

COMMITTEE ON BYLAWS

Robert T. Schofield, IV, Chair

Anita L. Pelletier, Vice Chair

Samantha Peikoff Adler

Eileen E. Buholtz

Michael E. Getnick

LaMarr J. Jackson

A. Thomas Levin

Steven G. Leventhal

David M. Schrauer

Oliver C. Young



Staff Memorandum

**HOUSE OF DELEGATES
Agenda Item # 3**

Attached for your reference are the Association's financial statements through September 30, 2021.

**NEW YORK STATE BAR ASSOCIATION
2021 OPERATING BUDGET
NINE MONTHS OF CALENDAR YEAR 2021**

REVENUE

	2021 BUDGET	ADJUST- MENTS	2021 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 9/30/2021	% RECEIVED 9/30/2021	2020 BUDGET	UNAUDITED RECEIVED 9/30/2020	% RECEIVED 9/30/2020
MEMBERSHIP DUES	8,764,295		8,764,295	9,285,855	105.95%	9,732,250	8,936,385	91.82%
SECTIONS:								
Dues	1,200,000		1,200,000	1,164,969	97.08%	1,321,800	1,216,571	92.04%
Programs	1,733,315		1,733,315	466,531	26.92%	3,123,430	722,818	23.14%
INVESTMENT INCOME	494,420		494,420	275,660	55.75%	500,800	275,585	55.03%
ADVERTISING	183,000		183,000	201,078	109.88%	250,000	169,993	68.00%
CONTINUING LEGAL EDUCATION	2,950,000		2,950,000	1,954,386	66.25%	3,220,000	2,264,268	70.32%
USI AFFINITY PAYMENT	2,154,000		2,154,000	1,607,733	74.64%	2,306,000	1,816,871	78.79%
ANNUAL MEETING	276,225		276,225	489,977	177.38%	1,312,000	1,582,391	120.61%
HOUSE OF DELEGATES & COMMITTEES	27,000		27,000	6,902	25.56%	174,750	24,476	14.01%
PUBLICATIONS, ROYALTIES AND OTHER	210,700		210,700	160,170	76.02%	216,200	154,239	71.34%
REFERENCE MATERIALS	1,300,000		1,300,000	733,456	56.42%	1,250,000	534,735	42.78%
TOTAL REVENUE	19,292,955	0	19,292,955	16,346,717	84.73%	23,407,230	17,698,332	75.61%

EXPENSE

	2021 BUDGET	ADJUST- MENTS	2021 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 9/30/2021	% EXPENDED 9/30/2021	2020 BUDGET	UNAUDITED EXPENDED 9/30/2020	% EXPENDED 9/30/2020
SALARIES & FRINGE	8,334,264		8,334,264	5,779,676	69.35%	8,790,034	6,176,920	70.27%
BAR CENTER:								
Rent	284,000		284,000	208,066	73.26%	284,000	233,252	82.13%
Building Services	365,000		365,000	220,769	60.48%	397,000	366,002	92.19%
Insurance	164,000		164,000	142,986	87.19%	170,000	131,601	77.41%
Taxes	180,250		180,250	159,152	88.30%	7,750	172,582	2226.86%
Plant and Equipment	893,500		893,500	630,150	70.53%	890,500	533,177	59.87%
Administration	526,100		526,100	354,333	67.35%	537,600	432,329	80.42%
SECTIONS	2,920,715		2,920,715	420,693	14.40%	4,445,230	1,670,559	37.58%
PUBLICATIONS:								
Reference Materials	248,800		248,800	71,723	28.83%	312,800	61,850	19.77%
Journal	245,700		245,700	189,211	77.01%	396,500	254,132	64.09%
Law Digest	75,000		75,000	35,820	47.76%	156,000	76,718	49.18%
State Bar News	85,500		85,500	67,947	79.47%	122,300	78,609	64.28%
MEETINGS:								
Annual Meeting	24,250		24,250	13,811	56.95%	714,700	949,214	132.81%
House of Delegates, Officers and Executive Committee	309,000		309,000	177,852	57.56%	468,825	172,949	36.89%
COMMITTEES:								
Continuing Legal Education	435,000		435,000	74,391	17.10%	1,480,500	336,321	22.72%
LPM / Electronic Communication Committee	1,400		1,400	-	0.00%	38,100	18,072	47.43%
Marketing / Membership	850,000		850,000	310,746	36.56%	877,050	329,382	37.56%
Media Services	269,450		269,450	160,049	59.40%	144,720	176,658	122.07%
All Other Committees and Departments	2,590,135		2,590,135	1,937,432	74.80%	2,983,790	2,719,963	91.16%
TOTAL EXPENSE	18,802,064	0	18,802,064	10,954,807	58.26%	23,217,399	14,890,290	64.13%
BUDGETED SURPLUS	490,891	0	490,891	5,391,910		189,831	2,808,042	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF SEPTEMBER 30, 2021

<u>ASSETS</u>	<u>UNAUDITED</u> <u>9/30/2021</u>	<u>UNAUDITED</u> <u>9/30/2020</u>	<u>UNAUDITED</u> <u>12/31/2020</u>
Current Assets:			
General Cash and Cash Equivalents	15,464,720	10,504,876	16,151,359
Accounts Receivable	18,063	81,357	30,527
Prepaid expenses	772,065 #	817,001	602,714
Royalties and Admin. Fees receivable	478,219	514,581	803,397
Total Current Assets	16,733,067	11,917,815	17,587,997
Board Designated Accounts:			
Cromwell Fund:			
Cash and Investments at Market Value	3,206,838	2,700,929	2,962,151
Accrued interest receivable	0	0	0
	3,206,838	2,700,929	2,962,151
Replacement Reserve Account:			
Equipment replacement reserve	1,117,909	1,117,798	1,117,826
Repairs replacement reserve	794,609	794,530	794,550
Furniture replacement reserve	220,017	219,995	220,000
	2,132,535	2,132,323	2,132,376
Long-Term Reserve Account:			
Cash and Investments at Market Value	33,004,086	27,362,615	30,108,641
Accrued interest receivable	0	0	117,962
	33,004,086	27,362,615	30,226,603
Sections Accounts:			
Section Accounts Cash equivalents and Investments at market value	4,041,301	4,037,480	4,046,948
Cash	1,210,806	268,831	229,979
	5,252,107	4,306,311	4,276,927
Fixed Assets:			
Furniture and fixtures	1,463,037	1,463,037	1,463,037
Leasehold Improvements	1,470,688	1,470,688	1,470,688
Equipment	4,034,985	9,748,499	3,906,126
Telephone	0	107,636	0
	6,968,710	12,789,860	6,839,851
Less accumulated depreciation	4,552,489	9,852,622	3,993,589
Net fixed assets	2,416,221 0	2,937,238	2,846,262
Total Assets	62,744,854	51,357,231	60,032,316
<u>LIABILITIES AND FUND BALANCES</u>			
Current liabilities:			
Accounts Payable & other accrued expenses	557,308	706,427	784,252
Deferred dues	0	186,363	6,165,151
Deferred income special	57,692	288,461	230,768
Deferred grant revenue	29,906	50,222	29,906
Other deferred revenue	258,522	174,003	888,104
PPP Loan Payable	1,482,957	0	0
Unearned Income - CLE	0	48,474	0
Payable To The New York Bar Foundation	510	675	19,965
Total current liabilities & Deferred Revenue	2,386,895	1,454,625	8,118,146
Long Term Liabilities:			
Accrued Other Postretirement Benefit Costs	8,976,735	8,290,883	8,706,735
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	243,000	270,000	299,674
Total Liabilities & Deferred Revenue	11,606,630	10,015,508	17,124,555
Board designated for:			
Cromwell Account	3,206,838 #	2,700,929 #	2,962,151
Replacement Reserve Account	2,132,535 #	2,132,323 #	2,132,376
Long-Term Reserve Account	23,784,351 #	18,801,732	21,102,232
Section Accounts	5,252,107 #	4,306,311 #	4,276,927
Invested in Fixed Assets (Less capital lease)	2,416,221 #	2,937,238 #	2,846,262
Undesignated	14,346,172 #	10,463,190 #	9,587,813
Total Net Assets	51,138,224	41,341,723	42,907,761
Total Liabilities and Net Assets	62,744,854	51,357,231	60,032,316

New York State Bar Association
Statement of Activities
For the Nine Months Ending September 30, 2021

	<u>September 2021</u>	<u>September 2020</u>	<u>December 2020</u>
REVENUES AND OTHER SUPPORT			
Membership dues	9,285,855	8,936,385	9,339,925
Section revenues			
Dues	1,164,969	1,216,571	1,216,608
Programs	466,531	722,818	769,606
Continuing legal education program	1,954,386	2,264,268	3,043,386
Administrative fee and royalty revenue	1,774,420	1,970,476	2,594,862
Annual meeting	489,977	1,582,391	1,582,326
Investment income	629,435	600,300	1,469,869
Reference Books, Formbooks and Disk Products	733,456	534,735	1,032,334
Other revenue	225,120	319,959	236,995
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Total revenue and other support	16,724,149	18,147,903	21,285,911
PROGRAM EXPENSES			
Continuing legal education program	568,494	934,425	1,260,881
Graphics	878,317	942,160	1,222,630
Government relations program	232,877	352,401	476,962
Law, youth and citizenship program	47	95	(185)
Lawyer assistance program	55,912	151,850	216,082
Lawyer referral and information services	427	13,474	14,518
Law practice management services	37,136	42,380	58,309
Media / public relations services	433,237	571,861	726,958
Business Operations	1,566,340	1,994,410	2,623,807
Marketing and Membership services	923,419	934,452	1,293,354
Pro bono program	121,082	136,150	187,586
Local bar program	-	41,809	41,105
House of delegates	177,795	159,178	198,716
Executive committee	57	13,771	14,020
Other committees	64,740	291,177	337,223
Sections	420,693	1,670,559	1,756,235
Section newsletters	181,837	134,319	192,810
Reference Books, Formbooks and Disk Products	491,215	491,403	726,284
Publications	292,978	409,460	462,750
Annual meeting expenses	13,811	949,214	958,195
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Total program expenses	6,460,414	10,234,548	12,768,240
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	2,197,275	2,186,769	2,574,654
Pension plans and other employee benefit plan costs	494,101	495,524	932,832
Rent and equipment costs	818,807	937,677	1,201,869
Consultant and other fees	401,507	389,350	503,319
Depreciation and amortization	558,900	450,000	657,511
Other expenses	33,997	199,645	195,334
	<hr/>	<hr/>	<hr/>
Total management and general expenses	4,504,587	4,658,965	6,065,519
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
Realized and unrealized gain (loss) on investments	5,759,148	3,254,390	2,452,152
Realized gain (loss) on sale of equipment	2,471,319	1,221,780	3,590,055
	-	26,500	26,500
CHANGES IN NET ASSETS			
	<hr/>	<hr/>	<hr/>
Net assets, beginning of year	8,230,467	4,502,670	6,068,707
	<hr/>	<hr/>	<hr/>
Net assets, end of year	42,907,759	36,839,052	36,839,052
	<hr/>	<hr/>	<hr/>
Net assets, end of year	51,138,226	41,341,722	42,907,759



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 6

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Attorney Wellbeing.

The Task Force on Attorney Wellbeing was appointed by past president Scott M. Karson to examine factors, both positive and negative, that impact the health and well-being of the New York legal community. The Task Force focused on nine key categories in its study: physical health, emotional health, substance abuse disorders and addiction, continuing legal education, the judiciary and courts, bar associations, legal education, public trust and ethics, and law culture and employment. As part of its study, the Task Force commissioned a survey of NYSBA members on lawyer well-being; over 3,000 members participated. The Task Force's report is attached; its recommendations for the House's consideration are summarize at pages 98-106 of the report.

This report was posted for comment in August 2021; The Committee on Legal Aid has indicated its support for the report and recommendations.

The report will be presented by Task Force co-chairs M. Elizabeth Coreno and Hon. Karen K. Peters.



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the NYSBA Task Force on **Attorney Well-Being**

*THIS IS US: FROM STRIVING ALONE TO
THRIVING TOGETHER*

October 2021

NYSBA ATTORNEY WELL-BEING TASK FORCE REPORT

THIS IS US: FROM STRIVING ALONE TO THRIVING TOGETHER

NYSBA TASK FORCE ON ATTORNEY WELL-BEING

Report of the Task Force on Attorney Well-Being

Members of the Attorney Well-being Task Force

Task Force Co-Chair	Task Force Co-Chair
M. Elizabeth “Libby” Coreno, Esq.	Hon. Karen K. Peters
Emotional Well-being	Physical Well-being
Meredith Heller, Esq. (Chair)	Robert S. Herbst, Esq. (Chair)
Alexis R. Gruttadauria, Esq. Simeon Goldman, Esq. Joel Kosman, Esq. Daniel Lukasik, Esq. Joseph Milowic, Esq. Diane E. O’Connell, Esq. Nancy Sciocchetti, Esq. Avrom Robin, Esq.	Samantha Braver (Law student) Richard D. Collins, Esq. Brian S. Cousin, Esq. Michael Deyong, Esq. Hilary Edmunds (Law student) Caroline Geiger, Esq. Cheryl F. Korman, Esq. Theresa B. Marangas, Esq. David Tennant, Esq.
Substance Use Disorders & Addiction	Law Culture & Employment
Hon. Sarah L. Krauss (Chair)	Kathryn Grant Madigan, Esq. (Chair)
Vincent E. Doyle III, Esq. Porter L. Kirkwood, Esq. George J. Pammer, Esq. Elaine A. Turley, Esq. Elizabeth Eckhardt (Special guest) Eileen C. Travis (Special guest) Pia Marinangeli (Special guest)	Eli B. Basch, Esq. Amber R. Poulos, Esq. Tara A. Pleat, Esq. Tricia Prettypaul, Esq. Kim Wolf Price, Esq. William Pulos, Esq. Lauren E. Sharkey, Esq. Steven P. Younger, Esq.
Law Education	Bar Associations
Rosemary Queenan, Esq. (Chair)	Glenn Lau-Kee, Esq. (Chair)
Markeisha Miner, Esq. Olivia Cox (Law student) Marta Galan Ricardo, Esq. Melinda Saran, Esq. Joey Corigliano (Law student) Dr. Yvette Wilson-Barnes, Esq. Kimathi Gordon Somers, Esq. Lisa Monticciolo, Esq.	Evan Goldberg, Esq. Ann Lapinski, Esq. Marne L. Onderdonk, Esq. C. Bruce Lawrence, Esq. Marquita Jo Rhodes Jeffrey A. Unaitis (Special guest)

Report of the Task Force on Attorney Well-Being

Judiciary & the Courts	Public Trust & Ethics
Hon. Shirley Troutman (Chair)	Marian C. Rice, Esq. (Chair)
Hon. Linda Poust Lopez Hon. Robert J. Miller Hon. Jane Pearl Hon. Adam Michelini Hon. Stan L. Pritzker	Prof. Patrick Connors Robert L. Haig, Esq. Mitch Borkowsky, Esq. Anna E. Remet, Esq. Deborah A. Scalise, Esq. Phil Touitou, Esq. Harvey Besunder, Esq. Michael Mooney (Special guest)
Continuing Legal Education	NYSBA Staff Liaison
James R. Barnes, Esq. (Chair)	Stacey A. Whiteley
Shawndra Jones, Esq. Katherine Suchocki, Esq. (Special guest) Laura Carroll, Esq. Andreas Apostolides, Esq. Glenn Green, Esq. (Special guest) Keisha Channer, Esq. (Special guest) Mark Berman, Esq.	Writer and Editor Joan M. Fucillo

Dedication

The Task Force Report is dedicated to our friend and colleague, Stephen P. Gallagher who was the first Director of Law Office Economics and Management for NYSBA from 1990 through 2003. After embarking on a successful coaching career for lawyers, Steve returned to his friends at NYSBA to assist with issues involving lawyer well-being in the age of retirement and worked closely with the Senior Lawyer Section. A dedicated, loyal and vociferous advocate for lawyer well-being, Steve attended as many of the working group meetings as he could despite declining health. Sadly, Steve passed away on May 2, 2021, prior to the release of the Task Force Report. His vision, voice, and influence profoundly affected the work of the Task Force and can be heard throughout this Report.

Message from the Co-chairs

For almost one hundred and fifty years, the New York State Bar Association, the largest voluntary bar association in the United States, has served as a “link between the state and the individual lawyer, as a force for constructive change.” Perhaps then, it is only natural and appropriate during the unfolding paradox of community disintegration supplanted by digital connection that NYSBA has boldly and bravely looked to its roots as a professional community to examine the collective impacts the 21st century world has on the well-being of our lawyers.

While the well-being of lawyers may seem like an individual lawyer’s problem, the data has been sounding an alarm for the better part of three decades that the training, culture, and economics of law contribute exponentially to the suffering in our profession. To truly address the systemic issues in law, we must look to the precedent of the profession as a command to take up a collective responsibility – to each other. We must move from striving alone to thriving together if we are to survive the present challenges.

On behalf of the NYSBA Attorney Well-Being Task Force, we expect this Report to be illuminating, sobering, and, ultimately galvanizing, acting as both a platform and a call to action. We must move beyond blame and shame as mechanisms to distance ourselves from the aspects of the legal system and law culture which are not working or offend our own understanding of the profession and, instead, shift our gaze to holistic solutions and better outcomes for ourselves and our colleagues.

We laud the dedication and productivity of our working group chairs and members, and express our appreciation to the dedicated NYSBA staff who supported our efforts over this year. We dedicate the work of the Task Force to each of you – your personal and professional value, your

Report of the Task Force on Attorney Well-Being

contribution to our community and your role in supporting the access to justice which is at the root of a free society. Our fondest hope is that we make manifest the belief that the healthy lawyer helps create a healthier world.

Libby Coreno, Esq.

Hon. Karen Peters

Table of Contents

NYSBA ATTORNEY WELL-BEING TASK FORCE REPORT 1

Members of the Attorney Well-being Task Force 3

Introduction..... 9

Background..... 11

 Accepting the Challenge, Crafting a Path..... 11

 Task Force Philosophy..... 12

 The Working Groups 13

 The Task Force Advisors 15

 Talking with Lawyer-Leaders; Reviewing the Literature 15

This Is Our Story..... 18

 The NYSBA Lawyer Well-Being Survey Results (2020) 19

Traversing the Spokes on the Wheel: The Case for Holistic Change 22

 Step into the Wheel: Beginning with Legal Education 22

 Entering the Profession: Law Culture and Employment..... 43

 Public Servant, Public Trust: The Role of Lawyer Ethics and Discipline 52

 Practice, Not Perfection: A View from the Bench..... 62

 Calming the Perfect Storm: Emotional Well-Being..... 70

 Facing Challenges, Getting Help: Substance Use Disorders, Mental Health and LAPs..... 75

 Staying Informed: Individual and Collective Continuing Legal Education..... 82

 Self-Care as a Mandate: Physical Well-being for Lawyers 90

 NYSBA: Navigating the Wheel of Well-Being for Lawyers; Recommendations for Change 98

APPENDIX A 107

 New York State Bar Association Attorney Well-Being Survey (2020)..... 107

 Demographic Survey Results..... 109

 Overall Satisfaction in the Practice of Law..... 111

 Greatest Impacts on Well-Being..... 112

 The Role of the Judiciary 115

 State of Emotional Well-Being before and during COVID 117

 Accessing Resources..... 119

APPENDIX B 135

 Task Force Co-Chairs, Working Group Chairs & Advisors 135

APPENDIX C 145

Report of the Task Force on Attorney Well-Being

Bar Association and Law Firm Outreach Report..... 145
APPENDIX D..... 145
Working Group on Substance Use & Addiction Court Report..... 147
APPENDIX E 151
Resolution of the Working Group on the Judiciary and the Courts 153
APPENDIX F..... 161
“My Time in Rural Private Practice” 161

Introduction

Why did you choose the law? Many of us talk about working for the cause of justice and being able to make a difference. We have colleagues who describe the delight of the intellectual challenges and the problem-solving that make a life in the law endlessly interesting. Others speak of the opportunity to do meaningful work.

While the law is not the only profession where a person can make a difference, it is the only profession dedicated to righting wrongs, ensuring fairness and endeavoring to ensure that all people be treated equally. Lawyers are unique in that our work is essential to a free and fair society. Of that, we justly are proud.

Yet, for all the positive aspects of law practice, there is a dark side. Lawyers are more vulnerable to stress, depression, anxiety and substance abuse than nearly any other profession. There are myriad reasons why. Some believe that the traits that make for effective lawyering – perfectionism and detail-orientation, when combined with legal training in anticipatory anxiety and a deep sense of responsibility – can cause a perfect storm. And once lawyers are inside the storm, they confront a help-resistant profession which prizes helping others but never seeking help for themselves and an inability to admit vulnerability – a trait universally perceived as a sign of weakness. We resist being the one needing answers and help; preferring to offer advice and provide solutions.

Our profession has rightly been termed “help-resistant,” a trait deeply embedded in the culture of law. Renowned as much for its fast pace as for its resistance to change, it took the rapid onset of a global pandemic and a resultant “world on pause” for lawyers to slow to a pace necessary to see, feel and grapple with the magnitude of our community’s well-being crisis which was both highlighted and exacerbated by more than a year of COVID-19 and its effects.

Change is most likely to occur during times of great disruption. COVID-19 has disrupted our families; it has disrupted our lives; it has fundamentally disrupted the practice of law – from the office to client meetings to the courts. When life, work and family enter uncharted territory, it is much more difficult to realistically expect a return to ‘business as usual.’ While our profession has been seriously studying the issues of lawyer stress and lawyer burnout for the better part of a decade, we now have a unique opportunity to implement real change. We must seize the moment.

While the pandemic increased our physical isolation from each other and challenged our traditional notions of the practice of law, we found lawyers talking with each other more, reaching out more, helping each other navigate new processes and grappling with new ideas. For a profession traditionally averse to change, this is an encouraging sign.

We need each other, because the most effective tool available to us is *us*: our community of lawyers. We face the same challenges, we understand each other in a way that others, even

family members, often cannot. When we embrace our community and declare our responsibility for each other, we can move from striving alone to thriving together.

Our Task Force mission was to address the well-being crisis in our profession. Little did we know we would be called upon to do so in an ongoing global pandemic. Yet, in this time of worldwide suffering, we found more opportunity than we could have ever imagined – to learn about and to make recommendations for real, impactful change in our legal community.

All stakeholders now realize attorney well-being is vital – to our own success and to our viability as a profession, one which is built on society's trust and faith in the rule of law. We, as lawyers and colleagues, must ensure our own health and well-being, and the creation of a culture that supports our colleagues. For ourselves and for those whom we serve, it is a moral and ethical imperative as well as the fiscally prudent thing to do. Change is upon us, and we are optimistic.

Background

Accepting the Challenge, Crafting a Path

The well-being of attorneys is critical to the effective practice of law, the protection of the public trust and the vibrancy of the culture of our profession. Well-being must be of paramount importance to all members of the legal profession, to ensure our individual and our collective survival.

The personal and professional rewards gleaned from the legal profession are many but may come at great cost. Data and reports compiled over the last decade have shown that lawyers experience rates of mental illness, fatigue, physical health problems and substance abuse disorders in numbers that exceed the national averages in all other professions.¹ While some attorneys may have underlying issues that make them more susceptible to mental health problems or substance abuse than others, the rates of ill-being far outpace the general population. The reality is that the status quo is not sustainable.

Lawyer surveys, including one undertaken by the New York State Bar Association (NYSBA), confirm these data. Simply put, for the sake of ourselves and our colleagues, we need a concerted national effort to bring the subject of attorney health and wellness to the forefront of our profession.

Shortly before NYSBA President Scott Karson took office in 2020, he determined that NYSBA should conduct its own investigation of the issues surrounding attorney well-being and New York lawyers, in particular. To do so, he created our Task Force on Attorney Well-Being and charged us with examining the factors, both positive and negative, that impact the health and well-being of the legal community. We were tasked with conducting a review of the entire cycle of a lawyer's life – from law student to retiree – developing a report describing our findings, and detailing attainable, measurable mitigation efforts that could be implemented across New York's legal landscape to ensure the health and well-being of our community.

Our Task Force's work has been greatly informed by NYSBA's long-standing and effective efforts in this area. For more than four decades, NYSBA has been a leader in the lawyer assistance movement. In 1978, it formed a special committee to address the problems of lawyer

¹ Among these: Va. Bar Ass'n, "The Occupational Risks of the Practice of Law," Report of the Va. State Bar President's Special Committee on Lawyer Well-Being, May 2019, https://www.vsb.org/docs/VSB_wellness_report.pdf; Nat'l Task Force On Lawyer Well-Being, Am. Bar Ass'n, *The Path to Lawyer Well-Being: Practical Recommendations For Positive Change* (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf>; Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 Geo. Wash. L. Rev. 554 (2015); <https://ir.law.fsu.edu/articles/94>; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 Behavioral Sci. & L. 261, 281 (2004); Jarrod Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 Vill. L. Rev. 361 (2020).

alcohol- and substance-use disorders. Building on the 12-Step AA model, that committee's first chair worked with the county bar associations in all 62 New York counties to establish Lawyers Helping Lawyers or Lawyer Assistance Committees. A dozen years later, the Lawyer Assistance Program (LAP) became a permanent department in NYSBA. Since then, in consultation with and with the support of the court system, LAP has broadened its focus to emphasize the vital role of prevention and early intervention, as well as treatment. In 2014, the Office of Court Administration provided a grant to support LAP's work.

NYSBA has also championed the amendment of the disciplinary rules and other laws to support lawyers experiencing mental health issues and to encourage them to seek assistance when needed. The effort is twofold: to assure lawyers that help-seeking behavior will not be stigmatized and to provide an incentive to get help before a problem becomes a crisis. Attorney disciplinary rules now allow the option of referring attorneys for treatment and New York's Judiciary Law now grants confidentiality to communications between lawyer assistance committee members or agents. Most recently, NYSBA helped lead a campaign to remove the mental health questions from the character and fitness portion of the application for admission to the New York bar.² NYSBA and other advocates for this change correctly surmised that these questions made law students reluctant to get much-needed assistance in times of uncertainty and stress, thus exacerbating the problem while sweeping it under the rug.

And yet, LAP funding is not permanent, even as its portfolio has broadened. The original LAP focus on substance-use disorders has rightfully expand to a host of known stressors which affect the health and functioning of lawyers – including the culture of law itself. LAPs are now tasked with educational efforts, case management for diversion programs, law school outreach and calls for more mental health support.

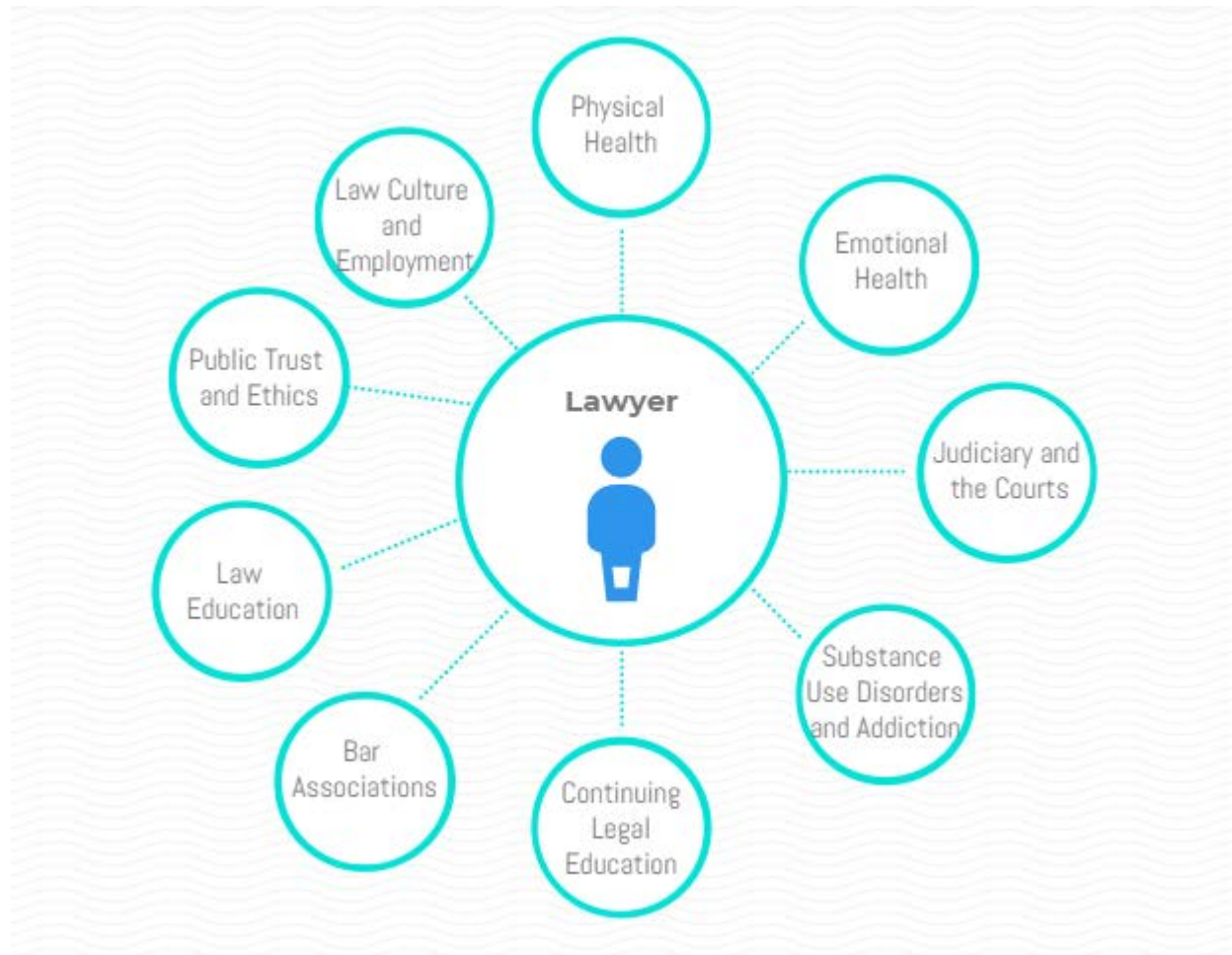
Task Force Philosophy

We understood that the issue of lawyer well-being was multifaceted, especially across a highly diverse landscape such as New York State. It was critical to identify the key areas in a lawyer's life and career where the individual, the system and the culture collectively impact on comprehensive well-being regardless if the lawyer is from a large firm or solo, urban New York City or rural Alleghany County, first year associate or retiring senior. We considered the lawyer as “the hub” of a holistic wheel containing nine spokes of influence most likely to impact a lawyer's life from law school through retirement – the “Wheel of Wellbeing.”

It was of the utmost importance to the Task Force that the challenges of the scope of attorney well-being be met with a broad, holistic approach, rather than a limited, category-specific approach to a system-wide problem. As a result, the Task Force was formed to include

² The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application, a report by the Working Group on Attorney Mental Health of the New York State Bar Association, Nov. 2, 2019. <https://nysba.org/report-of-the-working-group-on-attorney-mental-health/>.

stakeholders with diverse backgrounds and experience in each of the nine key categories to provide expertise and recommendations for actionable change. Conceptually, each Working Group for the nine categories was to independently develop the recommendations in their respective area and then the entire Task Force would work together to synthesize information from each Working Group into a final Report.



The Working Groups

The Task Force Co-Chairs, M. Elizabeth (Libby) Coreno, Esq. and Hon. Karen K. Peters developed the missions for the nine Working Groups and then asked nine of their distinguished colleagues to chair the efforts during a pandemic year when lawyers' worlds had been upended. Shortly after the nomination of each Working Group Chair, the members of the Task Force Working Groups were appointed in a collaborative effort between the Co-Chairs and each Working Group Chair based upon expertise, geographic area, and diversity. Below is the mission that was set forth for each of the nine Working Groups and their respective Chair. The full roster of the Task Force can be found on pages 2 and 3 of this Report.

Emotional Well-being: Meredith S. Heller, Esq.

The Working Group focused on the most up-to-date empirical data on the emotional and mental health of lawyers, the reasons for the higher-than-average rates of suboptimal psychology and provide recommendations concerning the studied mitigative efforts which can be utilized to assist lawyers in accessing mental and emotional support, as well as collaborated with the other Working Groups regarding possibilities for implementation across the legal community.

Physical Well-being: Robert S. Herbst, Esq.

The Working Group examined the importance of physical health, investigated why lawyers have a low physical activity participation rate, and made recommendations for methods to increase opportunities for physical movement and self-care in the legal community.

Substance Use Disorders and Addiction: Hon. Sarah Krauss

The Working Group addressed the current state of lawyer assistance in New York State, the scope and impact of addiction, including but not limited to, substance use disorders. Additionally, the Group's goal was to make recommendations about efforts which can be implemented at the local and state level to increase awareness, reduce stigma, and provide services, community, and support to lawyers.

Law Culture and Employment: Kathryn Grant Madigan, Esq.

The Working Group, a diverse group of practitioners – solos, small, medium and large firms, government and in-house counsel – examined the reports and key findings of state, local, and national bar associations on the topic of lawyer well-being and the occupational risks of law practice. It also reviewed scholarly research and consulted experts on the business case for and the ethical imperatives of promoting and prioritizing lawyer well-being. The group then identified the most attainable measures, and a pathway for implementation, for effecting transformative change in the profession and workplace culture – from law school to the active professional years through retirement.

Law Education: Rosemary Queenan, Esq.

The Working Group examined the current culture of law schools related to the health and well-being of students across New York, advised on the programs which have been successful in fostering health and well-being, and proposed recommendations to reduce stigma, increase well-being education, and facilitate systemic change in the approach to work-life balance for lawyers.

Bar Associations: Glenn Lau-Kee, Esq.

The Working Group reported on the current framework of bar associations across the state and their ability to assist as key stakeholders in the well-being of lawyers. Additionally, the Working Group sought to make recommendations concerning how the NYSBA, specifically, can work to increase awareness, work with local and national bar associations for education, and develop support mechanisms for lawyers.

Judiciary and the Courts: Hon. Shirley Troutman

The Working Group considered how stigma, culture, rules and procedures affect the state of our lawyers' health in its efforts to provide recommendations concerning methods to address attorney well-being from the judicial perspective.

Public Trust and Ethics: Marian Rice, Esq.

The Working Group examined the role that attorney well-being plays in ensuring ethical lawyering since malpractice claims, attorney discipline and even criminal behavior can often find its roots in a lawyer experiencing distress or a significant life event. The Working Group also sought to make appropriate recommendations by considering the principle that the practice of law is built upon the public trust and its requirement that lawyers operate within the expectations of professional responsibility.

Continuing Legal Education: James Barnes, Esq.

The Working Group examined the status of Continuing Legal Education for well-being, the current rules for well-being programming and the current demand for well-being programming across the state. Additionally, the Working Group considered a stand-alone well-being credit certification or whether other mechanisms could be used to implement the mitigation efforts recommended by the other subcommittees for continuing legal education.

The Task Force Advisors

In addition to the 80 lawyer-members and special guests of the Task Force, the group benefitted from at-large advisors with significant expertise in the field of lawyer wellbeing. Several of the Task Force advisors authored articles for the September 2020 issue of the NYSBA *Journal* on the scope and breadth of the issues affecting lawyer well-being and facing the profession as a whole.

A full list of the Task Force Co-Chairs, Working Group Chairs and Advisors is attached as Appendix B.

Talking with Lawyer-Leaders; Reviewing the Literature

The Working Groups engaged in conversations with each other and with our colleagues in New York and beyond to truly understand the depth of the issues confronting attorney well-being. Within its 54,000 square miles, New York State contains a mix of the very urban to the very rural, and everything in between. We sought guidance from lawyer-leaders in every corner of the state, and our discussions and their advice proved invaluable. All showed a deep commitment to our effort and many volunteered to serve.

We also called on several experts from around the country who have written about and studied the issues surrounding lawyer well-being, or, perhaps more aptly, why and how it is lacking. Among them were Jarrod Reich, professor of law at the University of Miami School of Law who authored a quantitative article on the relationship between the changes in law firm economics

and the decline in lawyer well-being;³ Len Heath, who, as president of the Virginia State Bar Association, formed and served on the committee that published a report about the “Occupational Risks of Practicing Law”;⁴ and Debbie Epstein-Henry, a Task Force advisor who is internationally known for her work in law firm culture and lawyer well-being. And we carefully reviewed the studies and reports released by other bar associations, such as the Virginia State Bar, the 2019 report of the Utah Task Force on Lawyer and Judge Well-Being,⁵ and the ABA’s 2017 report “The Path to Lawyer Well-Being.”⁶

Task Force members quickly determined that our main imperative was to talk directly with our colleagues. *Are you feeling stressed? If so, how do you handle the stressors in your law practice? What are they? What do you think about it? What kind of support do you need?* There has been a tremendous amount of data and opinions about lawyer well-being in the national conversation since the release of the ABA National Task Force Report in 2016, but we wanted to hear from our community of New York lawyers specifically, to gain their first-hand views on the stressors of our profession and what they believed could address it, especially in the midst of the COVID-19 pandemic.

We spent several months developing a survey to ask lawyers about these issues and more. In October 2020, we sent the Survey on Lawyer Well-Being (“Survey”) to all NYSBA members New York lawyers. To reach the greatest number of New York lawyers, we encouraged our members to share the Survey with non-NYSBA-member colleagues in their local and affinity bar associations, their law firms and other legal organizations. The Survey was both quantitative and qualitative, asking both free text and multiple-choice questions.⁷ Over the course of 45 days, a total of 3,089 attorneys responded to the survey. The results were both astonishing and highly informative.

Based on all the information the Task Force was able to gather, review and discuss, we developed two broad categories for study: the structure and the mechanics of the system and the profession; and the intangibles, such as culture, emotional and physical health, and public trust issues.

³ Jarrod Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 Vill. L. Rev. 361 (2020).

⁴ Va. State Bar Ass’n President’s Special Comm. on Lawyer Well-Being, *The Occupational Risks of the Practice of Law*, May 2019, Va. State Bar Ass’n, https://www.vsb.org/docs/VSB_wellness_report.pdf.

⁵ Utah Task Force on Lawyer and Judge Well-Being, *Creating a Well-Being Movement in the Utah Legal Community*, Feb. 2019, Utah Bar Ass’n, <https://www.utahbar.org/wp-content/uploads/2019/07/Task-Force-Report-2.pdf>.

⁶ Am. Bar Ass’n, *The Path to Lawyer Well-Being: Practical Recommendations For Positive Change* (2017), *supra* note 1.

⁷ The Task Force engaged Spa City Consulting, LLC to evaluate the quantitative and qualitative information received given the volume of the responses and the complexity of the information to be analyzed. On March 7, 2021, the firm provided the Task Force with “The New York State Bar Association’s Well-Being Survey 2020: Selected Areas of Analysis Results” which is provided in its entirety at Appendix A.

Because of the scope and complexity of the task, none of the nine Working Groups operated in a vacuum. Of necessity, their work overlapped a great deal – the structure of law education is inseparable from its role in disseminating the culture of law; the culture of law reinforces cultural norms taught in law schools and perpetuates the actions of the judiciary and the structure of law firms, whether large, small or solo; the emotional well-being and physical well-being of lawyers are influenced by the actions of these structural stakeholders.⁸ The structure of the entire legal system is dependent upon maintaining the public’s faith in our work and in the rule of law. And so, a whole system (holistic) approach to the Task Force was born.

We soon realized the value of being part of the whole, and of regular talking and listening sessions with other lawyers. Many of us on the Task Force had already joined the Lawyer-to-Lawyer Well-Being Roundtable, sponsored by NYSBA’s Lawyers Assistance Program (LAP), which was created in response to the COVID-related shutdown in March 2020 and co-moderated by Task Force Co-Chair, Elizabeth Coreno, Esq. and Task Force Advisor, Dr. Kerry M. O’Hara, PsyD. Other Task Force members joined the Roundtable, which was held for nearly 54 consecutive weeks during the pandemic. At these virtual weekly meetings, we had honest and vulnerable conversations about the issues, which has given us valuable insight and proven enormously helpful to our work. Sharing our stories and experiences with each other, being able to see their connections with the literature and the findings in data from lawyer and student surveys, has kept us focused on what is truly important – the humans behind the data.

As I look back, I examine my journey from law school to now, at age 60, having left active practice to work on other projects. Was it the practice of law that caused my depression? No. Was it a significant factor? Yes. The truth is, like most of you who struggle with mental health or addiction – and the numbers are staggering – you brought into the profession risk factors, sometimes several of them.

For me, there was the issue of genetics and a family tree filled with folks who struggled – and still do – with depression, bipolar disorder, and alcoholism. Second, I grew up in a dysfunctional home with an alcoholic father. These two things, I now see, put me at risk for depression at some point in my life.

Lawyering, which I found very rewarding, is a highly stressful profession for all of us. Stress, especially the unremitting type that lawyers experience every day – including on weekends – can tip the delicate balance in the brain and psyche, resulting in sickness, both physical and mental. And I am not talking about everyday anxiety or the blues. Clinical depression, anxiety, and addiction are actual illnesses that need treatment and care, not stigma, as often experienced by those afflicted.

The good news is that recovery is possible. Not only that, it is probable if one gets the help and support needed. The truth is you can’t fix these problems by yourself. There is now, unlike when I was diagnosed all those years ago, plenty of support and resources to help you, many of which are discussed in this report.

⁸ Despite the attention given to large firms, the largest cohort of lawyers in New York State and the U.S. are in solo or small-firm practices. Solo practitioners report higher rates of stress and dissatisfaction than their large-firm counterparts. See NYSBA Lawyer Well-being Survey 2020, Summary, App. A, “Overall Satisfaction in the Practice of Law.”

Report of the Task Force on Attorney Well-Being

There has also been a seismic shift happening in the legal culture across the country. This shift is being driven by the reality that we need to constructively and proactively address the causes and conditions of a culture that makes too many lawyers, law students, and judges unhealthy and unhappy in the legal profession. This profound shift in thinking and prioritizing mental health and well-being makes me hopeful and optimistic about real, positive, and lasting change.

And for myself, I have come a long way in these past 20 years. I learned to manage my depression and be a successful lawyer. The two are not mutually exclusive, as we sometimes think.

So please, as someone who has walked this path before, I encourage you to get the help you need. If you have already gotten it, keep going.

You're worth it.

Dan Lukasik, Esq. – Judicial Wellness Coordinator NYSOCA

This Is Our Story

In the Beginning

When you chose the legal profession, how did you imagine your life in the law? What did you think that life would mean? What did you imagine your workplace, your colleagues and your clients would be like? Did you see in yourself something of a crusader, someone whose job would be to right wrongs, or someone who could solve the thorny puzzles that life and the law so often present? That you would spend your life in service to the ideals of the law: truthfulness, honesty, responsibility and ethical behavior?

You fully expected to work hard, having absorbed the tropes common in books, films and television – the lone crusading lawyer, the lawyer with the out-sized work ethic, the lawyer who also plays detective to uncover corruption or save a wrongfully accused client.

These all are elements of the culture of law, but they are often seen through a romantic lens. Culture is messy. And the culture of law is made up of the good and the bad, the transactional and the noble, ambition and the pure desire to do good. Culture is revealed not just in its aspirations, but in what it “rewards, supports and tolerates.”⁹ And, unfortunately for lawyers, the actions for which they reap the highest rewards over the course of their careers can frequently cross the line into unhealthy behaviors.

For most of us, we start our path around the “Wheel of Well-being” in law school. Law schools provide the framework for the knowledge, training, expectations and attitudes that lawyers carry throughout their professional lives. Perhaps law schools’ most important task, the one that retains its influence throughout a legal career, is that of enculturating students into the profession. Both

⁹ NYSBA Attorney Wellbeing Podcast, *Who Are We Anyway? Exploring The Realities and Challenges in the Culture of Law*, May 2020 with Kathleen Fyfe of Fyfe Consulting, LLC. <https://podcasts.apple.com/us/podcast/who-are-we-anyway-exploring-realities-challenges-in/id1511208061?i=1000473671449>.

overtly and subtly, students receive cues that indicate what behaviors are encouraged: a competitive mindset, “a war-like persona,”¹⁰ the belief that the only place is at the top.

Students quickly absorb the lesson – law is competition. Who gets the highest grades? Who has all the answers in class? Who is always in the library, putting in the hours, nailing down every detail? The answers to those questions may determine who makes law review and who gets recommended for a coveted internship. In the law firm, that may mean who gets mentored, who gets choice assignments and who is on partner track.

While a healthy work ethic is essential, constant pressure to do beyond what is human will take its toll. Traits useful in law school, in the office or in the courtroom, can be deleterious to our personal lives – and sometimes with disastrous results. You cannot be a lawyer at home, with your spouse and children, with your friends and family, and in other interpersonal relationships. Conversely, if your interpersonal relationships are unhealthy, they can affect life at the office.

As we learn more and begin to question the notion that lawyers must be warriors, and to confront honestly the toll such behaviors take on lawyers, their careers, their clients and their colleagues, their firms and their families, we see a culture in crisis, one that must be changed. Yet, turning around the great ship of law cannot happen overnight. It happens over years; it takes time and resources. It is and will be an ongoing and multi-pronged effort.

The NYSBA Lawyer Well-Being Survey Results (2020)

When we set out to test what we had been told by the experts and prior attorney well-being reports with our own New York lawyers, we were gratified by the response to the Survey.. By the middle of December 2020, the Survey had returned 3,089 responses and volumes of information, opinions, stories, suggestions and criticisms. Lawyers were more than willing to tell us what they experience and what they think we should do about it.

The Survey provided the Task Force with a tremendous amount of data which was then reviewed against the unique landscape of New York law-practice life including the court system, the voluntary nature of NYSBA as a statewide association, the disciplinary framework, the CLE accreditation process, and the diversity of the state, among other things. While a full summary of the Survey finding is attached at Appendix A, we chose the following as particularly high-level data points to illustrate the most notable lessons we learned:

- There were 3,089 respondents to the Survey.
 - Most of the respondents (58%) have been in practice for over 21 years

¹⁰ Robert Goldman, JD, PsyD, *Lawyers Who Accept War-Like Personas Carry Heavy Burden*, NYSBA J., Sept.-Oct. 2020, at 20.

Report of the Task Force on Attorney Well-Being

- Respondents were most often from small firms with 2-10 lawyers (30%) or are solo practitioners (33%)
- Most lawyers who responded are from private law offices (70%), with government or agency, Legal Aid, in-house counsel, the judiciary, or other making up the remaining 30%
- The overall satisfaction with the practice of law was 3.42 on a scale of one to five. The top answers for the greatest impacts on lawyer well-being were:
 - Lack of boundaries for “down time” or “never off”
 - Client expectations and demands
 - Financial pressures in the “business of law”
- 7 out of 8 people (88%) who self-disclosed having a disability indicated that continuing certain virtual appearances even after the pandemic ceases is something the judiciary can do to help.
- While only 8% of respondents had utilized an Employee Assistance Program, individuals working for Legal Aid were the most willing to use a confidential resource provided by the bar association or an affiliated organization should one be provided. Members of the judiciary were least willing to use such a resource. 71% of new lawyers (those practicing 0-5 years) indicated they would consider using such a resource.
- The top three overall requests of NYSBA to assist with health were:
 - A gym or fitness membership discount, or discounted fitness equipment (479)
 - A request that NYSBA advocate for cultural change (147)
 - Free or low-cost counseling (114)
- Cultural changes were requested of NYSBA as well as employers. The feeling of being always on call and not having true downtime weighed on many individuals across types of practice, years in the profession, and number of lawyers at the respondent’s office.
- Generally, respondents indicated they are reluctant to seek assistance with mental health concerns. While there are many practical reasons for this (e.g., time and cost) stigma and confidentiality concerns posed significant barriers. Several respondents did not want to be perceived as “weak” by their colleagues or clients. Others noted that they did not believe that confidential resources would be truly confidential, with a few mentioning very negative experiences in the past where confidentiality was breached.

What Do We Value?

A look at the reward structure of law firms, law schools, agencies and not-for-profits, will reveal what we value.¹¹ We collectively and almost unanimously say we believe in the importance of attorney well-being and express our support. Yet, are we providing lawyers with the tools they need become healthy? Do we reward help-seeking behavior? Or, are we still valuing attorneys working 12-to-16-hour days while pointing to the gym memberships that they do not have time to use? The anecdotal evidence and the Survey results bear out that the “check the box” mentality is where law culture is, but the future will be looking at root causes.

Whether we are merely paying lip service to well-being, or sincerely making efforts to reform a culture that has traditionally turned a blind eye to unhealthy attorneys, can be revealed by asking, “*What is rewarded here? What is tolerated here? What is acceptable here?*”¹² And if we are not asking ourselves these probing questions, we then must ask ourselves why not.

The Bottom Line, Is the Bottom Line

By far the biggest sources of stress cited by the attorneys who participated in the NYSBA Survey were feeling they had no downtime and that they were always on call.¹³ Encouraging attorneys to take time off to rest and recharge, to seek help when needed, is a moral imperative. However, law firms and other workplaces – solo and small firm practices in particular – may find it difficult to put into practice. It may seem illogical that taking vacation time or going home at a reasonable hour will not affect the bottom line.¹⁴ Yet, there is no greater danger to law firms, the legal system and its clients than lawyers who are unwell.

As lawyers, we took an oath to abide by and to defend the rule of law. We are required to be competent, ethical, honest and truthful, and to behave honorably. Lawyers who are suffering due to a significant life event, burdensome workloads, financial pressures and other life stressors are more in danger of breaching their ethical responsibilities or using poor judgment. Malpractice claims, attorney discipline proceedings and even criminal proceedings often are rooted in the actions of a lawyer who is unwell. Any such breach affects the entire institution, not just the individual in crisis. Other attorneys and staff must cover for the affected lawyer. Some clients may lose faith and move on, or some form of damages must be paid. Once a firm has lost its clients’ trust, it is in trouble. Maintaining client trust is much easier than regaining it.

¹¹ NYSBA Attorney Wellbeing Podcast, *The Case for Attorney Well-being: A Profession in Change*, a discussion between Libby Coreno and Dr. Kerry O’Hara, <https://nysba.org/the-case-for-attorney-well-being-a-profession-in-change/>.

¹² *Id.*

¹³ See Appendix A, NYSBA Attorney Well-being Survey 2020, Summary.

¹⁴ Jarrod Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 Vill. L. Rev. 361 (2020).

Our most important professional investment is in our colleagues. *That* is the bottom line. Maintaining and growing this investment means working to ensure attorneys' health and well-being. Healthy lawyers are better lawyers.

Traversing the Spokes on the Wheel: The Case for Holistic Change

We understood early on that the complexity of the issues to be addressed – how we got here and how we can change – could not be evaluated in discrete units. A holistic, comprehensive and interrelated approach was necessary. We have demonstrated the research methods, the data set, and the key aspects underlying the culture of law – which we now understand to be the product of how we train, how we reinforce, what we learn to tolerate, and what we value. Now, our goal is to make the case for the path back home around the Wheel of Well-being. Our profession is charged with the public trust and the integral operation of a system governing all of society. While on the surface it may look like an individual's issue, attorney well-being is instead a collective responsibility.

“As above, so below; as within, so without.” – Hermes Trismegistus, Hermetic Corpus

Step into the Wheel: Beginning with Legal Education¹⁵

We open our case for attorney well-being with a robust discussion about legal education, how it shapes what lawyers value and how they are rewarded. It is the basis of a lawyer's career and highly influential throughout the arc of that career. And it is where we must focus much of our efforts if we are to eliminate the epidemic of lawyer ill-being, by stopping it before it starts.

Law schools across the country recognize that their law students and graduates need resources and services to enrich their well-being and help them through the difficulties of life and have initiated wellness programming and initiatives to encourage well-being in law school. Several surveys have been conducted and reports have been issued related to well-being in law school, including studies by the ABA and law school faculty and administrators in 2004, 2014,¹⁶ 2016¹⁷

¹⁵ Law Education Working Group members include: Dr. Yvette Wilson-Barnes (CUNY), Markeisha Miner (Cornell), Lisa Monticciolio (Hofstra), Rosemary Queenan (Albany), Marta Galan Ricard (Columbia), Melinda Saran (Buffalo), Kimathi Gordon Somers (Fordham) and law students Olivia Cox (Albany Law, Class of 2021) and Joey Corigliano (New York Law School, Class of 2021). The Working Group would like to thank Alex-Marie Baez, Diversity, Equity & Inclusion Post-Graduate Fellow (Albany Law School, class of 2020) and Sarah Dixon-Morgan (Albany Law student, class of 2022) for their work on the footnotes. Ms. Dixon-Morgan also assisted the Working Group with their research.

¹⁶ Fifteen law schools responded to the Survey of Law Student Well Being (SLSWB) was conducted with support from the ABA Enterprise Fund and sponsored by the ABA Commission on Lawyer Assistance Programs, Law Student Division, Small Firm and General Practice Division, Young Lawyers Division, Commission on Disability Rights and the David Nee Foundation. See Nat'l Task Force on Lawyer Well-Being, Am. Bar Ass'n, *The Path to Lawyer Well-Being: Practical Recommendations For Positive Change* (2017), <https://www.americanbar.org/content/dam/aba/images/abaneews/ThePathToLawyerWellBeingReportFINAL.pdf>.

¹⁷ In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation co-sponsored a study of mental health and substance abuse disorders. See Patrick Krill, Ryan Johnson, Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. Addiction

and 2017. These studies provide valuable data and information that highlights the following barriers to well-being faced by law students: (1) mental health issues, including depression and anxiety;¹⁸ (2) alcohol;¹⁹ and (2) drug use.²⁰

Based on its finding that “too many lawyers and law students experience chronic stress and high rates of depression and substance use,” in 2017, the ABA National Task Force on Lawyer Well-Being (ABA Report) issued a report and recommendations focused on “five central themes . . . to instill greater wellbeing in the profession.”²¹ However, with respect to law schools, the ABA Report noted that it “did not seek to identify the individual or contextual factors that might be contributing to students’ health problems,” but noted that “law school graduates cite heavy workload, competition, and grades as major law school stressors.”²² The ABA Report included specific recommendations for stakeholders collectively and individually, including the following recommendations for law schools:

Create Best Practices for Detecting and Assisting Students Experiencing Psychological Distress	Commit Resources for On-site Professional Counselors
Assess Law School Practices and Offer Faculty Education on Promoting Well-Being in the Classroom	Provide Education Opportunities for Well-Being-Related Topics
Empower Students to Help Fellow Students in Need	Facilitate a Confidential Recovery Network
Include Well-Being Topics in Courses on Professional Responsibility	Discourage Alcohol-Centered Social Events

Med., Feb. 2016, Vol. 10, Iss. 1;
[https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_othe
r_mental.8.aspx](https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_other_mental.8.aspx).

¹⁸ Seventeen percent reported depression, 23% mild to moderate anxiety, and 14% severe anxiety. One third of those who screened positive for anxiety reported developing anxiety during law school. *Id.* at 7.

¹⁹ About half of the respondents reported drinking enough to get drunk at least once in the prior 30 days, 43% reported binge drinking at least once in the prior two weeks and 22% percent reported binge drinking at least once in the prior two weeks. *Id.*

²⁰ Fourteen percent reported use of prescription drugs without a prescription in the prior 12 months and use of marijuana and cocaine increased since a prior study in 1991. *Id.*

²¹ A.B.A., *supra* note 16, at 2.

²² *Id.* at 35. *See also* Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 Behavioral Sci. & L. 261, 281 (2004) (noting negative effect law school can have on law students’ subjective well-being).

In making these recommendations for law schools, the ABA Report noted that “[l]aw school well-being initiatives should not be limited to detecting disorder and enhancing student resilience. They also should include identifying organizational practices that may be contributing to the problems and assessing what changes can be made to support student well-being. If legal educators ignore the impact of law school stressors, learning is likely to be suppressed and illness may be intensified.”²³

Since the ABA Report, many New York law schools have adopted the ABA’s and other recommendations and have established robust initiatives and programs focused on law student mental health and well-being. The next section of this report summarizes the tremendous work being done by the New York law schools on wellness initiatives.

New York Law Schools Programs and Initiatives Focused on Well-Being

In the fall of 2020, the Law Education Working Group sent a survey to the 15 New York law schools seeking information about resources and programs law schools offer and provide to promote the well-being of their students.²⁴ These resources and programs focus on law students’ well-being generally, including mental health, physical wellness, academic wellness and social wellness. A summary of the survey responses is provided below. The student members of the Working Group also met with the Student Bar Association presidents of all fifteen New York law schools to learn the student perspective related to well-being programs at their respective institutions which information has also been included below.

Counseling

Of the 11 law schools that responded to our Working Group survey, only one institution does not offer counseling services and seven reported that they offer onsite counseling services. While much progress has been made related to counseling services, the Student Bar Association presidents reported that most students expressed a desire for more support for student mental health. Students reported that they have advocated for onsite services and that the institutions that do not provide onsite counseling cited concerns related to confidentiality, insurance policies, restrictions on therapist licensing, and lack of counseling availability. Some students suggested that institutions should do more to communicate with students on the availability of counseling and other mental health resources.

Peer Support

In response to student concerns about disclosing mental health-related issues to faculty and staff at their institutions, many institutions offer peer-mentoring or support services. Several responding schools offer programs that empower students to promote and remind their peers of available support resources, as well as help them navigate the law school experience. One

²³ *Id.*

²⁴ Eleven of the 15 New York law schools responded to the survey.

institution offers an Upper-Year Peer Mentorship Program, which is “designed to foster community and inclusion within the Law School and ensure that all students feel cared for and supported.”²⁵ The program is structured as follows:

Second-year students who seek additional guidance and ties to the law school community are matched with third and fourth-year students who can empathize with their situation and support them as they navigate the personal, academic, and professional challenges of the 2L year. Mentoring groups meet on a weekly basis for the duration of the fall semester, with an option to continue through the spring term. Mentors are afforded a budget, which enables them to meet with their mentees regularly over coffee or a meal. All mentors enroll in the one-credit seminar “Peer Mentoring & Leadership,” which is designed to equip mentors with the tools and training they will need to support their mentees and develop the professionalism skills necessary for effective leadership. Mentors help each other work through challenges that arise in their mentoring, and practice cultivating critical leadership and professionalism skills such as listening, teamwork, emotional intelligence, and multicultural competence.

Another law school reported having “[s]tudent facilitators [who] are trained to listen to fellow students’ concerns and direct them to appropriate resources using an empathy, assistance, and referral model. In the last few years, more graduate and professional school students have been recruited and trained as peer support facilitators in response to student feedback that graduate and professional students were unlikely to participate in a program led by undergraduate students without similar lived or academic experiences.” Other law schools reported having similar mentor programs designed to match upper level students with incoming students to foster a sense of community and belonging. One school is working on a collaborative project with the Lawyer Assistance Program (LAP) and Lawyers Helping Lawyers (LHL) to establish a support group for students with the confidentiality protections LAP affords.²⁶

I had reached my bottom. Dropped from a class for failure to attend; gone from second in my class to almost not graduating on time. I needed help. Following the encouragement of a fellow law student, I went to a therapist who told me I was an alcoholic and needed AA. After attending meetings, getting a sponsor, and staying sober for a short while, I worked up the courage to reach out to our Dean of Students. He gave me a brochure for NYC LAP and permission to take 20 credits my last semester so I could graduate on time. Now, besides the workload, I had to somehow navigate the world without my

²⁵ NYS Task Force on Attorney Well-being Law School Survey, <https://albanylaw.evaluationkit.com/Respondent/Survey?ida=%2bKvnttlpiKiDfdjrpBBauSytLRW4kvg6bR7bi6OmIln5UdOzwi1M73PC7i8r6MVEus%2fh4p%2bCx4HFzSCwUGq4rA%3d%3d> (last visited Jan. 15, 2021).

²⁶ Pursuant to this initiative, approved law students who are active members of the local NYSBA Lawyers Assistance Program (LAP) will be “authorized agents” of the LAP, allowing conversations between the agents and other law students at their peer support meetings to have the confidentiality protections of Section 499 of New York State Judiciary Law.

Report of the Task Force on Attorney Well-Being

crutch of alcohol, even as it seemed pervasive, if not integral to our academic social scene. But I did it. I graduated.

After law school, I had to face with the mental health issues that I had been masking with alcohol abuse. I struggled to find the right mix of medication and therapy to be a functioning human, let alone an attorney. It was during this time of self-discovery that I found the Capital District Lawyers Helping Lawyers group. The group was comprised of attorneys and law students who themselves had struggled with mental health and substance abuse issues. Most of the members were successfully employed and respected in their community. Being amongst them gave me hope.

I eventually came to chair the Lawyers Helping Lawyers group and joined NYSBA's Lawyers Assistance Committee. Along the way, I was admitted to practice in New York and gained employment. Now I try to help others who suffer. I doubt I would be alive, much less an attorney, without the encouragement of my colleagues and this community. For that I am eternally grateful.

– Daniella E. Keller, Esq., Co-Chair, NYSBA Lawyers Assistance Committee

While Student Bar Association presidents applauded their school administration's efforts to foster peer support, they expressed concern that the students most in need of support are often reluctant or not interested in taking advantage of such services. Students reported that some students are more likely to seek support from affinity groups (e.g., APALSA, the Asian Pacific American Law Student Association; BLSA, Black Law Students Association; LALSA, Latin American Law Students Association; MLSA, Muslim Law Students Association; OUTLaw, LGBTQ+ Law Student Association). The "neutral" setting of affinity group meetings allows students to identify their own need for support and learn how to be an ally to reach out to classmates who may need help.

Best Practices for Identifying and Assisting Students

In an effort to reach out to students in need of support, particularly during the recent global health pandemic, New York law schools have established various best practices for identifying and assisting these students. For example, some schools have developed a protocol where members of the faculty, administration, and staff meet to discuss a team-oriented, collaborative approach to outreach and support. Several reporting schools have established written protocols that advise students, faculty, and staff on how to support students in distress, including reporting to the Office of Student Affairs, with thoughtful follow up with the students to provide resources and support.

Schools also reported that their onsite counselors or counseling centers have presented to faculty and offered other training programs to law school staff on how to recognize and best support students in distress.

Mental Health Education

Many law schools offer regular wellness programs (monthly or weekly) that focus on educating the community about wellness issues.²⁷ One school reported that it has a mandatory program for first-year students, called “Wellness 101: Strategies & Resources for Managing Stress & Cultivating Well-Being in Law School and Practice,” which provides an overview of the mental health challenges experienced by many law students and lawyers, the available resources (both on campus and in the legal and New York City community) to support students who are experiencing any of these issues, and strategies and resources they can use to affirmatively cultivate their well-being. While these programs provide the law school community with valuable information and awareness on mental health issues, attendance is a challenge. Many members of the community who are already aware and educated on these issues are the sole attendees. As a result, law schools are faced with the challenge of deciding how to encourage the broader community to engage and participate or whether to make such programs mandatory.

Student Bar Association presidents all stated that attendance at wellness events was a challenge. They attributed this to students not wanting to spend more time on campus than necessary or, during the COVID-19 pandemic, Zoom fatigue.

Collaboration with the Lawyer Assistance Program

Law schools recognize that the NYSBA LAP provides a valuable resource. All responding New York law schools reported hosting programs with the LAP and LHL programs. First-year orientation programs often include representatives from both organizations. One school has hosted LHL meetings on campus as a way to offer students a convenient way to join a meeting and learn about the program. Student feedback from orientation indicates that introducing LAP is incredibly helpful in reducing stigma around substance issues and mental health issues that often inhibits help-seeking behaviors. Law schools should continue to utilize LAP in orientation and other times throughout the course of the academic year.²⁸

²⁷ These programs include (1) Voices of Recovery panels/lunch talks, where attorneys share their personal stories about overcoming mental health challenges, (2) Mental Health First Aid and related trainings for law faculty and staff, (3) fitness activities led by faculty members, and workshops on: (4) Becoming a More Effective Mental Health Communicator, (5) Mindfulness and Meditation, (6) Stress Management, (7) Vicarious Trauma, (8) Racial Trauma Workshops, (9) Nutrition and Food Insecurity, and (10) Time Management.

²⁸ The ABA has recently proposed revisions to Standard 508 that would require law schools to provide students “[i]nformation on law student well-being resources.” A.B.A., Memorandum on ABA Standards and Rules of Procedure – Matters for Notice and Comment – Standards 303 and 508 and Rules 2 and 13 (Mar. 1, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20210301-notice-and-comment-standards-303-and-508-rules-2-and-13.pdf. Proposed Interpretation 508-1 provides “Law student well-being resources include information or services related to substance abuse and mental health. They can include, but are not limited to, counseling services provided in-house by the law school, through the university of which the law school is a part, or by a bar association legal assistance program. Other law student well-being resources may include information for students in need of critical services such as food pantries or emergency financial assistance.”

Professional Responsibility and Other Courses Focused on Well-Being

One reporting school has a required professionalism course for 1Ls where wellness is part of the curriculum and reported that all first-year students participate in a Wellness 101 program. Several schools reported that they include a mental health and wellness module in their required Professional Responsibility courses and other institutions have courses that are focused on mindfulness, such as “Mindfulness and Professional Identity” and “Positive Lawyering.” Student Bar Association presidents reported that some first-year legal writing/lawyering professors included well-being in their teachings.

Contemplative Lawyering and Mindfulness Programs

Several New York law schools have created spaces for law students to be introduced to and/or to practice deep reflection, mindfulness, meditation, yoga, and any art of contemplation they choose to help reduce their stress and anxieties, and improve their focus, attention, study habits and creativity. Some law schools have dedicated spaces (e.g., serenity room) for meditation, prayer, mindfulness and contemplation. The Student Bar Association presidents reported that these spaces are appreciated but are underused and not well-known amongst students.

Programs Related to Financial Well-Being

Many reporting law schools offer programming led by outside organizations such as Access Lex on financial planning, debt management, and financial well-being. However, Student Bar Association presidents expressed that there is not enough support and programming related to financial well-being during law school – for example, for those experiencing stress because of a change in scholarship status. Law schools have also responded to financial needs of law students by establishing an emergency financial assistance program to immediately address financial hardships. Many schools have organized fundraising efforts around these emergency funds, particularly during the recent pandemic and Access Lex has contributed funding for law school emergency fund programs. Law schools have also focused on issues of food insecurity, and many have instituted food services and pantries that are used widely and greatly appreciated by students. Student organizations have also addressed these issues by offering gift cards/promo codes for food delivery phone apps to students who attend events.

Communication/Establishing a Culture of Well-Being/Wellness Blogs and Webpages

Many schools maintain wellness blogs where the law school community can share and receive information about well-being resources. These blogs and web pages include resources on mindfulness, mental health counseling, financial counseling resources and other information. Some include resources and information related to the impact of COVID-19 pandemic and racial injustice.

Challenges for Law Schools

While the New York law schools have made great progress in addressing the needs of the law school community, there is more work to be done. Law schools should continue to provide the much-needed counseling and mental health support services and should continue efforts to educate the community on mental health and wellness challenges law students face. As law schools continue to address student well-being, it is important to take the further step of exploring and identifying the individual and contextual factors that might be contributing to law students' mental health issues, such as the historical culture of legal education, external factors that interfere with law student well-being, and the challenges faced by law schools in addressing them. These individual, contextual, and external factors can often interfere with wellness in various areas, including intellectual, emotional, social, physical and financial well-being.²⁹

Intellectual Well-Being and Law School Culture: The Hidden Curriculum

Law school is academically challenging. Navigating the culture of law school can also be challenging, particularly in the first year. The 1973 movie, *The Paper Chase*, examines the first-year experience of students at Harvard Law School. The esteemed Professor Kingsfield faces his first-year class and provides three statements that may still be repeated by some law professors today:

You come in here with a skull full of mush . . . and you leave thinking like a lawyer. You teach yourselves the law . . . but I train your mind. Through this method of questioning, answering . . . questioning, answering . . . we seek to develop in you the ability to analyze . . . that vast complex of facts that constitute . . . the relationships of members within a given society.³⁰

The culture of law school has changed as a result of the work of many legal education scholars who have noted the importance of mindfulness in teaching,³¹ as well as support from faculty, staff, student services, academic services and, most of all, diversity, equity and inclusion support.

But the vestiges of *The Paper Chase* remain. Law students are accustomed to succeeding academically, knowing the answers and how to obtain them, and, therefore, expect to receive all A's and obtain the job of their dreams. Instead, they are faced with the Socratic Method or some variation thereof, a curve (sometimes mandatory), and they are required to develop reading and analytical skills that are different than most have used during their undergraduate studies. Some

²⁹ Nat'l Task Force on Lawyer Well-Being, Am. Bar Ass'n, *The Path to Lawyer Well-Being: Practical Recommendations For Positive Change* (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf>.

³⁰ *The Paper Chase* (20th Century Fox 1973).

³¹ See Marjorie A. Silver, *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (2007).

scholars have noted that the “constant fear of a ‘cold call’ combined with the cutthroat learning environment is detrimental to most students’ ability to learn.”³²

The law school environment imposes pressure on law students to compete with their classmates for grades and class rank, with the goal of achieving a rank in the top 10% of the class, and that “a summer associate position at a large law firm, a coveted judicial clerkship, or membership on the law review or moot court board, are the prizes of law school and take precedence over thoroughly learning class material, practicing lawyering skills, or collaborating and communicating with others.”³³ This competitive culture reinforces and, possibly, incentivizes a fixed mindset among students.³⁴ However, as Professor Jolly-Ryan notes, opportunities for a high rank, positions on law reviews, big-law positions, and clerkships are limited. “In fact, by simple math, 90% of law students will not find themselves in the top 10% of the class, where most of the traditional rewards of law school are found” and students who do not rank in the top 10% “fear not only the consequences of poor grades, such as limitations on opportunities, but also the humiliation of not doing well academically after years of apparent successes” and are often “ill-prepared to handle the ups and downs of law school.”³⁵ This aspect of law school culture is referred to as the “hidden curriculum,” which “includes ignoring stress and its consequences, focusing on studies to the exclusion of all else in a student’s life, utilizing substance abuse for escape, and failing to pay attention to mental health.”³⁶

The ABA Standards for the Approval of Law Schools has required law schools to provide academic support to students in an effort to improve outcomes.³⁷ As a result, law schools have established robust academic support services, including faculty who are dedicated to working with students who are struggling academically. Some have raised concerns about the stigma associated with being in the bottom of the class and receiving academic support services. This can be addressed by shifting the culture so that students understand that given the challenging work required for law school, grades that are considered “average” should not be a source of shame. Law education scholars have noted that “by focusing on the emotional and psychological well-being of students, teachers enhance a student’s ability to succeed.”³⁸ Law schools can address some of these concerns by sending a message of belonging on the first day of law school

³² Louis N. Schulze, Jr., *Alternative Justifications for Academic Support: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 *Cap. U. L. Rev.* 41, 20 (2012).

³³ Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do For Law Students to Help Them Become Happy, Mentally Healthy Lawyers*, 48 *Louisville L. Rev.* 95, 109 (2009).

³⁴ See Carol S. Dweck, *Mindset: The New Psychology of Success* (2007).

³⁵ *Id.*

³⁶ Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 *S. Cal. Interdisc. L.J.* 147, 187 (2014) (citing Jolly-Ryan, note 33 *supra*, at 98).

³⁷ 2020-2021 Standards for Approval of Law Schools, Academic Advising and Support § 309 (A.B.A. 2020).

³⁸ Louis N. Schulze, Jr., *Alternative Justifications for Academic Support: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 *Cap. U. L. Rev.* 41, 20 (2012), at 20.

that reminds students that they were selected for admission based on their merit, and they are capable of succeeding in law school.

Emotional Well-Being and Law School Culture

As Professor McClain notes in his book *The Guide to Belonging in Law School*,³⁹ “[e]verybody faces challenges in law school. What is important is how you deal with those challenges.” The heavy workload and stress in law school can exacerbate maladaptive behaviors such as overuse of alcohol, food and other substances as coping mechanisms and can inhibit a sense of belonging for students who do not drink for religious, recovery, or other reasons. Alcohol is often served at law school and bar association functions, making alcohol central to the legal culture, which is not always similar to the undergraduate academic experience. Lack of appropriate sleep and poor nutrition take their toll as well. The stress caused by the financial burden of tuition, books and housing expenses can cause students to make unhealthy decisions.⁴⁰

As discussed above, many law schools are providing counseling and linkages to the LAP and LHL programs to help students deal with emotional, psychological and substance abuse issues. These services are particularly useful for students who are using unhealthy ways to cope and for students who develop symptoms triggered by certain topics of the facts of the case and related class discussions or who suffer vicarious trauma in experiential settings. Although almost all New York law schools provide counseling services, it can be financially challenging for law schools to provide individual, on-site private counseling sessions. The number of counseling sessions may be limited as a result, posing an access issue. In the majority of institutions, most of the institutional funding is reserved for the academic program and, because counseling is resource-intensive, funding for broader wellness initiatives, including counseling, can be difficult for law schools to find or allocate. While some law schools benefit from a counseling center shared with its undergraduate institution, which may defray costs, such general counseling services may not be suited to address the specific nature of law students’ stressors and concerns. To address these financial challenges, some law schools have funded counseling services through student health insurance and activity fees.⁴¹

Barriers to Belonging

Another crucial aspect to emotional well-being for law students is developing a sense of “connection, belonging, and a well-developed support network while also contributing to our groups and communities.”⁴² Law schools do not operate in a vacuum, but rather are products of

³⁹ Russell A. McClain, *The Guide to Belonging in Law School* 15 (2020).

⁴⁰ Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test and Extension of Self-Determination Theory*, 47 *Washburn L.J.* 101 (2008).

⁴¹ See NYSBA Attorney Well-being Survey 2020, Summary App. A.

⁴² Nat’l Task Force on Lawyer Well-Being, Am. Bar Ass’n, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), p. 9;

<https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf>.

and impacted by systems of exclusion that are endemic to society at large. At the time this Report was being drafted, the global community was in the throes of a once-in-a-century pandemic that disparately impacts individuals based on race, ethnicity, and economic status. Simultaneously, American society has been grappling with advocacy, activism and social justice protests in response to prominent instances of police violence. This has been occurring in an often polarized and divisive climate where the very definition of what constitutes a fact is constantly disputed and can vary based on individuals' affiliations. Disputes concerning the 2020 presidential election spilled over to the certification of Electoral College results, culminating in an invasion of the U.S. Capitol on January 6, 2021, marked by flags and other symbols of racialized violence and anti-Semitism, which overshadowed the peaceful transfer of power that are hallmarks of American democracy and the rule of law. Law students bring this context with them into their classrooms, and it necessarily affects their sense of inclusion and belonging or, more often than not, the lack thereof.

Additionally, students from underrepresented backgrounds may struggle with belonging in law school. The reality is that law school faculties often do not reflect the diversity of the student body at most institutions. Law school faculties have traditionally been primarily made up of white men.⁴³ While efforts have been made to diversify law school faculties, diverse faculty who progress in their scholarship and teaching are often recruited by prestigious law schools with greater endowments who seek to hire diverse faculty at higher ranks. This results in recruitment challenges for lower tier schools, which often have greater student diversity and with less faculty diversity.⁴⁴ And, diverse faculty representation is not high at higher-ranked institutions either. Thus, students from some communities – rooted in race, ethnicity, sex, gender identity, sexual orientation, religion, immigration status, and those whose primary language is not English, among others – do not see themselves reflected at the podium, in the pedagogy, or in the profession. Students struggle with learning facts and what is framed as objective law that do not often reflect their identities, histories, or experiences.⁴⁵ The resulting cognitive dissonance is jarring and is exacerbated in times of social unrest like these. This dissonance contributes to impostor syndrome,⁴⁶ isolation, and an inability to imagine oneself as a full member of the legal community. Potential law students also face this dilemma.⁴⁷

Another issue is one of career aspirations and employment, discussed more fully in the next section. Students in the top 10% of the class and those on law review are groomed for big firm

⁴³ See, e.g., Meera Deo, *Unequal Profession: Race and Gender in Legal Academia* (2019).

⁴⁴ Kevin R. Johnson, *Some Thoughts on the Future of Legal Education: Why Diversity and Student Wellness Should Matter in a Time of Economic Crisis*, 65 *Buff. L. Rev.* 255 (2017).

⁴⁵ We note that several New York law schools are addressing this issue by adding courses or curricular requirements focused on racial and social justice.

⁴⁶ Gill Corkingdale, *Overcoming Impostor Syndrome*, *Harv. Bus. Rev.* (May 7, 2008), <https://hbr.org/2008/05/overcoming-imposter-syndrome> (explaining that “Impostor syndrome can be defined as a collection of feelings of inadequacy that persist despite evident success. ‘Imposters’ suffer from chronic self-doubt and a sense of intellectual fraudulence that override any feelings of success or external proof of their competence.”).

⁴⁷ See Johnson, *supra* note 44.

jobs and judicial clerkships. Students who are not ranked in the top of the class are left wondering where they fit in for their future employment prospects. Students of color and women are often encouraged to look at public interest jobs where the majority of the clients “look like them.” Sandra Simkens’ article “*The Pink Ghettos*” of *Public Interest Law: An Open Secret* describes the “socialization” in law school where men are seen as “breadwinners” and women as “caretakers.”⁴⁸ Some law schools have noted the impact this has on students, beginning in the first year of law school:

This failure to incorporate the perspectives of marginalized and oppressed groups harms students. First-year legal education that fails to directly address hierarchy and subordination provides students with an impoverished experience and a limited and defective legal training that falls short of preparing them for legal practice and interaction in a diverse and demographically shifting country and a globally interdependent world.⁴⁹

A look at the 2020 report required by Standard 509 of the ABA Standards for the Approval of Law Schools demonstrates the lack of diversity of both faculty and students.⁵⁰ A summary of those findings is provided below.

Law Faculty					
	Total Full time (FT) professors	All minority (FT) professors	Black (FT) professors	Hispanic (FT) professors	Women (FT) professors
All 198 schools	9,329	1,990 (21.22%)	Not specified	Not specified	4,339 (46.51%)
NY schools only	987	185 (18.74%)	Not specified	Not specified	451 (45.69%)

⁴⁸ Sandra Simkens, *The “Pink Ghettos” of Public Interest Law: An Open Secret*, 68 Buff. L. Rev. 857, 864 (2020).

⁴⁹ Symposium at B.U. Sch. of L., *Racial Bias, Disparities and Oppression in the 1L Curriculum*, B.U. SCH. OF L. (Dec. 12, 2019), <https://www.bu.edu/law/2019/12/12/racial-bias-disparities-and-oppression-in-the-1l-curriculum/>. Symposium held Feb. 28-29, 2020.

⁵⁰ 2020-2021 Standards for Approval of Law Schools, Student Support Services § 509 (A.B.A. 2020). See Stephanie Francis Ward, *How Many Tenured Law Professors Are Black? Public Data Does Not Say*, ABA J. (Oct. 28, 2020, 3:25 PM), <https://www.abajournal.com/web/article/how-many-tenured-law-professors-are-black-public-data-does-not-say>.

Law Students (JD only)					
	All students	All minority students	Black students	Hispanic students	Women students
All 198 law schools	114,520	36,091 (31.51%)	8,870 (7.75%)	14,832 (12.95%)	61,949 (54.09%)

In addition, LGBTQ+ students and students with disabilities are underrepresented at many law schools. Diversity, equity and inclusion efforts do not always focus on these populations and law firms do not seek out these students in their efforts to diversify their staff.⁵¹ Finally, students who identify by their ethnicity, religion, gender identity, sexual orientation or disability do not see themselves well represented in law school texts and in course work, with the exception of their work in clinics, externships and field placements, where discussions around diversity, inclusion, and equity are often presented in an attempt to create a culturally sensitive future attorney.⁵²

Support Structures

The 2020 Law School Survey of Student Engagement (LSSSE) survey highlights that most law schools claim a focus on improving diversity; however, many students still feel marginalized based on race and ethnicity, gender, sexual orientation, gender identity or expression, and socioeconomic status.⁵³ The subsections below explore the lack of sufficient support structures that contribute to this experience of exclusion for three communities: racial and ethnic minorities, first generation/low-income individuals, and those who are differently abled.

Systemic Racism

Students of color face many challenges with respect to systemic racism within the legal system. As they maneuver the intricacies of social interaction and lack of opportunities to be easily included, students of color are often at risk for experiencing racial trauma which tends to have a clear impact on their overall well-being. Many law schools have initiated programs and initiatives to encourage faculty to address systemic racism in the legal system – in course

⁵¹ Nat'l Ass'n for Law Placement, Report on Diversity in U.S. Law Firms (2019).

⁵² Johnson, *Some Thoughts on the Future of Legal Education* *supra* note 44.

⁵³ Stephanie Francis Ward, *New report looks at how law students view their schools' diversity work*, ABA J. (Sept. 30, 2020, 10:14 AM), <https://www.abajournal.com/news/article/new-report-looks-at-how-law-students-view-their-schools-diversity-work> (citing LSSSE 2020 Annual Survey Results: Diversity & Exclusion). We note that at the time of the drafting of this report, the Council of the ABA's Section of Legal Education and Admissions to the Bar proposed a change to ABA Standard 206 that provides that "A law school shall provide . . . [a]n environment that is inclusive and equitable with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status."

materials and as part of class discussion. Schools have also noted the substantial burden on students, faculty, staff and administrators of color who are often asked to organize events, provide support, and educate the larger community on these issues. These issues can interfere with the well-being of the members of the law school community. As a profession, we must find inroads to eradicate the systems that continue to marginalize these students and young professionals as they begin their careers. Removing these long-standing barriers is the only way to change the face of our profession and the NYSBA is poised to support and assist law schools in their endeavor to achieve this.

First-generation Students

First-generation law students face additional issues that impact both their well-being and their overall performance in law school. Stressors from taking out loans, coupled with the likelihood that they come from a multicultural background or may need to attend law school part-time to maintain a full-time job, adds an additional set of external challenges. In addition, these students often are under pressure to meet familial and societal expectations and, despite these challenges, have no one in their personal or professional life who can assist them. These students are unfamiliar with the law school process, which can interfere with their well-being in law school and beyond.

Support for first-generation students is often limited to minority bar associations and diversity, equity and inclusion staffing and/or programs, although some schools have first-generation law student organizations or host receptions for first-generation students to connect with one another as well as with law faculty and staff who were first-generation students themselves. Many schools also have student mentors for first-year students through affinity groups, the Student Bar Association or organizations.

Students with Disabilities

Students with disabilities experience different levels of stress that can be detrimental to their well-being. Although most law schools maintain offices that work with disabled students to support their education as much as possible, steps can be taken to enhance inclusion and a sense of belonging for students with disabilities. For example, in November 2020, the NYSBA hosted programming for parents and law students on how to plan for disability testing accommodations in law school with a particular focus on doing so during a pandemic.

One area in which students with disabilities continue to face challenges is related to seeking accommodations. Students with disabilities are often required to fund the cost associated with obtaining medical documentation and evaluations to support their accommodation requests. Additionally, students with disabilities continue to experience the stigma associated with accommodations and the misperception that accommodations provide an advantage. Further, students with disabilities face a significant administrative burden with completing the extensive necessary forms to secure accommodations on the bar exam.

Student Bar Association presidents at the majority of institutions described the process for seeking accommodations as “too difficult.” Additionally, each president felt that their school’s process to receive accommodations could be clearer and more transparent. Students also expressed dissatisfaction with the level and amount of accommodations they received and raised concerns about the anonymity of their requests. Many law schools have taken steps to anonymize the accommodations process, which is recommended as a best practice with respect to requests for accommodations. Law schools also work to balance student concerns about the accommodations process with schools’ legal responsibilities to ensure students receive consistent support tailored to their individual conditions and circumstances.

But seeking accommodations is only one challenge that has an impact on well-being. Law schools should continue to focus on developing programming for students with disabilities that is focused on how to succeed in law school. While law schools have offered programming that highlights the work of persons with disabilities in the legal profession, which is valuable, it is important to provide resources and support to students to address the challenges they may face while they are in law school. A collaborative approach between the NYSBA and local law schools supporting current disabled students would be remarkably insightful. Offering these resources to disabled law students positions them for success and will serve to lessen the negative impact on their mental state and wellness while in law school.

Student Emotional Health

Students also continue to struggle with whether to seek assistance for their mental health needs. A 2004 study of lawyers recovering from mental illness determined that the two greatest factors in failing to seek treatment was the belief that “they could handle it on their own” and that discovery of treatment would stigmatize their reputation. The National Task Force on Lawyer Well-Being released research that included an expansive list of reasons why lawyers are so help-averse, including:

(1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture’s negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking is a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules.

As noted in the introduction above, New York removed the mental health question from the bar admission application in 2019 in response to the NYSBA Attorney Working Group on Mental Health Report. Students applying to the bar were relieved as, in the past, many applicants to the bar equivocated as to whether they needed to report seeking any counseling they ever had,

medication they took or are currently taking to relieve symptoms of ADHD, mild anxiety and/or depression, or self-help they might have explored. Individuals with DSM IV - R diagnoses whose impairment is fully controlled by medication felt relief as to not having to explain and worry an employer member of the Character and Fitness Committee might find out. However, students at New York law schools often seek admission in other states that continue to require disclosure by a lawyer who has received treatment for any type of mental illness.

Most of us are but a degree of separation (if not closer) from the ravages of mental illness. My mother suffered from schizophrenia, in a time when medical science could do little to help her. The illness robbed her of a normal life and my family of her presence, as she was frequently hospitalized. Were she alive today, with appropriate medication, my mother could have lived a perfectly normal and productive life. She was one pill away from the sanity that we often take for granted.

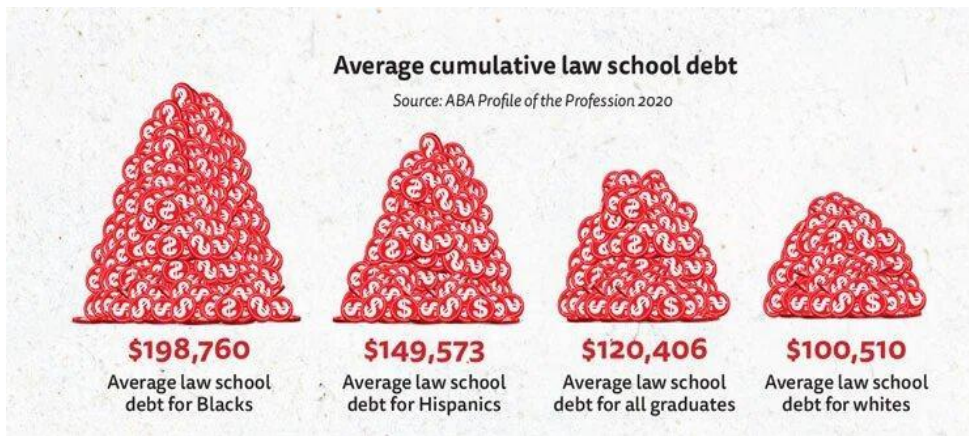
My mother's struggles inspired me during my year as NYSBA president to advocate for the elimination of questions on the Bar admission application that required applicants to reveal their mental health history. A multi-disciplinary task force I established issued a report in 2019 that cited studies showing that law students suffering from depression and other mental health conditions would forgo needed treatment and medication to avoid having to disclose their condition to admission committees. Thankfully, our court system followed the task force's recommendations and eliminated these antiquated questions.

The stigma of mental illness remains a danger to the public's health and well-being. We can all draw on our personal experiences to rid the legal profession of this scourge and encourage our colleagues and friends to get the help they need.

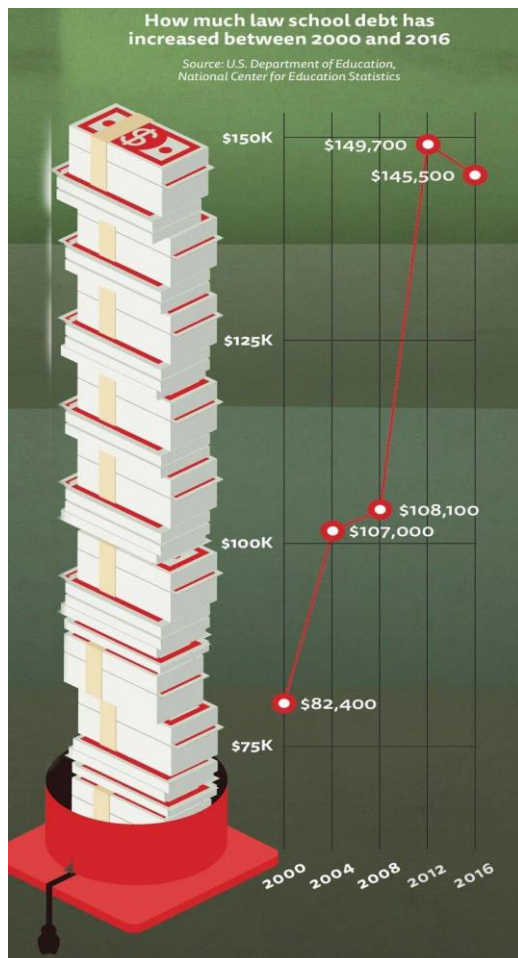
– Hank Greenberg, Former President, NYSBA

Financial Well-Being and Employment Pressure

Financial and employment (in)stability are known to be significant stress points that can also detrimentally impact law student well-being. The investment needed to attend law school is substantial, even without considering the earning potential lost by students during the law school years. The actual cost of a law school education can easily exceed \$100,000 after factoring in tuition, books, housing, transportation, and other living expenses. Some students work part-time to defray the cost of a legal education, which complicates their ability to become integrated into the informal networks that contribute to success and a sense of belonging in law school, such as attending office hours, career and other mentorship programming, and student organization meetings. Many students have to repay sizable loans after law school, which can be challenging. While a small number of law graduates land high-salaried legal jobs, the vast majority do not.



According to the ABA’s survey of 1,000 law school graduates in March of 2020, the average amount of debt students have upon graduation is \$165,000.⁵⁴ The amount of debt is even larger for first-



generation lawyers and lawyers of color.⁵⁵ This chart indicates the “[a]verage cumulative law school debt” as reported by the ABA.

Legal education scholars have noted that student debt can prevent law students from “pursuing their original goals in favor of high-paying positions that provide financial security at the expense of personal satisfaction. . . . For example, many law students who would like to pursue public-interest careers – perhaps as advocates for non-profit agencies or as legal counselors to low-income populations-find it impossible to do so because of their heavy debt (and because there are a limited number of these positions). Thus, many law students are forced to make lifelong career choices based on how they will repay school loans, rather than how they would like to act as a legal professional.”⁵⁶ Graduates may choose high-paying jobs over those that they might be passionate about or would make them happier.⁵⁷

[Chart by Elmarie C. Jara, Getty Images, <https://www.abajournal.com/magazine/article/law-school-debt-is-delaying-plans-for-recent-grads-and-heres-how-6-are-adapting>].

⁵⁴ Debra Cassens Weiss, *Law student debt averages about \$165K at graduation, creating stress and restricting choices, survey says*, ABA J. (Oct. 27, 2020, 12:19 PM), <https://www.abajournal.com/news/article/law-student-debt-averages-165k-at-graduation-creating-stress-and-restricting-choices-survey-says>.

⁵⁵ Debra Cassens Weiss, *Majority of minority female lawyers consider leaving law; ABA study explains why*, ABA J. (June 22, 2020, 4:19 PM), <https://www.abajournal.com/news/article/most-minority-female-lawyers-consider-leaving-law-aba-study-explains-why>.

⁵⁶ Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do For Law Students*, 48 Louisville L. Rev. 95, 115-16 (2009).

⁵⁷ Weiss, *Law Student Debt Averages about \$165K*, *supra* note 54.

Stress is also caused by the unpredictable job market for law students. A New York Times article reported that in 2015 “more than 20% of graduates from the class of 2010 held jobs that did not require law degrees. Only 40% worked in law firms, compared to 60% from the class of 2000.”⁵⁸ Regarding salaries, “[t]he 2018 median pay for law school graduates across the board was only \$70,000. . . . Entry-level prosecuting attorneys earn a median pay of \$56,200; public defenders do slightly better at \$58,300.”⁵⁹ “‘Over the long term,’ the ABA report noted, ‘we continue to ask new graduates to absorb a larger debt burden than their predecessors. The class of 2020 – as their plans to become licensed abruptly devolved into chaos during the COVID-19 pandemic – will almost assuredly bear the biggest burden we have ever asked of any modern class of lawyers.’”⁶⁰

The financial burden of law school also impacts nearly every aspect of life after graduation. Financial wellness often directly affects overall wellness and can have a significant impact on physical, mental, and emotional wellness.⁶¹ Financial challenges cause increased stress, decrease productivity, and reduce overall happiness.⁶² And young lawyers often postpone many life decisions, including purchasing cars and homes, getting engaged or married, or having children due to the burden of law school debt.⁶³

Bar association members comprise a brain trust that could be of great value to law schools in implementing programs and initiatives to introduce resources and practical advice regarding financial well-being to incoming students. A proactive approach for prospective students between bar associations and local law schools about how to finance a legal education would be extremely beneficial as offering this information may serve to lessen the stresses relating to financial burdens. Educating these prospective law students on funding beyond traditional services provided by the offices of financial aid will equip them with resources that may permanently offset the financial burdens if they are encouraged to plan ahead. This encouragement should include identifying non-traditional funding sources that may offer law students grants or financial support. For example, NYSBA’s “brain trust” could develop and host a program (or a series of programs) that provide information to students on financial well-being – and which could benefit new and veteran attorneys as well. Development of a module that addresses loan and debt management will offer students the opportunity to start law school with

⁵⁸ Greg Depersio, *Is Law School Worth It Anymore?*, Investopedia (Aug. 16, 2020), <https://www.investopedia.com/articles/personal-finance/082416/going-law-school-worth-it-anymore.asp>.

⁵⁹ *Id.*

⁶⁰ Weiss, *Law student debt averages about \$165K supra* note 54.

⁶¹ Stephanie Francis Ward & Lyle Moran, *Law school debt is delaying plans for recent grads*, ABA J. (Dec. 1, 2020, 12:00 AM), <https://www.abajournal.com/magazine/article/law-school-debt-is-delaying-plans-for-recent-grads-and-heres-how-6-are-adapting>.

⁶² Gradifi by E-Trade, *Financial Wellness Benefits Boost Employee Happiness and the Bottom Line*, ABA (2020), <https://www.aba.com/-/media/documents/industry-insights/gradifi-financial-wellness-ebook.pdf?rev=54b91feb5b1e4c229d32ba7e5ab7e092>.

⁶³ *Id.*

a different mindset relating to finances and would lessen their burden, thereby enhancing their well-being in an already challenging environment.⁶⁴

Physical Well-Being in Law School

Law schools and the legal profession have made progress in modeling the importance of physical well-being and making explicit the connection between physical health and a long, productive career in law. All reporting law schools offer fitness classes and events to encourage students to be active while in law school. These include yoga classes, wellness walks with student services professionals, faculty/staff-student volleyball and other similar programs. And many schools have student organizations that are focused on fitness-related activities, such as a soccer club. While the benefits of a consistent physical fitness routine are well-documented, students often cite the lack of time as a factor for not being able to fully avail themselves of such offerings. This perception of insufficient time for physical fitness and an inability to prioritize physical well-being is a challenge as physical well-being can have a significant impact on an individual's intellectual and emotional well-being. Finding sufficient resources to address physical well-being such as maintaining fitness facilities and programs, nutrition-focused programs, and programs focused on food insecurity can be similarly challenging for law schools as well.

As such, the Task Force's Physical Fitness Working Group recommends that law schools take "advantage of high levels of access to well-being and recreation opportunities within colleges and universities." For example, if a "law school is affiliated with a university, it should arrange for its students to have affordable privileges to take part in the wellness offerings available to undergraduates and publicize their availability. If university facilities are inadequate or the law school is stand-alone, it should arrange for student discounts at neighboring gyms and fitness facilities." The Working Group also recommends inviting attorneys to speak to law students about practicing well-being throughout their legal career.

Law schools should also be mindful about preparing students for wellness in their law practice. When entering the profession, new attorneys are often addressing financial challenges and may not have the resources for mental health counseling or fitness memberships, and their legal employers may not provide mental health and wellness benefits. Law schools can assist in transitioning law students to the profession by encouraging students to develop strong wellness habits that can carry over into their professional careers.

Transition to the Legal Profession

The ABA and New York State require students to have training that provides ethical, experiential and practical knowledge to transition to the legal profession.⁶⁵ One way students can

⁶⁴ Sara Tabin, *Thinking Differently*, Yale Daily News (May 19, 2019, 11:45 PM), <https://yaledailynews.com/blog/2019/05/19/thinking-differently/>.

⁶⁵ *Id.* See also 22 NYCRR § 520.18 (requiring documentation of skills competency for admission to the bar in New York).

obtain experiential and practical knowledge is by participation in an externship or clinic, which provides the opportunity for students to observe the reality of law and models of professionals. Among other things, experiential opportunities teach students how to acquire facts and counsel clients, apply the law, face ethical dilemmas, and relate to other professionals.⁶⁶ Oregon's Alternatives to the Exam Task Force recently released a Report calling for alternate ways to enter the profession which focus less on the test-taking mechanisms of the bar exam and on models such as "where the second and third years of law school would be clinic-based work finalized with a major project that would be submitted for approval to the Oregon Board of Bar Examiners. A second option would be an apprentice-based where applicants to work under a licensed attorney for up to 1,500 hours and then submit a selection of work samples to the board." The Report focused on "substantial evidence to support offering alternative pathways to licensure that maintain and enhance rigor, while ensuring that new lawyers enter the profession with the knowledge and skills that they need to service clients."⁶⁷

Law schools can do more to train students for the day-to-day life of an attorney. After the first year of law school, students create their own schedule. And, even in the first year, most do not have classes on Friday. Students fortunate enough to have a summer associate position in a big firm often do not see the actual work hours necessary to reach the billable hours quota. Even young attorneys in legal services do not work "9 to 5" and often begin at the bottom of the power structure. Expectations of power, money and privilege are not realized.

Professional Identity Formation

The culture of law school needs to better prepare law students to be knowledgeable, skilled, resilient and understand their own values, goals, strengths and weaknesses. The transition from law student to attorney should be made with perspective, understanding and fortitude to seek what and where they want to be in the profession. One way to better prepare law students for the transition to the profession is by encouraging them to develop their professional identity while in law school and to become aware of the importance of the alignment between their individual personal values and the values of the profession.⁶⁸ Using self-evaluation to develop an understanding of how and whether their individual values align with the values of their clients and their employer can be integral to lawyering effectiveness and long-term career satisfaction. Legal educators have also suggested that it is important to encourage law students to focus on improving their understanding of their own formative capacity, including learning from their own strengths, as well as other professionals. By modeling self-evaluation, we can underscore

⁶⁶ Charlotte S. Alexander, *Learning to be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. Rev. 465 (2011).

⁶⁷ Elizabeth Olson, *Oregon High Court to Consider Dropping Bar Exam for New Lawyers*, Bloomberg Law, July 6, 2021, <https://news.bloomberglaw.com/business-and-practice/oregon-high-court-to-consider-dropping-bar-exam-for-new-lawyers>.

⁶⁸ We note that, at the time of the drafting of this Report, the Council of the ABA's Section of Legal Education and Admissions to the Bar has proposed a change to ABA Standard 303(b) which would require law schools "to provide substantial opportunities to students for . . . the development of a professional identity." Proposed Standard 303(c) provides: "A law school shall provide training and education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation."

the importance of knowing one’s own values and how they contribute to one’s professional responsibilities, as well as their long-term career satisfaction and success.

Additionally, separating individual values from professional values may strip law students and lawyers of their own autonomy and interfere with attorney well-being and career satisfaction. Consider a lawyer representing a client or cause that goes against their individual values and the impact to their autonomy when that lawyer is “rendered morally impotent.”⁶⁹ Relying on a study conducted by the ABA, attorney and author Steven J. Harper notes that public sector lawyers, who are able to function with greater autonomy report greater career satisfaction.⁷⁰ In addition to personal autonomy and the satisfaction that comes from making meaningful contributions, Harper identifies another theme among those who are satisfied with their careers: they understand in advance the pros and cons of their chosen career. He notes, “the law is a career in which understanding one’s own personality and predilections can help to produce a satisfying career. Those who know themselves well are more likely to find a job that suits them.”⁷¹ To foster greater career satisfaction for law students, law schools should encourage students to assess their individual values and decipher how those values align with different types and areas of law practice. Students should also be advised to consider practice size (solo, small or medium-sized firm, Biglaw?) and workplace environment (in-house, corporate, government?) when looking at what would best fit their values.

Concurrently, students should be equipped with information, resources, and narratives regarding financial stewardship, loan forgiveness, and loan repayment so their accumulated debt loads do not foreclose them from pursuing the career paths they desire and that align with their values.

What Can Legal Employers Do?

The ABA’s National Task Force Report (2016) established a seven-point pledge for law firms, legal departments and law schools who pledge to:

1. Provide enhanced and robust education to attorneys and staff on topics related to well-being, mental health, and substance use disorders.
2. Disrupt the status quo of drinking-based events:

⁶⁹ See Steven J. Harper, *The Lawyer Bubble: A Profession in Crisis* 61 (2013) (citing to a 1990 Johns Hopkins University Study that reported 20% of all attorneys will suffer from clinical depression at some point in their careers); see also Cheryl Ann Krause & Jane Chong, *Lawyer Wellbeing as a Crisis of the Profession*, 71 S.C. L. Rev. 203, 240 (2019) (observing lack of autonomy where lawyers are being denied the ability to take on work that is reflective of their interest and values); Patrick R. Krill et al., *The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46, 51 (2016) (reporting levels of alcohol abuse, depression, anxiety and noting that “it is reasonable to surmise from these findings that being in the early stages of one’s legal career is strongly correlated with a high risk of developing an alcohol use disorder.”).

⁷⁰ Harper, *supra* note 69, at 61.

⁷¹ *Id.*, at 58–59.

Report of the Task Force on Attorney Well-Being

- a. Challenge the expectation that all events include alcohol; seek creative alternatives.
 - b. Ensure there are always appealing nonalcoholic alternatives when alcohol is served.
3. Develop visible partnerships with outside resources committed to reducing substance use disorders and mental health distress in the profession: healthcare insurers, lawyer assistance programs, EAPs (Employee Assistance Programs), and experts in the field.
 4. Provide confidential access to addiction and mental health experts and resources, including free, in-house, self-assessment tools.
 5. Develop proactive policies and protocols to support assessment and treatment of substance use and mental health problems, including a defined back-to work policy following treatment.
 6. Actively and consistently demonstrate that help-seeking and self-care are core cultural values, by regularly supporting programs to improve physical, mental and emotional well-being
 7. Highlight the adoption of this well-being framework to attract and retain the best lawyers and staff.

As of October 2020, 193 legal employers and law schools had signed the pledge. The ABA has created a template for employment policies that provide for confidentiality, leave for treatment and return to practice. The list of signatories could serve as a useful resource to students applying to summer and permanent positions. However, we realize that the elements of this pledge depend on the size of the law firm or law firm department to make them possible. Certain items, such as leave without pay, also depend on the debt of the law student now the lawyer.

Notably, only 31 law schools are signatories to the pledge and only two New York law schools have signed the pledge. Schools that have not signed the pledge have indicated that many aspects of the pledge do not apply to law schools. In order to address this in New York, it is recommended that NYSBA develop a *Law Student Well-Being* pledge that is specific to law schools. Additionally, the New York and other state bar associations through their lawyer assistance and wellness programs could expand the availability of mental health resources through state and local government to solo practitioners, smaller firms and attorneys in government, public interest and closely held corporations.

Entering the Profession: Law Culture and Employment

Law firms, like law schools, are highly competitive. We quickly learn that to get ahead we must follow the same program from our educational environment: work the hardest, be the best. Those

of us who join large firms must meet the billable hour quota, and then some, strive to get noticed, to get promoted, to get on partner track. If we enter public or government service, or a corporate legal department, we do not need to meet a billable hour quota, but we bring with us the lessons of law school – work the hardest, be the best, get noticed, move up the ladder. If we join a small firm or strike out on our own, we learn to run a business, and determine that we will be the best at that, too. Yet the truth is, we spent three years working almost single-mindedly toward the goal of being a lawyer to find out it is truly just the beginning.

Like most of us did, young lawyers soldier on thinking things will soon get better and they will either get used to the pace or become experienced enough so that they will not have to work so hard. But in most cases that is not what happens, and the more proficient young lawyers become in their job generally results in a higher billable hour quota, a larger workload or maybe taking on clients we do not really want. After five years of trying, many lawyers begin to experience burnout; some report feelings of depression or anxiety.

The legal profession has known for decades that its members suffer from mental illness and addiction in staggering numbers, yet it largely has been unmoved to create changes. However, making meaningful, systemic changes to promote and prioritize lawyer well-being will reduce costs, increase efficiencies, and improve profit margins. The profession not only should make these changes to create a better future for the profession and its lawyers, but it should do so because it is in its financial interest to do so. In making these changes, even for economic and business reasons, the profession and its lawyers will benefit as a result.

No one is immune from stress. Private practitioners face financial pressure from having to generate business, bill hours or collect fees. It is especially challenging for solos and practitioners in small firms, who also run a business, which eats up a significant amount of time.⁷² A litigator's job is innately adversarial, and lawyers may experience secondary trauma or compassion fatigue as a result of their clients' stress.

It is even more difficult for members of under-represented groups. They do not see themselves in their law firms, which are overwhelmingly white and male. In fact, the law is the whitest of all the professions. According to the ABA's "2019 Profile of the Legal Profession," 85% of lawyers are white; 5% are African-American; 5% are Hispanic; and 3% are Asian-American.⁷³ The ratio of men to women in the profession is 2:1. These numbers have not budged in the past decade, despite changes in U.S. population, and an increase in the number of women – who have edged out their male counterparts – and under-represented people entering law school.

⁷² Small-firm attorneys spend 61% of their time practicing law, 39% on business; solos spend 55% of their time practicing law, 45% on business. We note that there can be a huge gap between the hours spent in the practice of law and the number of hours actually billed. Thomson Reuters, Solo Small Firm Survey 2016, <https://complexdiscovery.com/thomson-reuters-solosmall-firm-survey-how-lawyers-spend-their-time-and-the-money-they-make-2/>.

⁷³ <https://www.mycase.com/blog/aba-2019-report-lawyer-demographics-earnings-tech-choices-and-more/>.

Law school contributes to and law firm culture encourages unhealthy behaviors. As most law schools are taking meaningful steps to help ensure the health and well-being of their students, law firms, too, are realizing that the cultural norms of law – perfectionism, unhealthy levels of self-reliance, overwork and a crusading mind set – are not behaviors to emulate, they are occupational hazards.⁷⁴ But those behaviors are crucial to the current law firm business model, no matter how or where you practice.

The First 10 Years

During the first 10 years of practice, we learn the ins and outs of the legal profession. We also encounter new stressors, pressures and anxieties, and we may double down on the habits and coping mechanisms we developed in law school. During this time period, most lawyers report that they are generally satisfied with their work.⁷⁵ This holds true despite the fact that lawyers in the first decade of practice report significantly high rates of alcohol use.⁷⁶

Years 11 to 15

The excitement of starting your career is over. Maybe you are beginning to tire of the long hours, the work of building and maintaining a business, feeling like you cannot get ahead. You may have a child and a mortgage and still have law school debt. For most lawyers, career satisfaction drops.⁷⁷ For some of us, this can feel like a tipping point.

Between years 10 and 15 of practice, lawyers tend to ask themselves existential questions: Who am I? Why am I here? Is my current path right for me? Ideas can begin to form about returning to the path that originally called us to law. Maybe we just are tired of law firm culture in general or are disheartened about how we are viewed as lawyers.⁷⁸

As we approach mid-career, it is natural to question previously held beliefs about who we are and where we believe we should be. It might also feel “natural” to resist seeking help for what

⁷⁴ Va. Bar Ass’n, “The Occupational Risks of the Practice of Law,” Report of the Va. State Bar President’s Special Committee on Lawyer Well-Being, May 2019, https://www.vsb.org/docs/VSB_wellness_report.pdf.

⁷⁵ NYSBA Attorney Well-Being Survey 2020, Summary, App. A.

⁷⁶ In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation co-sponsored a study of mental health and substance abuse disorders. See Patrick Krill, Ryan Johnson, Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, *J. Addiction Med.*, Feb. 2016, Vol. 10, Iss. 1, pp. 46-52; https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_othe_r_mental.8.aspx.

⁷⁷ NYSBA Attorney Well-Being Survey 2020, Summary, App. A. NYSBA’s lawyer survey showed that lawyer satisfaction with their work starts to inch downward after their fifth year and drops precipitously in year 11. The survey also revealed that, in general, the least satisfied lawyers were solo practitioners, and those in firms of 101 to 200 lawyers. According to the survey, the “sweet spot” for law firm life was in firms of 21 to 100 lawyers. Attorneys in small firms of two to ten lawyers reported markedly higher rates of satisfaction than solos.

⁷⁸ A Pew Research Center survey found that only 17% of those questioned believed that attorneys contribute to society’s well-being. See Joseph Liu, *Public Esteem for Military Still High*, Pew Research Ctr., July, 11, 2013, <https://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/>.

we may dismiss as merely an early mid-life crisis. Yet, if we feel unwell, anxious and distressed, and cannot figure out what to do or where to turn, it is imperative that we seek help. If our mental health is in danger, ignoring those symptoms and soldiering on may eventually endanger our ability to practice law, which can have severe repercussions. And if we also are physically unwell, that will exacerbate any mental health issues we may be experiencing.

Years 16 and Beyond

For most lawyers, it gets better. As we enter our sixteenth year in practice, job satisfaction begins to rise precipitously, peaking at year 21 and holding steady through to retirement.⁷⁹ By this time, wherever we have landed – whether we switched jobs, tailored our practice to better suit our needs, become part of leadership or achieved satisfaction as a senior associate – most lawyers have found career satisfaction. We have a better understanding of ourselves, are aware of the breadth of our knowledge and a confidence in our value.

Given the opportunity, we can mentor new lawyers and share our experience. We can let young lawyers know that we will listen, that we have been there ourselves and remind them that there is no shame in seeking assistance. We cannot change the culture of law by ourselves, but we can be part of the solution by serving as guides for others.

Retirement: Who Will I Be?

We have been on the go for our entire legal career – meetings, clients, on call 24/7, setting aside family matters for the needs of others, researching, calculating, strategizing and problem solving. What if that all goes away? How will we define ourselves? For many lawyers, the prospect of retirement can be as anxiety-producing as anticipating a particularly rough day in court. Aging, however, is not just a personal matter. For lawyers who work in large firms, government agencies or corporate entities, it is likely that transition planning is part of the workplace structure – whether we want it or not.

For solos and small firms, the transition can be problematic in other ways. If you and your small-firm partners are around the same age, you may be looking to bring younger lawyers on board to eventually take over the practice. If it is just you, you may be looking to sell your practice. What if there is little interest from potential buyers? What do you do with that stack of wills?

It is not surprising that many solo practitioners do not expect to retire at all. And that may be a relief, because then no changes are needed. But plans must be made. What if choice is taken away due to cognitive decline and clients are left in limbo?

Aside from the logistics of transferring clients and closing files, the most important question is how you want to redefine yourself. Who will you be?

⁷⁹ NYSBA Attorney Well-Being Survey 2020, Summary, App. A.

When Whitney North Seymour, Jr. and Peter Megargee Brown left their law firms in 1984, it was to open a new practice, one that was a 180-degree turn from their careers in Biglaw. They opened a two-person office and hired part-time help. While they hoped to make a living, they also hoped to render service. They took individual cases, did some public interest work and also took on work from people who could not afford to pay them. Seymour characterized their practice as akin to that of a “family doctor,” and referred to their office as a “country” firm.⁸⁰ He also said that he was “having the most exciting and enjoyable professional experience of my life.”⁸¹

Understand your value. You have decades of experience and a wealth of knowledge. Part-time or pro bono work, mentoring younger lawyers or law students are possibilities.

Bar associations are well-positioned to assist in the transition. They have members of all ages and from all stages of the profession – from student to retiree. Many have senior lawyer committees that can serve as clearinghouses for lawyers looking for assistance in winding down their careers or entering a second, or even a third, act.

Business Case for Change: Attorney Well-Being as an Ethical and Business Imperative⁸²

So, we understand the impacts of our profession on well-being and overall satisfaction. We also understand that the legal profession has long been at a well-being crisis. Indeed, for over 30 years, a significant number of studies, articles, and reports have demonstrated the prevalence of depression, anxiety, and addiction in the profession. Throughout this time, there have been just as many calls for the profession to make changes to promote, prioritize, and improve lawyer well-being, particularly as many aspects of the way the profession operates exacerbate mental health and addiction issues, as well as overall lawyer dissatisfaction. Yet, as the ABA National Task Force on Lawyer Well-Being acknowledged in its 2017 *Path to Lawyer Well-Being* report, many stakeholders in the profession have “turned a blind eye to widespread health problems” that pervade the profession. But why?

A number of these stakeholders – especially law firms – have turned a “blind eye” in large part because they have not seen the financial incentives in addressing the problem. After all, firms’ short-term goal of maximizing annual profits has become their principal long-term goal; consequently, lawyer distress has risen along with partner profits. Thus, the commodification of

⁸⁰ See B. Drummond Ayres Jr., *The Independent Style of Deaver’s Prosecutor*, N.Y. Times, June 8, 1987; Deirdere Carmody & Laurie Johnston, *New York Day By Day*, N.Y. Times, Jan. 21, 1983.

⁸¹ See Whitney North Seymour, Jr., *Re-thinking Retirement*, NYSBA J., Jan. 2003, p. 50; <https://nysba.org/whitney-north-seymour-jr-jan-2003/>.

⁸² The “Business Case for Change” section of the Report was adapted from Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 Vill. L. Rev. 361 (2020), and sources cited therein. Prof. Reich has written extensively and speaks widely on the economic case for law firm addressing well-being and increasing profitability, retention and satisfaction as a result. His full biography appears in Appendix B.

the profession is a key driver of the pervasiveness of lawyer distress, with such distress a means to the profit-maximizing ends.

However, systemic changes designed to provide support and resources to lawyers will avoid costs associated with lawyer mental health and addiction issues and, more importantly, create efficiencies that will increase firms' long-term financial stability and growth. Indeed, lasting and meaningful change will benefit law firms' collective bottom lines as it will improve: (i) performance, as clients are demanding efficiency in the way their matters are staffed and billed; (ii) retention as that creates efficiencies and the continuous relationships demanded by clients; and (iii) recruitment, particularly as younger millennial and Generation Z lawyers – who prioritize mental health and well-being – enter the profession.

Performance

All professions incur significant costs due to untreated employee mental health and addiction issues, with each representing among the most burdensome illnesses to United States employers. Most of these costs are borne by employers because of losses in workplace productivity. Indeed, studies have shown that untreated mental health issues double annual sick days. Employees with such untreated issues have nearly four times more unproductive time at work than those without them, losing on average approximately five days per month due to unproductive work. Moreover, increased lawyer stress not only leads to a decline in health and well-being, but diminished cognitive capacity as well.

By contrast, studies have shown that employers who promote employee well-being and engagement have better business outcomes and employees who perform better. Put simply, as a practical matter, *more engaged employees generate higher business outcomes*. And companies that help to promote well-being realize a significant financial gain. In particular, studies reveal that for every dollar a company spends on employee wellness programs, medical costs decrease by more than \$3.27, absenteeism-related costs decrease by \$2.73, and employers realize \$4.00 in increased employee productivity.

Firms have been able to avoid addressing lawyer well-being issues on performance-related grounds because their business model is one that thrives on and financially rewards inefficiency – the billable hour. However, in recent years, clients have demanded (and caused) law firms to move away from the traditional hourly billing model and toward alternative fee arrangements, such as, among other things, fixed price agreements, success fee agreements, and contingency pricing. Such alternative fee arrangements, together with budget-based pricing, could account for as much as 80-90% of all law firm revenues. Further, large companies are seeking to change the billing model for their outside counsel. They are insisting on alternative fee arrangements, as the overwhelming majority of in-house corporate counsel has or seeks to cut their company's legal expenses. In other words, the billable hour model is one that is antithetical to productivity and efficiency; clients are now demanding firms move away from this model, and will instead award

their business to firms that demonstrate they can perform the work productively, efficiently, predictably and cost-effectively. Accordingly, firms that prioritize lawyers' well-being will be better equipped to meet client demands for exceptional yet efficient service.

Retention

In general, attrition rates among lawyers at law firms are high, and untreated mental health and addiction issues can contribute to this already-high rate of lawyer attrition. According to one estimate, the cost of replacing a junior lawyer is roughly 1.5 to 2x times the annual salary of that lawyer. Thus, taking the average pre-pandemic attrition rates and using a conservative estimate salary, associate attrition costs law firm with 100 associates approximately \$6 million, and firms with 500 associates approximately \$30 million annually. Such costs do not include the likely higher implicit costs such as lost productivity time, covering the work of the departing lawyer, and disrupted intrafirm and client relationships.

Law firms that promote lawyer well-being will see improved retention rates. Studies in other industries have shown that businesses that promote employee well-being typically operate with much lower levels of employee turnover, which avoids the replacement cost of new employee hiring and training. Further, clients have begun to consider lawyer attrition as well as quality-of-life issues that affect attrition when making decisions of which outside firms to retain. In fact, in August 2019, 3M – whose legal department is a signatory to the ABA Wellness Pledge – has incorporated the pledge into its requests for proposals from outside counsel, asking firms if they have signed the pledge and what specific steps they have taken to promote lawyer and staff well-being.

Thus, firms that make efforts to retain their lawyers will not only avoid turnover costs as well as prevent the loss of institutional knowledge about matters and clients relationships generally, they will help to foster and retain clients in the first place. And firms will be better equipped to retain their lawyers by taking steps to promote and prioritize their wellness and well-being.

Recruitment

The third area in which the profession will benefit will be in recruitment, particularly with respect to millennial and Generation Z lawyers. People in these generations suffer from higher levels of mental distress and suicidal ideation than previous generations at their age. And, perhaps as a result, they are more open about mental health and addiction issues and more motivated to promote their well-being than older generations at their age.

As these generations enter the workforce, they prioritize work-life balance when choosing employment, even more than salary. Indeed, other important considerations include leadership opportunities, a sense of meaning or purpose in their work, training, and the impact the work has on society – that is, the types of motivations and values that enhance one's subjective well-being and, in turn, inversely correlate to depression and mental distress.

Law students and young lawyers in this generation are no different. In its “2019 Summer Associates Survey,” the *American Lawyer* reported that 42% of respondents said that they are concerned about their mental health, including because of the “structure of the legal industry.” Further, when asked to list their top three factors in considering an employment offer from a law firm, work-life balance was the most important factor. Moreover, young millennial and Generation Z law students are at the forefront in promoting mental health in the profession, including through their activism in seeking the elimination of questions related to mental health history and addiction treatment from state bar admission questionnaires, and their demand for the creation of well-being-related programs and curricula at law schools.

Accordingly, firms that prioritize lawyer health and well-being will be attractive both to these younger and future lawyers who prioritize their own well-being, as well as lateral lawyers who seek better balance for themselves and the profession.

Common Practice: Solo, Small Firm

Large firms are not the only environments which are affected by and responsible to address lawyer well-being. While talk in and about the profession all too often centers on large firms – their cases, their salaries, their bonuses, who is in or who is out – that world is comparatively small. Fully two-thirds of lawyers in New York State are in solo or small firm practices. About half of these are solos. Surprisingly, these numbers stand, no matter where in the state we work – even in New York City.

Sometimes Lawyer, Full-time Business Owner

Did law school help prepare us for a variety of practice situations, or did the summer job placements focus mainly on larger firms or placements in the courts or other government agencies? If we did get to see a one- or two-person office in action, we saw only the lawyering, likely not the business side of law. While anyone in private practice faces certain business-related financial pressures – having to generate business, bill hours, collect fees – this is especially challenging for solo and small firm practitioners. Our colleagues who practice “small” understand generating business, but also learn hands-on the part that includes hiring office staff; paying rent, utilities, and insurance; developing a list of attorneys you can call on for per diem help with a large case; this list goes on.

Moreover, if the practice is a start-up, it likely means taking out another loan, on top of law school loans. General practitioners must prepare to take anything that walks in the door which likely means working BigLaw hours, at least initially.

The Rural Lawyer's Dilemma

Unless employed by the government, most rural lawyers are solos or work in small firms.⁸³ They face the same challenges as lawyers in more populated areas, and ones that are unique to rural life. Rural lawyers “are overwhelmed by [the] volume of cases, financial stress and limited resources” and the difficulty of “finding qualified attorneys to refer cases to.”⁸⁴ And they are graying. Nearly 54% of rural lawyers are over the age of 55.⁸⁵ Some have said they find it difficult to retire because there is no one to take their place.

The financial realities can be burdensome. As one lawyer put it, “a working spouse is pretty much a necessity.”⁸⁶ Most lawyers will try to get a part-time position that offers a regular paycheck to supplement their practice. In rural areas with few lawyers, conflicts are more likely to crop up. Assigned work, such as Article 18-B appointments, require appearing in court and can entail hours of driving from court to court in remote areas of the state where the county courthouse can more than 50 miles away. Out of necessity, many lawyers find ways to work in their cars.

In serving indigent clients, it can be difficult to keep in contact when needed – a client might live in an area where cellphone service is spotty or maybe their service was cut off. It can be a juggling act. There is less opportunity to develop the camaraderie, to exchange information and ideas, to make the connections that tell us we are not alone. There are fewer people to turn to. The only bar association may be headquartered in the county seat or may be nearly nonexistent. It can be an isolating way of life.

Finding Assistance

Solo and small firm practitioners, who have only themselves to rely on, need the support and encouragement of the legal community. If they are unwell and stressed, feel isolated and alone, they cannot properly serve their clients. As business proprietors, they have large responsibilities on top of law practice. Resources are scarce. These lawyers may want help but have more trouble finding help it.

Bar associations and other legal organizations can be valuable resources to small firm and solo lawyers and can assist by providing programming and support systems geared toward these lawyers' particular circumstances.

⁸³ Taier Perlman, *Rural Law Practice in New York State*, Report of the Gov't Law Ctr., Apr. 2019, at 1. <https://www.albanylaw.edu/centers/government-law-center/the-rural-lawinitiative/Documents/rural-law-practice-in-new-york-state.pdf>.

⁸⁴ *Id.*

⁸⁵ *Id.* at 11.

⁸⁶ William Pulos, Esq. of Pulos & Rosell, LLP (Alfred, New York) and Task Force member, discusses life as a rural lawyer in his contribution, “My Time in Rural Private Practice” at Appendix F.

Public Servant, Public Trust: The Role of Lawyer Ethics and Discipline

A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibilities for the quality of justice. As a representative of clients, a lawyer assumes many roles, include advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.⁸⁷

Perfection as the Enemy

The perfect is the enemy of the good. This simple sentence, frequently attributed to one penned in French by the Enlightenment-era writer, philosopher, and social activist Voltaire,⁸⁸ sums up so much of what we struggle with as legal practitioners. As aptly described in the Report's Law Education section, the drive for perfection in our professional endeavors starts in law school, and in many respects, presents an elusive and unattainable goal: the desire to win and accomplish the objective for our clients, be they organizational, governmental, or private. The ever-present pressure to be accepted and acknowledged favorably by peers, partners, managers, judges, and by clients, others in the legal community, or the public at large, who will somehow contribute to the advancement of our careers and professional reputations.

While the legal profession is, of course, a helping profession with expert problem-solvers who strive to do their professional best on a daily basis, we must acknowledge the dehumanizing effect that the goal – to be perfect – can have on both our professional and personal lives. The unrelenting pressure to produce perfection, whether or not self-inflicted, can lead to negative consequences, partially attributable to abject fear of not being perfect.

No one likes to have their work questioned, certainly. But, the trauma-based response experienced by some attorneys who receive a complaint of professional misconduct can, in some cases, lead to inertia and a downward spiral, ultimately resulting in a finding of professional misconduct and the issuance of professional discipline. In certain circumstances, this discipline can end up with the imposition of a public censure, suspension, or at worst, disbarment. It is incumbent on us all as stakeholders in the legal community and members of the legal profession to ensure that resources and information are available to attorneys in general, but it is imperative that we take action on behalf of our colleagues who experience this type of reaction. Whether

⁸⁷ NYSBA NY Rules of Professional Conduct (2020), at Preamble: A Lawyer's Responsibilities (hereinafter "Preamble"), comment [1]. The Preamble is non-binding and is published by NYSBA to provide guidance to attorneys in complying with the New York Rules of Professional Conduct (hereinafter "RPC"), Joint Rules of the Appellate Division, (22 NYCRR) Part 1200.

⁸⁸ See Francois Voltaire, Philosophical Dictionary.

their reaction is due to substance or alcohol abuse, other mental or physical health impairment, trauma-related background, or the general feeling of being overwhelmed by the pressures of juggling professional practice and work/life balance in any regard, they must be made aware of available resources. And, most important, they need to know that they are not alone, and that if they are struggling for any reason, they have support and can access the necessary resources to ensure their return to well-being, and in turn competently practice and achieve success in their professional endeavors.

The Attorney Disciplinary System: Increasing Access and Education for Assistance

In March 2015, then-Chief Judge Jonathan Lippman of the Court of Appeals announced the creation of the Commission on Statewide Attorney Discipline (“Commission”) to conduct a comprehensive review of the existing attorney disciplinary system in New York State, with a goal of ultimately enhancing the efficiency and effectiveness of the disciplinary process throughout the State.⁸⁹ As a result of the Commission’s work, in December 2015, Judge Lippman announced the promulgation of the Rules for Attorney Disciplinary Matters (“Atty. Disc. Rules”), (22 NYCRR) Part 1240, which became effective on October 1, 2016, and have since been amended, and which provide for a uniform and harmonized approach to the handling of attorney disciplinary matters throughout the State.⁹⁰ The Atty. Disc. Rules are applied in conjunction with and supplemented by Court Rules in each of the Appellate Division Departments (“Court Rules”).⁹¹ At the outset, attorneys should be aware of the Atty. Disc. Rules and applicable Court Rules, so that they are able to access information and understand the framework of the attorney disciplinary system to which they are subject.

The Attorney Grievance Committees (“AGCs”) in each of the four Departments provide practical information on their respective websites about the work of the AGCs, types of matters addressed, and links to resources such as applicable rules and forms pertaining to attorney disciplinary matters.⁹² The LAP’s continued collaboration with the New York State Unified Court System ensures that information about the attorney disciplinary process is readily accessible and its educational efforts could potentially include professional service videos from judges, attorneys, and NYSBA officials. Widespread distribution and increased accessibility of informational resources about the attorney disciplinary system and process could help reduce fear-based reactions of some practitioners when faced with a grievance and/or the potential for

⁸⁹ See, NY Courts page on Commission on Statewide Attorney Discipline, available at: <http://ww2.nycourts.gov/ATTORNEYS/DISCIPLINE/index.shtml>.

⁹⁰ See, (22 NYCRR) Part 1240; see also, “Overview of the Attorney Disciplinary Process” (hereinafter “Overview”), available at: <http://www.nycourts.gov/ad3/AGC/Forms/OverviewAttyDiscipProcess.pdf>.

⁹¹ See, Rules of the Appellate Division, First Department (22 NYCRR) Part 603; Rules of the Appellate Division, Second Department (22 NYCRR) Part 691; Rules of the Appellate Division, Third Department (22 NYCRR) Part 805; Rules of the Appellate Division, Fourth Department (22 NYCRR) Part 1020.

⁹² See, <http://www.nycourts.gov/courts/AD1/Committees&Programs/DDC/index.shtml> (1st Dept.); <http://www.nycourts.gov/courts/ad2/attorney matters.shtml> (2d Dept.); <http://www.nycourts.gov/ad3/AGC/Index.html> (3rd Dept.); <http://www.nycourts.gov/courts/ad4/Clerk/AttyMtrrs/atty-discip.html> (4th Dept.).

interaction with an AGC, and further inform members of the public about the ways in which our profession engages in self-governance.

Pre-Admission Professionalism Courses

In order to be admitted to the practice of law in New York State, applicants are required to demonstrate that they possess the requisite qualifications for admission to the practice of law as set forth in the Rules of the Court of Appeals.⁹³ Applicants are also subject to applicable rules in the respective Appellate Division Department in which they seek admission.⁹⁴ In the First and Second Departments, applicants for admission are required to complete pre-admission professionalism programs.⁹⁵ These programs draw upon the experience of various speakers and have been known to address topics including civility, frequent issues arising in disciplinary matters such as communicating with clients and properly maintaining attorney bank account and other records, along with issues impacting other aspects of attorney well-being, such as providing resources for addressing substance and alcohol abuse. In the Second Department, completion of its multi-hour professionalism program has been required for those admitted to practice since 2006, and has been known to feature speakers from different parts of the legal profession, including judges, general practitioners, AGC staff attorneys, attorney members of the AGCs, and those with experience in risk management, as well as bar leadership. It is currently presented as a three-hour online program.⁹⁶ The First Department's program, addressing professional ethics and related topics, has been required since 1999, and since 2018, presented in a two-hour online format.⁹⁷

Harmonizing aspects of a pre-admission/pre-licensing program requirement throughout the State and across Departments would ensure uniform educational resources to all attorneys seeking admission. The programs are beneficial not only for new attorney applicants at the time of their introduction to the profession, but would establish a foundation upon which they could build and provide resources on which to draw throughout their careers. Providing pre-licensing programs which include guidance on real world issues such as the importance of competency would benefit the individual attorney applicants and help to maintain the honor and integrity of the legal profession.

⁹³ *See generally*, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, (22 NYCRR) Part 520. Further, applicants for admission upon examination, with certain limited exceptions, are required to meet a skills competency requirement for admission by showing that "...the applicant possesses the skills and values necessary to provide effective, ethical and responsible legal services this State." (22 NYCRR) §520.18.

⁹⁴ *See generally*, (22 NYCRR) Part 602 (1st Dept.); (22 NYCRR) Part 690 (2d Dept.); (22 NYCRR) Part 805 (3rd Dept.); (22 NYCRR) Part 1015 (4th Dept.).

⁹⁵ *See*, (22 NYCRR) §602.3; §690.21. Additional information regarding these programs is available on the respective websites, at <http://www.nycourts.gov/courts/AD1/Committees&Programs/CFC/index.shtml> (1st Dept.); <http://www.nycourts.gov/courts/ad2/attorney matters.shtml> (2d Dept.).

⁹⁶ 22 NYCRR §690.21; *see also*, <http://www.nycourts.gov/courts/ad2/orientation.shtml>.

⁹⁷ 22 NYCRR §602.3; <http://www.nycourts.gov/courts/AD1/Committees&Programs/CFC/index.shtml>.

Focused Expansion of Diversion Programs

The AGCs throughout New York State should take the opportunity to apply diversion options to all disciplinary proceedings in the broadest possible fashion with an emphasis on the situation presented rather than the specific nature of the infraction.⁹⁸ Under the Atty. Disc. Rules, diversion is available throughout New York State.⁹⁹ Atty. Disc. Rules §1240.11 (“Diversion Rule”) provides a mechanism for an AGC or respondent attorney to seek an order of diversion from the applicable Appellate Division during the course of a disciplinary investigation or proceeding.¹⁰⁰ The applicable Rule provides in relevant part, as follows:

- (a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court....¹⁰¹

In determining to issue an order of diversion, the Court considers the nature of the alleged misconduct and whether it occurred during a time the respondent attorney suffered from the claimed impairment, along with a determination as to whether it is in the public interest to divert a respondent to a monitoring program, such as LAP.¹⁰² In practical terms, the benefit to a respondent who is diverted to a monitoring program is not only potentially to their mental or physical well-being,¹⁰³ but can also ultimately result in the discontinuance of a disciplinary investigation or proceeding upon proof of successful completion of a such program being supplied to the Court.¹⁰⁴

⁹⁸ Failure to comply with an obligation or prohibition imposed by a Rule (of Professional Conduct) is a basis for invoking the disciplinary process. The Rules pre-suppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

⁹⁹ Prior to the promulgation of the Atty. Disc. Rules, the Third Department provided a formal mechanism by which a respondent attorney or the AGC, then-known as the Committee on Professional Standards, could make application for an attorney who raised alcohol or substance abuse or dependency as a mitigating factor in a disciplinary matter to be diverted to a monitoring program sponsored by LAP. *See*, (former) Rules of the Appellate Division, Third Department, (22 NYCRR) §806.4(g).

¹⁰⁰ Atty. Disc. Rules §1240.11(a).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Anecdotal evidence suggests that of the attorneys who have sought diversion under the Diversion Rule since 2016, and have entered into a monitoring agreement with LAP or similar program, the majority seek assistance with substance abuse and/or alcohol dependency, or other mental health issue. However, diversion is also available for attorneys suffering from physical impairments, and monitoring programs can be implemented for those suffering from essentially any condition which can be monitored.

¹⁰⁴ Atty. Disc. Rules §1240.11(b). Under this Rule, it is important to note that the converse is also true, and a respondent who is unsuccessful in a monitoring program or commits additional professional misconduct while

Significantly, the Diversion Rule provides that all aspects of an application for diversion and a respondent's participation in a monitoring program as ordered by the Court, along with any related records, are confidential or privileged pursuant to Judiciary Law §§90(10) and 499. Despite these assurances of privacy, historical and anecdotal evidence suggests that attorneys are reticent to raise an issue of impairment.¹⁰⁵ As addressed in so much of the work of this Task Force and other similar initiatives relating to attorney well-being, the fear of stigma and/or admitting vulnerability poses a significant challenge.

It is of paramount importance that attorneys and their counsel be aware of the Diversion Rule and the possible avenue to increased well-being and assistance it provides for an attorney who is suffering from a mental or physical impairment.¹⁰⁶ In the Third Department, attorneys who receive notice of a complaint of professional misconduct are advised of the Diversion Rule from the outset of the investigation. AGC staff attorneys in the Third Department also regularly discuss the Diversion Rule at CLE presentations and with counsel for respondent attorneys.

However, despite the dissemination of this information, anecdotal evidence suggests that many respondent attorneys remain hesitant to pursue diversion. This is not only due to concerns about the stigma they may experience, but also to a conscious decision to 'take their chances' with the outcome of a disciplinary investigation. The majority of complaints of professional misconduct do not ultimately result in a disciplinary proceeding and/or Court order of public discipline and may instead result in the dismissal of a complaint, or determination of an AGC that a non-disciplinary letter of advisement be issued, or that an admonition be imposed as the appropriate measure of discipline.¹⁰⁷ Dismissals, letters of advisement, and admonitions are all private and confidential.¹⁰⁸ Attorney discipline is public in the relatively small number of cases where a disciplinary proceeding results in findings of professional misconduct and the associated issuance of a public order imposing discipline by the applicable Appellate Division.¹⁰⁹ That

subject to the diversion order, may face the rescission of the order and the resumption of the disciplinary investigation or proceeding.

¹⁰⁵ See, e.g., Testimony of Deborah Scalise, Esq., before the Commission on Statewide Attorney Discipline, Hearing date August 11, 2015, at pp. 40-44. In advocating for the adoption of a uniform diversion rule which would allow for expanded consideration of psychological issues, Attorney Scalise, a member of this Working Group, who has extensive experience both as disciplinary counsel and respondents' counsel, relayed anecdotal evidence regarding an instance where a respondent attorney was hospitalized for treatment of bipolarism, and was facing discipline for failing to cooperate in a disciplinary investigation. In seeking an adjournment of the proceedings, he disclosed the hospitalization to her, but conveyed he would rather be disbarred for failing to cooperate than reveal the information regarding his mental health diagnosis and treatment.

¹⁰⁶ Notwithstanding the Diversion Rule or the filing of a particular complaint of professional misconduct/grievance, it is important for attorneys to be cognizant of their professional obligations regarding withdrawal in circumstances where a mental or physical condition impacts their representation of a client. See, RPC Rules 1.16(b)(2) and 1.16(c)(9). See also, Atty. Disc. Rules §§1240.14 and 1240.17, regarding proceedings pertaining to incapacitated attorneys. Attorneys should also be mindful of their professional obligations under RPC Rule 8.3, Reporting Professional Conduct.

¹⁰⁷ See, Atty. Disc. Rules §§1240.7, 1240.8.

¹⁰⁸ See, Atty. Disc. Rules §§1240.18; Judiciary Law §90(10).

¹⁰⁹ See, Atty. Disc. Rules §§1240.7, 1240.8; see also, Overview, *supra* note 90, for additional information regarding the disciplinary process and potential outcomes in disciplinary matters.

being the case, anecdotal evidence suggests that many attorneys would rather wait to see what occurs with any given disciplinary investigation by an AGC. Because, by applying for and being granted diversion, they not only expose themselves to the vulnerability of raising a mental or physical health condition or impairment, but could also be subject to the rigors and requirements of a monitoring program for a period of a year or more. Further, while a diversion order is confidential, some attorneys may still be reluctant to have any order issued that addresses their underlying condition or impairment. Thus, they may not raise or wish their counsel to raise these issues. Similarly, in circumstances where an AGC is aware of an impairment and moves for diversion, the respondent may choose not to respond or join in the motion and instead face the outcome of the disciplinary investigation or proceeding. Like so many other aspects of well-being, an attorney must be ready and willing to move forward and be an active participant in their own journey to wellness.

Recent public decisions in disciplinary matters indicate the Courts are cognizant of, sensitive to, and carefully consider issues pertaining to attorney well-being when determining an appropriate disciplinary sanction and/or reinstating an attorney to practice who has demonstrated such reinstatement will be in the public interest.¹¹⁰ While diversion decisions are confidential, hopefully the dissemination of public opinions demonstrating courts' consideration of the impact of impairment and treatment in disciplinary matters will encourage respondent attorneys to seek diversion where applicable.

Even when diversion is not sought under the Diversion Rule, anecdotal evidence also suggests that AGCs may engage in informal diversion in certain cases. This may include an AGC's consideration of a respondent attorney's compliance with treatment recommendations following an arrest and conviction¹¹¹ for an alcohol- or substance-related driving offense such as driving while intoxicated or other crime pertaining to substance use or abuse or alcohol dependency. It may also include a situation where a respondent attorney has voluntarily chosen to enter into a LAP monitoring agreement for their own benefit, and allows compliance information to be

¹¹⁰ See e.g., Matter of Shmulsky, 186 A.D.3d 1878 (3rd Dept. 2020) (discussing that numerous factors were considered in mitigation when determining an appropriate sanction, including affirmative steps taken by the respondent to address emotional issues that contributed to his misconduct, and sealing those portions of the record which contained sensitive information pertaining to his treatment with mental health providers). As referenced by Attorney Scalise in her 2015 testimony, it is recommended that courts remain cognizant of sensitive information when issuing public decisions in order to encourage attorneys to be forthcoming in raising issues of impairment. See, Scalise Hearing Testimony, *supra*, at pp. 34-38; Matter of Canale, 162 A.D.3d 1455 (3rd Dept. 2018) (finding it was in the public interest to reinstate a disbarred attorney who demonstrated he had taken steps to address substance abuse and related issues which impacted his conduct resulting in disbarment, and dedicated himself to assisting others who suffer from similar issues).

¹¹¹ See, Atty. Disc. Rules §1240.12; Judiciary Law §90(4)(c), regarding reporting obligations for attorneys who are convicted of a crime. Attorneys and their counsel should be aware that for attorney disciplinary purposes, conviction occurs at the time a plea is entered. An attorney who is convicted of a felony is subject to automatic disbarment as an operation of law. See, e.g., Matter of Tendler, 131 A.D.3d 1301 (3rd Dept. 2015) (disbarring an attorney who entered a conditional plea to a felony DWI), subsequent proceeding at 145 A.D.3d 1314 (3rd Dept. 2016) (denying reinstatement); Matter of Werther, 2021 NY Slip Op 02215 (3rd Dept. 2021) (disbarring an attorney who pleaded guilty to felony DWI.).

shared with an AGC during the course of a disciplinary investigation. Sharing of this type of information is essential. As any AGC staff attorney, or AGC committee member is likely to discuss in conversation about the disciplinary process, the facts and circumstances of any given case, including mitigating factors, are carefully considered when issuing recommendations (staff attorneys) or making determinations (AGC Committee members), and may significantly impact the outcome of the investigation.

Ignored Complaints: Freeze Response

Staff attorneys at the AGCs expend an inordinate amount of time and energy seeking responses from attorneys who simply “freeze” upon receipt of a complaint.¹¹² Attorneys are required to cooperate in an AGC investigation of alleged misconduct, and the failure to do so in and of itself can result in a finding of misconduct.¹¹³ Atty. Disc. Rules §1240.9 provides a mechanism for AGCs to seek a respondent attorney’s suspension from the practice of law on an interim basis during the pendency of an investigation on the basis of that attorney’s failure to comply with an AGC’s lawful demand in an investigation.¹¹⁴ Further, an attorney who is suspended on an interim basis for failing to cooperate can ultimately face disbarment if that attorney has failed to respond or appear for further investigatory proceedings within six months from the date of the suspension order. Notably, the Atty. Disc. Rules provide that such disbarment can be ordered upon application of an AGC, without any further notice to the respondent attorney¹¹⁵. On a practical level, what this means is that an attorney who fails to respond to an AGC which is seeking that attorney’s response to a complaint of professional misconduct can be suspended, and ultimately disbarred, on that basis alone. This can occur regardless of whether or not an AGC would ultimately have determined there to be merit to the underlying complaint.

AGCs do not rush to obtain interim suspension orders, and multiple efforts are made to obtain a respondent attorney’s response prior to seeking court intervention. For instance, in the Third Department, in conjunction with Atty. Disc. Rules §1240.7, an attorney who is the subject of a complaint/grievance is issued a Notice of Complaint of Professional Misconduct (“Notice”), directing that attorney to submit a written response to the allegations within 25 days, and advising the attorney of both their obligation to cooperate with the investigation and the potential for the AGC to apply for an interim suspension if they fail to do so. Further, if an attorney fails to respond to the initial Notice, a second Notice is issued, directing the attorney to submit a response within 15 days, again advising them of the ramifications of failing to do so. An attorney who fails to respond may be directed to appear before the Chief Attorney or staff attorney for a formal interview or examination under oath, and the AGC may also apply to the Clerk of the Court for a subpoena to compel their attendance.

¹¹² The terms “complaint of professional misconduct”, “complaint”, and “grievance” are used interchangeably.

¹¹³ See e.g., *Matter of Kove*, 103 A.D2d 968 (3rd Dept. 1984).

¹¹⁴ Atty. Disc. Rules §1240.9(a)(3).

¹¹⁵ Atty. Disc. Rules §1240.9(b).

Despite the multiple opportunities given to attorneys to respond to AGCs in their respective investigations, both case law and anecdotal evidence illustrate that some do not cooperate and face the potential imposition of public discipline such as suspension and/or disbarment as a result¹¹⁶. Seeking interim suspension is often seen as a last resort by the AGCs after other efforts used to try to obtain an attorney's response to a complaint have been unsuccessful.

We should explore solutions to the problem of lawyers who are non-responsive due to ill-being issues in their lives and who may not otherwise be in jeopardy of discipline but may be ill-served by the failure to respond. One possibility is a system that would allow the AGCs to reach out to a designated colleague of the attorney who is the subject of the complaint to minimize the potential discipline for failing to cooperate with an AGC investigation and maximize the potential for an attorney who needs assistance and is struggling with issues impacting well-being to be made aware of available resources. This resource could be provided through the optional designation of a colleague to be listed as a potential contact in conjunction with the filing of an attorney's biennial registration with the New York State Unified Court System's Office of Court Administration – Attorney Registration Unit.¹¹⁷ If a colleague is listed as a contact and the respective AGC has received no response from an attorney who is the subject of a disciplinary investigation, the AGCs could be authorized to access designee information on file with the Attorney Registration Unit for an attorney who has been unresponsive to other communications, and could then be able to reach out to this authorized designee.

While not to be viewed as minimizing attorneys' professional obligations to be responsive to AGCs (and others who may be trying to reach them), having an additional potential contact available could be a valuable tool, given the objective of moving forward to resolution of the disciplinary investigations and proceedings, and assisting in ensuring attorney well-being. Given the challenges faced by so many since the onset of the COVID-19 public health crisis, there could be any number of reasons, other than simply choosing not to cooperate, why an attorney has not responded to an AGC. Anecdotal evidence suggests many AGC communications are now handled electronically, reducing the chances for mail-related delays or other issues. As the legal profession continues to utilize technology and embrace tools enabling virtual practice, the use of electronic communications and virtual proceedings in the attorney grievance process may also increase cooperation. However, since we increasingly see and rely on electronic communications

¹¹⁶ See e.g., Matter of Brownell, 180 A.D.3d 1218 (3rd Dept. 2020), (suspending an attorney who was already suspended for failing to comply with an AGCs lawful demands in connection with an investigation), subsequent proceeding at, 187 A.D.3d 1402 (3rd Dept. 2020) (disbarring respondent).

¹¹⁷ Judiciary Law §468-a and the Rules of the Chief Administrator of the Courts, (22 NYCRR) Part 118, require all attorneys admitted in the State of New York to register every two years, whether they are residents or non-resident, active or retired, or practicing law in New York or elsewhere. In 2020, New York had approximately 338,000 registered lawyers. See, The Lawyers' Fund for Client Protection of the State of New York ("Lawyers' Fund"), Highlights from the 2020 Annual Report of the Board of Trustees ("Report"), available at: <http://www.nylawfund.org/>. The Report, which provides valuable reference information, including that pertaining to claims handled and paid out, and emphasizes that in the experience of the Lawyers' Fund, the vast majority of lawyers are honest, caring, also discusses causes of misconduct, which can often be traced to issues involving alcohol or substance abuse, gambling, and other pressures including those related to other mental health issues.

in so many aspects of life, some attorneys may feel overwhelmed by the volume of emails they receive on a daily basis. In those circumstances, an attorney could take individualized steps such as setting up an auto-reply message indicating alternate means of contact. Just as it is incumbent on attorneys to cooperate with AGCs, it is also a professional obligation to ensure responsiveness in general practice and to client communications.¹¹⁸ NYSBA could refer to and build upon its work on the NYSBA Planning Ahead Guide,¹¹⁹ when exploring the practical aspects and potential implementation of assistance in area of responsiveness.

Mentoring in Professional Liability Areas and Civility.

Another means of providing assistance is possible through the increased use and availability of mentors and mentoring resources. The NYSBA Committee on Professional Ethics answers questions about concerns pertaining to attorney conduct and issues non-binding opinions on issues of ethics.¹²⁰ NYSBA Ethics Opinions, which are publicly accessible, also provide valuable guidance and information for attorneys and the general public. However, development of a peer-to-peer resource could provide a different avenue for direct insight and interaction that is readily available to an attorney who is struggling, including by providing a non-judgmental setting in which the mentor and mentee are able to brainstorm together about available resources. While members of such a group would not provide representation in an AGC disciplinary investigation or proceeding, just having someone to talk to about issues that arise in everyday practice on a peer-to-peer level could help to address a potentially impactful ethics scenario before it reaches that point. Such resources could also be vital to solo practitioners and those who do not have colleagues readily accessible with whom they feel comfortable talking about an ethics or civility issue that may arise. Expansion of resources based on current initiatives like the Lawyer-to-Lawyer Well-Being Roundtable would also be beneficial. Further, having mentoring resources available for young attorneys provides another tool for them to use as they establish and move forward in their careers. One possible way to help attorneys accomplish these goals would be to institute changes to CLE credits pertaining to attorney well-being. While CLE is discussed later in the Report, it is worth noting that the incorporation of changes could help to ensure that attorneys maintain the high standards expected in the profession,¹²¹ as well as their own well-being.¹²²

¹¹⁸ See e.g., RPC Rules 8.4, 1.4.

¹¹⁹ See, NYSBA Planning Ahead Guide, How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death, (Second Ed., 2015-2016), available at <https://nysba.org/attorney-resources/planning-ahead-guide/>.

¹²⁰ More information on that Committee is available at <https://nysba.org/committees/committee-on-professional-ethics/>. NYSBA Ethics Opinions are available at https://nysba.org/news-center/?show_category=ethics-opinions. Comments to the individual RPC Rules, while also non-binding, provide valuable information and guidance to attorneys. See, NYSBA NY Rules of Professional Conduct, *supra*. Treatises such as Simon's New York Rules of Professional Conduct Annotated, Roy D. Simon and Nicole Hyland, [Thomson Reuters 2019 Ed.], also provide extensive analysis of and guidance on the RPCs and Comments.

¹²¹ It is important that attorneys remain aware of and strive to behave in accordance with civility standards expected for the profession. The New York Standards of Civility are not disciplinary rules under the RPC. However, they are

Outreach Program: Goal of Rehabilitation

Attorneys may experience the ramifications of a public order of discipline not only on their professional practices and careers, but also on their personal lives. It is not difficult to imagine scenarios involving the widespread impact on an attorney of any public order, but particularly when subject to a suspension or disbarment. For those who do not have support systems in place, it is also easy to imagine that this can be overwhelming in some respects. Having an outreach program available to attorneys (or former attorneys) could provide invaluable assistance to those impacted. While members of such a group would not provide representation, much like the previous point addressing mentoring, having peer support to rely on could provide an invaluable resource and assist an attorney on their path to wellness.

Attorneys who are suspended or disbarred must comply with the conditions of the respective court orders, as well as associated provisions of the Atty. Disc. Rules¹²³ and Judiciary Law, and may face other requirements, such as being directed to appear before a Character and Fitness Committee in connection with the submission of a reinstatement application. In order to be reinstated following a period of suspension, or in the case of disbarment, after seven years, an attorney seeking to be reinstated must apply in accordance with the procedure set forth in the Atty. Disc. Rules and accompanying Appendices,¹²⁴ the provisions of the underlying order, and demonstrate to the applicable court that the attorney should be reinstated to the practice of law, and that such reinstatement is in the public interest. Again, it is not difficult to imagine that applying for reinstatement can be daunting. As with cases of diversion, or other instances where an attorney raises issues of mental and/or physical health before a court, having someone to call on, not for representation, but just for moral support, could be beneficial and contribute to that attorney's well-being regardless of whether reinstatement is ultimately granted.

aspirational standards which encourage those in the legal profession to observe principles of civility and decorum. *See*, (22 NYCRR) Part 1200, Appendix A.

¹²² States that have enacted CLE requirements in areas related to attorney well-being: California, North Carolina, South Carolina, Nevada, Oregon and Illinois. Support for such a requirement in New York has been voiced by other bar associations and groups within the legal profession. *See e.g.*, New York City Bar, Report in Support of Mental Health, Substance Use and Lawyer Well-Being Continuing Legal Education (CLE) Requirement for New York Attorneys, by the Lawyers Assistance Program Committee and the Mental Health Law Committee, June 2020, at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/mental-health-substance-use-and-lawyer-well-being-continuing-legal-education-requirements> (listing states with the requirement).

¹²³ Atty. Disc. Rules §1240.15.

¹²⁴ Atty. Disc. Rules §1240.16; Appendices B, C, D, F. The provisions of Atty. Disc. Rules pertaining to reinstatements apply to suspended attorneys generally. For instance, unlike some other states, New York does not have an administrative suspension as a penalty for failing to register as required. Therefore, an attorney who is suspended for misconduct related to that attorney's failure to comply with attorney registration requirements of Judiciary Law §468-a, will be required to move for reinstatement in accordance with the applicable Atty. Disc. Rules and procedure, as would an attorney who is suspended for other professional misconduct. *See e.g.*, Matter of Attorneys in Violation of Judiciary Law §468-a, 185 A.D.3d 1373 (3rd Dept. 2020) (suspending multiple attorneys on the basis of uncontroverted evidence of misconduct and determining suspension was warranted for engaging in conduct prejudicial to the administration of justice pursuant to RPC Rule 8.4(d) for failing to fulfill attorney registration requirements and being delinquent in their attorney registration for at least one biennial period).

Practice, Not Perfection: A View from the Bench¹²⁵

The question of fitness to practice in the legal system is largely a self-regulating endeavor, as was made clear from the review of ethics and discipline. Judges and the courts play a key role not only in the regulation of attorneys, but also the management of their courtrooms and the perception of the public in accessing the system as a whole.

Notably, the culture of our modern legal profession operates in a larger society that – by and large – holds attorneys in ill repute, particularly when compared to other professions. A recent Pew Research Center survey demonstrated that only 17% of those questioned believed that attorneys contribute to society’s well-being.¹²⁶ Strikingly, this percentage is less than any other profession measured in the survey. This negative characterization has contributed to the stress encountered by young lawyers who are trying to find a role that is morally satisfying and meaningful in the eyes of a skeptical, if not hostile, society. Their challenge is further complicated by the fact that many begin their careers with crushing educational debt, resulting in career decisions based on harsh economic reality, rather than pursuing ideals such as social justice.¹²⁷ It is easy to understand how this existential issue makes it difficult for lawyers to navigate a career path that fits within their worldview of justice. Even when lawyers choose public service, the same culture that bemoans their financial success also perceives them as though they are not real lawyers, as exemplified by comments heard by public defenders. Lawyers in the defense bar, who advocate daily to ensure that the rights and principles in the Constitution are enjoyed equally by all of society, pay a price in defending these principles, especially when their cause or client is unpopular.

Encased in a “need to win and be the best” belief system, the cultural aspect of lawyering can be all consuming and override the importance of our own personal well-being. It also exists within a strict hierarchy, where judges are at the top and the remaining levels are occupied by clients, staff and the public. In this hierarchy, the contingencies of the lawyer’s practice, and often aspects of their lives outside of law, are controlled in large part by these other players. Thus, deadlines, rules, and financial concerns provide the stressful backdrop to the culture in which we practice.

Notwithstanding the stressors attendant to the legal profession, practicing law is an honorable and worthy pursuit, particularly in this day and age. Understanding the culture is integral to

¹²⁵ This section of the report was submitted by the Working Group on the Judiciary and the Courts which membership included Hon. Shirley Troutman (Chair), Hon. Robert J. Miller, Hon. Stan L. Pritzker, Hon. Jane Pearl, and Hon. Adam D. Micholini.

¹²⁶ Joseph Liu, *Public Esteem for Military Still High*, Pew Research Center, <https://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/> July 11, 2013.

¹²⁷ Since 2004, 18-b assigned counsel are paid \$75 per hour for felonies and \$60 per hour for misdemeanors, with a \$4,200 case cap. Resistance to increasing attorney compensation for public defense adversely impacts minorities in a disproportionate fashion (*see* Jeh Johnson, Report from the Special Advisor on Equal Justice in the New York State Courts, 75-76 [Oct. 1, 2020]).

making the practice more fulfilling to attorneys and more effective for our clients. As will be shown, there are practical ways to accomplish this important goal. But first, we must address certain ethical realities about the role of judges in lawyer wellbeing.

Judicial Ethical Considerations

There can be serious ethical issues for judges who want to assist a struggling lawyer, and the question that inevitably arises is: What types of activities are ethically permitted? While the line of demarcation is somewhat opaque, as a starting point, it is ethically permissible for judges to engage in extra-judicial activities that improve the law, the legal system and the administration of justice.¹²⁸ More specifically, the New York State Advisory Committee on Judicial Ethics (the Committee) has determined that it is ethically permissible for judges to participate in attorney diversion and legal assistance programs.¹²⁹ But what is the proper role for judges?

The Committee Opinion 16-177, issued May 4, 2017, addressed: (1) whether a part-time judge¹³⁰ could be involved in the departmental grievance committee's diversion program; and (2) whether a judge can participate in a bar association's lawyer assistance committee. The Committee found that it was proper for a part-time judge to participate as a mentor/monitor in a grievance committee diversion program with certain caveats, including disqualification "from matters involving attorneys he/she interacts with in the diversion program, both during the pendency of the relationship and for two years thereafter."¹³¹ The Committee also found that it was proper for a judge, including a full-time judge, to participate in a lawyer assistance committee (hereinafter LAC). In distinguishing grievance committee participation with LAC activity, the Committee noted, "the interactions between this judge and the attorney [in LAC's] are relatively brief and take place in a group setting where the judge and other recovering attorneys share their own experiences with substance abuse. Unlike the grievance committee's diversion program, no ongoing counseling, mentoring or monitoring relationship is contemplated. Given this much-reduced interaction and the lack of a one-on-one relationship, the Committee believes the judge's impartiality cannot 'reasonably be questioned' in all matters involving the attorney."¹³² However, caveats exist and, for example, the judge must recuse in a matter involving the specific attorney in the event the attorney is uncomfortable due to interactions with the judge, such as those occurring in a 12-step program.¹³³

Opinion 18-58 is also instructive and involves a judge who was concerned that an attorney, who is an appointed fiduciary, was "struggling to keep up." The judge wanted to help the attorney but was cognizant of the tension created by 22 NYCRR 100.3 (D) (2), which requires a judge to "take appropriate action" if there is a substantial likelihood that the attorney committed a

¹²⁸ See 22 NYCRR 100.4; Advisory Comm on Jud Ethics Op 13-09/13-52 [Jan 24, 2013/Apr 25, 2013].

¹²⁹ See Advisory Comm on Jud Ethics Op 18-58 [Mar 29, 2018]; Op 16-177 [May 4, 2017].

¹³⁰ The Committee has advised that a full-time judge cannot serve on an attorney grievance committee.

¹³¹ Advisory Comm on Jud Ethics Op. 16-177.

¹³² Advisory Comm on Jud Ethics Op. 16-177, quoting 22 NYCRR 100.3 [E] [1].

¹³³ See Advisory Comm on Jud Ethics Op 16-177.

substantial violation of the Rules of Professional Conduct. Here, the Committee drew a bright line, stating that referring an attorney to a disciplinary committee, which requires disqualification, is entirely different from referring an attorney to an LAC, which does not require disqualification. The Opinion further elucidates the critical 22 NYCRR 100.3 (D) (2) issue, which is bound to arise in these matters, “[h]ere, too, this judge must assess if he/she has received information indicating a substantial likelihood the lawyer has committed a substantial violation of the Rules of Professional Conduct’s competence requirements. If so, the judge must take some ‘appropriate action.’”¹³⁴ The purpose of the reporting requirement is not to punish attorneys for the slightest deviation from perfection, but to protect the public from attorneys who are unfit to practice law.¹³⁵ Thus, if the misconduct, if true, seriously calls into question the attorney’s honesty, trustworthiness or fitness as a lawyer, the only fitting action is to report them to the appropriate disciplinary authority.¹³⁶ But in all other instances, the judge has discretion to take appropriate measures short of referral for disciplinary action.¹³⁷ “Such measures may include, but are not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and sanctioning a lawyer.”¹³⁸

The next common issue involves *ex parte* communication, which may occur when a judge has concern about an attorney’s well-being. In the context of a judge participating in an LAC, footnote 5 in Opinion 16-177 presciently frames the issue: “the Committee trusts the judge will not ‘initiate, permit, or consider any impermissible *ex parte* communications with the attorney about any matter before the judge.’” Except for this footnote, the Committee has not directly addressed this matter in the context at issue here. Nevertheless, the Committee provides some guidance, “[a] judge must always avoid even the appearance of impropriety and must always act to promote public confidence in the judiciary’s integrity and impartiality. Therefore, a judge, with specific exceptions, must ‘not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding.’ A pending proceeding is one that has begun but not yet reached final disposition, and an impending proceeding is one that is reasonably foreseeable but has not yet been commenced.”¹³⁹

Generally, communication with an attorney about a problem impacting the attorney’s well-being and ability to practice is indeed proper, but safeguards should be put in place to ensure that nothing pending or impending before the judge is discussed. Depending on the circumstances, including the pendency of the case or cases involving the particular lawyer, a judge could decide to refrain from such communications and consider a referral to a LAC. To conclude, these issues

¹³⁴ Advisory Comm on Jud Ethics Op 18-58, citing 22 NYCRR 100.3 [D] [2].

¹³⁵ See Advisory Comm on Jud Ethics Op 10-85 [June 10, 2010].

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Advisory Comm on Jud Ethics Op 20-195 [Dec 10, 2020].

are difficult and often unclear. Accordingly, a judge must exercise caution and careful discretion when trying to assist a lawyer in distress if that lawyer practices in their court.

Judicial Role in Diversion and Lawyer Assistance Programs

With respect to diversion programs,¹⁴⁰ while possessing great potential, their efficacy may be hindered by practical concerns and implementation issues. To begin, it is startling that the New York State Bar Association LAP reports that a recent study¹⁴¹ found that just over 20% of practicing lawyers have reported problematic drinking patterns, which is a rate significantly higher than the 6.4% of Americans who display signs of alcohol-use disorder. Sadly, substance abuse disorders, encompassing drugs such as opioids and even marijuana, are also prevalent in the legal profession.¹⁴²

Lawyers suffering from alcoholism, substance abuse or mental health issues are likely to have diminished capacity to exercise professional judgment on behalf of a client, which may lead to violations of the Rules of Professional Conduct.¹⁴³ For practical purposes, the diversion program allows attorneys to obtain a stay of the disciplinary matter while seeking treatment, continuing to practice law and serving their clients. In the Appellate Division, Fourth Department, the Court reevaluates the circumstances, typically after one year, and decides whether the disciplinary matter should be dismissed or resumed. If the lawyer commits additional misconduct during the monitoring period or ceases complying with the treatment monitoring program, the Court may vacate the stay and reinstate the disciplinary investigation or proceeding. In our view, the Appellate Divisions' diversion rule is consistent with the principle that the punishment of past wrongs is not the primary purpose of the attorney disciplinary process, "[t]he proper frame of reference, of course, is the protection of the public interest, for while a disciplinary proceeding has aspects of the imposition of punishment on the attorney charged, its primary focus must be on protection of the public. 'Our duty in these circumstances is to impose discipline, not as punishment, but to protect the public in its reliance upon the presumed integrity and responsibility of lawyers.'"¹⁴⁴

Based on the above, because alcoholism, substance abuse and mental health issues are prevalent in the legal profession, and the symptoms of those conditions will likely impair a lawyer's ability

¹⁴⁰ See the "Public Servant, Public Trust: The Role of Lawyer Ethics and Discipline" Section of this Report, *supra*, for a full discussion on diversion, the LAP program and ways to improve the access and impact of the system.

¹⁴¹ In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation co-sponsored a study of mental health and substance abuse disorders. See Patrick Krill, Ryan Johnson, Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. Addiction Med., Feb. 2016, Vol. 10, Iss. 1, https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_othe_r_mental.8.aspx.

¹⁴² *Id.*

¹⁴³ See the "Public Servant, Public Trust: The Role of Lawyer Ethics and Discipline" Section of this Report, *supra*, for a full discussion on diversion, the LAP program and ways to improve the access and impact of the system.

¹⁴⁴ Matter of Levy, 37 NY2d 279, 282 [1975], quoting Matter of Kahn, 38 AD2d 115 [1972].

to serve clients and act in a professional manner, lawyer assistance programs and the Appellate Division diversion program serve the public interest. Indeed, the potential beneficiaries of those programs include the impaired lawyer, the lawyer's family, partners, employees and clients, as well as the courts and the legal profession as a whole.

As noted in the "Public Servant, Public Trust" section above, in actual practice, the diversion program has been underutilized since the promulgation of 22 NYCRR 1240.11 in 2016. The Third Department, for example, has seen only a handful of diversion applications over the past five years, with only one such proceeding reaching successful fruition. This may be so because the diversion rule applies only to a particular and narrow set of facts. First, the Rule contemplates a lawyer ready, willing and able to seek treatment at the time when the disciplinary investigation or proceeding remains pending. All too often, the attorney's threshold acknowledgment of impairment or condition comes only *after* the disciplinary process has resolved unfavorably. Thus, it is much more common that a claim of impairment and successful treatment will arise in the context of an application for reinstatement from suspension or disbarment, rather than within the proceeding which gave rise to the suspension or disbarment in the first place.¹⁴⁵

Moreover, even assuming that the attorney coming before the AGC is willing to admit that they have a problem in the course of the disciplinary investigation, the Rule additionally requires a logical nexus between the alleged misconduct and the claimed impairment.¹⁴⁶ To that end, the Courts have proven reticent to permit a diversionary stay of the proceeding or investigation where the misconduct alleged does not appear to be a direct consequence of the claimed impairment.¹⁴⁷ Further, the Rule also requires consideration of whether diversion would be in the public interest. The import of this consideration is that, where the purported misconduct is gravely serious or poses an ongoing threat of injury to the public at large, a diversionary stay will not be available. In one such confidential matter considered by the Third Department, for example, the alleged misconduct implicated the attorney's management of his attorney trust account. Notwithstanding record evidence of the attorney's mental health condition and his entry into a monitoring agreement with LAP, the presence of considerable client funds in the account militated against a stay of the AGC investigation since the committee's ability to monitor the trust account foreclosed the possibility of additional client injury going forward.

The resolution of this particular Third Department matter proves another point and may speak more generally about the dearth of true diversion cases at the Appellate Division. It must be remembered that the diversion rule is fundamentally concerned with affording the attorney an opportunity to escape the imposition of discipline at the conclusion of successful treatment. While the above discussion illustrates that the avoidance of discipline following a diversionary stay may not always be warranted, it does not speak to whether successful treatment by the

¹⁴⁵ See e.g. Matter of Canale, 162 AD3d 1455 [2018].

¹⁴⁶ See 22 NYCRR § 1240.11 [a] [2] [requiring a Court to consider "whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment"].

¹⁴⁷ See e.g. Matter of Pierre, 153 AD3d 306, 310-311 [2017].

attorney may have other positive consequences on the disposition of the disciplinary matter. Stated differently, even if the investigation or proceeding is permitted to go forward to a finding of misconduct, successful treatment may still be offered as strong mitigation evidence which might cause the Attorney Grievance Committee to keep the disciplinary sanction private or cause a Court to impose a less severe public sanction than it otherwise would.¹⁴⁸ Nevertheless, the efficacy and great promise of diversion programs may require tweaking by the respective Appellate Divisions.

Family Court and Other Charged Arenas

No discussion about health and well-being in the courts without attention paid to Family Court, which is known to be a stressful tribunal for lawyers and judges. Through the exploration of this challenging court, it is our goal to develop strategies to promote and sustain attorney well-being.

It has been said Family Court is one of the saddest places and one of the busiest courts. This mixture creates a breeding ground for stress and does not allow time for the lawyer, judges and, of course, the litigants, to process the often tragic events which dominate the court. In this context, lawyers are often overwhelmed by client demands in trying to adjust a client's expectations to match reality. As an attorney, your time is limited and you cannot spend as much time on the cases as you feel they deserve, which can lead to feelings of impotence and depression. Judges and attorneys both bear witness to some truly horrific events as clients may be lost to violence, drug addiction or suicide. The vast majority of litigants are also under great financial pressure, which is particularly the case in poorer urban and rural areas. Repeated court appearances and prolonged litigation adds to the stress in their lives. Attorney wellness is adversely impacted by repeatedly representing family and criminal law clients who negatively experience child welfare, juvenile justice and criminal justice systems that reflect social and racial injustice.¹⁴⁹

When there is a delay in these courts in assigning counsel to persons who are qualified to receive same, oftentimes it is due to a mistaken belief that they are better off representing themselves if they can't hire a "real attorney." When counsel does appear, the attorney and the client are already on shaky ground. These attorneys are put in very difficult situations, due to the fact that they are appointed late in the process yet are subjected to unrealistic expectations from both the court and the client. Unfortunately, the result is unnecessary delays, and even successive attorney appointments, which further exacerbates already volatile situations. Moreover, judges may find it convenient to appoint the same attorneys with regularity but also must be mindful that they may be inadvertently creating an untenable situation for these attorneys, by overburdening their already overwhelming practice.

¹⁴⁸ See e.g. Matter of Shmulsky, 186 AD3d 1878 [2020]; Matter of Njogu, 170 AD3d 1320 [2019], reinstated 175 AD3d 800 [2019].

¹⁴⁹ See generally Jeh Johnson, Report from the Special Advisor on Equal Justice in the New York State Courts [Oct. 1, 2020].

While there is no easy answer, as a court system, and as individual judges, there are practices that can be implemented to mitigate the pressures of the practice of law and make the atmosphere less stressful for litigants and attorneys. Court Attorney Referees and Judicial Hearing Officers can be utilized in underserved areas. With consent of the parties, they can preside over cases, and in some situations may even be able to preside over hearings. Directing resources to underserved courts would also be a way to alleviate stress on the courts and increase efficiency in the resolution of matters. Some courts are overburdened by caseloads while other courts are not even working to capacity. As long as these inequities exist, the courts are missing out on a real opportunity to increase efficiency and assist litigants who are often desperate for help. Perhaps metrics could be developed to distribute help where it is most needed before it reaches crisis level. This reallocation of resources could also provide flexibility in adjourning cases and reduce the unfortunate, but necessary, practice of Family Court trials being drawn over long periods of time.

Attorneys, not only those in Family Court, face a myriad of stressors that negatively impact their well-being. Significantly, our Survey identified certain actions which could be taken by the judiciary to reduce stress and foster well-being. These actions include continuing certain virtual appearances post-pandemic, liberalizing adjournment requests where appropriate and not prejudicial, harmonizing the differing local rules and requirements, reducing emphasis on standards and goals and, importantly, adjusting judicial temperament. Judges should heed these comments and adapt our approach to better meet the needs of the litigants and the attorneys more fully.

The Judiciary Must Buy In

It bears repeating that we in the legal profession face myriad challenges and contend with an alarmingly high degree of stress. When compared to the general population, lawyers present significantly elevated levels of anxiety, depression, substance abuse, problem drinking and other morbidities.¹⁵⁰ Anecdotally, lawyers experience and report stress derived from incivility, court deadlines, crushing student debt and other financial burdens, work-addiction, sleep deprivation, suicidal ideation, negative public perception, focus on profits and diversity concerns.¹⁵¹ Of course these conditions affect emotional well-being, family life and negatively impact upon the administration of justice with respect to the zealous representation of clients and the efficacy and efficiency of court proceedings. Indeed, “[t]o be a good lawyer, one has to be a [clear thinking] healthy lawyer.”¹⁵²

¹⁵⁰ See Nat’l Task Force On Lawyer Well-Being, Am. Bar Ass’n, *The Path to Lawyer Well-Being: Practical Recommendations For Positive Change* (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf>.

¹⁵¹ *Id.*

¹⁵² *Id.*

These impacts present a call-to-arms, compelling the judiciary to understand, support and foster attorney well-being. There are, however, other reasons why the judiciary must work together toward this fundamental goal. Judges have a responsibility to protect the safety and integrity of the courtroom. This encompasses emotional and physical safety parameters. Courtroom civility requires continuous judicial oversight and consistent judicial leadership. Attorney well-being maximizes successful client representation, apposite legal negotiation and litigation, as well as optimal courtroom performance. In the Federalist Papers, No. 78, Alexander Hamilton referred to the judicial branch as the “citadel of the public justice and the public security.” Accordingly, as leaders of the judiciary branch,¹⁵³ judges are gatekeepers, clothed with a sacred duty to foster the fair and proper administration of justice.¹⁵⁴ In this role, judges have the ability and tools to readily identify problem issues and promote attorney well-being for the benefit of the justice system. Since attorney competency is directly related to attorney well-being, promoting same is simply part of doing the job, and is directly related to a judge’s primary duty.

There are other reasons why the judiciary must support attorney well-being. As Pogo famously said, “we have met the enemy and he is us.”¹⁵⁵ Judges have the authority and responsibility to operate their courtrooms in the manner they see fit. With this authority comes a power, which may be abused and wielded in a way that enhances attorneys’ stress. Causing attorney stress in the courtroom is the antithesis of the role and duty of a judge. Our Task Force on Attorney Well-Being believes that it is intrinsically fair to ask judges to look in the mirror and determine whether some of the judiciary’s rules, actions and conduct should be modified to make it easier for lawyers to feel more comfortable in the courtroom, therein maximizing their ability to zealously represent clients. Judges have a responsibility to manage cases effectively, including case triaging by complexity as well as by filing timeframes. Attorney well-being is requisite to successful judicial case management.

There are other straightforward reasons why the judiciary must support attorney well-being: Judges are also attorneys, and those who practice in our courts are part of our extended judicial family. Fostering attorney wellness is simply the right thing to do and doing the right thing defines as the role of judges. The judiciary has an ethical responsibility to intervene when attorney wellness is compromised to the point it is detrimental to client representation and courtroom safety and civility. Judicial satisfaction is enhanced by implementing therapeutic jurisprudence, including ethically contributing to attorney wellness, where warranted and feasible. Finally, enhanced attorney well-being will contribute to judicial well-being, because the “well” attorney will be much more efficient and effective, promoting more reasonable outcomes and fostering courtroom civility.

¹⁵³ Arch M. Cantrall, *The Judge as a Leader: The Embodiment of the Ideal of Justice*, ABA J. Vol. 45, No. 4 339-342 [Apr. 1959].

¹⁵⁴ See 22 NYCRR 100.0; American Bar Association Model Code of Judicial Conduct, Canon 1, note 4.

¹⁵⁵ Walt Kelly, *Earth Day*, Pogo comics, 1970.

Calming the Perfect Storm: Emotional Well-Being

Given what we discovered about law education, the values of law culture and practice, ethics and discipline, and emotionally charged courtrooms, it is not surprising that, during the course of a lawyer’s career turn around the Wheel, issues of emotional ill-being can begin to affect significant aspects of both personal and professional life. The nature of our training can contribute to the development of one or more the most common coping mechanisms for us: disconnection from feelings (alexithymia), anticipatory anxiety, perfectionism, control, imposter syndrome, and substance use disorders.¹⁵⁶ In fact, “a perfect storm can be observed where lawyers are predisposed to certain traits that cause stress and burnout, are then trained into anticipatory anxiety (professional worriers), which is known to be suboptimal psychology, and then are potentially stigmatized and perceived as weak when the burden becomes too much. Rather than seek professional help, many lawyers withdraw from peers, friends and family, or engage in ‘maladaptive coping behaviors’ such as self-medicating with alcohol and other substances.”¹⁵⁷

Disconnection from Feelings

Lawyers are taught to always be logical. In other words, we are taught that it is essential to the proper practice of law to be disconnected from our emotional experience. Lawyers are trained in a form of pessimism that questions everyone and everything. Over time, this disconnection can make it harder and harder for lawyers to respond authentically to their own needs or the needs of others including their clients, family, friends, and partners, without exhibiting suspicion, skepticism, or trying to analyze or problem-solve the interaction.

Anticipatory Anxiety

Known for our skill of seeing every potential pitfall from every angle, lawyers become prodigious at anticipating everything that possibly could go wrong, running every scenario through our heads and playing out all possible countermoves an opponent might make.¹⁵⁸ In other words, we become professional mind-readers – or so we think. The successful application of anticipatory anxiety requires a negative mindset. Optimism destroys the exercise. If we do it right, our work is exhaustive. Unfortunately, it also is exhausting, leads to burnout and can begin to “leak” over into other areas of our lives.

¹⁵⁶ NYSBA Wellbeing Podcast, Epi. 1; <https://nysba.org/the-case-for-attorney-well-being-a-profession-in-change/>.

¹⁵⁷ M. Elizabeth Coreno & Kerry Murray O’Hara, PsyD, *Attorney Wellbeing: The Science of Stress and the Road to Well-Being*, NYSBA J., Oct. 2019.

¹⁵⁸ Brandon Vogel, *Vicarious Trauma Is Real and Really, Really Common with Lawyers*, NYSBA Bar News, 7/7/2020 citing M. Elizabeth Coreno, Esq., who states that lawyers are trained to worry and that relates to a high negative response to stressful situations, a negative perception of the future and pessimism. “Part of the training in becoming an attorney is to anticipate problems. It is to look at the future and what can go wrong, run that 3-D maze like a mouse, think of all the pitfalls and then literally experience it so your client doesn’t have to. Over time, that creates a neural patterning for the human being, not the lawyer.” <https://nysba.org/vicarious-trauma-is-realand-really-really-common-with-lawyers/>

Perfectionism

A component of anticipatory anxiety, perfectionism requires that we miss nothing.¹⁵⁹ If we miss something, we have dropped the ball. How do we know if we have missed something? Our opponent wins. And even if we win, self-doubt creeps in. Maybe your opponent missed something; then again, you almost missed that obscure point of law upon which everything hinged. Disaster is never far.

Control

An extension of perfectionism, lawyers can become fixated on the idea that we can control the outcome by being perfect in our preparation, knowing exactly what is on our opponent's mind and anticipating every argument the other party could possibly make¹⁶⁰. Then, of course we win – or at least that is what we tell ourselves. Over time, this overblown sense of control begins to convince the lawyer that every success and, more importantly, every failure, is entirely on their shoulders.

Imposter Syndrome

Never feeling like *you* actually got the job done and feeling that *you* are working below expectations. We tell ourselves that we must work harder and someday we may be a fully functioning lawyer. The practical pessimism taught to lawyers is internalized, which can lead to profound self-doubt. It creates a negative feedback loop that can feel impossible to shake. And suddenly, we no longer can leave our lawyer mindset at the door. It is a way of life.

And Then Burnout

Overworked, exhausted lawyers, who have the sense that their work is never good enough, that they do not matter, may be told they are suffering from “burnout.” It is the bone-weariness that comes of the relentlessness of being constantly on – to meet billable hour quotas and client demands. The problem with using the term “burnout” is that it is isolating. If we are burned out, it is on us as individuals, rather than looking at the whole picture of the culture of law.¹⁶¹

Stigma: Mental Health and Substance Use Disorders

Stigma is the number one reason why attorneys, judges, and law students are reluctant to seek help for mental health, alcohol and drug problems. Legal professionals fear that stigma – “mark

¹⁵⁹ *Id.*, noting that, “perfectionism has gotten you pretty far and has driven you to excel and exceed expectations so it can be very threatening to think about breaking it down -- but we don't want to break down what is adaptive and lifts you up and makes you more effective.” Kerry Murray O'Hara, PsyD.

¹⁶⁰ See Coreno & O'Hara, *Attorney Well-being*, *supra* note 157.

¹⁶¹ See Jill Lepore, *It's Just Too Much*, *New Yorker*, May 24, 2021, p. 29, discussing the phenomenon of burnout and its origins in the 1970s, when “real wages stagnated and union membership declined,” turning the “responsibility for enormous economic and social upheaval and changes in the labor market back onto” workers.

of disgrace or infamy”¹⁶² – will impact their reputation and standing. As raised previously in this Report, fear of stigma often prevents law students from seeking help, concerned it will affect their bar admission, image, or employability while lawyers and judges are concerned they will forever be characterized as having a problem that will negatively impact their careers. The most recent Diagnostic and Statistical Manual, 5th Edition (DSM-V) is used by clinicians to diagnose the presence and severity of a “substance use disorder” – a term that replaces words like addiction, dependence, alcoholic, and drug addict which promote stigma. Although science has proven that a substance use disorder is a chronic brain disease that can be successfully managed,¹⁶³ and that susceptibility to the physical and psychological manifestations of substance use are due to factors outside of a person’s control, such as genetics and environment, it still is viewed as a moral failing or character flaw.

Education is the most effective way to end the stigma, negative attitudes and fear that cause individuals who struggle with substance use issues to isolate and needlessly suffer. The primary goal of providing education about mental health and substance use disorders is to create a safe environment that encourages attorneys, judges, law students, staff and family members to seek help and assist the judiciary, law schools and legal employers in providing support, resources and appropriate accommodations. In fact, the ABA’s ongoing focus is on the importance of reinforcing education as the number one step in opening a productive dialogue, looking at the data and planning for ongoing discussion. Taking the first step in the Well-Being Pledge¹⁶⁴ “to provide enhanced and robust education to attorneys and staff on well-being, mental health and substance use disorders” has given us a path forward for addressing the prevalence of stigma.

It Takes a Toll

Considering the volume of statistics available on lawyer rates of depression, anxiety, burnout, and substance use disorder, the Task Force decided to go beyond theories, data and numbers to instead ask lawyers about their beliefs as to why there are rampant rates of mental health decline in law. Further, the Task Force Survey asked what resources lawyers are aware of, which they have tried, and what keeps them from getting help. The results of the Survey confirmed largely what we have been told by experts for years concerning the high demands on lawyers, but they also resonated with some deep truths about the disconnect between how we are trained and how we are rewarded; how we feel and how we act; what we say we value and what we reward as valuable; what we say we will tolerate and what we actually tolerate; the nobility of the profession and its loss of humaneness.

One morning in December of 1997 there was a knock on my door and I opened it to find a nervous, uneasy State Trooper standing in front of me. As a criminal defense trial lawyer I knew many State

¹⁶² International Bipolar Foundation, <https://ibpf.org/stigma-%C2%96-a-mark-of-disgrace-or-infamy-a-stain-or-reproach-as-on-ones-reputation/>.

¹⁶³ See, e.g., <https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics>.

¹⁶⁴ https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/.

Report of the Task Force on Attorney Well-Being

Troopers but this was not the face of one I knew. He asked me to confirm my identity and then said, “Your son is dead”; at least that’s how I remember it.

My son had committed suicide during the night. I am a survivor of that suicide. The cost was immense.

As lawyers we are smart, in control, self-assured and able to find the answer to the problems our clients bring us. We don’t show weakness or vulnerability. That’s what lawyers are and do but it can be our downfall. I learned the first part early on and lived it, at least until the above events helped make it impossible. I soon found myself unable to complete even the simplest tasks. I lost my law license, then my wife. Finally in desperation I sought therapy.

Therapy taught me that I had suffered from depression most of my life which exacerbated the grief I felt in losing my son. I learned depression was a medical condition that could be treated. After several years of therapy I was finally able to be a productive person and become a practicing lawyer again.

I often heard people say that “something good always comes from something bad.” I believed it as a kid and still believe it now, even after all I’ve been through. When bad things happen to colleagues we need to reach out and take the time to listen, offer friendship and unwavering support. Your connection to your colleagues and friends can make the difference in their lives that helps them survive and appropriately deal with their tragedy, mental health issues or addiction. It can save their lives. Doing nothing is not an option.

– Thomas Nicotera, Esq.

Survey Responses on Emotional Well-being

In NYSBA’s Survey, when lawyers were asked to choose among a list of 15 answers what are the greatest impacts on their well-being as lawyers, they cited: “lack of boundaries”; “no downtime”; “never off.”¹⁶⁵ Client expectations and demands and the financial pressures of the business of law were also top choices. Then there is the pandemic, which has been a double-edged sword for many lawyers. Offices closed and work, meetings, and court all were conducted online. Business was no longer as usual and likely never will be. Online court appearances eased the burden of having to travel but all-online all-the-time meetings, conferences and client calls broke down any remaining semblance of client or office boundaries.

When asked whether lawyers had experienced a mental health-related problem or concern in the last three years, nearly 37% of lawyers indicated that they had. Yet, Legal Aid employees were the only group of practitioners where most respondents indicated they had thought about seeking professional support for a mental health concern in the past three years. Over 70% of judiciary and solo practitioners indicated they had not considered it.

Of the people who had considered seeking support, the majority (62%) found support; 44% of people who considered seeking support found support that was helpful. However, 26% of the people who indicated they had considered seeking support did not indicate whether they found it.

¹⁶⁵ See NYSBA Attorney Well-Being Survey 2020, Summary, App. A.

Those who indicated they did not consider seeking support for a mental health-related concern in the past, 71% *did not* provide a reason. Of those who gave a reason, almost 19% indicated it was not needed, followed by another 2.5% indicating they already had supports in place. Another reason given was that they had no time.

After identifying how they are feeling and what is impacting their well-being, we then asked lawyers to let us know about helpful resources they are aware of, which ones they have accessed and found helpful, and, in other cases, why they have not. Certainly, it was important to discover whether New York lawyers faced the same help-resistance identified in the ABA National Task Force Report on Lawyer Well-Being and why. Its research included an expansive list of reasons why lawyers are so help-averse, including: (1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture's negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules.

Across all practice sizes, except one, a severe need of services would have made it more likely that someone would seek out supports, i.e., must be in crisis before seeking help. However, almost 29% of lawyers who answered this question are in firms sized 101-200 and they indicated that would only seek services if confidentiality were guaranteed. More than any other groups, people in firms of 101-200 lawyers had concerns about confidentiality.

Additionally, lawyers told us all kinds of personal reasons why they were not inclined to seek support for an issue of which they were aware. Other than 'lack of time' some of the most noteworthy responses included no or limited health insurance coverage and perceptions of shame for being a "weak" lawyer. Lawyers also told us what would make them more likely to seek support in the future such as availability of a counselor of like race or gender, availability of EAP, assurances of greater confidentiality.

While there are bar association-sponsored counseling services like North Carolina's Bar Cares Program¹⁶⁶ and Massachusetts' Lawyers Helping Lawyers¹⁶⁷ (a division of Mass LOMAP Massachusetts' Law Office Management Assistance Program), NYSBA is a voluntary bar association which provides its outreach, education, interventions and referrals through the Lawyer Assistance Programs at NYSBA, Nassau County Bar Association and the New York City Bar Association which are supported through grants and state funding. For New York lawyers, it is critical to understand the role LAPs have in reducing the stigma around substance

¹⁶⁶ <https://www.ncbar.org/members/resources/barcares/>.

¹⁶⁷ <https://www.lclma.org/resources/>.

issues **and** mental health issues that often inhibits help-seeking behaviors as well as what additional resources will be necessary in the future.

Going through a mental health struggle or addiction can feel like a very lonely place to be. We may think others don't understand, or, assume that if they really knew what we were dealing with, they would judge us poorly either at work or in our personal lives. This fear just keeps the loneliness inside and often does not lead to someone in need of help seeking it out.

The truth is you don't have to go it alone. You can get the support you need to recover, to stay well, and have confidentiality so that your condition remains private. One of the best ways to do this is to join a peer support for lawyers, whatever your situation may be.

I started a depression support group 14 years ago. My regular participation in this group of other attorneys who struggle with depression – just like me – has been one of the keys to managing my condition. I find it easy to talk to my group because first, they are already know how tough lawyering is and second, how depression can make their jobs even more of a challenge. Over the years I have been in the group, and for that matter other such groups, Support groups are safe places not only share with others your struggles, but also celebrate your successes.

– Dan Lukasik, Esq., Judicial Wellness Coordinator, NYS Office of Court Administration

Facing Challenges, Getting Help: Substance Use Disorders, Mental Health and LAPs¹⁶⁸

On July 15, 2020, an article in the *NY Times*, entitled “In the Shadow of the Pandemic, U.S. Drug Overdose Deaths Resurge Record,” indicated that a rise in drug-related deaths beginning in 2019 has continued to climb and perhaps worsened due to the coronavirus pandemic.¹⁶⁹ We can justifiably assume that many lawyers are “self-medicating” due to stress, anxiety, depression, fear and uncertainty about the future. In our own NYSBA Survey from late fall of 2020, when asked whether they had consumed more alcohol or drugs than intended or felt that they should “cut back” or “quit,” about 17% of lawyers told us that they were consuming more substances than they either previously had and/or felt the need to reduce or quit altogether. Another 4% admitted that they “were not sure” whether their substance use was a problem.¹⁷⁰

There is no doubt that such statistics are moving in the wrong direction, and this sounds warning bells for the LAPs in New York. They, along with their committees, have the primary goal of delivering educational programs, on a statewide basis, to provide substance use and mental health education for every individual involved in the legal profession, including law students, recent graduates and new lawyers, new judges, seasoned practitioners, aging lawyers and judges,

¹⁶⁸ This section of the Report is based on the report of the Working Group on Substance Use Disorders and Addiction, chaired by Hon. Sarah Krauss. The Working Group’s list of recommendations, included in this section, begins on page 79 and supplemental recommendations are included in Appendices C and D. The group would also like to acknowledge the work of the New York City and Nassau County Bar Association LAPs, which informed the group’s work.

¹⁶⁹ <https://www.nytimes.com/interactive/2020/07/15/upshot/drug-overdose-deaths.html>.

¹⁷⁰ NYSBA Attorney Well-being Survey 2020, Summary, App. A.

staff and family members. In sum, LAPs represent the only statewide unified front against the issues which are plaguing our profession. Too often, LAPs are involved only in crisis situations and are underfunded to the size and scope of their mission. We simply must do more.

History of LAPs in New York

The history of the lawyer assistance movement is necessarily linked to the creation and expansion of the Alcoholics Anonymous (AA) movement in the United States. It began in 1930s when the basic textbook, commonly referred to as the “Big Book,” was published, explaining the core of which is the now well-known “Twelve Steps” of substance use disorder recovery. Much of “lawyer assistance” in the United States is largely the story of individual attorneys, themselves in recovery, who brought the message to other lawyers needing help.

By 1976, New York and Canadian attorneys in recovery met in Niagara Falls at an event that has since become known as International Lawyers in Alcoholics Anonymous (ILAA) and they continue to hold annual meetings throughout the U.S. and Canada. In 1978, Ray O’K, an attorney from Westchester County, was appointed by the NYSBA as Chair of a special committee created to address the problem of lawyer alcoholism and drug abuse. He contacted the presidents of the 62 county bar associations to form local Lawyer Helping Lawyer Committees.

In the late 1980s, as the Committee’s visibility increased, and the numbers of lawyers seeking assistance continued to grow, the Committee petitioned NYSBA to hire an individual to direct the program and provide initial assessments and referrals for treatment. Ray Lopez, the first NYSBA Lawyer Assistance Program Director, came on board in 1990. A major early success for the program and Committee was the enactment of Section 499 of the Judiciary Law, which grants confidentiality to communications between Lawyer Assistance Committee (LAC) members or its agents and lawyers or other persons.

The New York Lawyer Assistance Trust “NYLAT”

As has been noted throughout our Report, New York State is geographically large – spanning four Judicial Departments, 13 judicial districts, and 62 counties over 54,000 square miles. The state is also a mix of very urban to very rural where the attorney population of a single urban firm can surpass that of several rural counties combined. With 177,035 lawyers, New York ranks first in the nation in terms of the number of licensed lawyers (2018). This diversity creates unique challenges for LAPs needing to serve populations with such varying degrees of needs and resources.

The New York Lawyer Assistance Trust (NYLAT or the Trust) was created in 2001 as an initiative of the Unified Court System, following the recommendation of the Commission on Alcohol and Substance Abuse in the Legal Profession. The Trust’s mission was to bring statewide resources and awareness to the prevention and treatment of alcohol and substance abuse among members of the legal profession. Its mission was later expanded to include mental

health issues as well. Responsibility for the administration and management of the Trust was vested in a 21-member board of trustees appointed by the Chief Judge, and the Trust worked to enhance the efforts of the bar associations' LAPs and committees. With the advent of the Trust and its grant program, additional part-time mental health professionals were added to enhance LAP staffs. Through its website and quarterly newsletters, NYLAT raised the conversation regarding impairment issues in the profession to new levels of "normalcy" and awareness was high.

NYLAT sponsored several conferences to raise awareness of LAP issues, targeted to particular segments of the profession. For example, the Law School Program targeted the need for education on LAP matters, early identification, and information regarding admission to the practice of law, for applicants who may have a history of infractions relating to impairments. Yet another event focused on gender-based issues; and a third, on reaching lawyers of color. Staff participated with the NYSBA Committee on Law Practice Continuity in the development of the "Planning Ahead Guide," which encouraged lawyers to prepare a strategy for facing disability, or exiting their practice. The NYLAT Judge Advisory Council convened to consider how best to reach out to judges who face impairment issues, and its work continues in the Judicial Wellness Committee of the New York State Bar Association.

In 2014, The Office of Court Administration provided a grant to NYSBA's LAP to support the development of the Lawyer Assistance Project. The Project came in the wake of the New York Lawyer Assistance Trust, an initiative of the Unified Court System in place from 2001-2011, which worked to bring statewide resources and awareness to the prevention and treatment of substance abuse, and mental health problems among members of the legal profession.¹⁷¹

Lawyer Assistance: A National Perspective

Lawyer Assistance Programs are now found in all 50 states, and the American Bar Association has a standing Commission on Lawyer Assistance Programs (CoLAP). CoLAP has the mandate to educate the legal profession concerning alcoholism, chemical dependencies, stress, depression and other emotional health issues, and to assist and support all bar associations and lawyer assistance programs in developing and maintaining methods of providing effective solutions for recovery.

On a national level, the results of two large studies analyzing the legal profession were published in 2016. As has been repeatedly cited by our Task Force, the first report was published by the ABA Commission on Lawyer Assistance Programs and the Hazelton Betty Ford Foundation. The study covered 13,000 currently practicing lawyers and found that between 21% and 36% qualify as problem drinkers, and that approximately 28%, 19%, and 23% are struggling with some level of depression, anxiety, or stress, respectively. The effects of these mental health problems included suicide, social alienation, work addiction, sleep deprivation, job

¹⁷¹ The Trust itself was the primary recommendation of the Bellacosa Commission.

dissatisfaction, a diversity crisis, work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception. Significantly, the ABA study found that younger lawyers in the first 10 years of practice and those working in private law firms experience the highest rates of problem drinking and depression.

The second study covered 15 law schools and over 3,300 law students. It found that 17% of law students experienced some level of depression, 14% experienced severe anxiety, 23% had mild or moderate anxiety, and 6% reported serious suicidal thoughts in the past year. When it came to alcohol consumption, the results were even more dramatic. Forty-three percent reported binge drinking at least once in the prior two weeks and 22% reported binge drinking two or more times during that period. One quarter of the participants fell into the category of being at risk for alcoholism, for which further screening was recommended.

The results of these two national surveys demonstrated that lawyer well-being issues could no longer be ignored. Acting for the benefit of all lawyers, the National Task Force was established. On August 14, 2017, the National Task Force on Lawyer Well-Being Report, entitled “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,” was published.¹⁷² In the cover letter that accompanied the report, the co-chairs of the National Task Force wrote as follows:

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers’ basic competence. This research suggests that the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust.

What can LAPs do in the face of a culture that often does not even let them in the front door? And yet, the profession does appear to want to improve their lawyers’ mental health and substance use disorders. According to an article¹⁷³ discussing the results of ALM’s 2019 Mental Health and Substance Abuse Survey. The problem is that the mental health crises attorneys are experiencing are rooted in the business models that have made law firms enormously profitable. Survey respondents cited the tyranny of the billable hour, client demands, “unrealistic deadlines” and the inability to take vacation or other time off. One respondent spoke about the tension between making the billable hour quota versus taking needed time off: “If I take a week off for

¹⁷² The report can be found at <https://perma.cc/EY3P-5G9P>.

¹⁷³ Dylan Jackson, *Law Firms Want to Improve Mental Health, but They’re Failing to Take ‘Preventive Action,’* Law.com, <https://www.law.com/americanlawyer/2020/04/27/law-firms-want-to-improve-mental-health-but-theyre-failing-to-take-preventative-action/>. Discussing the results of ALM’s 2019 Mental Health and Substance Abuse Survey.

vacation, that's 40 hours I have to cram into the year somewhere else." Another noted that despite meeting the billable hour requirement, the lawyer was told in their review that they had "left money on the table," meaning the lawyer should have "billed more."

Increasing Resources and Education

Given the mission of LAPs and the breadth of scope in terms of geography, services, and education for which they are responsible, the Task Force came to understand that focusing on both the individual health of lawyers and altering the culture of law itself would require a bridge. The root for "articulation" quite literally is derived from "to connect the parts"¹⁷⁴ and so it is more than appropriate that the LAPs charged with giving voice to the pains in our profession are also key to constructing the path between the lawyer and the system – helping us connect and offering safe passage. From their role in successful diversion cases, law student orientation, attorney case management and public health education, we must ensure adequate resources, access and sustainability for this mission.

I was sober about three months and attending daily meetings of Alcoholics Anonymous when I was instructed to enroll in the Lawyers Assistance Program Monitoring Program. At that point I was still trying to find my footing in sobriety. I had known about the LAP for years but had not reached out for help with my alcoholism. I was scared, and I cloaked my fear in arrogance. I was certain I could get sober by myself. I obviously couldn't. The wonderful thing is that I did not have to. My daily AA meetings and my weekly discussions with my LAP monitor reminded me that I had a whole network of people supporting me in my sobriety and all rooting for me to succeed.

It is no secret that many in our profession suffer from mental health problems, alcoholism, and/or drug addiction. It is no secret yet so many continue to suffer in silence because of a fear that admitting to having such a problem will hurt an attorney professionally.

I have learned that I am only as sick as my secrets. The same goes for our profession. I am loud and proud of my sobriety. I am open and honest about my struggles and how I worked to overcome them. By doing so, I am letting others like me know that they are not alone, that there is hope and there is help. I now have an opportunity to give back by being a volunteer monitor to assist others like me on their path to recovery. I am but one beggar showing another beggar where to find bread.

– Robin Z, Esq.

While the Report contains its "Resources and Recommendations" collectively in the final Section, the LAPs navigation role in lawyer well-being is so fundamental to the operation of the whole, that the recommendations of the Working Group on Substance Use Disorders and Addiction are encapsulated here in their entirety as potential pathways over the bridge.

Recommendations for Reducing Stigma, Increasing Education and Assisting in Lawyer Health

1. **Rethinking Education:** Explore and identify ways that stigma affects lawyer wellbeing beyond substance use disorders and across areas such as mental illness, physical

¹⁷⁴ <https://www.merriam-webster.com/dictionary/articulation>.

disabilities, etc. and include education on intervention, prevention, and resilience through experiential and inspirational models.

- a. Identify who, within law firms and legal departments, makes decisions and schedules staff development, well-being seminars, and CLE programs.
 - b. Identify ways to gain entree into law firms, non-profits, in-house counsel departments, government agencies and the judiciary.
 - c. Utilize experiential learning methods such as small group activities.
 - d. Conduct surveys to gain information regarding attorney attitudes, beliefs and stereotypes about substance use disorders.
 - e. Provide cultural sensitivity training to LAP members and volunteers to increase awareness of culturally specific ways that mental health issues and substance use may be experienced in different cultures.
 - f. Develop targeted, specialized educational materials to be made available to small and large law firms, solo practitioners, judges, law students, staff and family members in content areas such as wellness, substance use and mental health.
 - g. Use national events to publicize potential education materials (i.e., suicide awareness day, mental illness awareness week, lawyer well-being week).
 - h. Promote attorney wellness formats beyond CLE Credit programs such as wellness roundtables, town halls and peer support group formats.
2. **Increasing Outreach.** Develop specific strategies to reach out to small law firms and solo practitioners who may not be getting wellness, substance use and mental health education through the Working Group's "Bar Association and Law Firm Outreach Report" at Appendix C which highlights the following:
- a. Create small law firm and solo practitioner outreach committee to include a member of the Executive Committee. Each of such committee members should be a member of the bar who has extensive contacts and exposure in the legal community to insure commitment and support from Bar Associations.
 - b. Develop and deliver a message to legal employers to normalize, through human resource policies, addressing attorney wellness (SUD, Addiction, Mental Health) issue so that it is treated with the same

respect and accommodation as any medical problem or serious physical illness that requires surgery or extensive treatment.

- c. Implement the plans for NY Courts with the NYS Unified Court system in the attached “Court Report” developed by the Working Group on Substance Use Disorder & Addictions Working Group at Appendix D.
 - d. Incorporate wellness, substance use, and mental health education into CLE’s and Bar Association programs (e.g., Wellness Programs) that are offered to Bar members, as many solo practitioners take advantage of these programs and CLEs.
3. **Law School Partnerships.** Develop strategies to enhance the well-being of law students in each of the 15 law schools in New York.
 - a. Work with key stakeholders in each law school responsible for organizing and scheduling educational presentations mental health, substance use and well-being.
 - b. Identify opportunities to address students at each level of their educational experience from orientation through graduation and LLMS, i.e. professional development and professional responsibility.
 - c. Encourage each school to identify a student LAP representative who would be available to provide peer support and liaison with LAPs to ensure that students are aware of the services available to them through LAPs.
 - d. Encourage schools to initiate Students Helping Students Programs. These programs not only provide peer support but organize mental health and wellness related activities and programs.
4. **Increase Diversity and Inclusion Efforts.** Develop a strategy of education for minority bar associations and law school minority communities to increase diversity and lower stigma in those communities.
 - a. Develop relationships with minority bar associations. Identify bar association members to collaborate with to plan and schedule educational presentations.
 - b. Develop culturally specific programing including focus group studies to determine need.
 - c. Recruit members of minority bar associations and law school minority communities as lawyer assistance committee members and volunteers.
5. **Media Messaging.** Recommend to NYSBA and other CLE accredited Bar Associations that a two-to-five minute PSA from LAP be provided in a video format for broadcast

during Zoom CLE's and the opportunity for in person presentations during eventual in-person CLE presentations.

Staying Informed: Individual and Collective Continuing Legal Education

Following our legal education and subsequent demonstration of fitness to practice for bar admission, there is perhaps no greater career-long collective statement our profession makes about its values concerning education and professional excellence than Continuing Legal Education (CLE). Through the certification process of CLE programming, the lawyers of New York make a unified statement about the skills, knowledge and ethics which must be possessed, expanded upon, and revisited throughout the arc of our professional lives.

As is extensively addressed within the Task Force materials from several of the Working Groups, the legal profession needs a serious and deliberate critique of how it trains, incentivizes, supports and reinforces negative or ill-being beliefs and practices which can and do affect the health and wellbeing of lawyers. The information reviewed by the CLE Working Group was sobering and grim concerning the state of our profession in terms of statistical evidence of the rampant rates of anxiety, depression, substance use disorders, burnout, etc. As such, there is no purpose in debating *whether* CLE will play a role in addressing this professional health emergency, but rather *how* the NYSBA can employ CLE to best and most immediately effect needed change.

CLE: An Educational Resource

CLE provides a critical intercession and an educational tool for lawyers who have graduated law school and been admitted to practice. In fact, CLE may be the only opportunity that mental health and well-being educational providers, such as the LAPs (as noted above), have to pass along lifesaving information to practitioners. We already know that stigma is the number one reason why attorneys, judges, and law students are reluctant to seek help for alcohol and drug problems. As indicated, respondents to the NYSBA Attorney Well-being Survey 2020 noted their reluctance to seek assistance with mental health concerns, citing stigma and confidentiality as significant barriers. Several respondents specifically noted that they did not want to be perceived as “weak” by their colleagues or clients.¹⁷⁵ Certainly, fear of stigma often prevents law students from seeking help, who are concerned it will affect their bar admission and employability.¹⁷⁶

¹⁷⁵ NYSBA Attorney Well-being Survey 2020, Summary, App. A..

¹⁷⁶ See generally, *The Impact, Legality, Use and Utility of Mental Disability Questions on the NYS Bar Application*, NYSBA Working Group on Attorney Mental Health, Nov. 2019. <https://nysba.org/report-of-the-working-group-on-attorney-mental-health/>.

CLE Accreditation and the NYS CLE Board

The CLE Program Rules are the Joint Rules of the Appellate Divisions (22 NYCRR 1500). Pursuant to Part 1500, Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Regulations and Guidelines have been promulgated by the New York State Continuing Legal Education Board (“CLE Board”) to clarify the “Mandatory Continuing Legal Education Program for Attorneys in the State of New York.” These Regulations and Guidelines are to be read with the Program Rules for a full understanding of New York State’s continuing legal education requirement.¹⁷⁷ It is notable that there are several successful CLE programs offered in New York which do address both mental health/stress management and substance use disorder education under practice management and ethics. However, it is also notable that New York does not currently mandate attorneys obtain credits in mental health or substance abuse education, while there are six states which do have such a mandate.¹⁷⁸ Unlike our sister states, New York has a unique process for developing the criteria for CLE and the credits which must be obtained by attorneys at different stages of their career. For purposes of general understanding, a short review of key definitions, the NYS CLE Board and the process for certification in New York is set forth below.

The NYS CLE Board

The Continuing Legal Education Board (CLE Board) consists of 16 resident members of the bench and bar. Three members are chosen by each of the Presiding Justices of the Appellate Divisions, and four are chosen by the Chief Judge of the State of New York. The Chief Judge designates the Chair. Board members serve at the pleasure of the Administrative Board of the Courts for a three-year term. The CLE Board is authorized to: “accredit providers of courses, programs, and other educational activities that will satisfy the requirements of the Program; determine the number of credit hours for which continuing legal education credit will be given for particular courses or programs; adopt or repeal regulations and forms consistent with these rules; examine course materials and the qualifications of continuing legal education instructors; consult and appoint committees in furtherance of its official duties as necessary; foster and encourage the offering of accredited courses and programs, particularly in geographically isolated regions; and report annually on its activities to the Chief Judge, the Presiding Justices of the Appellate Divisions and the Chief Administrator of the Courts.” The current New York State CLE Board Chair is Hon. Betty Weinberg Ellerin.

¹⁷⁷ Program rules are available at: http://ww2.nycourts.gov/sites/default/files/document/files/2018-08/16a%20-%20%20CLE-Regulations__Guidelines-June%202018.pdf.

¹⁷⁸ See *Support for Mental Health, Substance Use and Lawyer Well-Being Continuing Legal Education (CLE) Requirement for New York Attorneys*, New York City Bar Association, June 2020, p. 4, at: https://s3.amazonaws.com/documents.nycbar.org/files/2020700-Mental_Health_CLE.pdf (citing to California, North Carolina, Nevada, Oregon, Illinois, and South Carolina). Further note that North Carolina also maintains the North Carolina Bar Cares program which provides free mental health assessments to lawyers licensed in the state. <https://www.ncbar.org/members/resources/barcares/barcares-faqs/>.

Current Mental Health, Substance Abuse & Wellbeing Programs in NYS

Attorney well-being courses and programming focusing on alcohol and substance abuse can be classified as “Ethics and Professionalism,” while time management and stress management programs fall under “Law Practice Management.” NYSBA has been successful in achieving accredited attorney wellbeing programs such as:

- Finding the Compassion Balance: Mindful Lawyering and Vicarious Trauma
- Practicing Law with Mindfulness
- Mindfulness for Lawyers in Times of Stress
- Lawyer Wellbeing: Ethical Considerations
- Wellbeing for the Senior Attorney
- Attorney Wellness/Substance Abuse in the Legal Profession
- What Makes Lawyers Happy
- Lawyer Assistance Program/Prevention Intervention

Yet, each course noted above is limited to the presentation of materials in lecture format and cannot contain any practical exercises to demonstrate techniques or practices. For example, if a course includes 10 minutes of meditation exercises, those minutes would not carry MCLE credit.

As such, it is apparent that the challenges of CLE programming present two distinct, but related, issues: (1) how to use CLE educational programming to reduce stigma about mental health and substance use disorders; and (2) how to increase the availability of preventive techniques and teachings to reduce incidences of cognitive and emotional decline.

The New York City Bar Association CLE Proposal

In June of 2020, the New York City Bar Association (City Bar) issued a policy statement concerning its support for one (1) credit hour Mental Health/Substance Use CLE per reporting cycle for every admitted attorney in New York which credit is to be inclusive of (not in addition to) the existing CLE requirement. The conclusions reached by the City Bar related to misconduct cases, financial losses, mental illness, drug and alcohol abuse and the urgent need for destigmatizing efforts in the profession are beyond dispute.¹⁷⁹ The City Bar cites to the ABA’s Model Rule for MCLE Requirements which provides:

¹⁷⁹ See *id.*, *Support for Mental Health, Substance Use and Lawyer Well-Being Continuing Legal Education (CLE) Requirement for New York Attorneys*, New York City Bar Association.

Report of the Task Force on Attorney Well-Being

- (1) All lawyers with an active license to practice law in this Jurisdiction shall be required to earn an average of fifteen MCLE credit hours per year during the reporting period established in this Jurisdiction. [and]
- (2) As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following areas:
 - (a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year);
 - (b) *Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years);* and
 - (c) Diversity and Inclusion Programming (at least one Credit Hour every three years.)¹⁸⁰

Within the City Bar proposal, there is a reference to the attorney disciplinary committees of the New York court system which “have also recognized the widespread and pervasive nature of these problems within the legal profession, as well as the need to need to provide attorneys with support to help overcome them.”¹⁸¹ As is discussed at length by the Public Trust and Ethics Working Group, the 2016 diversionary rule, adopted by all four Appellate Divisions, allows for treatment to help attorneys avoid discipline through the selection of a monitoring program with one of the state’s three lawyer assistance programs. Education on these key issues not only helps raise awareness of warning signs and available services, but it also reduces stigma and ultimately protects the public from attorney malpractice.

NYSBA Attorney Well-being Survey: CLE

As part of the 2020 Survey, it was critically important to ask a broad range of lawyers from different backgrounds, geographic areas, firm sizes and levels of experience about their views concerning how NYSBA and the profession in general should approach our mental health and wellbeing crisis. Below is a summary of the five critical responses the Task Force received related to CLE:

Importance of Mental Health and Substance Abuse CLEs

The first question posed to over 3,000 lawyers who responded to the survey asked whether they believed mental health and/or substance abuse CLEs were important. Overwhelmingly and across every demographic criterion to which the responses were correlated, lawyers responded that education in the area of mental health and substance abuse was important, namely: 83.33%.

¹⁸⁰ *Id.* at p. 4 (emphasis supplied).

¹⁸¹ *Id.* at p. 6.

Report of the Task Force on Attorney Well-Being

Q23: Do you believe that continuing legal education programs on mental health and/or substance abuse in the legal profession are important?

Answered: 3,024 Skipped: 65

ANSWER CHOICES	RESPONSES	
Yes	83.33%	2,520
No	16.67%	504
TOTAL		3,024

Importance of Attorney Well-being CLEs

In order to draw a distinction between the Model ABA proposal and the highly relevant information presented by the City Bar, the NYSBA Task Force asked about the importance of wellbeing programming, as distinct from mental health and substance abuse only. Again, overwhelmingly the preventative-type of attorney wellbeing programming received broad, cross-demographic support. Slightly more lawyers agreed at about 85%.

Q24: Do you believe that continuing legal education programs on attorney well-being are important?

Answered: 3,043 Skipped: 46

ANSWER CHOICES	RESPONSES	
Yes	85.28%	2,595
No	14.72%	448
TOTAL		3,043

Wellbeing CLE related to Public Trust

Yet, when we asked lawyers about whether providing for a requirement in the area of attorney well-being would strength the public trust in the profession, the result was much closer. A majority of attorney did not agree that it would – with 53% disagreeing.

Report of the Task Force on Attorney Well-Being

Q25: Would a continuing legal education requirement for attorney well-being assist in strengthening public trust in the legal profession?

Answered: 3,033 Skipped: 56

ANSWER CHOICES	RESPONSES	
Yes	46.55%	1,412
No	53.45%	1,621
TOTAL		3,033

Mandatory CLE for Attorney Wellbeing and Solo/Small Practice Lawyer

When the Task Force asked lawyers responding to the Survey whether a mandatory CLE credit should be adopted in New York, most did not support another mandatory credit hour. When the data analyst reviewed these responses against the demographic information, it was noted that over 70% of the survey respondents practiced in environments with fewer than 20 lawyers – i.e., small or solo practices. When the narrative responses (i.e. attorney could expand on answers with comments) were reviewed, it was clear that mandatory CLE presents a significant time and cost consideration to the population of lawyers who are identified as solo or small-firm practitioners. It is critical to consider not only the split on support of a mandatory requirement but also the lawyers who would be most impacted across New York State.

Q26: Should a continuing legal education program on attorney well-being be required as part of the mandatory biennial CLE reporting cycle?

Answered: 3,050 Skipped: 39

ANSWER CHOICES	RESPONSES	
Yes	44.82%	1,367
No	55.18%	1,683
TOTAL		3,050

The Topics Attorneys Consider Necessary for CLE/Programming

The Task Force asked Survey respondents what topics they considered important for CLEs or other wellness programs. The Survey presented 13 choices, and the respondents could pick as many as they wanted. In the Survey analysis, the responses were correlated to the size of office and number of years in practice (See NYSBA Attorney Well-being Survey 2020, Summary, Appendix A, “CLE Resources.”) “Dealing with Difficult People” was the most popular topic for all types of practices except law firms with two or more employees. Their top selection was

“Stress Reduction” with “Dealing with Difficult People” as a close second. “Stress Reduction” was the second-place answer for all other types of practices. “Work-Life Balance” was also a popular selection for all types of practices, although it was slightly less popular with solo practitioners (56%) as compared with everyone else (approximately 65%). “Work-Life Balance” was the most popular topic for those in practice 0-5 years (79%), followed by “Stress Reduction” at 75%. “Dealing with Difficult People,” “Stress Reduction,” and “Work-Life Balance” were the clear top three choices regardless of number of years in the profession.

Lawyers also took the opportunity to write in about CLEs that they would like to have offered but do not have adequate access to currently. As noted in the Summary, tiered-based CLE on family law experience was suggested and strong suggestions were made to NYSBA to engage in anti-racism work, advocate for a 40-hour work week, closing the gender gap, and building understanding for lawyers with learning disabilities – as more impactful ways to combat attorney ill-being than a CLE. In fact, one lawyer wrote, “Everything that the profession likes to talk about in terms of well-being is a band-aid to treat the symptoms rather than facing up to the **underlying causes** of so much depression and misery – we shouldn’t need hotlines and mindfulness trainings, etc. in the first place, and we should ask ourselves what has gone so very wrong that we find ourselves in this position.”¹⁸² (emphasis supplied)

In fact, many lawyers commented that CLE is just one more obligation to place on a lawyer and it implicitly blames the lawyer for the inability to cope with the stress of a profession without boundaries. One comment which was identified during the data analysis was a lawyer’s advice to:

Push back on clients’ unrealistic expectations and create a culture of protected time for attorneys. If you want to get a sense of what junior attorneys think of their law firms’ well-being initiatives, look up the countless memes online about how law firms require attorneys to bill 80-hour weeks and then encourage them to attend a mental health webinar, believing this fulfills their duty to look after attorneys’ mental health. Well-being CLEs and free meditation apps are band-aid solutions that ignore the root issue, which law firms refuse to address.¹⁸³

Evolving Landscape for CLE for Attorney Well-being – Short and Long Term

It is evident that there are several competing principles at play in the complex issue of attorney well-being and CLE. The first is that we do need to reduce stigma and find ways to encourage attorneys to receive the information they need which might save their lives or others. The second is that acquiring CLE credits can place a significant burden on lawyers depending upon their socio-economic status and size of law firm and increasing that load should not be done without

¹⁸² NYSBA Attorney Well-being Survey 2020, Summary, App. A.

¹⁸³ *Id.*

due consideration to that burden. The third is that lawyers are clear that placing the responsibility for their individual well-being solely on them ignores the overarching professional culture which creates the ill-being at the outset.

CLE Offerings at NYSBA and Credit Hours Available in the Immediate Term:

NYSBA should consciously focus on the routine development and offering of CLE programming to raise education and awareness for attorneys on a broad spectrum of well-being topics with the goal of making an immediate impact on attorneys in these areas as opposed to having a sole focus of long-term regulatory change with respect to CLE. As noted, the ability to change the mandatory CLE requirements does not rest with NYSBA but is a complex process which could encompass years of advocacy efforts by the City Bar, NYSBA and local bar associations. Relatedly, the addition of a Diversity, Equity and Inclusion (DEI) mandatory credit hour was a hard-fought victory. And it is our understanding that the CLE Board is in the midst of considering a mandatory technology credit hour even before addressing well-being.

Therefore, as long-term efforts remain on-going, the Task Force seeks to address what can be done immediately, at the NYSBA level, to address the concerns about access to CLE, stigma, cost, and other barriers to entry cited by lawyers within the NYSBA Attorney Wellbeing Survey. The CLE initiative at NYSBA shall be “Reducing Stigma and Increasing Access” and should include:

- a. Free well-being, mental health and substance use disorder programs offering CLE on a regular cycle;
- b. Require the incorporation of well-being programming as a “best practice” into section and committee CLE programs at NYSBA, especially half- and full-day programs, as well as section destination meetings;
- c. Make well-being CLE programming a standard inclusion in Bridging-the-Gap CLEs, which are often well-attended by young and new practitioners; and
- d. Offering a well-being CLE program as a standard offering for all newly-admitted attorneys.

Immediate Advocacy Efforts by NYSBA to the CLE Board

NYSBA, ideally through a newly-created standing Well-Being Committee, should seek advocacy efforts to explore modifications to the current CLE regulations with New York State’s CLE Board. These efforts should include, but not be limited to:

- a. Allowing for at least a minimum amount of skills development time with CLE credit offered for programs, as opposed to the current landscape where only presentations of theory are permissible for credit;

- b. Seeking to broaden programming to include credit for solutions-based programming; and
- c. Broadening well-being CLE programs offering ethics credit beyond simply substance abuse control, to consolidate with public trust and ethics work focusing on prevention for attorneys from needing to enter a diversionary program.

Expanding NYSBA Offerings for Education Beyond CLE

While it is extremely important that well-being programs are routinely offered on diverse topics that include CLE credit, NYSBA should highlight and make available programs, offerings, workshops and retreats which provide attorneys with an opportunity to explore the complex issues of attorney well-being, including how well-being intersects with diversity, equity, inclusion, disability, etc. NYSBA should not be restricted by accreditation issues, understanding that not all worthy programs must necessarily carry CLE credit and stand-alone programs offer invaluable collegiality such as peer-to-peer support groups, the Lawyer-to-Lawyer Wellbeing Roundtable, and other such opportunities, which help to remove stigma and increase vulnerability among colleagues. While many programs will carry credit and advocacy efforts will be ongoing to expand the type of program that may receive accreditation, NYSBA should offer programming, regardless of CLE credit status, that raise education and awareness for attorneys on issues of well-being.

Self-Care as a Mandate: Physical Well-being for Lawyers

Responses to NYSBA's Attorney Well-being Survey¹⁸⁴ clearly demonstrate that the system and the culture of law are broken. As we work to repair and replace that which is broken, there is a significant role for lawyers, as individuals, to play in our own self-care and well-being. It is imperative that we do so.

Undeniably, the COVID-19 pandemic brought an already sedentary practice to a standstill. Lawyers and law students worked or studied remotely. Students abruptly found themselves in virtual classrooms, without the normal supports of study groups and office hours, facing exams for which they felt ill-prepared. Lawyers left their offices and practiced via Zoom. Lawyers and law students, who often report high levels of stress due to work and study pressures, have spent more than 16 months tethered to their home-office chairs, hunched over a laptop. This has resulted in increased stress. Modern humans are not evolutionarily suited for unremitting nonphysical stress.

Work stress sets off the fight or flight reaction. Our bodies respond as if work stress were a physical threat from a predator and prepares to react physically. The increased levels of

¹⁸⁴ See NYSBA Attorney Well-being Survey 2020, Summary App. A.

adrenaline and cortisol cause increases in blood pressure, heart rate, and blood sugar levels.¹⁸⁵ If there were a physical threat, we would act by either fighting or running. But there isn't. We have to sit and write the brief, respond to the emails and then move on to the next pressing matter. The threat perceived never ends.

Stress and Sedentary Workstyle

As stress builds, we can become anxious, irritable, and depressed. We might eat more to maintain our energy levels, which may become a factor in developing high blood pressure, heart disease, difficulty sleeping, hormonal imbalances and obesity, as well as diabetes from high blood sugar. The sedentary nature of legal work – sitting for extended periods during the day in front of the computer, talking on the phone and attending meetings – adds to the health problems caused by stress. Sitting too much by itself can be a factor in heart disease, cancer, and diabetes.¹⁸⁶ A recent study found that sitting for more than eight hours a day was detrimental to mental health. Those who sat for less than eight hours a day presented lower depression scores.¹⁸⁷

Traditionally, bar associations have sought to help members suffering from depression, alcoholism or substance abuse through lawyer assistance programs. These programs, however, do not deal with the physical impacts of lawyer stress. Yet, stress has physical effects on the mind and body, its impact is susceptible to being treated holistically, by including physical activity, which can help to mitigate the mental and physical effects.

A Holistic Approach to Health: Mind, Body, Spirit

NYSBA has become a leader in recognizing the importance of attorney well-being.¹⁸⁸ Under this holistic approach to stress, regular physical activity is acknowledged as effective in improving anxiety and depression.¹⁸⁹

¹⁸⁵ Bruce McEwan, *Physiology and Neurobiology of Stress and Adaptation: Central Role of the Brain*, [/journals.physiology.org/doi/full/10.1152/physrev.00041.2006](https://journals.physiology.org/doi/full/10.1152/physrev.00041.2006).

¹⁸⁶ <https://pubmed.ncbi.nlm.nih.gov/27475271/>.

¹⁸⁷ Paers, Kola-Palmer, De Azevedo, *The Impact of Sitting Time and Physical Activity on Mental Health During COVID-19 Lockdown*, *Sports Sciences for Health*, June 10, 2021. <https://link.springer.com/article/10.1007/s11332-021-00791-2>.

¹⁸⁸ NYSBA's work was instrumental in the courts' deleting the mental health questions from the Character and Fitness portion of the Application for Admission to the Bar in New York. *See The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application*, a report by the Working Group on Attorney Mental Health of the New York State Bar Association, Nov. 2, 2019. <https://nysba.org/report-of-the-working-group-on-attorney-mental-health/>. In 2019, NYSBA devoted its entire Journal to the question of attorney wellness. *NYSBA Journal, Wellness = Work + Life + Balance*, Aug. 2019, Vol. 91, No. 6.

¹⁸⁹ A. Ströhle, Physical activity, exercise, depression and anxiety disorders. *J. Neural Transm.* 116, 777 (2009). <https://doi.org/10.1007/s00702-008-0092-x>.

A study by Lawrence Krieger and Kennon M. Sheldon¹⁹⁰ found that subjects who engaged in regular exercise had greater well-being than other subjects and reported greater satisfaction in areas such as feelings of autonomy, relatedness and competence. The Centers for Disease Control and Prevention (CDC) notes that “[e]ven one session of moderate-to-vigorous physical activity reduces anxiety, and even short bouts of physical activity are beneficial.”¹⁹¹ In addition to these mental health benefits, regular physical activity improves physical health. According to the CDC, people who are physically active for 150 minutes a week have a 33% lower risk of all-cause mortality than those who are physically inactive.¹⁹²

Physical activity may be more important in light of the COVID-19 pandemic and its aftermath. COVID has had a great impact on the legal profession as lawyers began working from home, surrounded by their families, the demand for legal services dropped and the economy faltered.¹⁹³ Law students had to study remotely and recent graduates faced uncertain job prospects and postponement of the bar exam. April Campbell of the Association of Legal Administrators (ALA) characterized associates in the 25-to-45 age range as being “at the breaking point.”¹⁹⁴

A wide range of maladies and conditions can be cured or improved if one becomes more active. For example, physical activity has been proven to lower blood pressure, lower blood sugar, improve cholesterol levels, and increase insulin sensitivity. Regular physical activity cuts the risk of heart attack, stroke, diabetes, certain types of cancer such as colon and breast cancers, osteoporosis and fractures, obesity, and certain types of dementia and cognitive decline.¹⁹⁵ Physical activity helps build muscle mass, increase functional strength and improve sleep quality and overall quality of life.¹⁹⁶ It has been shown to slow the aging process and prolong lifespan. People who are physically active have a much lower risk of all-cause mortality, but benefits start to accumulate with any amount of moderate or vigorous physical activity.¹⁹⁷ Further, regular physical activity also strengthens the immune system, making it better able to fight off infection, including from COVID-19. It also prevents one from developing the underlying conditions of

¹⁹⁰ Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 Geo. Wash. L. Rev. 554 (2015); https://ir.law.fsu.edu/articles/94_

¹⁹¹ CDC Physical Activity Basics, <https://www.cdc.gov/physicalactivity/basics/index.htm>. See also CDC Physical Activity Guidelines, 2d Ed., <https://www.cdc.gov/physicalactivity/basics/adults/index.htm>. Strength training is generally considered to be anaerobic exercise. It involves short bursts of activity involving maximum power such as lifting weights, calisthenics, and sprinting, which raises one’s overall metabolism, which burns calories.

¹⁹² See *id.*, CDC Physical Activity Guidelines.

¹⁹³ Debra Cassens Weiss, *More work shifted to law partners as demand for legal services dropped, new report says*, ABA J., Aug. 13, 2020; <https://www.abajournal.com/news/article/more-work-shifted-to-law-partners-as-demand-for-legal-services-dropped-report-says>.

¹⁹⁴ Conversation between Working Group on Physical Well-being Chair Robert Herbst and April Campbell, Executive Director of ALA on August 4, 2020.

¹⁹⁵ CDC Physical Activity: Active People Healthy Nation https://www.cdc.gov/physicalactivity/downloads/Active_People_Healthy_Nation_at-a-glance_082018_508.pdf.

¹⁹⁶ CDC Physical Activity Guidelines, 2d Ed., <https://www.cdc.gov/physicalactivity/basics/adults/index.htm>.

¹⁹⁷ *Id.*

obesity, high blood pressure, heart disease, and diabetes, which the CDC warns can make infection with the coronavirus more severe or even fatal.¹⁹⁸

Making Time for Physical Activity

Guidelines released by the Department of Health and Human Services (HHS) recommend at least 150 minutes of moderate intensity aerobic or 75 minutes of vigorous intensity physical activity or an equivalent combination each week.¹⁹⁹ On November 26, 2020, the World Health Organization (WHO) released its own updated guidelines, in part to combat inactivity related to COVID-19 and to prevent certain underlying conditions that increase the severity of infection with COVID-19.²⁰⁰ The guidelines recommend that adults do at least 150–300 minutes of moderate-intensity aerobic physical activity; or at least 75–150 minutes of vigorous-intensity aerobic physical activity; or an equivalent combination of moderate- and vigorous-intensity activity throughout the week and should also do muscle-strengthening activities at moderate or greater intensity that involve all major muscle groups on two or more days a week.

Examples of aerobic activity include walking, running, swimming, and cycling.²⁰¹ The CDC also recommends that adults do two or more days a week of moderate or high intensity strength training exercises that use the major muscle groups.²⁰²

Making YOU a Priority

The CDC reports that only 53.3% of adults meet the guidelines for aerobic activity and only 23.2% meet the guidelines for both aerobic and muscle strengthening activity.²⁰³ The actual numbers may be much lower, as the figures come from self-reported data, which tend to be biased upwards.²⁰⁴ According to the Bureau of Labor Statistics, only about 19% of the population was engaged in sports and exercise in 2017.²⁰⁵ The reasons are numerous – cost, lack of time, lack of facilities, inconvenience, lack of motivation, a lack of energy, child care, family obligations, boredom when doing certain activities, injuries or other conditions which make

¹⁹⁸ See CDC at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>; US Dep't Health & Human Servs., <https://health.gov/our-work/physical-activity/current-guidelines/scientific-report>.

¹⁹⁹ <https://jamanetwork.com/journals/jama/fullarticle/2712935>.

²⁰⁰ World Health Organization 2020 Guidelines on Physical Activity and Sedentary Behaviour, <http://dx.doi.org/10.1136/bjsports-2020-102955>.

²⁰¹ Aerobic activity, or “cardio,” conditions the cardiovascular system by increasing the body’s demand for oxygen, raising the rate of breathing and heart rate.

²⁰² CDC Physical Activity Guidelines, 2d Ed., <https://www.cdc.gov/physicalactivity/basics/adults/index.htm>.

²⁰³ <https://www.cdc.gov/nchs/fastats/exercise.htm>.

²⁰⁴ <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0036345>.

²⁰⁵ See Physical Activity: Statistics and Facts, citing Bureau of Labor Statistics Report, <https://www.statista.com/topics/1749/physical-activity/>; <https://www.statista.com/statistics/189562/daily-engagement-of-the-us-population-in-sports-and-exercise/>.

certain activities painful, a lack of perceived results, and not wanting to do certain activities either alone or in the presence of others.²⁰⁶

The innate nature of the legal profession may cause the rate of lawyer participation to be as low as or lower than for Americans generally.²⁰⁷ Those in the legal profession work long hours, often in high-pressure situations. Lawyers were taught to outwork everyone else, whether by preparing more thoroughly than their opponents a case, by billing more hours than their colleagues or by spending more time on client development. Then there is the fact that law firms make money by having lawyers at their desks working. The bottom line discourages lawyers from taking time off. Thus many fear that they would be viewed negatively by their peers and by more senior attorneys, who could affect their careers, if they took time away from the office to engage in self-care. This too can be a barrier, making the act of taking the time to improve their health an additional source of stress. Lawyers may be unwilling to take the time for self-care or may even be afraid to reveal a need to do so as it may be seen as a sign of weakness.

Therefore, the nature of being under stress may itself inhibit lawyers from participating in physical activity. When people are under stress, they will generally prefer the comfort of inactivity and avoid exertion.²⁰⁸ Avoidance of physical activity becomes the default.

Finding a Community and What Works

In looking for ways to increase participation in physical activity, research shows that the three most important tools are: (1) making social connections, (2) allowing the person to feel a sense of competence, and (3) helping the individual to find activities that are truly and intrinsically enjoyable.²⁰⁹

Social connection is in our DNA. Certain neurophysiological mechanisms developed that caused our hunter-gatherer ancestors to work together cooperatively, to increase their chances of survival.²¹⁰ Research suggests that humans are biologically tuned to be social creatures, and that social bonding helped to quiet the fight-or-flight response.²¹¹ As such, joint participation in a moderately intense physical activity has been shown to improve group cohesion.²¹² Group cohesion may also facilitate participation in physical activity. That may explain the popularity of group-oriented activity programs such as CrossFit or spin class. Group support may help people

²⁰⁶ Felipe Reichert, et al., *The Role of Perceived Barriers to Engagement in Leisure-Time Physical Activity*, Am. J. Pub. Health, Oct. 2011, <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2005.070144>.

²⁰⁷ This is based on the observations of the Physical Well-being Working Group's chair Robert S. Herbst. He discussed this in his article *The Case for Attorney Wellness*, NYSBA J. (Mar. 2020) and more generally in *Attorney Wellness in a Nutshell*, NYSBA J. (Aug. 2019).

²⁰⁸ Matthew A. Stults-Kolehmainen & Rajita Sinha, *The Effects of Stress on Physical Activity and Exercise* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3894304/>.

²⁰⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6549388/>.

²¹⁰ Nigel Nicholson, *How Hardwired is Human Behavior*, Harvard Bus. Rev. (July-Aug. 1998)

²¹¹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1868418/>.

²¹² *Social Bonds and Exercise: Evidence for a Reciprocal Relationship*, PLoS One. 2015; 10(8): e0136705. Published online 2015 Aug 28. doi: 10.1371/journal.pone.0136705.

push themselves and overcome their reluctance to join, while their entry increases group cohesion and accountability for participation.²¹³

Making Physical Health a Priority: Our Culture

Social support does not necessarily mean having others in the gym or on the track sweating alongside each other. Rather, lawyers need to know that their taking time away from work for self-care will have the approval and encouragement of their superiors and colleagues and will not have negative consequences. In a profession where absolute commitment is demanded, “the culture of the law industry” must “consider well-being and make it a priority.”²¹⁴

Having the right social support and encouragement from law firm leadership can strengthen law firm/legal department cohesion and help lawyers to spend some portion of their time and energy on physical activity, which they likely would not do on their own. Firm and bar leaders must sincerely demonstrate that physical health is a priority. A lawyer who engages in regular physical activity is healthier, and therefore a better and more productive lawyer. Workplace wellness programs in general have also been shown to cut costs. An analysis of well-being programs found that employer medical expenses decrease \$3.27 and absenteeism related costs decrease \$2.75 for every dollar spent on the programs.²¹⁵ According to British researchers, workers who spent 30 to 60 minutes in physical activity at lunchtime reported an average performance boost of 15%. Sixty percent of workers saw improved time management skills, mental performance, and ability to meet deadlines on days they exercised.²¹⁶ Law firms have seen significant gains in billable hours from reduced absenteeism and have received a positive return on investment from the costs of having a well-being program.²¹⁷

Moreover, having a well-being program will also aid lawyer recruitment and retention. Colleges now feature wellness centers instead of gyms and many law schools have well-being curricula and activities which teach law students ways to handle stress. Young associates are more willing to come forward and avail themselves of assistance out of concern for their well-being.²¹⁸

²¹³ See *id.*; Alex Abad-Santos, *After the Coronavirus Pandemic, Group Fitness Will Never Be the Same*, Vox.com (May 18, 2020).

²¹⁴ Kathryn Fyfe, *Legal Culture Must Change for Attorneys to Thrive*, NYSBA Journal, 22, 23 (Sept./Oct. 2020).

²¹⁵ Erin Brereton, *Constructing the Ideal Health and Wellness Initiative*, Legal Mgmt. (Jan. 2019).

²¹⁶ *Exercising at Work and Reported Self Performance*, Int'l J. Workplace Health Mgmt. 1(3):176-197, Sept. 2008.

²¹⁷ A large international law firm whose well-being program includes a fitness center at its New York office with strength and cardio equipment, in-person and virtual fitness classes, personal training, and physical therapy has reported to this Working Group that the prevalence rates fell for hypertension by 36%, elevated blood sugar by 28%, and high stress levels by 49%. Firm members report 44% fewer work loss days due to illness. In 2019, the firm received a 2.2:1 return on investment based upon reduced time away from productive activity resulting in billable hours compared with the cost of operating the program. For a discussion of the benefits of well-being programs to law firms' bottom lines see generally the “Business Case for Change” section of this Report. It is adapted from Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 Vill. L. Rev. 361 (2020).

²¹⁸ NYSBA Attorney Well-being Survey 2020 Summary, App. A.

Further, polls show that millennials value work life balance over increased compensation.²¹⁹ To take advantage of these trends, firms are pointing to their well-being programs in their recruiting materials and as part of their benefits package.

Solo and small firm practitioners, who must rely on themselves or a small group of colleagues, need the support and encouragement of the legal community to engage in self-care. They should understand that putting their clients ahead of their own well-being can damage their practice and lead to ill health. Instead, they should make themselves their most important client; otherwise, their other clients will suffer. Taking part in physical activity will help keep them grounded and reduce the stress levels that many report.²²⁰

Perhaps the most important factor in increasing participation in physical activity is whether the chosen activity is intrinsically motivating and enjoyable. In our society, the general concept of being physically active comes with a lot of baggage.²²¹ Physical activity is seen as “exercise,” a word which, for many, has negative connotations – especially for those who were not very successful in gym class. The idea exercise success is out of reach is perpetuated by the exercise videos and infomercials that show toned, enthusiastic people moving in an accomplished manner, which can be hard to achieve.

Also, the fitness industry tends to emphasize improving sports performance, not health. When newcomers enter a gym and see gym-goers pushing themselves with intense effort under the mantra of “no pain, no gain,” that can make the notion of physical activity seem unattractive, unpleasant, and unwelcoming. It is something for athletes – not for them.

In its updated Guidelines, the WHO stopped using the term “exercise” and instead concentrated on physical activity, which it defined as “any bodily movement produced by skeletal muscles that requires energy expenditure. Physical activity refers to all movement including during leisure time, for transport to get to and from places, or as part of a person’s work.”²²²

We can harness our natural drive to seek comfort when under stress. All movement, even movement which is not seen as traditional exercise but which is still enjoyable and feels good to the body, such as riding a bicycle to the store or gardening, will improve health as long as it is sufficiently intense.²²³ When something is intrinsically pleasing, people will default to it for

²¹⁹ See Reich, *supra*, note 217; Ginger Christ, *Millennials Value Work Life Balance Over Money*, EHS Today (Apr. 12, 2016).

²²⁰ NYSBA Attorney Well-being Survey 2020, Summary, Appendix A.

²²¹ Timothy D. Nelson, *Negative Attitudes Toward Physical Activity: Measurement and Role in Predicting Physical Activity Levels Among Preadolescents*, J. Pediatric Psych., Vol. 35, Issue 1, Jan./Feb. 2010, pp. 89–98, <https://academic.oup.com/jpepsy/article/35/1/89/918283>.

²²² World Health Organization 2020 Guidelines on Physical Activity and Sedentary Behaviour <http://dx.doi.org/10.1136/bjsports-2020-102955>

²²³ US Dep’t Health & Human Servs., <https://health.gov/our-work/physical-activity/current-guidelines/scientific-report>; CDC Physical Activity Guidelines, 2d Ed., <https://www.cdc.gov/physicalactivity/basics/adults/index.htm>; see

comfort.²²⁴ After a long and stressful day of meetings and phone calls, answering e-mails, legal research or marking up documents, they will seek out taking a walk in the fresh air. Then, as they do the activity, their body will produce endorphins and endocannabinoids which will increase their enjoyment and feeling of well-being and lower their stress level. The more often they do the activity, the more they will enjoy it as their body adapts and they develop an overall sense of well-being from being fit. They will then want to repeat the activity and they will make it a priority.²²⁵

Physical Fitness Survey Results

The NYSBA Task Force Survey on Attorney Well-Being²²⁶ asked lawyers, “What resources and member benefits would you like the NYSBA to provide to help you improve your physical fitness and health?” The results showed that of those responding:

- 18.3% wanted discounts on gym memberships, training sessions, equipment, etc.
- 10.6% wanted resources such as classes, information, programs, and CLE on nutrition, exercise, weight loss, and other well-being topics.²²⁷
- 7.4% wanted programs for stress management such as yoga and meditation classes.
- 5.47% wanted coaches, counselors, trainers or therapists, including mental health therapists.
- 5.2% wanted opportunities for peer support and to make social connections which would help them be physically active.

Perhaps most telling, were the answers to the question asking about ways to improve lawyers’ physical health: 9.2% of respondents saw a connection between their physical and mental health expressly used the term “mental health” in their answer. Overall, 23% of the answers indicated that attorneys were looking for ways to reduce their stress and improve their mental health.²²⁸ The holistic approach is intuitive to lawyers. Now they need a culture that supports a holistic approach to help lawyers get – and stay – fully well.

Tanner Garrity, *Does Yardwork Count as Exercise?*, InsideHook, Apr. 24, 2020, <https://www.insidehook.com/article/health-and-fitness/yard-work-gardening-exercise>,

²²⁴ W. Jack Rejeski & Jason Fanning, *Models and Theories of Health Behavior and Clinical Interventions in Aging: a Contemporary, Integrative Approach*, *Clin Interv Aging*, 2019; 14: 1007–19, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6549388/>; Self Determination Theory, APA PsycNet, <https://psycnet.apa.org/record/2011-21800-020>

²²⁵ Robert S. Herbst, *A Winter Wellness Wonderland*, NYSBA J., Jan. 2020, p. 35.

²²⁶ See NYSBA Attorney Well-being Survey 2020, Summary App. A.

²²⁷ Several respondents answered Question 13 by saying that the number of required CLE hours should be reduced because they are non-compensated time and take away from time that could be spent with family or on self-care.

²²⁸ Notably, Question 27 of the Survey asked, “What topics, skills, continuing training or programs do you believe would be beneficial CLE in the area of well-being (check all that apply).” The answers reflected the overstressed state of the profession: 45.53% chose Physical Fitness & Mental Clarity (including yoga) and 40.41% selected Nutrition for Busy Lawyers, while 69.53% asked for CLE on Stress Reduction, 66.02% sought programs on Work-Life Balance, and 48.59% chose CLE on Mental Health Issues.

NYSBA: Navigating the Wheel of Well-Being for Lawyers; Recommendations for Change

We can now see possibilities that we could not see two years ago. Covid-19, the closures and the lockdowns brought the situation to a head. Not because we didn't already know that reform is needed, we just didn't know that change was possible. And now we know. Out of necessity, we made enormous changes in how law firms, law schools, court systems, government agencies and legal services operate. NYSBA formed task forces, held regular informational meetings, and offered many resources to lawyers who navigated the shutdown in real time. We made these changes quickly; we had to.

Now, as we collectively catch our breath, we have begun to look at our assumptions about our profession, our health and well-being – the law school model, the reward structure of law firms, access to resources, the role of the judiciary, ethics and triggers for professional problems – with the understanding that this will reveal what we value.

NYSBA is committed to leading the way for a profession in change, especially as it pertains to our fitness to practice. Through the Task Force process, we have come to understand that attorney well-being is an individual's concern but a collective responsibility. Such issues are pervasive in law and must be addressed on multiple, inter-related levels for real, meaningful change. We must make these changes with a collective, sustained effort.

Nationwide, bar associations are highlighting and instituting programs to address the attorney well-being crisis. NYSBA, along with other commercial CLE providers, has begun to regularly offer well-being programs and the New York delegation has supported the ABA resolution for well-being. While NYSBA is a voluntary bar association state and cannot mandate state-wide programs to address the issues raised in this Report, New York bar associations represent the collective voice of their member attorneys and have an obligation to address member concerns as well as ensuring the protection of the public. NYSBA acknowledges and accepts its critical position and role for state-wide efforts to address attorney well-being issues.

Therefore, the Task Force on Attorney Wellbeing submits the following recommendations to be considered by the NYSBA House of Delegates:

Recommendations for NYSBA	Suggested Considerations and Implementations
Formation of a NYSBA standing Committee on Attorney Well-Being	Tasked with (a) the development and implementation of well-being programs and initiatives for all New York attorneys and law students, (b) the state-wide coordination and advancement of well-being programs and resources for bar associations, the judicial system and employers, and (c) the encouragement of a “culture change” in which the stigma and other barriers to participation in well-being programs are lowered.

<p>Well-Being Committee Composition</p>	<p>NYSBA President may consider the following criteria for appointment to a newly-formed Committee:</p> <ul style="list-style-type: none"> a. A representative from each New York State LAP. b. Representatives from diverse areas of New York State, including non-lawyer well-being professionals. c. Representatives from newly-admitted and senior attorneys. d. Other stakeholders such as OCA, NY law schools and other local and affinity bar associations.
<p>Well-Being Committee Mission</p>	<p>NYSBA may wish to consider the following initiatives for the work of the Committee on Well-Being:</p> <ul style="list-style-type: none"> a. Implementation of the Task Force recommendations from the Report. b. The role of the current Lawyer Assistance Committee for cross-Committee initiatives. c. Develop outreach programming for attorneys who have been formally disciplined, with goal of rehabilitation. d. Work with LAPs, bar associations and others to advocate to NYS CLE Board regarding possible modifications of CLE regulations including: <ul style="list-style-type: none"> i. Skills development programs with CLE credit; currently, only presentations of theory offer credit; ii. Include credit for solutions-based well-being programming, rather than focusing on the negative aspects of ill-being; and iii. Broaden well-being CLEs offering ethics credit to include public trust and ethics work, focusing on prevention rather than the need for diversionary programs. e. Develop online resources and materials on topics which support well-being and the importance of self-care. f. Develop and promote a “Law Firm Roadmap for Well-Being Best Practices” for law firms or other legal employers in offering social opportunities which enable people to enjoy shared physical activity. g. Collaborate with the court system (OCA) to create a referral network of clinicians with specific experience

	<p>dealing with the legal profession, such as North Carolina’s Bar Cares program and Massachusetts’ LOMAP.</p>
<p>NYSBA Well-Being Priorities</p>	<p>As overall well-being policy and support, NYSBA may wish to consider:</p> <ul style="list-style-type: none"> a. Member benefits which facilitate participation in physical activity and other means of self-care. b. Consideration of mentoring in professional liability areas and civility. c. Devote part of Law Practice Management programming to educating on the business case for lawyer wellness. a. Budget for participation in national programs and conferences on attorney well-being for the Committee.
<p>NYSBA LAP Funding Advocacy</p>	<p>NYSBA House of Delegates should consider a resolution which establishes such a priority for NYSBA’s LAP and urges a similar commitment for other LAP programs and a commitment by OCA (see Appendix E). The Committee should assist in addressing:</p> <ul style="list-style-type: none"> a. The LAPs as the foundation of other well-being programs. b. Ensure access to at least one clinician at each LAP in New York. c. Examine past and current funding, sustainability of existing LAPs (NYSBA, NYC Bar, Nassau County Bar). d. Consider supporting Lawyer Assistance Programs in other New York bar associations. e. Develop and present CLE programming on attorney well-being, emphasizing well-being as a component of compliance with the Rules of Professional Conduct; maintain dedicated webpage to educate law firms and lawyers about mental health resources and develop free or low-cost counseling opportunities.

<p>NYSBA and CLE</p>	<p>NYSBA could create a signature CLE initiative entitled “Reducing Stigma and Increasing Access” which would include:</p> <ul style="list-style-type: none"> a. Free well-being, mental health and substance use disorder programs offering CLE on a regular cycle; b. Require incorporation of well-being programming as a “best practice” into NYSBA section and committee CLEs, as well as at section destination meetings; c. Make well-being CLE programming a standard inclusion in Bridging-the-Gap CLEs; and d. Develop a well-being CLE program as a standard offering for all newly-admitted attorneys. e. Expand NYSBA offerings CLE, such as workshops and retreats which allow attorneys to explore the complex issues of attorney well-being, as well as how well-being intersects with diversity, equity, inclusion, disability, etc.
<p>NYSBA collaboration with New York law schools</p>	<p>NYSBA is in a leadership position to expand collaboration with all New York law school which may include:</p> <ul style="list-style-type: none"> a. Meetings of wellness liaisons at law schools and legal employers. b. Co-host virtual programming across law schools and among State bar, law firms, public interest organizations, the judiciary and law schools. c. Develop a roundtable program (LAP) tailored to the law student audience; consider reintroducing NYSBA’s toolkit. d. Host yearly meetings between NYSBA LAP and deans of students of all NY law schools to foster statewide collaboration in law school well-being. e. Offer mental health training focused on detection and response for law faculty, staff, administrators throughout the state (in collaboration with Mental Health First Aid). f. Create a wellness pledge for law schools and legal employers. g. Collaborate with law schools on programs to address student debt load and financial well-being, particularly within the context of pursuing public service or public interest positions in the State of New York. h. Convene quarterly meetings with affinity bar associations and the law schools in the State to discuss issues of diversity, equity and inclusion in legal education and the legal profession.

	<p>Communication initiatives to include:</p> <ul style="list-style-type: none">a. Stories of members of the legal profession who are prioritizing their holistic health and well-being on state bar websites, programming, and materials.b. Educate the legal profession on NYSBA’s effort to help eliminate mental health questions from the character and fitness application. Increase transparency for law schools and law students about how mental health diagnosis and treatment will affect bar admission through programming and information campaigns. <p>Curriculum initiatives to include:</p> <ul style="list-style-type: none">a. Partner with leading faculty and practitioners statewide to develop a unit and/or teaching resources on wellness to be incorporated into professional responsibility courses required for graduation.b. Advocate for New York to become a national leader in by requesting that the Court of Appeals and Board of Law Examiners require completion of a course on wellness as a condition of graduation from a NY-accredited law school and/or as a condition of licensure.c. Provide and highlight no or low-cost well-being initiatives to address law schools’ resource limitations.d. Convene at least one meeting of the states’ law school deans a year about how NYSBA can assist with achieving representational diversity in faculty hiring, consistent with each school’s mission and goals, to address barriers to belonging that negatively impact student mental health.
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Recommendations for Law Schools	Suggested Considerations and Implementations
<p><i>Collaboration Across the Profession:</i> Law student wellbeing is the collective responsibility of several constituencies: students, faculty, staff, the bench, and the practicing bar. The following recommended best practices can help each of these constituencies advance and achieve the collective goal.</p>	<ol style="list-style-type: none"> 1. Appoint a wellness liaison at each school to coordinate with NYSBA on issues of well-being. Liaisons to meet regularly to share current events, strategies, and program ideas. 2. Develop a list of providers, vendors, campus and community partners for wellness programming and resources, to share with students and counterparts throughout the State – especially critical for law schools in more remote parts of the State. 3. Collaboration with local law schools and professionals about financing a legal education, information that may serve to lessen the stresses relating to financial burdens. 4. Offer counseling services on site at the law school, if possible, preferably staffed by providers who have experience with the unique stressors of the law school experience. 5. Host an LAP program as early as Orientation to reduce stigma, encourage help-seeking behaviors, and introduce students to resources and mentors in the profession. 6. Develop programming focusing on marginalization of individuals of color, first-generation students, disabled students and students who are members of the LGBTQ+ community and the importance of diversifying the legal arena and having a sense of belonging. Work to eliminate the barriers to an affordable legal education that impact the numbers who make it to and through law school. 7. Develop resources to support disabled students to lessen the negative impact on their mental state and wellness while in law school. 8. Offer training to law students to support their fellow students, possibly in conjunction with legal employer professional development partners. 9. Present wellness programs in partnership with members of NYSBA that reduce and address stigma, demystify the daily work of attorneys, and encourage and assist students in developing habits that help their health and well-being.

<p><i>Communication on Well-being:</i> Reducing the stigma associated with mental health issues and giving law students and lawyers permission to make their well-being a priority are laudable aims that are more relatable and, thus, achievable when admired members of the profession share their personal stories of success and struggle.</p>	<ol style="list-style-type: none"> 1. Encourage law schools to have a dedicated page on their websites that identifies wellness resources. 2. Implement systems for students and faculty to share wellness concerns with responsible administrators or campus health professionals. For example, faculty awareness and reporting of excessive absences, which often signal an underlying wellness issue. 3. Host special events commemorating mental health awareness days. Address well-being during orientation and reorientation programs, including a wellness-focused perspective on law school and wellness resources. 4. Establish a culture of wellness throughout the institution – e.g., feature law faculty speakers at wellness-focused events, including faculty discussing their own struggles, would help remove the facade of perfectionism endemic to the culture of law.
<p><i>Curricular Innovations:</i> The role of faculty governance over law school curriculum cannot be underestimated. Through their empowered governance and leadership functions, law school faculty can greatly influence and shift the culture of legal education, demonstrating that wellness is a valued priority of the legal academy and profession as a whole, not an “add-on” to be sacrificed for academic success or client and supervising attorney needs.</p>	<ol style="list-style-type: none"> 1. Proactively incorporate wellness into the curriculum through for-credit or non-credit bearing courses. 2. Discuss mental health and substance use in Professional Responsibility courses as well as client counseling and clinical courses. 3. Develop opportunities to discuss professional identity formation to encourage students to be mindful of their individual values, strive for a career path aligned with those values and promote self-awareness. 4. Include lectures or a workshop series on wellness topics in both doctrinal and experiential courses throughout the curriculum. 5. Promote well-being in the classroom by mindful attention to use of the Socratic method and engaging in conversations that raise awareness on issues of diversity, equity and inclusion. 6. Acknowledge the impact of the lack of representational diversity at the podium, particularly in required doctrinal courses and commit to addressing this through examination of the composition of and charges to faculty appointments committees. 7. Adopt learning outcomes and, possibly, technical or essential performance standards, specific to wellness (e.g., tools needed to promote personal and professional well-being).

Recommendations for Employment and Culture Change	Suggested Considerations and Implementations
<p>Promote attorney well-being as an ethical and professional obligation of lawyers, as well as a business imperative.</p>	<p>Attorney well-being: (i) reduces expensive turnover, results in higher client satisfaction and loyalty, higher productivity and profitability; and (ii) it is a core to a lawyer’s Duty of Competence under the Rules of Professional Conduct; competent representation suffers when a lawyer’s health declines.</p>
<p>Develop a “Law Firm Roadmap” for Well-Being Best Practices</p>	<ol style="list-style-type: none"> 1. Creation of lawyer and staff well-being committees and strong mentoring programs and sponsorship programs; 2. Cap billable hours and bonus availability no higher than 1800 hours; consider alternative billing arrangements and client expectation of value; 3. Support taking full allotment of vacation time and parental leave/flexible work policies; actively encourage fathers to take parental leave; 4. Sign the ABA “Well-Being Pledge for Legal Employers.” 5. Develop best practices tailored to the firm and institutionalize periodic HR assessment of attorneys’ well-being, at least annually. 6. Actively manage client expectations; create a formal “coverage” system to avoid disruption of services to clients. 7. Establish discussion groups for confidential and safe forums for lawyers to discuss well-being issues. 8. Encourage sabbaticals; emphasize the importance of HR intervention or involvement. 9. Resources tailored to smaller firms and solo practitioners to developed by the NYSBA Well-Being Committee and LPM including coverage policies, programs on work/life balance, technology assistance, health/disability insurance affordability, student loan forgiveness, etc.
Recommendations for Courts	Suggested Considerations and Implementations
<p>In the Courtroom</p>	<ol style="list-style-type: none"> 1. Judiciary should make a greater effort to seek attorney input when establishing scheduling orders, when requests for virtual appearances are made and must be more flexible when valid attorney concerns call into question the feasibility of that schedule; 2. Allow virtual appearances to continue for certain proceedings. 3. Standardize the Rules of Court for particular courts within the Unified Court System (UCS) as a whole, to the greatest extent possible. 4. Accommodations for attorneys with disabilities should include the opportunity to participate virtually.

	<ol style="list-style-type: none"> 5. Assign attorneys at the earliest possible point in the courts that are highly charged arenas – i.e., family court, criminal court and housing court.
<p>Well-Being and Diversion</p>	<ol style="list-style-type: none"> 1. All Appellate Divisions to use diversion programs when disciplinary proceedings are brought against attorneys engaging in conduct due to issues with mental health, substance and alcohol abuse. 2. Take steps to minimize the potential for an ignored complaint of professional misconduct/grievance; and 3. Develop and implement mandatory pre-admission professionalism courses.
<p>Well-Being and Education</p>	<ol style="list-style-type: none"> 1. OCA to join NYSBA in supporting the tenets of the following Attorney Wellness Policy Statement (Appendix E). 2. UCS to institutionalize services and policies relating to substance use, mental health and other addiction disorders, including education, training, peer support and access to treatment. 3. Judicial training programs should stress the importance of judges treating members of the bar with dignity and respect; the challenges of mental health challenges and substance use disorders prevalent in the profession; and the ethical obligations to avoid even the appearance of bias. 4. Provide court system leaders with specific objectives including, but not limited to: <ol style="list-style-type: none"> a. A commitment to establish “wellness liaisons” in every District to act as initial points of contact; b. A commitment to offer and encourage attendance at regularly scheduled wellness programming throughout each District; and c. A commitment to set aside funding in each District’s annual budget to ensure consistent provision of wellness programs.

APPENDIX A
New York State Bar Association
Attorney Well-Being Survey (2020)²²⁹
SUMMARY

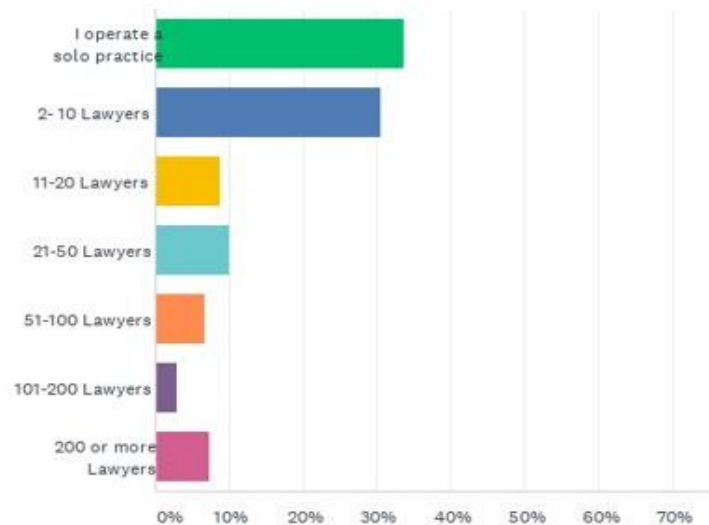
²²⁹ The Task Force engaged Spa City Consulting, LLC to evaluate the quantitative and qualitative information received given the volume of the responses and the complexity of the information to be analyzed. On March 7, 2021, the firm provided the Task Force with “The New York State Bar Association’s Well-Being Survey 2020: Selected Areas of Analysis Results,” which is the basis for this Summary.

Demographic Survey Results

Nearly two-thirds of all respondents (63%) practice law in either a solo or small firm (2-10) setting which is the same demographic of solo/small practice survey (63%) from the 2019 ABA Legal Technology Survey Report: Volume III: Law Office Technology.²³⁰ It is also largely consistent with the statewide findings of the NYS Commission to Examine Solo and Small Firm Practice Report from 2006 which cited to the 2004 NYSBA Desktop Reference on The Economics of Law Practice in New York State,²³¹ as well as the 2019 NYSBA Report and Recommendations on Rural Justice Task Force Report.²³² In sum, New York State remains a solo and small practice jurisdiction where the vast majority of lawyers (respondents to the survey or otherwise) work in small offices settings; presenting unique challenges to their well-being as compared to their large firm or government counterparts.

Q2: How many lawyers practice at your office?

Answered: 3,037 Skipped: 52



²³⁰ https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/solosmallfirm19/

²³¹ <https://www.nycourts.gov/LegacyPDFS/IP/jipl/pdf/ssfreport.pdf> ; <https://www.nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf>

²³² [http://www.nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf](https://www.nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf)

Report of the Task Force on Attorney Well-Being

Q2: How many lawyers practice at your office?

Answered: 3,037 Skipped: 52

ANSWER CHOICES	RESPONSES	
I operate a solo practice	33.72%	1,024
2- 10 Lawyers	30.59%	929
11-20 Lawyers	8.76%	266
21-50 Lawyers	10.11%	307
51-100 Lawyers	6.62%	201
101-200 Lawyers	2.83%	86
200 or more Lawyers	7.38%	224
TOTAL		3,037

Notably, an overwhelming majority of respondents are in private practice and are in their second-half of practice lives. The breakdown of (1) the type of office lawyers are practicing in and (2) the lawyers in the first 20 years of their professional experience is as follows:

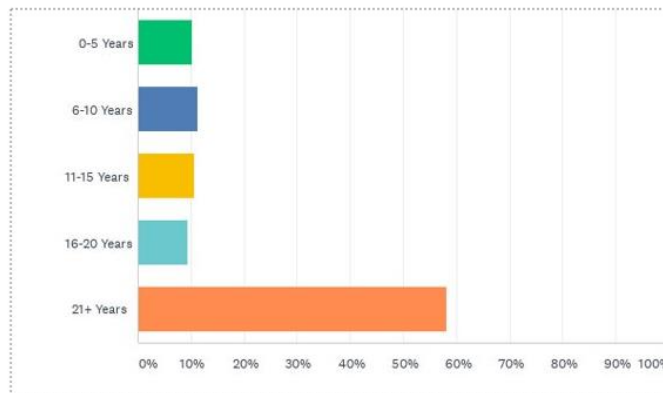
Q3: What is the type of office in which you practice?

Answered: 3,074 Skipped: 15

ANSWER CHOICES	RESPONSES	
Law Firm	64.15%	1,972
In-house counsel department	6.96%	214
Government or agency	10.51%	323
Legal Aid	5.43%	167
Judiciary	4.33%	133
Other (please specify)	8.62%	265
TOTAL		3,074

Q1: How many years have you been licensed to practice?

Answered: 3,076 Skipped: 13



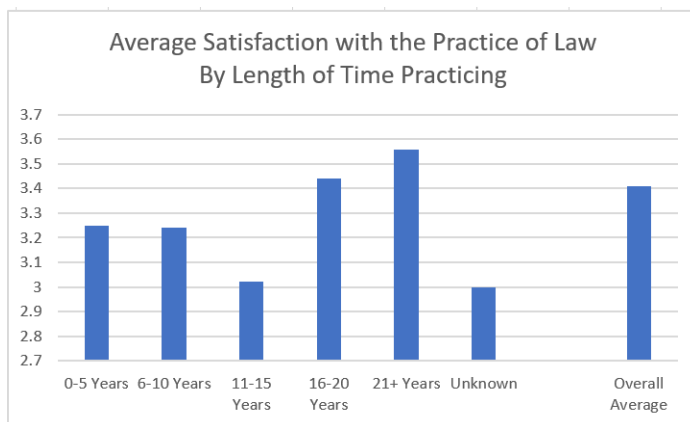
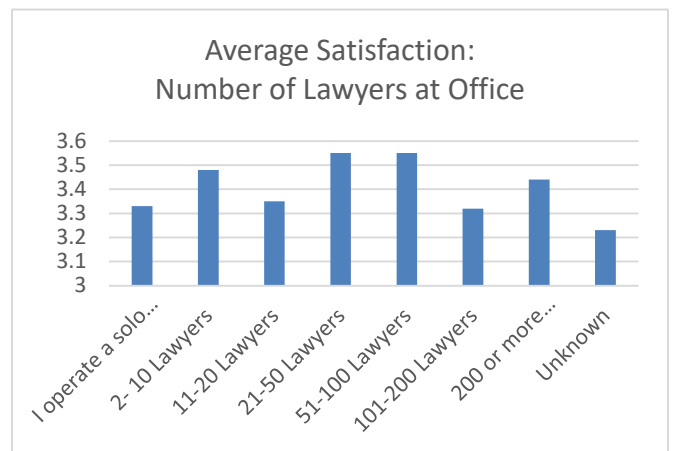
Report of the Task Force on Attorney Well-Being

ANSWER CHOICES	RESPONSES	
0-5 Years	10.34%	318
6-10 Years	11.28%	347
11-15 Years	10.76%	331
16-20 Years	9.36%	288
21+ Years	58.26%	1,792
TOTAL		3,076

By cross-analyzing the well-being responses from the Survey against the demographic information of the respondents, a much clearer picture emerged regarding the disparate ways in which stress, anxiety, physical health, access to resources, and day-to-day impacts affected different cohorts of lawyers. Areas of examination included overall satisfaction, impacts on wellbeing, access to resources, program and skills training, physical and mental health, and the role of the judiciary. We also received feedback concerning the importance of wellbeing for lawyers and what lawyers believed can and should be done to address the problem. A summary of the Survey results is provided in the next section.

Overall Satisfaction in the Practice of Law

We learned a great deal about the arc of a lawyer's career and how each stage affects individual lawyers differently. We learned that lawyer satisfaction was generally greatest for those in government or other service positions, such as Legal Aid, and that, for most lawyers, their level of satisfaction did not rise or fall in tandem with their salary. The lawyers who expressed the most satisfaction with their positions were further along in their careers.



We also learned that years 5-15 of practice are often the most stressful, peaking at around year 10. Here is where the disconnect between expectations of what lawyering would be like, and the reality of actual practice, sets in, which can trigger what is known as “professional identity crisis”²³³. At that point, lawyers often feel they have lost their place in the legal system, sometimes in society itself. They feel disconnected from the profession they have poured so much of themselves into, and no longer understand their roles in it or how they fit in. Importantly, we understand that this can be a tipping point for lawyers.



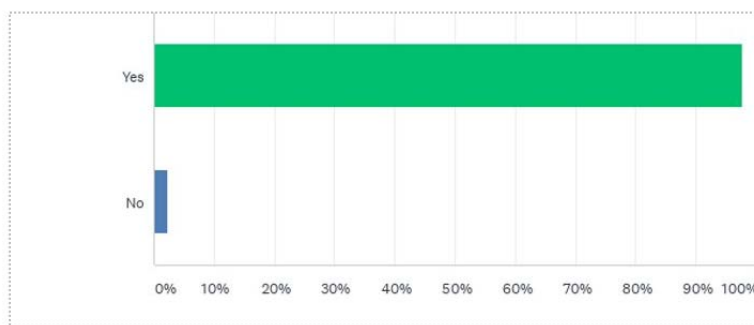
In summary, the overall satisfaction with the practice of law was 3.42 on a scale of one to five. Lawyers who have been practicing for 21 or more years were most satisfied with the profession. The judiciary also reported higher satisfaction than the other types of practice. Congruent with the overall results, solo practitioners in the field for 21 or more years had the most satisfaction. Solo practitioners with 6-15 years of experience were some of the least satisfied individuals with the profession, with averages under three. Respondents with 101-200 lawyers at their office were least satisfied, while those with 21-50 were most satisfied.

Greatest Impacts on Well-Being

The overwhelming majority of lawyers, when asked, agree that “fitness to practice” is part of our duty and responsibility as lawyers. The results exceeded 97% in the affirmative – the most significant collective response in the entire Survey.

Q6: Do you consider your “fitness to practice” as part of your responsibility as a lawyer?

Answered: 3,072 Skipped: 17



So, lawyers are keenly aware that their health and fitness to practice is an indelible part of their role. We then endeavored to discover what they believe impacts that responsibility. When we asked lawyers about the greatest impacts to their wellbeing, they were provided a list of 15 choices from which they could select up to

5, as well as have the opportunity to provide free-text of the response of their choosing. The overall top answers for the greatest impacts on one’s well-being as a lawyer were:

- Lack of boundaries regarding “down time” or “never off”

²³³ See Mary Walsh Fitzpatrick & Rosemary Queenan, *Professional Identity Formation, Leadership and Exploration of Self*, 89 UMKC L. Rev. 539, Spring 2021.

Report of the Task Force on Attorney Well-Being

- Client expectations and demands
- Financial pressures in the “business of law
- Judges/Judiciary and COVID Impacts as the most common write-in answer.

Even when the results were cross analyzed against type of practice, the size of the office, or the number of years in practice, the results did not differ widely.

Type of Practice	Top Answer	Number of Responses	Total Population	Percentage of Responses
Law Firm	Lack of boundaries for “down time” or “never off”	719	1195	60%
Solo Practice	Lack of boundaries for “down time” or “never off”	463	969	48%
Government or Agency	Culture of law and/or the culture of my work setting	175	299	59%
In-house counsel department	Lack of boundaries for “down time” or “never off”	117	208	56%
Legal Aid	Lack of boundaries for “down time” or “never off”	114	183	62%
Judiciary	Isolation	61	135	45%
Retired, Unemployed, Other, or Unknown	Lack of boundaries for “down time” or “never off”	56	100	56%

Years Have You Been Licensed to Practice?	Top Answer	Number of Responses	Total Population	Percentage of Responses
0-5 Years	Lack of boundaries for “down time” or “never off”	191	318	60%
6-10 Years	Lack of boundaries for “down time” or “never off”	225	347	65%
11-15 Years	Lack of boundaries for “down time” or “never off”	204	331	62%
16-20 Years	Lack of boundaries for “down time” or “never off”	164	288	57%
21+ Years	Lack of boundaries for “down time” or “never off”	879	1792	49%
Unknown	Lack of control over schedule	8	13	62%

Report of the Task Force on Attorney Well-Being

How Many Lawyers Practice at Your Office?	Top Answer	Number of Responses	Total Population	Percentage of Responses
I operate a solo practice	Lack of boundaries for “down time” or “never off”	492	1024	48%
2- 10 Lawyers	Lack of boundaries for “down time” or “never off”	489	929	53%
11-20 Lawyers	Lack of boundaries for “down time” or “never off”	166	266	62%
21-50 Lawyers	Lack of boundaries for “down time” or “never off”	189	307	62%
51-100 Lawyers	Culture of law and/or the culture of my work setting	106	201	53%
101-200 Lawyers	Lack of boundaries for “down time” or “never off”	63	86	73%
200 or more Lawyers	Lack of boundaries for “down time” or “never off”	145	224	65%
Unknown	Lack of boundaries for “down time” or “never off”	20	52	38%

Other notable information from the cross-analysis on impacts to lawyer well-being included:

- Several government or agency respondents indicated that lack of options for advancement and lack of appreciation contribute to their lack of satisfaction with the field of law.
- Discrimination against lawyers with disabilities, racism, sexism, and ageism were all noted as contributors to lack of satisfaction by some solo practitioners.
- E-discovery and increasing rules and regulations were indicated as stressors by some of those who work as in-house counsel.
- Billable hours were cited as something that causes stress to individuals who work in law firms.
- High caseloads were called out by several people working for Legal Aid as well as by lawyers with 21-50 people at the office.
- Lack of agency/autonomy noted by several individuals in firms of 200 or more.
- Inadequate support was noted by some individuals in firms with 2-10 lawyers.
- Because the question permitted free-text responses, it is notable that several respondents noted that all the given answer choices skewed negative and a few listed positive aspects

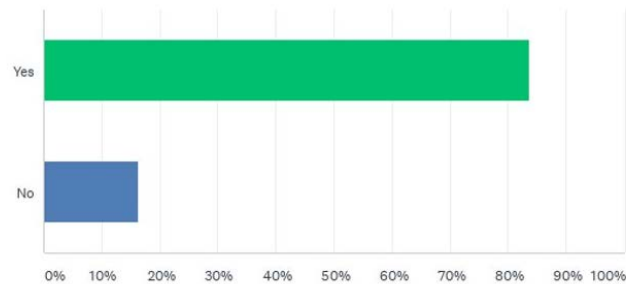
of being a lawyer (e.g., helping clients brings satisfaction, good colleagues have a significant positive impact) while others noted things they do to improve their well-being, such as exercise.

The Role of the Judiciary

As noted above, the most common text-free response to the impact to lawyer wellbeing was “judge/judiciary.” The Survey responses indicate that lawyer overwhelming believe that the judiciary and the courts have a role to play in the promoting lawyer wellbeing – by a margin of about 84%.

Q7: Do you believe the judiciary has a role to play in promoting lawyer well-being and mental health?

Answered: 3,076 Skipped: 13



The next question concerned how the judiciary impacts lives of attorney and their wellbeing. Once again, lawyers were given a series of suggested choices and were also permitted to write responses in narrative form.

Q8: What actions could the judiciary take to reduce your stress and foster well-being? (Please select 5 choices)

Answered: 3,014 Skipped: 75

ANSWER CHOICES	RESPONSES
Liberalize adjournment requests where appropriate and not prejudicial	51.73% 1,559
Reduce emphasis on standards and goals	34.37% 1,036
Allow letter briefs in certain cases	29.16% 879
Increase on the record conferences	14.86% 448
Continue certain virtual appearances even after the pandemic ceases	67.42% 2,032
Ensure that judges have ready access to mental health referrals	16.49% 497
Add training for judges to spot stress issues among the Bar	27.47% 828
Adjust judicial temperament	53.35% 1,608
Increase access to Court Attorneys	22.00% 663
Harmonize differing rules and requirements of judges within the same court	58.10% 1,751
Other (please specify)	16.62% 501
Total Respondents: 3,014	

The overall top answers for actions the judiciary could take to reduce one’s stress and foster well-being across all demographics (office setting, practice area, years in practice) were:

- (1) Continue certain virtual appearances even after the pandemic ceases

(2) Harmonize differing rules and requirements of judges within the same court

(3) Adjust judicial temperament

Other noteworthy text responses included:

- Virtual appearances made their practice more efficient, although some people advocated for a full return to in-person operations.
- Courts need to address racism.
- The judiciary should be respectful of attorneys' time.
- Some solo practitioners and lawyers in smaller offices indicated they feel the judiciary favors lawyers from larger firms.
- Apply rules equally to plaintiffs' and defendants' counsel.
- Improve transparency in election/selection of judges and foster true diversity and equity across race, ethnicity gender and class.
- Big law firms often bully small firms - courts should be aware of this and stop giving such deference to large firms.
- Most Judges are courteous and accommodating. It is only a few that make life difficult.
- Ask attorneys when they want a case to be adjourned to instead of picking it based on their schedule alone.

Lawyers with Disabilities in the Courtroom: The narrative responses and cross-analysis revealed that 88% (7 out of 8) lawyers who self-disclosed a disability stated that continuing certain virtual appearances even after the pandemic ceases is something the judiciary can do to help with disabled lawyer well-being. For the judiciary, the comments from individuals that identified as having a disability were as follows:

- Video has reduced the need for adjournments. It also provides greater access for disabled counsel.
- Provide opportunities for disabled attorneys.
- Understand disabilities; I am in a wheelchair.

Stereotyping in the Courtroom: Additionally, the Survey brought to light that more than 20% of lawyers have had

Q16: If you answered yes to Question #15, please check the applicable boxes below that apply to you.

Answered: 947 Skipped: 2,142

ANSWER CHOICES	RESPONSES	
LGBTQ	7.29%	69
Male	23.13%	219
Female	49.74%	471
Person of Color	15.31%	145
Attorney admitted ten years or less	29.14%	276
Attorney admitted ten years or more	34.00%	322
Prefer not to answer	17.53%	166
Total Respondents: 947		

their credentials to practice law questioned by another attorney, the judiciary, court officer or lay person while in the course of their duties. The results indicate a demonstrable intersection of stereotyping, discrimination and “othering” and well-being. In other words, lawyer well-being is inextricably linked to diversity and inclusion efforts as lawyers who identify in minority groups experience these targeted impacts to their mental and emotional health differently than majority groups.

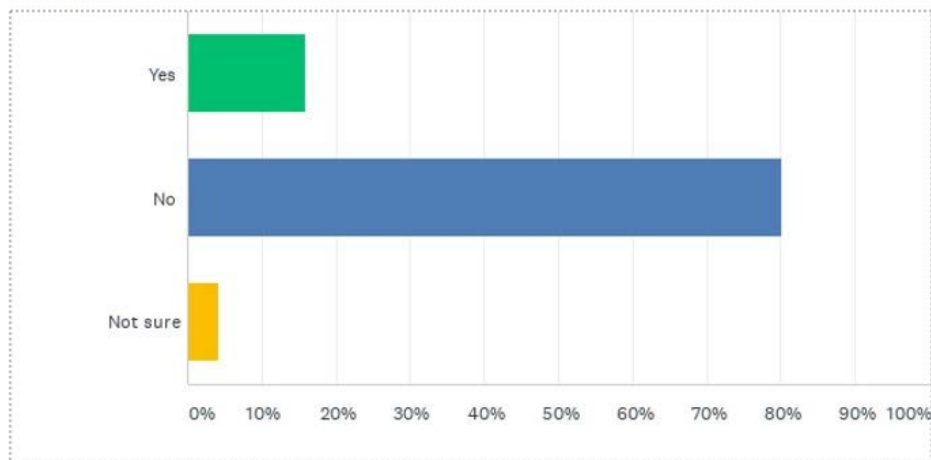
State of Emotional Well-Being Before and During COVID

We next asked lawyers to tell us about their perspectives on their own emotional well-being in the last three years, as well as the use of substances during the COVID-19 pandemic. It was important to the Task Force to understand how lawyers self-assessed their own mental health and coping mechanisms during such an unprecedented time in our history.

When asked whether they had consumed for alcohol or drugs than intended or felt that they should “cut back” or “quit,” lawyers told us that about 17% of them were consuming more substances than they either previously had and/or felt the need to reduce or quit altogether. Another 4% admitted that they “were not sure” whether their substance use was a problem.

Q17: Since the COVID 19 pandemic has descended upon us, have you consumed more alcohol or drugs than you intended, or felt you should cut back or quit but could not?

Answered: 3,058 Skipped: 31



When asked whether lawyers had experienced a mental health-related problem or concern in the last three years, nearly 37% of lawyers indicated that they had. Legal Aid employees were the only group of practitioners where most respondents indicated they had thought about seeking professional support for a mental health concern in the past three years. Over 70% of judiciary and solo practitioners indicated they had not considered it.

Of the people who had considered seeking support, the majority (62%) found support and 44% of people who considered seeking support found supports that were helpful. However, 26% of

Report of the Task Force on Attorney Well-Being

the people who indicated they had considered seeking support did not indicate whether they found it.

Type of Practice	Yes		No	
	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses
Law Firm	393	33%	795	67%
Solo Practice	266	28%	695	72%
Government or agency	115	39%	181	61%
In-house counsel department	76	37%	131	63%
Legal Aid	98	54%	83	46%
Judiciary	30	22%	105	78%
Retired, Unemployed, Other, or Unknown	41	42%	57	58%
Grand Total	1019	33%	2047	67%

Did You Find Support?	Did You Find Support Helpful?										Total Number of Responses	Total % of Responses
	Yes		No		Somewhat		N/A		(blank)			
	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses		
Yes	451	44%	28	3%	135	13%		0%	15	1%	629	62%
No		0%		0%	1	0%	68	7%		0%	69	7%
Somewhat	1	0%	10	1%	12	1%		0%	2	0%	25	2%
N/A - did not seek support		0%		0%		0%	9	1%		0%	9	1%
(blank)	21	2%	4	0%	1	0%	1	0%	260	26%	287	28%
Grand Total	473	46%	42	4%	149	15%	78	8%	277	27%	1019	100%

Of the people who had indicated they did not consider seeking support for a mental health-related concern in the past, 71% *did not* provide a reason. Of the responses obtained, the top three were: (1) support not needed; (2) no time; and (3) already had supports in place.

Report of the Task Force on Attorney Well-Being

If you did not consider seeking help, why not?	Number of Responses	Percentage of Responses
(blank)	1456	71.1%
Not needed	380	18.6%
No time	40	2.0%
Already had supports	32	1.6%
worked it out or attempted to work out on my own	22	1.1%
Did not feel it would help	21	1.0%
Found support	21	1.0%
Confidentiality concerns	13	0.6%
Not severe enough	13	0.6%
Other	9	0.4%
Stigma	9	0.4%
Cost and time	7	0.3%
Unsure of resources available	7	0.3%
Cost	6	0.3%
Uncomfortable seeking help	5	0.2%
too overwhelmed	4	0.2%
Seeking now or plan to seek	1	0.0%
Difficulty finding support/ support unavailable	1	0.0%
Grand Total	2047	100.0%

Accessing Resources

After identifying how they are feeling and what is impacting their well-being, we then asked lawyers to let us know about helpful resources they are aware of, which ones they have accessed and found helpful, and, in other cases, why they have not. Certainly, it was important to discover whether New York lawyers faced the same help-resistance identified in the ABA National Task Force Report on Lawyer Well-Being and why. Its research included an expansive list of reasons why lawyers are so help-averse, including: (1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture's negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules. Moreover, while not in New York, state applications for the bar admission require disclosure by a lawyer if he or she has received treatment for any type of mental illness.²³⁴ Perhaps most importantly, we desired feedback from New York lawyers about what *they* believed would help in breaking down these barriers.

²³⁴ M. Elizabeth Coreno & Kerry Murray O'Hara, PsyD, *Attorney Wellbeing: The Science of Stress and the Road to Well-Being*, NYSBA J., Oct. 2019.

Report of the Task Force on Attorney Well-Being

Access to Emotional Support Services

We asked lawyers to tell us, if they sought emotional support, how did they go about accessing it? It was an entirely free-text, narrative question and all 566 unique responses were consolidated into a summary of the qualitative data. From a baseline perspective, there was a 74% response rate for individuals who did seek support for their emotional well-being concerns. Individuals who work in law firms with two or more lawyers were most likely to ask their doctor for assistance, whether to obtain a referral or other help. Solo practitioners, government or agency staff, Legal Aid, and retired, unemployed, other, or unknown all were most likely to seek a recommendation from a family member or friend. Members of the judiciary were most likely to connect with their health insurer. Several people across types or practices found a mental health specialist through a Psychology Today search.

Lawyers in the early years of practice (0-5 years) were most likely to do an internet search for supports. People in the field 6-10 years were most likely to either do an internet search or to get a recommendation from a friend or family member. Individuals in the field 11-15 years or 21 or more years were most likely to ask for a recommendation from a friend or family member, whereas people with 16-20 years of experience would most likely reach out to their health insurer.

If you sought support how did you go about finding it?	0-5 Years	6-10 Years	11-15 Years	16-20 Years	21+ Years	Unknown	Total Number	Total Percentage
(blank)	41	47	40	28	113	1	270	26%
Recommendation from friend or family	14	25	27	18	69		153	15%
Asked my doctor	14	18	22	14	61		129	13%
Internet search	35	25	18	1	14	1	94	9%
Health insurer	16	21	10	19	22	1	89	9%
Already had support	8	4	6	8	11		37	4%
Did not seek support	3	6	10	4	11		34	3%
Independent search	5	5	6	3	8		27	3%
EAP	6	7	1		8		22	2%
Referral	1	2	2	2	10		17	2%
Found a mental health professional	2		1	2	12		17	2%
Professional connections	3	1	1	2	9		16	2%
Mental health professional used in the past		6	2	1	7		16	2%
Other	6	1	1	1	5		14	1%
LAP			3	2	9		14	1%
Recommendation from another attorney	1	2	1	2	7	1	14	1%
Bar Association resource		1	3	1	5		10	1%
Psychology Today search	2	1	4	1	1		9	1%
Spoke with friends/ family/ faith leader		1	1		6		8	1%
Called providers	1	2		1	2		6	1%
Local provider search	3				3		6	1%
Privately	1				4		5	0%
Through the veterans' organizations			1		2		3	0%
Could not find	1				2		3	0%
Through mental health providers	1		1				2	0%
I don't remember			1		1		2	0%
Still seeking					2		2	0%
Grand Total	164	175	162	110	404	4	1019	100%

Report of the Task Force on Attorney Well-Being

Perhaps as important were the reasons provided why resources *were not* accessed for a lawyer who had identified a mental health concern.

Most lawyers who did not seek support (71%) did not indicate why. Of those who gave a reason, almost 19% indicated it was not needed, followed by another 2.5% indicating they already had supports in place. More than any other groups, people in firms of 101-200 lawyers and those in firms of unknown size had concerns about confidentiality.

Across all practice sizes, except one, a severe need of services would have made it more likely that someone would seek out supports, i.e. must be in crisis before seeking help. However, almost 29% of lawyers who answered this question are in firms sized 101-200 and they indicated that would only seek services if confidentiality were guaranteed.

Additional analysis was necessary to discern the volume of reasons for not seeking support in the narrative, free-text responses. Lawyers told us all kinds of personal reasons why they were not inclined to seek support for an issue of which they were aware. Some of the most noteworthy and common narrative responses are paraphrased below:

- I live in a small city (town).
- I do not have time.
- My health insurance covers a fraction of the cost.
- It takes too much time away from all the other directives that are being thrown at us.
- Felt I should be able to handle it on my own. No one wants a “weak” lawyer.

Why didn't you seek support?	Percentage Did Not Seek Support for This Reason								Grand Total
	I operate a solo practice	2- 10 Lawyers	11-20 Lawyers	21-50 Lawyers	51-100 Lawyers	101-200 Lawyers	200 or more Lawyers	Unknown	
(blank)	70.1%	72.4%	68.8%	73.1%	73.6%	62.5%	68.0%	81.6%	71.1%
Not needed	21.5%	17.1%	16.2%	15.6%	18.6%	16.7%	18.4%	13.2%	18.6%
Already had supports	2.0%	2.4%	2.9%	3.8%	2.3%	6.3%	3.2%	0.0%	2.5%
No time	1.2%	1.5%	4.0%	2.7%	1.6%	6.3%	4.0%	0.0%	2.0%
Worked it out or attempted to work out on my own	1.4%	1.0%	2.3%	0.5%	0.0%	0.0%	0.8%	0.0%	1.1%
Did not feel it would help	0.7%	1.1%	0.6%	1.1%	1.6%	2.1%	2.4%	2.6%	1.1%
Not severe enough	0.3%	1.3%	0.6%	1.1%	0.8%	0.0%	0.0%	0.0%	0.7%
Confidentiality concerns	0.7%	0.5%	0.6%	1.1%	0.0%	2.1%	0.0%	2.6%	0.6%
Other	0.3%	0.5%	1.2%	0.5%	0.8%	0.0%	0.0%	0.0%	0.4%
Stigma	0.3%	0.3%	0.6%	0.5%	0.0%	2.1%	1.6%	0.0%	0.4%
Unsure of resources available	0.5%	0.3%	0.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.3%
Cost and time	0.7%	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.3%
Cost	0.4%	0.3%	0.0%	0.0%	0.8%	0.0%	0.0%	0.0%	0.3%
Uncomfortable seeking help	0.0%	0.3%	1.2%	0.0%	0.0%	0.0%	0.8%	0.0%	0.2%
Too overwhelmed	0.0%	0.2%	0.6%	0.0%	0.0%	2.1%	0.8%	0.0%	0.2%
Seeking now or plan to seek	0.0%	0.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Difficulty finding support/ support unavailable	0.0%	0.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Grand Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Lawyers allowed told us what would make them more likely to seek support in the future. The narrative responses were pulled and categorized for the following summary:

- Availability of a counselor of my race and gender.

Report of the Task Force on Attorney Well-Being

- If I did not feel comfortable confiding in family or friends, I would avail myself of my employer’s EAP services.
- If there was some way to address my issues without repercussions from the judiciary.
- Greater certainty of confidentiality, which will probably never be certain, so I’ll continue to suffer in isolation and without getting help.
- Nothing. No time to stop for something like that.

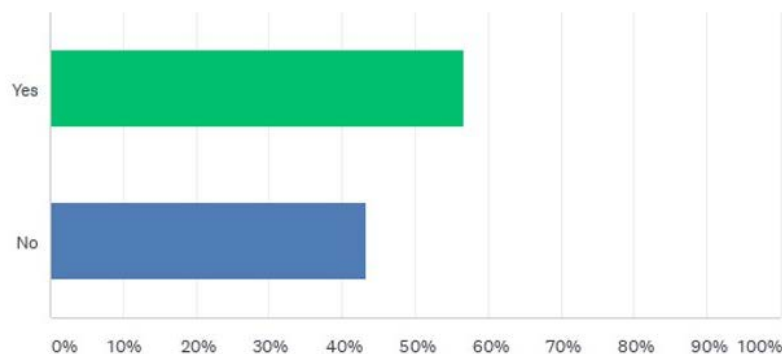
If you didn't seek support, what, if anything, would have made it more likely that you would seek support?	I operate a solo practice	2- 10 Lawyers	11-20 Lawyers	21-50 Lawyers	51-100 Lawyers	101-200 Lawyers	200 or more Lawyers	Unknown	Grand Total
A severe need	42.9%	54.0%	36.8%	7.7%	73.3%	0.0%	25.0%	33.3%	42.3%
A supportive work environment	0.0%	4.0%	5.3%	0.0%	0.0%	0.0%	0.0%	0.0%	1.6%
Anonymity	4.8%	2.0%	0.0%	23.1%	0.0%	0.0%	0.0%	0.0%	3.8%
Decreased stigma	1.6%	6.0%	5.3%	7.7%	0.0%	0.0%	8.3%	33.3%	4.4%
Ease of access	3.2%	4.0%	10.5%	0.0%	0.0%	14.3%	0.0%	0.0%	3.8%
Easily accessible telephonic resources	1.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.5%
Extra time	4.8%	2.0%	21.1%	7.7%	6.7%	0.0%	16.7%	0.0%	6.6%
Free or low cost services	9.5%	4.0%	15.8%	15.4%	0.0%	14.3%	0.0%	0.0%	7.7%
Guaranteed confidentiality	9.5%	8.0%	0.0%	0.0%	0.0%	28.6%	16.7%	0.0%	7.7%
Lack of support from family and friends	1.6%	2.0%	0.0%	15.4%	6.7%	14.3%	0.0%	0.0%	3.3%
Other	12.7%	4.0%	5.3%	7.7%	13.3%	14.3%	8.3%	33.3%	9.3%
Remote counseling options	1.6%	6.0%	0.0%	15.4%	0.0%	14.3%	16.7%	0.0%	4.9%
Vetted referrals	6.3%	4.0%	0.0%	0.0%	0.0%	0.0%	8.3%	0.0%	3.8%

Addiction and Lawyer Assistance Resources

It was critical for the Task Force to understand the depth to which Lawyer Assistance Program (LAP) education and outreach has penetrated the profession, as these programs are so vital to attorneys, law students, and judges. We asked lawyers whether they were aware of the NYSBA LAP, the NY City Bar Association LAP, or the Nassau County LAP and the services that are offered. The majority of all lawyers who responded (3,067) they *were* aware of at least one of the programs and its services – at a rate of nearly 57% percent.

Q14: Are you aware of the Lawyers Assistance Program at the New York State Bar Association, the New York City Bar Association and the Nassau County Bar Association and the free and confidential services they offer?

Answered: 3,067 Skipped: 22

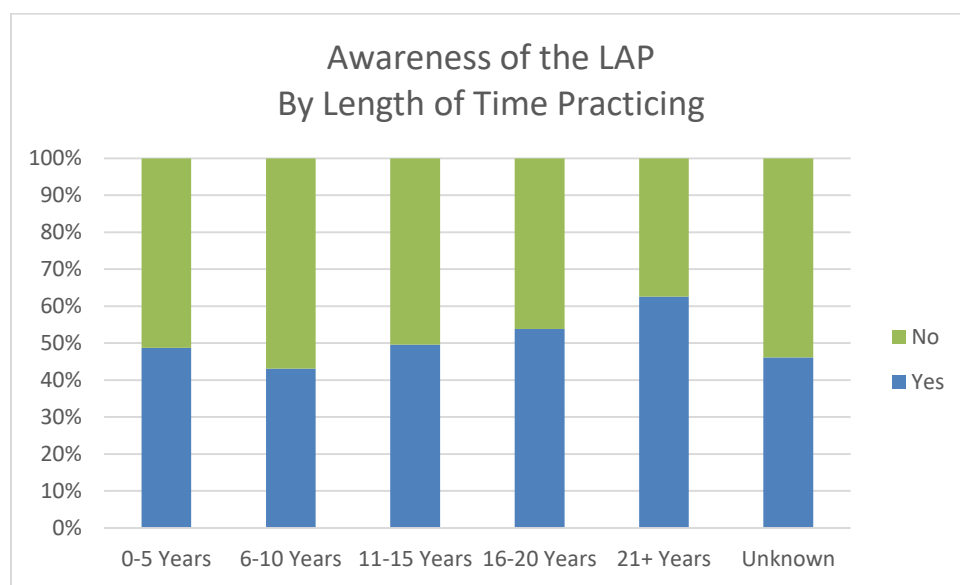


When cross analyzed against the demographic information, solo practitioners, the judiciary, and Legal Aid employees were most familiar with the LAP, with in-house counsel being least aware.

Report of the Task Force on Attorney Well-Being

Individuals in the profession for 6 to 10 years were least likely to be aware of the LAP, and practitioners in the field for 21+ years were most likely to know about it.

Type of Practice	Yes		No	
	Number of Responses	Percent of Responses	Number of Responses	Percent of Responses
Law Firm	660	55.56%	528	44.44%
Solo Practice	587	61.21%	372	38.79%
Government or agency	153	51.34%	145	48.66%
In-house counsel department	93	44.93%	114	55.07%
Legal Aid	108	59.02%	75	40.98%
Judiciary	83	62.41%	50	37.59%
Retired, Unemployed, Other, or Unknown	53	53.54%	46	46.46%
Grand Total	1737	56.64%	1330	43.36%

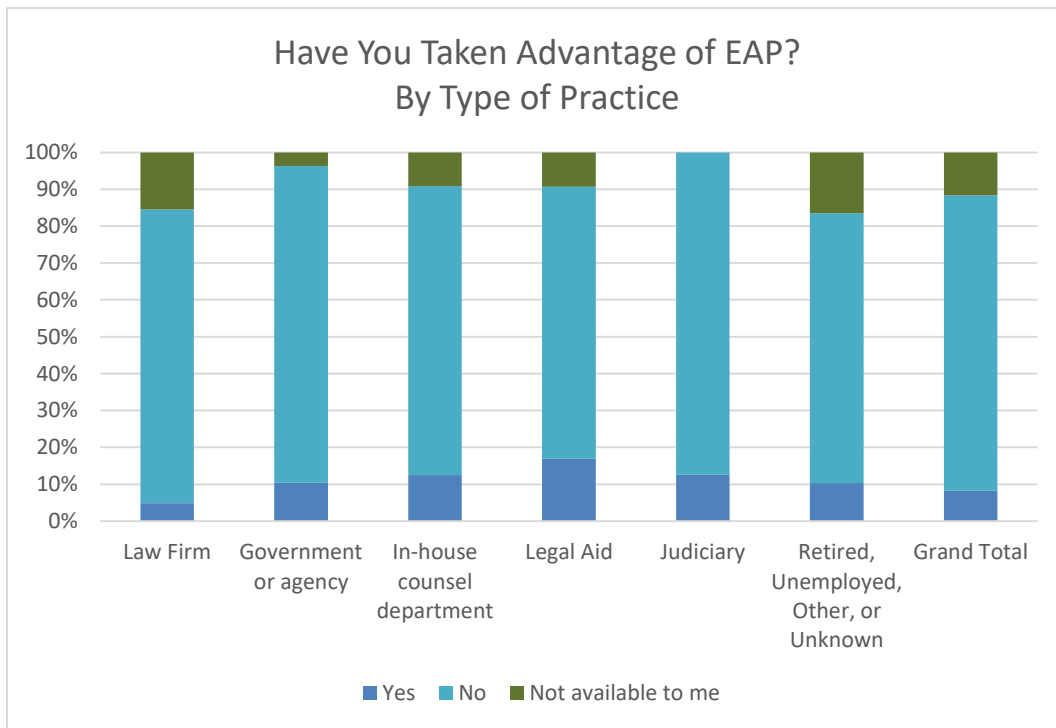


Employment Resources

When asked about Employee Assistance Programs for well-being, only 8% of lawyers indicated having used the resources when available. Those results were brought into further understanding when cross-analyzed with demographic information. Legal Aid attorneys were the most likely to use EAP services (17%) and law firm attorneys the least (5%). Likelihood of using EAP services was reduced to single digits for lawyers who have been practicing for more than 21 years.

Report of the Task Force on Attorney Well-Being

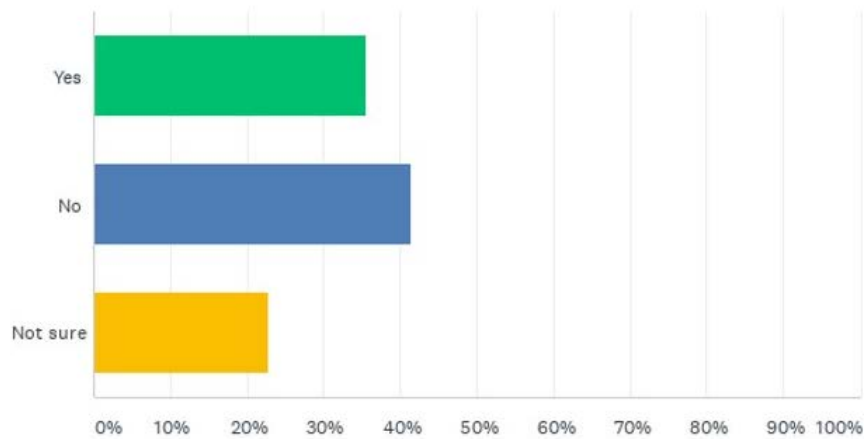
Length of Time Practicing Law	Yes		No		Not available to me		Total Number of Responses
	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses	Number of Responses	Percentage of Responses	
0-5 Years	27	10%	209	76%	40	14%	276
6-10 Years	28	10%	211	76%	39	14%	278
11-15 Years	19	8%	188	76%	41	17%	248
16-20 Years	23	11%	165	81%	15	7%	203
21+ Years	76	7%	911	83%	109	10%	1,096
Unknown		0%	7	70%	3	30%	10
Grand Total	173	8%	1,691	80%	247	12%	2,111



When we turned to ask about other employer resources, outside of EAP, lawyers provided information about their access and barriers to access from the solo practitioner to the large firm and government agency perspective. The first question we asked was to determine the number of employers with lawyer well-being policies at the firm level, as recommended by the National Task Force Report (2016). About 35% of the lawyers who responded are aware of their employers’ policy for attorney well-being and another 21% were not sure whether one existed.

Q10: Does your employer have a policy to assist you in taking the time needed to address attorney wellness issues?

Answered: 3,026 Skipped: 63



We also asked lawyers what they believed employers could do to better support their well-being, both mental and physical. Almost half of survey respondents, 46%, (excluding solo practitioners) elected *not* to provide an answer to this free-text, narrative question. Of the 1,135 responses received, nearly all were unique, however some patterns emerged.

- 6% of people in law firms, government or agencies, in-house counsel departments and the judiciary indicated that their employer already provides adequate supports, and 9% of people working for Legal Aid and 7% of “other” respondents indicated this was the case.
- An overarching theme was time off. Many people requested work-life balance, increased vacation time, sick time, or mental health days. Many of those requesting such things noted that they need to feel that the time off will truly be “off,” meaning no expectations regarding calls or e-mails. Several people indicated that having backup support, so they do not come back to an overwhelming workload is important.
- Other people noted that even if an office’s policies allowed for adequate time off, they felt pressure not to take it from partners or other people in authority.

As the responses were cross analyzed by demographics, the top three constructive answers for each type of practice are as follows:

- Law Firm: Ability to take time off/ work/life balance, reduce billable hour requirements/caseloads, adjust office culture to support mental health.
- Government or agency: Additional staffing (attorneys or support staff), check in with me/ treat me with respect, and flexibility to work remotely.

Report of the Task Force on Attorney Well-Being

- In-house counsel department: Ability to take time off/ work/life balance, additional staffing (attorneys or support staff), adjust office culture to support mental health.
- Legal Aid: Flexibility to work remotely, realistic expectations, additional staffing (attorneys or support staff).
- Retired, Unemployed, Other, or Unknown: Ability to take time off/ work/life balance, adjust office culture to support mental health, and flexibility to work remotely.

In what was the likely the most illuminating aspect of reviewing the volume and breadth of attorney responses, the testimonials, stories, fears and anger poured out of lawyers in response to this question and provided important harbingers of a profession moving quickly towards inhumane and a collective burnout. The comments below have been paraphrased and summarized to highlight key themes from the responses to what lawyers believed employers could do to help them:

- As an associate, greater empathy and attention to workload from the partners – but the whole system seems hopelessly broken. Everything that the profession likes to talk about in terms of well-being is a band-aid to treat the symptoms rather than facing up to the underlying causes of so much depression and misery – we should not need hotlines and mindfulness trainings, etc. in the first place, and we should ask ourselves what has gone so very wrong that we find ourselves in this position.
- I think management needs to actually support the grunt work. I am lucky and my bosses encourage us to take time off or “enjoy the nice weather,” but it’s also unrealistic because we are so busy and sometimes the comments are more frustrating than supportive. So, I think providing actual support (more collaboration perhaps) and showing that you have a real understanding of our work, so that we can actually take the suggested break and feel supported in that way-like you actually want to be involved to support us.
- Let us use sick days or take medical leave when we need it without lines like “if you’re not better when you come back, maybe you’re not cut out to be an attorney.” Everyone heals at a different rate. We suffer from varying severity of diseases and injuries. There is a learning curve to managing new disability or diagnosis with a chronic disease. Surgery does not fix everything, and there are non-surgical treatments that require recovery time as well. And in the age of unprecedented ways to work and communicate without being in the office in person, we are most effective as lawyers when we are allowed to manage our own health. Managing partners that shame us for trying to take care of ourselves and blindly micro-manage the health of their attorneys only perpetuate the lack of attorney well-being.
- Push back on clients’ unrealistic expectations and create a culture of protected time for attorneys. If you want to get a sense of what junior attorneys think of their law firms’

well-being initiatives, look up the countless memes online about how law firms require attorneys to bill 80-hour weeks and then encourage them to attend a mental health webinar – believing this fulfills their duty to look after attorneys’ mental health. Well-being CLEs and free meditation apps are band-aid solutions that ignore the root issue, which law firms refuse to address.

- Set the example. Never being “off” gives the impression that no one else can either.

NYSBA Resources

Since the vast majority law practice in New York is small practice, it was important to the Task Force to identify the resources that NYSBA, as a statewide organization, might consider offering lawyers who otherwise do not have access to larger firm resources. So, we asked lawyers to tell us what services and resources they would be interested in from NYSBA to improve their overall well-being.

The question was asked in a fully open format and allowed lawyers to write any manner of response. Of the 2,149 responses provided, 1,484 answers were unique, requiring a full review to consolidate them and track for themes. After consolidating similar answers, the top three overall requests of NYSBA to assist with physical fitness and health were:

- A gym or fitness membership discount, or discounted fitness equipment (479)
- A request that NYSBA advocate for cultural change (147)
- Free or low-cost counseling (114)

By practice type, solo practitioners indicated that group health insurance would be valuable to them. Solos also requested resources geared toward them, including support groups. In-house counsel and members of the judiciary indicated that webinars, seminars, literature, newsletter articles would be useful to them. Some people took the opportunity to request specific CLEs, like ones tiered based on family law experience.

It is also important to note that “cultural change” meant different things to different people. Many people said that NYSBA should advocate for 40-hour workweeks and flexible business practices in firms and with the courts, where others invited NYSBA to engage in anti-racism work, closing the gender gap, and building understanding for lawyers with learning disabilities.

Noteworthy suggestions to NYSBA from respondents include:

- As a solo practitioner, it would be helpful if the Association could arrange for attorneys to step in when mental health issues, exhaustion takes one’s focus away from the practice.
- Something about how to access benefits without shame.

Report of the Task Force on Attorney Well-Being

- The firm environment, which is not supportive of women and minorities and parents is my major problem. Collecting and publishing hiring and retention data on these issues to make firms publicly accountable would help.
- The thing that is missing is for solo and small firms having to deal with the pressures of too much work (need to take the case to earn a living) vs. the time that each case requires.
- Training for the judiciary to correct racial bias, bias against women, and bias against legal aid attorneys.
- Reduced membership fee with CLE on fitness.
- I know the idea is it would be confidential but far too many things across many fields that were supposed to be confidential ended up not being so I do not think I would be comfortable doing this through the NYSBA.

Funding for wellbeing programs by New York State also appeared in the Survey results, including whether lawyers would support a modest fee increase in the biennial registration if it was solely limited to attorney well-being. Most lawyers supported the initiative (49.51%) in its entirety, while another 25.41% would support increased funding without an increase in the registration fee. The balance of respondents did not support increased funding (25.08%).

Additionally, lawyers were supportive of reduced malpractice insurance premiums if the lawyers demonstrated engagement with specified well-being training (83.24%).

Report of the Task Force on Attorney Well-Being

What could NYSBA provide to help you improve your physical fitness and health?	Law Firm	Solo Practice	Government or agency	In-house counsel department	Legal Aid	Judiciary	Retired, Unemployed, Other, or Unknown	Grand Total
Online or In-Person Fitness program/membership discounts or home gym equipment discounts	36.4%	34.6%	47.6%	35.7%	51.7%	48.3%	46.5%	38.8%
Advocate for cultural change	16.7%	11.3%	15.4%	13.0%	5.5%	7.7%	14.5%	13.5%
Free or low cost counseling	10.3%	10.1%	10.7%	5.0%	12.1%	2.6%	0.0%	9.4%
Other	8.4%	11.9%	2.6%	5.0%	7.9%	9.8%	2.4%	8.4%
Webinars, seminars, literature, newsletter articles	7.3%	5.6%	3.4%	9.5%	5.6%	6.6%	11.2%	6.5%
sponsored leisure activities	4.4%	3.5%	10.0%	9.4%	5.9%	4.2%	4.2%	5.2%
Mentoring, Peer Counseling, or Support Groups	2.9%	4.8%	2.2%	2.0%	5.5%	8.8%	1.9%	3.7%
Group health (medical, drug, dental) plan	1.4%	6.8%	0.0%	4.5%	1.7%	0.0%	0.0%	3.1%
EAP-like services	3.8%	2.8%	1.1%	7.2%	0.6%	2.5%	2.2%	3.1%
Free or cheaper CLEs, or fewer CLE hours	0.5%	1.7%	3.9%	0.0%	1.7%	3.6%	3.4%	1.5%
Comprehensive discounts to various services	1.2%	1.6%	1.2%	1.9%	0.0%	0.0%	4.0%	1.4%
CLE on wellbeing, mental health, or avoiding burn out	1.1%	1.5%	0.7%	2.2%	0.0%	2.4%	0.0%	1.1%
Career assistance	1.0%	0.6%	1.1%	0.0%	0.0%	3.5%	2.8%	0.9%
CLE or dues payment assistance	0.5%	1.2%	0.0%	2.2%	0.0%	0.0%	0.0%	0.7%
Nutrition counseling	0.5%	0.9%	0.0%	2.5%	0.0%	0.0%	0.0%	0.7%
Expanded Lawyer Assistance Program	1.3%	0.4%	0.0%	0.0%	0.0%	0.0%	0.0%	0.6%
Substance use treatment and supports	0.8%	0.4%	0.0%	0.0%	1.8%	0.0%	0.0%	0.6%
Financial Counseling to advise on how best to manage money, reduce student debt, etc.	0.6%	0.0%	0.0%	0.0%	0.0%	0.0%	6.9%	0.5%
Business coaching	1.0%	0.4%	0.0%	0.0%	0.0%	0.0%	0.0%	0.5%

Since confidentiality has repeatedly emerged as a significant barrier to lawyers seeking out and receiving the help they need, we asked them if they would take advantage of a confidential bar association resource for emotional health – and if it cost a modest fee. Most lawyers (54%) said they would participate – with about that number still willing to participate if it cost a modest fee. Meanwhile, approximately 45% of lawyers said they would not participate, free or not.

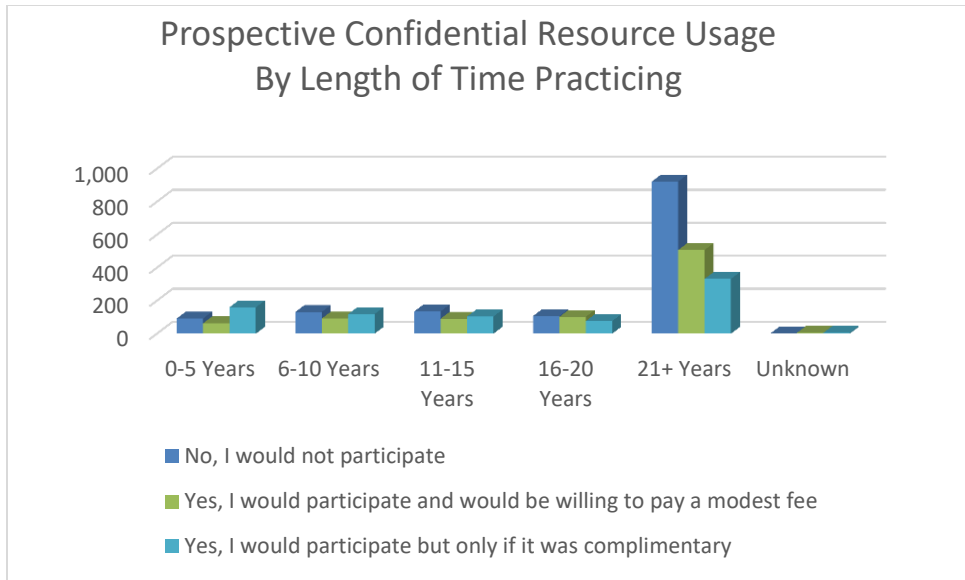
Q12: If the bar association, or an affiliated organization, provided a confidential resource to help you manage your stress, family issues, work/life balance or other wellness issues would you participate? If so, would you be willing to pay a modest fee for it?

Answered: 3,046 Skipped: 43

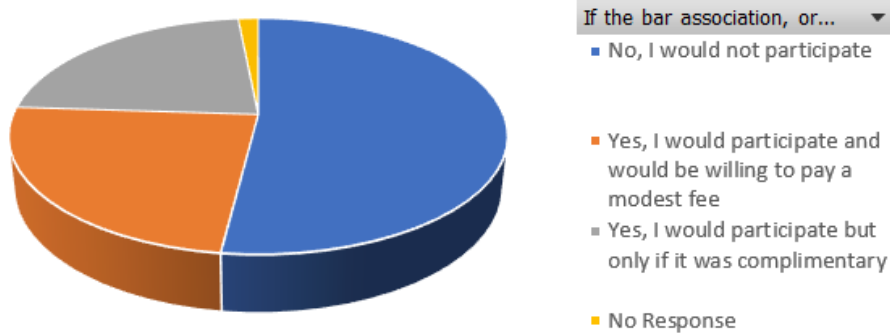
ANSWER CHOICES	RESPONSES	
No, I would not participate	45.63%	1,390
Yes, I would participate but only if it was complimentary	26.13%	796
Yes, I would participate and would be willing to pay a modest fee	28.23%	860
TOTAL		3,046

When we looked more closely at the results, we discovered that individuals working for Legal Aid were the most willing to use a confidential resource provided by the bar association or an affiliated organization, and members of the judiciary were least willing to use such a resource. 71% of new lawyers (those practicing 0-5 years) indicated they would participate in such a resource, but 51% of those practicing 0-5 years would only use it if it were free. A majority (52%) of people who had never sought or found help previously indicated they would not avail themselves of such a resource.





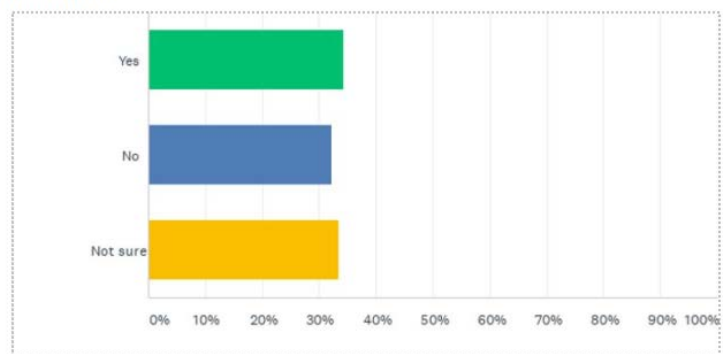
Propsective Confidential Resource Usage By Individuals Who never Sought or Found Help



When we asked lawyers whether they would be interested in *servicing* as a confidential mentor to an attorney seeking support, there was an even share of respondents who said that would serve (33.37%), who would not be interested (32.28%) or who were unsure (34.35%).

Q21: Would you be willing to serve as a confidential mentor to an attorney seeking support?

Answered: 3,037 Skipped: 52



Finally, we asked lawyers whether they would be interested in a variety of services which either have been or could be provided by NYSBA to assist in

Report of the Task Force on Attorney Well-Being

lawyer well-being. Respondents could choose any or all of the options presented. Regardless of type of practice, the majority of respondents indicated they would be most interested in receiving additional information on professional assistance when needed. The least popular response was a confidential consult with someone as to what actions might be appropriate to take care of any issues noted in the self-assessment. Other free-text responses throughout this survey revealed wariness on the part of attorneys to trust that confidential services are truly confidential, so it is possible that sentiment is responsible for the interest level for this support.

Would you be interested in any of the below?	Law Firm	Solo Practice	Government or agency	In-house counsel department	Legal Aid	Judiciary	Retired, Unemployed, Other, or Unknown	Total
Receive additional information on professional assistance where needed	340	269	100	72	72	40	34	927
Participate in attorney support groups where appropriate	284	266	75	56	62	29	26	798
A Meeting with a mentor who could give ethical and practical guidance on a confidential basis	231	194	71	36	46	19	21	618
Confidential consult with someone as to what actions might be appropriate to take care of any issues noted in the self-assessment	211	149	55	26	35	21	21	518
Total	1195	969	299	208	183	135	100	3089

CLE Resources

New York lawyers overwhelmingly believe that Continuing Legal Education (CLE) programs on attorney wellbeing are important with 85% in support. The support for CLE programs regarding mental health and substance use remained equally high at 83%. However, when asked whether CLE for attorney wellbeing should be mandated as part of the biennial reporting cycle, New York lawyers were split with 46.43% in support and 53.57% opposed. Nearly the same ratio of lawyers appeared when asked whether a mandatory CLE credit in attorney wellbeing would strengthen public trust in the legal profession – 47.7% saying yes and 52.3% saying no.

With respect to the content of the CLE desired by lawyers (mandatory or otherwise), respondents were provided with 13 choices and could select as many as they wanted. “Dealing with Difficult People” was the most popular topic for all types of practices except law firms with 2 or more employees – their top selection was “Stress Reduction” with “Dealing with Difficult People” a close second. “Stress Reduction” was the second-place answer for all other types of practices. “Work-Life Balance” was also a popular selection for all types of practices, although it was slightly less popular with solo practitioners (56%) as compared with everyone else (approximately 65%).

Report of the Task Force on Attorney Well-Being

“Work-Life Balance” was the most popular topic for those in practice 0-5 years (79%), followed by “Stress Reduction” at 75%. “Dealing with Difficult People,” “Stress Reduction,” and “Work-Life Balance” were the clear top three choices regardless of number of years in the profession.

What topics, skills, and continuing training or programs do you believe would be beneficial CLE in the area of well-being?	Law Firm		Solo Practice		Government or agency		In-house counsel department		Legal Aid		Judiciary		Retired, Unemployed, Other, or Unknown		Total Responses
	Law Firm %	Law Firm %	Solo Practice %	Solo Practice %	Government or agency %	Government or agency %	In-house counsel department %	In-house counsel department %	Legal Aid %	Legal Aid %	Judiciary %	Judiciary %	Retired, Unemployed, Other, or Unknown %	Retired, Unemployed, Other, or Unknown %	
Dealing with Difficult People	801	67%	682	70%	215	72%	147	71%	147	80%	92	68%	69	69%	2,153
Stress Reduction	806	67%	599	62%	196	66%	145	70%	127	69%	86	64%	63	63%	2,022
Work-Life Balance	777	65%	542	56%	184	62%	136	65%	122	67%	90	67%	69	69%	1,920
Mental Health issues	530	44%	379	39%	155	52%	106	51%	112	61%	76	56%	55	55%	1,413
Physical Fitness & Mental Clarity (including yoga)	497	42%	408	42%	126	42%	97	47%	79	43%	68	50%	49	49%	1,324
Mindfulness	468	39%	364	38%	137	46%	98	47%	84	46%	62	46%	48	48%	1,261
Implicit Bias	411	34%	324	33%	148	49%	101	49%	121	66%	67	50%	59	59%	1,231
Nutrition for Busy Lawyers	459	38%	321	33%	124	41%	88	42%	87	48%	55	41%	41	41%	1,175
Substance Use issues	439	37%	319	33%	118	39%	77	37%	93	51%	67	50%	42	42%	1,155
Resiliency	374	31%	315	33%	108	36%	90	43%	88	48%	55	41%	44	44%	1,074
Leadership	330	28%	181	19%	96	32%	81	39%	65	36%	39	29%	36	36%	828
Vicarious Trauma	203	17%	219	23%	117	39%	45	22%	130	71%	48	36%	30	30%	792
Vulnerability and Authenticity Training	184	15%	143	15%	64	21%	53	25%	64	35%	31	23%	23	23%	562
Total	1195		969		299		208		183		135		100		

What topics, skills, and continuing training or programs do you believe would be beneficial CLE in the area of well-being?	0-5 Years		6-10 Years		11-15 Years		16-20 Years		21+ Years		Unknwn		Total Responses
	0-5 Years %	0-5 Years %	6-10 Years %	6-10 Years %	11-15 Years %	11-15 Years %	16-20 Years %	16-20 Years %	21+ Years %	21+ Years %	Unknwn %	Unknwn %	
Dealing with Difficult People	213	67%	233	67%	231	70%	203	70%	1265	71%	8	62%	2,153
Stress Reduction	237	75%	238	69%	216	65%	188	65%	1135	63%	8	62%	2,022
Work-Life Balance	250	79%	235	68%	218	66%	189	66%	1021	57%	7	54%	1,920
Mental Health issues	210	66%	202	58%	173	52%	144	50%	677	38%	7	54%	1,413
Physical Fitness & Mental Clarity (including yoga)	162	51%	164	47%	138	42%	121	42%	734	41%	5	38%	1,324
Mindfulness	159	50%	155	45%	137	41%	127	44%	678	38%	5	38%	1,261
Implicit Bias	176	55%	170	49%	151	46%	133	46%	594	33%	7	54%	1,231
Nutrition for Busy Lawyers	177	56%	159	46%	137	41%	115	40%	584	33%	3	23%	1,175
Substance Use issues	142	45%	147	42%	129	39%	111	39%	620	35%	6	46%	1,155
Resiliency	124	39%	137	39%	112	34%	109	38%	590	33%	2	15%	1,074
Leadership	114	36%	122	35%	102	31%	106	37%	381	21%	3	23%	828
Vicarious Trauma	134	42%	120	35%	108	33%	90	31%	338	19%	2	15%	792
Vulnerability and Authenticity Training	110	35%	97	28%	69	21%	60	21%	223	12%	3	23%	562
Total	318		347		331		288		1792		13		

APPENDIX B

Task Force Co-Chairs, Working Group Chairs & Advisors

Task Force Co-Chairs:

M. Elizabeth “Libby” Coreno, Co-Chair

M. Elizabeth Coreno (“Libby”) provides counsel and consulting services to individuals, regional businesses, and international corporations in the real estate and construction industries. She is currently General Counsel to Bonacio Construction, Inc., and manages a small boutique practice (Law Office of M. Elizabeth Coreno, Esq. PC) for clients who need expertise in zoning, planning, and real property development; complex commercial and real estate transactions; land use and SEQRA actions. Over the last 17 years, Ms. Coreno has acted as land use counsel to some of the largest economic and real estate development projects in the Capital and Mohawk Valley regions of New York State.

Ms. Coreno is a long-time advocate and speaker on the issue of attorney well-being and worked to form the first-ever Attorney Wellbeing Subcommittee at the New York State Bar Association, as part of its Law Practice Management Committee. When she was President of the Saratoga County Bar Association, she brought about the establishment of SCBA’s Lawyers Assistance Committee and currently serves as the committee’s chair. Ms. Coreno was also a contributing member of NYSBA’s Working Group for Mental Health which successfully advocated for the removal of mental health screening questions for admission to the New York State bar in 2019.

In 2020, Ms. Coreno and her colleague, Dr. Kerry Murray O’Hara, PsyD, hosted the first-ever five-part *Attorney Wellbeing Podcast* for NYSBA which focused on the foundations of the attorney suffering and methods to begin to shift change. When the COVID-19 shutdown began, Ms. Coreno and Dr. O’Hara developed a confidential, weekly Zoom gathering solely focused on well-being impacts to the lives of lawyers. The *Lawyer-to-Lawyer Well-Being Roundtable* met for 54 free sessions between 2020 and 2021 in which lawyers collectively shared fears and concerns about depression, anxiety, court closures, racial injustice, political upheaval – but ultimately obtained skills for their lives, tools for their practices and a sense of belonging. She is the author of several articles on attorney well-being including, *Attorney Wellness: The Science of Stress and the Road to Well-Being* (with Dr. O’Hara) (NYSBA Bar Journal, Oct. 2018) and *Never Alone: Addiction, Recovery & Community* (NYSBA Journal, Dec. 2018). She has been interviewed by national publications on issues facing lawyers and their well-being including [law.com](http://www.law.com), the *New York Law Journal*, *Bloomberg Law*, and the American Bar Association’s *Bar Leader*. Ms. Coreno, along with Dr. O’Hara, are nationally recognized speakers and workshop leaders in lawyer well-being, specifically advocating for culture change and teaching skills for the rehumanizing of law and its lawyers.

Hon. Karen K. Peters, Co-Chair

The Honorable Karen Peters is a trailblazer in New York’s legal community, with a judicial career spanning nearly 35 years, including as the former Presiding Justice of the New York State Supreme Court, Appellate Division, Third Department.

Justice Peters began her legal career in private practice (and taught gender discrimination in the law and criminal law as an Assistant Professor at the State University of New York at New Paltz). She later served as an Assistant District Attorney in Dutchess County, New York; as counsel to the New York State Division of Alcoholism and Alcohol Abuse; and as Director of the New York State Assembly's Government Operations Committee. Her judicial career began in 1983, when she became the first woman elected to Ulster County's Family Court bench. In 1992, she became the first woman elected to the New York State Supreme Court in the Third Department (and was reelected in 2006). In 1994, she was appointed to the Appellate Division, Third Department, and, in 2012, became the first woman named as Presiding Justice of the Third Department. Justice Peters retired from the bench in December 2017.

She is of counsel to Epstein Becker Green and currently serves as the Chair of the New York State Permanent Judicial Commission on Justice for Children (formed in 1988 to improve the life chances of justice-involved children and adolescents) and the New York State Unified Court System's Commission on Parental Legal Representation. Justice Peters also serves on the Unified Court System's Advisory Committee on Judicial Ethics, as well as NYSBA's Committees on Children and the Law, Judicial Wellness, Procedures for Judicial Discipline and The New York State Constitution.

In addition to those notable accomplishments, Justice Peters is the recipient of numerous honors, including the 2017 Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare, the 2017 Betty Weinberg Ellerin Mentoring Award, the New York State Bar Association's Judicial Section Inaugural Award for Advancement of Judicial Diversity, the Center for Women in Government and Civil Society's Public Service Leadership Award, the Capital District Women's Bar Association's Justice Kaye Distinguished Membership Attorney Award, Albany Law School's Kate Stoneman Award, and the Robert L. Haig Award for Distinguished Public Service.

Working Group Chairs

James R. Barnes, Chair, Working Group on Continuing Legal Education

James R. Barnes, a shareholder of Burke & Casserly, P.C., focuses his practice in elder law, trusts and estates, guardianship, special needs planning, business formation and succession planning, and real estate. He is Chair of NYSBA's Committee on Continuing Legal Education and is a past Chair of NYSBA's Young Lawyers Section.

Mr. Barnes is a Trustee of the Foundation for Ellis Medicine in Schenectady, and serves on the board of directors of the Visiting Nurse Service of Northeastern New York. He conducts regular speaking engagements in various community and professional forums, lecturing about current topics affecting seniors and their families.

Meredith Heller, Chair, Working Group on Emotional Well-being

Meredith S. Heller, a solo practitioner based in New York City, represents criminal defendants in both federal and state criminal courts, including before the Second Circuit Court of Appeals and the New York Court of Appeals. She has also counseled attorneys facing discipline and bar applicants on the admissions process.

A speaker at the Orientation Program for Newly Admitted Attorneys in the First Department and a frequent presenter at Continuing Legal Education programs, Ms. Heller discusses quality of life issues, substance abuse and the resources available through the Lawyers Assistance Program. She is a past Chair of the New York City Bar Association's Professional Responsibility Committee and NYCBA's Lawyers Assistance Program Committee. She also has served on NYSBA's Professional Discipline Committee.

Robert S. Herbst, Chair, Working Group on Physical Well-being

Robert S. Herbst has been a law firm partner and a public company General Counsel, including for the largest health club chain in the northeast which owns the New York Sports Clubs. He is a former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. He is a 19-time World Powerlifting Champion and member of the AAU Strength Sports Hall of Fame and is an internationally recognized authority on exercise, fitness, and well-being.

Glenn Lau-Kee, Chair, Working Group on Bar Associations

Glenn Lau-Kee is a partner in the Lau-Kee Law Group PLLC, a law firm in New York City, which concentrates on real estate, business, and trusts and estates planning.

A former president of the New York State Bar Association, Mr. Lau-Kee was appointed by former Chief Judge Judith Kaye to the Committee to Promote Public Trust and Confidence in the Legal System and the Commission to Examine Solo and Small Firm Practice. Mr. Lau-Kee is a former president of the Asian-American Bar Association of New York, a former co-vice chair of the Commission on Human Rights of the City of New York, and has served on the boards of directors of the New York County Lawyers' Association, Legal Services for New York City, Fund for Modern Courts, Queens Legal Services Corporation, YMCA of Greater New York and US-Asia Institute in Washington, D.C.

Hon. Sarah L. Krauss, Chair, Working Group on Substance Use Disorders and Addiction

Hon. Sarah (Sallie) L. Krauss served as an Acting Supreme Court Justice in both the Supreme Court and the Family Court in Brooklyn, New York, from 2005 until her retirement in 2012. Prior to her elevation to state Supreme Court, Judge Krauss served in the Brooklyn Civil and Criminal Courts.

Throughout her career, Justice Krauss has worked extensively in support of attorney and judicial wellness. She chaired the American Bar Association’s Commission on Lawyer Assistance Programs and its Judicial Assistance Initiative, where she published an ABA resource guide entitled “Judges Helping Judges; Resource and Education.” For 30 years she has been a member of New York State Bar Association’s Lawyer Assistance Committee, which she also chaired, and has served on NYSBA’s Judicial Wellness Committee since its inception.

Kathryn Grant Madigan, Chair, Working Group on Law Culture and Employment

Kathryn Grant Madigan is Senior Partner and Founding Chair of the Elder Law Practice Group at Levene Gouldin & Thompson, LLP, where she concentrates her practice on elder law and trusts and estates. She is a Trustee of the IOLA Fund of New York and serves on the Third Department Judicial Screening Committee.

Ms. Madigan is past president of the New York State Bar Association, and a past president of the Broome County Bar Association, the youngest and the first woman to hold that office. She is a noted lecturer in estate planning and elder law, leadership and professionalism, work/life balance, stress management, and the legal and psycho-social aspects of aging.

She received the Kate Stoneman Award, given by Albany Law School for actively seeking change and expanding opportunities for women, and the Ruth G. Schapiro Award, given by NYSBA for noteworthy contributions to the concerns of women. In 2003, she, with then-Law Practice Management Director Stephen Gallagher, pioneered NYSBA’s Women on the Move, an annual CLE program.

Ms. Madigan has long served the SUNY Binghamton community and currently serves as Chair of the Binghamton University Council.

Rosemary Queenan, Chair, Working Group on Law Education

Rosemary Queenan is Associate Dean for Student Affairs and Professor of Law at Albany Law School, Albany, NY. In her role as Associate Dean, she assists with the administration of the law school, develops programming and initiatives focused on student life and wellness, counsels students, and serves as advisor to students and student organizations.

Her scholarship is focused on education and disability law. Her most recent work includes, “Delay & Irreparable Harm: A Study of Exhaustion Through the Lens of the IDEA,” published in the North Carolina Law Review (2021) and “Professional Identity Formation, Leadership and Exploration of Self,” published in the University of Missouri Kansas City Law Review (2021), which she co-authored with Albany Law School Assistant Dean Mary Walsh Fitzpatrick.

Marian C. Rice, Chair, Working Group on Public Trusts and Ethics

Marian C. Rice is managing partner at the Melville, NY law firm L'Abbate, Balkan, Colavita & Contin, LLP, where she concentrates her practice on the representation of attorneys and risk management for lawyers, and also serves as General Counsel to the Firm. Ms. Rice is currently Co-Chair of the New York State Bar Association Law Practice Management Committee, Chair of the NYSBA Working Group on Re-Opening Law Firms, a member of NYSBA's Committee on Professional Ethics and serves as an alternate to the NYSBA Nominating Committee. She is a Past President of the Nassau County Bar Association, the largest suburban bar association in the country.

Hon. Shirley Troutman, Chair, Working Group on the Judiciary and the Courts

Hon. Shirley Troutman is Associate Justice in the Appellate Division, Fourth Department. She was appointed by former Governor Andrew M. Cuomo in February 2016. Previously, Justice Troutman had served as a trial judge in New York State Supreme Court. Prior to her election to Supreme Court, Justice Troutman was a County Court Judge and served as a City Court Judge.

Before joining the bench, Justice Troutman was an Assistant United States Attorney for the Western District of New York, Assistant State Attorney General and an Assistant District Attorney. She was appointed by Chief Judge Janet DiFiore as co-chair of the Franklin H. Williams Judicial Commission, which is responsible for developing programs to improve the perception of fairness within the court system and to help ensure equal justice in New York State. She previously served as a member of the Advisory Committee on Judicial Ethics of the NYS Unified Court System.

Advisors:

[Robin Belleau, JD, LCPC](#), has been the Director of Wellbeing for Kirkland & Ellis since 2019 and was a lawyer with eight years of practice experience as a public defender and state's attorney before earning a master's degree in counseling. Following her degree, Robin joined the Illinois LAP as clinical director before becoming the executive director of the organization. She was also a member of the ABA National Task Force on Attorney Wellbeing and contributed to the 2016 Report. During the COVID 19 shutdown, Ms. Belleau shared her expertise and wisdom about lawyer wellbeing at the NYSBA Women's Section, Women on the Move (2020) program as well as assisted the Working Group on Emotional Wellbeing.

[Jason Fanning, Ph.D.](#), is Assistant Professor and Wells Fargo Faculty Scholar in the Department of Health and Exercise Science at Wake Forest University with an appointment in Internal Medicine at Wake Forest School of Medicine. Dr. Fanning is a National Institutes of Health-funded behavioral scientist who directs the Wake Forest Behavioral Medicine Laboratory. He teaches courses in health psychology and biostatistics and conducts clinical trial research on the promotion of physical activity across the lifespan. To date, he has published more than 60 peer

reviewed papers on the psychology of physical activity promotion. Dr. Fanning was an invaluable advisor to the Working Group on Physical Well-being. We appreciate his knowledge, insight, and guidance in working to improve the physical and mental health of the legal community.

[Kathleen Fyfe](#), founder of Fyfe Consulting, LLC, is a culture sleuth, change strategist, and community builder. She brings decades of experience working with individuals and organizations, both large and small. Believing that the people and their choices are the most important resources a company has, she customizes trainings based on the needs of the company and how they want to grow. Her expertise includes culture, strategic planning and development, organizational assessments, emotional intelligence, leadership and management training, team building and coaching. Ms. Fyfe has appeared as a guest expert on the NYSBA Attorney Well-being Podcast and contributed “Legal Culture Must Change for Attorneys to Thrive” as part of the *NYSBA Journal*, September 2020 edition.²³⁵ Her remarkable insights about law culture and systems provided the Task Force with the framework for addressing systemic barriers for collective well-being for all Working Groups.

[Stephen P. Gallagher](#) was the first Director of Law Office Economics and Management for NYSBA from 1990 through 2003. He spent the balance of his career in coaching lawyers through transition, teaching marketing strategy to MBA students; and committing time each day to moving his personal journey through growth and renewal forward. He remained a dedicated friend to the NYSBA community, including and especially this Task Force. Mr. Gallagher contributed “Finding a Healthy Way to Transform Our Lives as We Retire” to the *NYSBA Journal*, September 2020 edition,²³⁶ as well as provide countless hours of participation, research and assistance to the co-chairs and several of the Working Groups.

[Robert Goldman, Psy.D.](#), is a licensed psychologist and attorney with over 18 years of experience in combining law and psychology. He served as the supervising psychologist for the Suffolk County Probation Department and Suffolk County Mental Hygiene Services and has lectured nationally on topics ranging from restorative justice, educational law, forensic evaluations and the treatment of anxiety and depression among teens and adults. He is also the co-chair of the Neuroscience and Law Committee and an adjunct professor at Hofstra University and St. Joseph’s College. Dr. Goldman recently started a company, TLC-Virtual Resiliency, which provides virtual support to help employees develop resiliency. Dr. Goldman contributed “Lawyers Who Accept War-like Personas Carry Heavy Burden” to the *NYSBA Bar Journal*, September 2020 edition,²³⁷ as well as provided clinical expertise and guidance to the Working Group on Emotional Well-being.

²³⁵ <https://nysba.org/legal-culture-must-change-for-attorneys-to-thrive/>.

²³⁶ <https://nysba.org/finding-a-healthy-way-to-transform-our-lives-as-we-retire/>

²³⁷ <https://nysba.org/lawyers-who-accept-war-like-personas-carry-heavy-burden/>.

Terry Harrell is the Executive Director of the Indiana Judges and Lawyers Assistance Program, graduated from Maurer School of Law and is a Licensed Clinical Social Worker (LCSW), a Licensed Clinical Addictions Counselor (LCAC) and has a Master Addictions Counselor certification (MAC). Ms. Harrell is active with the Indiana State Bar Association and is a Fellow of the Indiana Bar Foundation. She serves on the American Bar Association’s Commission on Lawyer Assistance Program’s Policy and Well-Being Committees and serves on the National Task Force on Lawyer Well Being. Ms. Harrell authored the brilliant piece entitled, “Beyond the Silence: Removing Stigma Around Addiction” for the NYSBA Bar Journal, September 2020 edition²³⁸, as well as providing guidance and expertise to the Working Group on Substance Use Disorders and Addiction.

Deborah Epstein Henry is an expert, consultant, best-selling author, and public speaker on careers, workplaces, women and law. She runs DEH Consulting where she consults and speaks internationally. Ms. Epstein Henry conceived of Best Law Firms for Women, a benchmarking survey and competition she ran for a decade with Working Mother. She wrote two ABA best-selling books, *Law & Reorder* (author, 2010) and *Finding Bliss* (co-author, 2015). In 2011, Ms. Epstein Henry co-founded Bliss Lawyers to employ lawyers to work in temporary roles for in-house and law firm clients. In 2020, her company was acquired by Axiom, the global leader in high-caliber, on-demand legal talent, and she now serves as their executive consultant. Ms. Epstein Henry authored “What Makes Virtual Lawyer Happy” for the NYSBA *Journal*, September 2020 edition²³⁹ as well as providing information and consulting services to the Working Group on Law Culture and Employment.

Kerry O’Hara, Psy.D., is a clinical psychologist and the Director/Founder of DBT Wellness & Psychological Services in Saratoga Springs, N.Y. She has over 25 years of experience in a variety of clinical settings including inpatient, residential, forensic, outpatient, and academic. Over the course of the last seven years, Dr. O’Hara has focused on the mental health crisis and wellness for the field of law. Dr. O’Hara has provided more than a dozen free, educational CLE programs for NYSBA and lawyers across the state about the unique impacts of the practice of law on the individual, co-hosts the NYSBA Attorney Well-being podcast with Task Force Co-chair Libby Coreno, and she co-facilitated the weekly NYSBA Lawyer-to-Lawyer Roundtable during the entirety of the COVID19 shutdown. She also contributed “How a Lunch Between Dear Friends Led to a Movement to Change the Legal Culture” for the NYSBA *Journal*, September 2020 edition,²⁴⁰ as well as provided the co-chairs, the Emotional Well-Being, and Law Culture Working Groups with clinical and experiential expertise.

Jarrod F. Reich is a member of the faculty of the University of Miami School of Law, where he currently teaches first-year and upper-level writing courses as well as evidence, and serves as faculty

²³⁸ <https://nysba.org/beyond-the-silence-removing-the-stigma-around-addiction/>.

²³⁹ <https://nysba.org/what-makes-a-virtual-lawyer-happy/>.

²⁴⁰ <https://nysba.org/how-a-lunch-between-dear-friends-led-to-a-movement-to-change-the-legal-culture/>

advisor to the Miami Law Mental Health Collective. Previously, he served on the faculties of Georgetown University Law Center and Florida State University College of Law, as well as the Benjamin N. Cardozo School of Law as an adjunct professor, teaching courses in legal writing, appellate advocacy, alternative dispute resolution, and seminars for judicial externs, in-house counsel externs, and legal writing fellows. He focuses his scholarship on lawyer and law student well-being: among other things, his scholarship has appeared in the *Villanova Law Review* and Harvard Law School's *The Practice*. He is a member of the Institute for Well-Being in Law's Advisory Board of Directors, and he presents on well-being topics both nationally and internationally. In 2020, he was Chair of the Association of American Law Schools' award-winning Section on Balance in Legal Education and serves on its Executive Committee. Prof. Reich writes and presents on legal writing, and is the co-author of the fourth edition of *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, the premier legal writing textbook for practitioners. Prior to teaching full-time, he was Counsel at the firm Boies Schiller Flexner LLP, where he focused his practice on complex litigation. His work in the field of lawyer and law student well-being informed portions of this Report and he contributed the section of this Report entitled "Business Case for Change: Attorney Well-Being as an Ethical and Business Imperative."

APPENDIX C

Bar Association and Law Firm Outreach Report

NYSBA Attorney Well-being Task Force SUD and Addictions Work Group
Bar Association and Law Firm Outreach Report by Elaine Turley 10/27/2020

I. Bar Association and Law Firm Leadership Issues

Our committee must address the low incidence of response by law firms and managing attorneys of organizations to requests by lawyer assistance programs to present information, recommendations or model policies for attorney wellness.

Law firm participation in lawyer assistance and attorney wellness programs will help firms to increase productivity, improve the quality of the representation the firm provides clients, and avoid losses due to potential attorney grievance or malpractice matters.

A. OUTREACH AND COMMUNICATIONS TO LAWYERS AND LAW FIRMS:

1. Outreach and communications between colleagues on a person to person basis is likely the best option. Following are recommendations for implementation:
 - a. Create a law firm outreach committee in each county comprised of one representative of the executive committee of each bar association and one member of each county's lawyer assistance committee who is also a member of the NYSBA lawyer assistance committee. Each of such committee members should be a member of the bar who has extensive contacts and exposure in the legal community wherever possible.
 - b. Advocate and arrange for each county bar association to designate an administrative person who will assist the outreach committee in creating, printing and disseminating correspondence and other communications.
 - c. The outreach committee will plan and implement ways to make contact with law firms including
 - i. Making personal contact with colleagues to identify and facilitate introduction to personnel and attorneys in firms and organizations (create a contact tree);
 - ii. Identifying and facilitating introduction to the individual(s) who make(s) decisions regarding staff development and seminars.
2. Use national events to publicize potential education materials (i.e., suicide awareness day, mental illness awareness week, lawyer well-being week);
3. Every bar association must include information about the services provided by the county lawyer assistance programs or committees and the NYSBA LAP on a slide

at the beginning of each CLE and other bar association presentation and include such statement in all written materials disseminated at CLEs and other events. LAPs and LACs must advocate for, confirm implementation of, and oversee continuation of such announcement.

4. Posters and pamphlets for NYSBA LAP or county LAPs must be placed and maintained at county bar associations, all court buildings, and other sites serving the legal community. It would be helpful for the NYSBA to have an employee work with someone on the county level to implement this program.
5. Publish articles in county bar association newspapers/journals. Example: In Suffolk County the LHL committee acts as “editor/sponsor” of a monthly edition of the Suffolk Journal each year. The LHL committee must arrange for and collect 4-8 articles for publication and must review, edit and deliver to the bar association each article. This has been very effective in making judges, bar association members, and other attorneys aware of the issues related to SUD and services provided by lawyer assistance.

B. OUTREACH AND COMMUNICATIONS TO BAR ASSOCIATIONS:

1. The lawyer assistance committee of each county should obtain a commitment from each county bar association to convene a special meeting once or twice a year at which the county lawyer assistance committee and the NYSBA LAP will together make a presentation to the officers and directors of the bar association on matters related to the lawyer assistance programs in NYS and the particular county and to discuss how the county bar association can improve awareness of and access to lawyer wellness and substance use recovery resources.
2. The county lawyer assistance committee/NYS LAP should make one or two CLE presentations for credit to each committee of the county bar associations. For example: In Suffolk County there are approximately 38 committees within the bar association. The committee chairs often try to make CLEs for credit available to their committees and inviting a LAC/LAP to do so would relieve the committee chairs of having to create and submit materials for approval. Considering some committees meet for joint meetings for special programming the LAC/LAPs could potentially make 25-35 presentations to committees within the Suffolk County Bar Association alone and reach the individual members who practice in the area of law represented by the committees, including law firm partners and managing partners.

C. Programming

1. Create a series of presentations that are CLE eligible and include video to be

presented by a personal moderator. Make a list of attorneys and other professionals willing and able to act as personal moderators.

2. To achieve maximum participation video-taped presentations should be approved for CLE credit, be no longer than 1.5 hours and preferably 1 hour, and should be offered at a low or no cost so the law firm will be willing to pay for the credits for all attorneys in the practice or organization or the attendees at a bar association committee meeting are willing to participate. Consideration must be given to making video presentations or audio presentations available for attorneys to view or listen to on demand at a location of their choosing.
3. Create video-taped presentations suitable for personnel departments, law firm staff, etc., that can be easily presented on short notice by a personal moderator or viewed at home/office or listened to as desired.

APPENDIX D

Working Group on Substance Use & Addiction Court Report

Working Group on Substance Use Disorder & Addictions

COURT REPORT

The New York State Unified Court System (and its approximately 16,000 employees) present an opportunity to provide valuable information to these legal professionals regarding available services for substance use, mental health and other addiction disorders. We have identified five (5) specific areas of concern which must be addressed. These are leadership, consistency, frequency, penetration and action and each will be addressed sequentially below.

Leadership: Access to, and support from, UCS leadership will be crucial in developing and maintaining a successful and collaborative program. The leaders must be willing to set this as a priority or it is unlikely that otherwise staff will become adequately sensitized to these issues. Therefore, it is absolutely essential that those in the highest leadership positions fully endorse this initiative. This obviously leads to the question of how to secure that commitment, particularly in a Court System where leadership positions change regularly. The answer is institutionalization. If these policies become part of the daily fabric of the organization, they are likely to endure despite changes in leadership and the consequent shifts in priorities. Accordingly, we should seek to engage leadership with a focus of securing a commitment to the institutionalization of services related to substance use, mental health and other addiction disorders including education, training, peer support and access to treatment.

It should be noted that one critically important byproduct of institutionalization is the reduction in stigma which often inhibits individuals from seeking help. Conversely, a failure to address stigma will result in an absolute bar to institutionalization. Therefore, the elimination of stigma must be a primary goal for institutionalization. In order for conversations about substance use, mental health and other addiction disorders to become as common and comfortable as discussing any other health issue, leadership must provide a consistent message that it is safe to raise these matters without fear of stigma or any other negative repercussions.

Consistency: Consistency is one avenue towards normalization and ultimately institutionalization. An unrelenting effort to deliver this message, through regularly scheduled programming, is required to educate and develop the level of comfort and competency which eliminates stigma and encourages open discussion. This can be accomplished by instituting mandatory trainings on an annual or semi-annual basis along with monthly updates and informational sessions. These trainings should consistently highlight the treatability of substance use, mental health and other addiction disorders and endeavor to destigmatize conversations around these issues.

Frequency: At a minimum, leadership should consider mandatory online and in-person trainings (similar to those for cyber security and/or sexual harassment issues) on an annual or semi-annual basis. Periodic updates and informational sessions would be a helpful adjunct and

would support stigma reduction efforts. Monthly peer group gatherings, either remotely, in-person or as a hybrid should be developed to encourage open discussion of these issues. Simultaneously, care must be taken to avoid over saturation and the potential for a disruption in operations. The frequency of scheduled trainings, seminars or activities needs to be finely tuned and targeted to achieve maximum impact.

Penetration: Any proposed substance use, mental health or other addiction disorders policy and/or protocol needs to be distributed and absorbed universally in order to achieve institutionalization. However, this information must simultaneously appeal to and encourage those suffering from substance use, mental health and other addiction disorders to seek assistance. Trainings and distributed materials should be formatted so that they facilitate access to treatment and other services as well as educate and reduce stigma.

Action: The foregoing is of no avail unless followed by concrete actions. Beginning with organizational leadership, the following specific actions constitute proposed first steps towards implementing a plan of institutionalizing policies related to substance use, mental health and other addiction disorders.

- 1.) Identify current allies among the Administrative Judges, Supervising Judges, District Executives, Court Managers and the Office of Justice Court Support and enlist their assistance in advocating on behalf of substance use, mental health and other addiction disorders education.
 - a. Provide these leaders with specific objectives including, but not limited to, the following;
 - i. A commitment to establish “wellness liaisons” in every District who can act as initial points of contact.
 - ii. A commitment to offer and encourage attendance at regularly scheduled wellness programming throughout each District.
 - iii. A commitment to set aside funding in each District’s annual budget to ensure consistent provision of wellness programs.
 - b. Develop collaborative partnerships with, among others, the Judicial Institute, the Office for Justice Initiatives and the Office of Policy and Planning to provide information and educational programming during their annually scheduled training programs.
 - c. Consistently reinforce to leadership and all supervisory staff within the Court System four (4) basic truths:

Report of the Task Force on Attorney Well-Being

- i. That there are grave consequences associated with substance use, mental health issues and other addictive behaviors.
- ii. That these are commonplace and impact the daily functioning of the court system.
- iii. That there is a need for, and readily available, effective treatment modalities.
- iv. That every manager, at every level, will encounter these issues in the workplace. That when identified, these matters should be addressed openly, honestly and nonjudgmentally, because there is something we can do about it.

APPENDIX E

Resolution of the Working Group on the Judiciary and the Courts

**Attorney Wellness Initiative Policy Statement
in support of the Lawyers Assistance Program**

WHEREAS, the New York State Bar Association understands that in order for our citizens to have trust and confidence in the legal system, the profession itself must be mentally, emotionally and physically healthy.

WHEREAS, the New York State Bar Association is committed to assisting persons in the legal profession who are dealing with impairment issues that affect job performance; and

WHEREAS, practice management studies have demonstrated that early intervention and treatment of law firm or legal department professionals can assist a firm or department to avoid negative consequences that can result from a failure to deal with impairment and to protect the interests of the clients; and

WHEREAS, The New York State Bar Association's Lawyers Assistance Program has experienced periods of funding cuts which have been detrimental to its functioning in assisting lawyers, judges, law students and their families with issues of stress, impairment, and the ethical practice of law, and

WHEREAS, the New York State Bar Association has developed a policy to enhance the wellbeing of all attorneys through the establishment of the Attorney Wellbeing Task Force, and

WHEREAS, the Attorney Wellbeing Task Force has published many recommendations to assist New York attorneys in developing and maintaining healthy practices to ensure their fitness to practice law,

WHEREAS, the New York State Bar Association further understands that an impaired profession adversely impacts the fair administration of justice and that said impairment may impact disproportionately people of color and those who are economically disadvantaged;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association urges all stake holders to fully support Lawyer Assistance Programs by creating a supportive work environment that encourages impaired members of the legal profession to seek assistance and to fully commit to providing the necessary financial resources for said programs and NYSBA pledges to continue to support the Lawyers Assistance Program(LAP) and commits to ensuring that the organization and funding of the LAP is sufficient to enable LAP to function in New York State as best practices of the Model Lawyer Assistance Program adopted by the ABA House of Delegates - February 2004.

APPENDIX F
“My Time in Rural Private Practice”
By William Pulos, Esq.

MY TIME IN RURAL PRIVATE PRACTICE

by Bill Pulos

The physical environment in rural New York State is beautiful, the economic landscape is not. Running a rural general law practice as a solo or small firm practitioner has to be one of the toughest challenges anywhere.

I've lived for 66 years, and for 10+ years have had my solo office, in Allegany County, the third poorest county per capita in New York. It is one of the 420 counties in the Appalachian Regional Commission. I've been my own boss for 40 years, and the experience has taught me that a general practitioner has to work *very* hard. Sadly, over time, the risk and exposure of a general practice has increased, while opportunities have shrunk, with potential clients that many times shop for lawyers as if they are going to Wal-Mart.

But I am very lucky to have lived this life and am very grateful to my family, law partner Timothy Rosell, friends and clients who have supported me in my dream and mission of being a small-town lawyer. Without them I wouldn't have made it. I practice in and near the community where I grew up, having left only for law school in Albany. I've embraced my freedom and independence and I'm thankful for that. I've done my best to give back to my community and I'm very proud of what I've done.¹

But make no mistake, making an upper middle-class income from a rural general practice, having a happy family life and putting kids through college is extremely difficult. The sand is running through the hour-glass as general practice lawyers, particularly rural lawyers, are becoming anachronisms. The problem is a lot bigger than the academics/big firm leaders think.

“Rural lawyer wellness” is something you don't see written about much. For me, the discussion of lawyer wellness is inextricably intertwined with protecting, preserving and enhancing one's physical, mental, emotional, spiritual and financial health. For many rural lawyers, financial health is an enormous factor in their well-being. There is no lawyer wellness without happiness and joy; and no happiness or joy without at least a modicum of financial stability.

Early on, I learned of an Allegany County lawyer who, in the 1960s and '70s, used to wrap himself in aluminum foil at his office desk to keep warm in winter. Forty years ago he was one of the first rural lawyers to “hit it big” by getting permanent government employment. Salary, health insurance, regular hours, paid time off, retirement pension, promotion and perks. That can't be easily matched in a rural law practice.

To start, I did part-time outside work, earning about \$10,000 a year, no benefits. It helped me survive while starting the business, paying the bills and servicing my debts. Over the next 18 years I continued with outside work as an adjunct professor and speaker at local colleges with stints as town attorney and village attorney.

* <https://www.billpulos.com/the-40-years-public-service-of-attorney-william-whitaker-pulos/>.

The challenges of what it takes to succeed in rural private practice without steady, stable government work can't easily be explained – or taught. The freedom and independence of starting/owning/running your own shop is alluring, but it can come with a steep price that few can comprehend. Most newbie graduates and most lawyers couldn't do it 40 years ago, and it is more difficult now, with or without high tech.

Some Advice

To have a chance, those contemplating a rural practice today need to:

- 1) be independently wealthy and/or well-known via a long-established prominent family with a long reach of palpable government, political and business influence;
- 2) walk into and/or buy an established practice with a file cabinet full of lucrative wills and a heavy dose of guaranteed-paying legal work, such as a prominent bank as a client;
- 3) intend from the start to obtain a full-time W-2 government job and stick with it for about 35 years, to reap the benefits of pay, promotion, pension and perks;
- 4) intend from the start to obtain a long-term, W-2, \$50,000+ part-time government job (including pension and health insurance) to supplement the lawyer's fledgling private practice; or
- 5) plan to work 60-80 hours+/-week by taking everything that walks in the door, including assigned counsel, family court, bankruptcy, divorce, local courts and DWIs. Notably, maintaining wellness in private practice while working in these fields can be very difficult. This option is toughest of all if the lawyer is interested in a loving, fulfilling balanced family life, particularly with children included. A working spouse is pretty much a necessity.

Truthfully, if your plan is to start/find/buy/pursue a profitable, prosperous and fulfilling a pure, rural private practice, you are up against nearly insurmountable odds.

And if option 5 is your only option, after some years you likely will begin to question whether any reward, of any kind, is worth the risk and the cost to grind it out in a rural practice for 40 years. Physically, mentally, emotionally, spiritually and financially, it takes a toll. The truth is, you can lose altruism pretty quickly.

With rare exception, government pay and benefits are the rural lawyer's mother lode. Anecdotally, many rural lawyers aren't able to save enough purely from private practice for their retirement. That's why many old-time small-town lawyers practiced law till they died. They had savings, perhaps, but no cash-flow retirement fund. Thus I was not surprised to see a prominent rural personal injury attorney retire from his practice and take a county job at the end of his career, to earn some retirement credit. That should tell you something.

Some More Advice and a Word of Caution:

Compare the rural private lawyer's income with that of a mid-level government lawyer with a \$100,000/year job (perhaps part-time), and 30 years of retirement credit. The government lawyer is entitled to a lifetime pension of \$5,000/month, \$60,000 a year, *state tax-free*. In a small town, that's not chicken feed.

There are many government lawyers whose pensions will exceed \$60,000/year, on top of their Social Security. When rural private lawyers make the inevitable comparison to their contemporaries' government wages, benefits and work requirements, along with those of other non-lawyer government employees, it can make small town, general practice lawyering look like one hell of a lot of school work, testing, loans, degrees, sweat and stress for the financial return.²²⁴¹

For a private practitioner to receive the same \$5,000 monthly (after NYS tax) requires accumulating \$1.3 million for a withdrawal rate of 5% annually. Many times, that financial reality comes too late to a private practitioner. Once it does, achieving retirement security becomes difficult. Many times, this realization is followed by disillusionment and depression and the almost inevitable family, alcohol, drug, money and health problems of a lawyer in crisis.

While young lawyers would be well advised to start saving, investing and compounding 10% of their gross yearly income with the goal of saving at least \$30,000 (tax-deferred) by age 30, that is very difficult to do while paying down law school debt. I know; I had it – 40 years ago. Saving money while starting out in a rural law practice? That is mostly an oxymoron.

Rural Lawyer Well-being

For many attorneys, financial problems are major factors in attorney ill-being, but the problem is compounded for rural private practitioners. However, the problems are not just financial: Many rural lawyers in private practice have deep and abiding commitments to their communities and many older rural lawyers do not retire because there is no one to take their place. People in rural areas need representation. Who will serve the people they serve?²⁴² This crisis of conscience can be a factor in attorney well-being. There are steps that must be taken by bar associations, lawyer assistance programs, and other stakeholders to address the well-being crises faced particularly by rural lawyers.

To all involved with attorney wellness, thank you very much for your efforts and resolution on this very important issue.

Bill Pulos

Hornell, New York

May 30, 2021

<https://www.billpulos.com/>.

²⁴¹ Look up anyone paid with taxpayer dollars; everyone can do the math. <https://www.seethroughny.net/>.

²⁴² See Taier Perlman, Rural Law Practice in New York State, Report of the Gov't Law Ctr., Albany Law School, Apr. 2019; see also Joan Fucillo, *A Look at the Lives of Five Rural Lawyers*, <https://nysba.org/a-look-at-the-lives-of-five-rural-lawyers/>. Ms. Fucillo edited Mr. Pulos' piece.



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RE: Report and recommendations of the Task Force
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October 14, 2021

The Committee on Legal Aid enthusiastically supports the report and recommendations of the Task Force on Attorney Wellbeing.

The recommendations contained in this monumental report will help to make a historic contribution to the health and wellbeing of attorneys across the profession.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 8

REQUESTED ACTION: Approval of the report and recommendations of the Emergency Task Force on Solo and Small Firm Practitioners.

The Emergency Task Force on Solo and Small Firm Practitioners was appointed by past president Henry M. Greenberg to examine the impact of the COVID-19 pandemic on solo and small firm practitioners. The Task Force's report is intended to serve as a blueprint for dealing with this and future crises. The report focuses on the following areas: law office management, courthouse safety, criminal matters, civil matters, virtual evidence, executive orders, the practice of law as essential, and economic assistance.

This report was posted for comment in August 2021; There were two comments received from the Criminal Justice Section and the Trial Lawyers Section.

The report will be presented by Task Force co-chairs June M. Castellano and Domenick Napoletano.



NEW YORK STATE
BAR ASSOCIATION

Report and recommendations of the **Emergency Task Force on Solo and Small Firm Practitioners**

*The Pandemic Blueprint: A Lawyer's Guide
and Recommendations for the Solo and
Small Firm Practitioner*

October 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

THE PANDEMIC BLUEPRINT:
A LAWYER'S GUIDE AND RECOMMENDATIONS
FOR THE SOLO AND SMALL FIRM
PRACTITIONER

The New York State Bar Association Emergency Task Force for
Solo and Small Firm Practitioners

August 2021

TABLE OF CONTENTS

MEMBERS OF THE NEW YORK STATE BAR ASSOCIATION EMERGENCY TASK
FORCE FOR SOLO AND SMALL FIRM PRACTITIONERS3

INTRODUCTION4

EXECUTIVE SUMMARY5

SECTION ONE: Law Office Management.....9

SECTION TWO: Courthouse Safety18

SECTION THREE: Criminal Matters21

SECTION FOUR: Civil Matters24

SECTION FIVE: Virtual Evidence28

SECTION SIX: Governor’s Executive Orders.....40

SECTION SEVEN: The Practice of Law as Essential42

SECTION EIGHT: Economic Assistance to Members.....44

SUMMARY OF RECOMMENDATIONS.....47

CONCLUSION.....50

APPENDIX A: Survey of Bar Members Regarding Court Reopening and Virtual Appearances
and Results.....51

APPENDIX B: Summary of Selected Governor’s Executive Orders.....94

APPENDIX C: NYSBA Resolution to Classify the Practice of Law as Essential.....105

APPENDIX D: Information for Residents of Correctional Facilities: Frequently Asked
Questions about the COVID-19 Vaccine by AMEND.....107

APPENDIX E: What People in Prison Need to Know About the COVID-19 Vaccine by the
Marshall Project.....116

APPENDIX F: NYSBA Resolution for Frontline Vaccination.....121

**MEMBERS OF THE NEW YORK STATE BAR ASSOCIATION
EMERGENCY TASK FORCE FOR SOLO AND SMALL FIRM PRACTITIONERS**

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INTRODUCTION

In March 2020, the New York State Bar Association's President Henry M. Greenberg established an Emergency Task Force charged with examining the impact of the COVID-19 crisis on all aspects of solo and small firm practice. The Task Force embraced its specific mission to make recommendations on how solo and small firm practitioners can maintain their practices during the health crisis and determine how the Association, its members and the profession-at-large can aid these lawyers during this unprecedented period of uncertainty.

Members of the Task Force are practitioners located throughout the state and practice in urban, suburban and rural settings. Most practice in small and solo settings, though some practice in large firms. Task Force members provide direct legal services to individuals and businesses. All were affected by the pandemic. Out of this sensitivity grew an urgency to assure the public that their interests would continue to be served.

To carry out that objective, the Task Force advocated to the executive branch of New York to classify the practice of law as essential which led to a resolution adopted by the Association's Executive Committee in support of essential classification. The Task Force also coordinated with the Office of Court Administration on re-instituting new filings in civil matters and expanding the scope of electronic filings. Several Task Force members were featured in various continuing legal education seminars for NYSBA members on a variety of topics applicable to the pandemic.

Over time, the Task Force recognized that it had accumulated a trove of information and recommendations that would be useful to small firms and solo practitioners. Disseminating that information in a comprehensive report will prepare solo and small practitioners for the next crisis, hence, the creation of this Pandemic Blueprint.

As of this writing, there is no definitive end in sight for the COVID-19 pandemic, nor is there any way of knowing when the next pandemic or similar catastrophe will strike. The Blueprint offers guidance on handling a future crisis. Parts of the Blueprint are practical and designed specifically for day-to-day management if another catastrophic event occurs. Other parts of the report are aspirational, designed as a clarion call to the Office of Court Administration (OCA) and New York legislators to modernize court operations to meet the everyday and technological challenges of the 21st century, especially for solo and small firm practitioners and the thousands of New Yorkers they represent.

EXECUTIVE SUMMARY

COVID left an indelible, devastating, and incalculable imprint on the legal profession, particularly on small and solo New York law firms. The tragic and untimely deaths of attorneys and judges throughout the state permanently altered the New York legal landscape. The lack of comprehensive disaster plans, statewide court closures, the failure to designate attorneys as essential workers, restrictions on in-person gatherings, and the economic fallout that followed all contributed to the severe and negative impact suffered by small and solo practitioners.

There is no one compendium of model practices for how solo and small firm practitioners should deal with a pandemic nor is there a one-size-fits-all solution to the next catastrophic event. It is the genuine hope of the Task Force that no other crisis akin to the COVID pandemic ever occurs again. However, in view of the threat posed by coronavirus variants and the consequences of the national reckoning with systemic injustice, climate change and globalization, events like this pandemic will not be isolated.

The Task Force concentrated its focus across several different areas. The Blueprint covers each of those categories which are summarized below.

I. LAW OFFICE MANAGEMENT

The COVID -19 pandemic exponentially increased day to day stresses on the operation and functioning of law offices, especially solo and small firm practices. Attorneys had to navigate the challenges that came with preparing for and learning to work remotely. Attorneys dedicated daily time to learning family leave laws, unemployment insurance procedures, and navigating the frequently released Governor's Executive Orders. Once offices were allowed to re-open, attorneys devoted time to establishing, enacting, enforcing, and revisiting policies to ensure compliance with government mandates and the safety of staff and clients. The Task Force identified actions appropriate for most law offices. The Task Force collected a list of resources, including CLE programs available on demand through NYSBA, which cover the many aspects of law office management required not just for the COVID-19 crisis but for future pandemics as well.

II. COURTHOUSE SAFETY

As the pandemic stretched into the summer of 2020, concerns increased regarding the lack of access to justice with courthouses shut down, and thoughts turned to how to safely resume court functions and in-person operations. In July 2020, The Commission to Reimagine the Future of New York Courts issued their initial report on restarting in-person operations. In August 2020, the Task Force surveyed NYSBA members regarding their experience and comfort with returning to in-person court appearances. At a September 2020 New York Senate hearing to examine the re-opening and operation of the courts, The Legal Aid Society of New York City (LAS) offered testimony that included recommendations regarding safety measures that should be implemented in the courts of New York City. The Task Force found that many of the recommendations studied and proposed by these groups should apply statewide.

III. CRIMINAL MATTERS

The COVID-19 pandemic forced criminal practitioners and defendants to confront specific procedural and constitutional challenges. How to minimize the risk of exposing participants to the COVID virus so that defendants can appear at trials and sentencings posed the greatest challenge. Defense practitioners also considered the implications for defendants who waive the right to an in-person appearance during sentencing in those situations where this option is available.

IV. CIVIL MATTERS

The pandemic compelled OCA to adopt measures to enable access to the courts without requiring personal appearances. The increased use of electronic filing and the use of Microsoft Teams made virtual appearances and trials possible. The Task Force took a fresh look at prior recommendations contained in various earlier reports, such as the Comprehensive Civil Justice Program 2005: Study and Recommendations and the Report of the Commission to Examine Solo and Small Firm Practice. Many of the ideas in those reports are reflected in the Task Force recommendations.

V. VIRTUAL EVIDENCE

The Task Force compiled a list of issues and concerns caused by the use of virtual hearings and trials. One of the more difficult issues to resolve has been the submission and

presentation of evidence during a virtual trial. In March 2021, New York instituted Virtual Evidence Courtrooms within the NYSCEF system as a solution to the difficulties encountered in managing evidence during virtual trials. To eliminate inconsistencies caused by each judicial district having developed its own rules for virtual trials, the Task Force recommends that OCA, in consultation with the Bar, promulgate uniform rules for the administration of virtual hearings and trials and develop a statewide electronic evidence policy.

VI. GOVERNOR'S EXECUTIVE ORDERS

Governor Andrew Cuomo issued many executive orders in response to the pandemic. Notable areas affecting solo and small firm practitioners included statute tolling, virtual notarization, and moratoriums on evictions and foreclosures. Many of the Executive Orders (EOs) expired but were extended on multiple occasions, many at the last minute. EOs became moving targets that were difficult to follow. The nomenclature used to catalog and reference the EOs made them tedious and time-consuming to track. The Task Force recommends an index be created for EOs. Search results could direct the user to the relevant EOs and show highlighted text.

VII. THE PRACTICE OF LAW AS ESSENTIAL

Early in the pandemic attorneys were prevented from having their staff report to the office in person by the restrictions covering in-person working arrangements because law firms did not fall under the umbrella of an essential business. The Task Force presented a resolution to NYSBA's Executive Committee which called on state bar leaders to appeal to state officials to make them understand the critical role lawyers play in the delivery of justice to New Yorkers. A Resolution to classify the practice of law as essential was adopted by the Executive Committee. The Task Force recommends that the practice of law be deemed essential by New York State leaders.

VIII. ECONOMIC ASSISTANCE TO MEMBERS

After courthouse doors closed and attorneys were forced to shut down their physical offices, the Task Force distributed information to NYSBA members about available financial assistance. Government programs, such as the Paycheck Protection Program (PPP) and the

Emergency Economic Injury Loans/Grants (EIDL), were available to law offices and the Task Force sought to ensure that state bar members knew about these programs. The Task Force shared information regarding the details of mortgage and rent relief. The Task Force sponsored and participated in a CLE program on PPP loan forgiveness. The Task force successfully advocated for state and federal courts to accelerate the voucher procedures used to compensate court-appointed assigned counsel, particularly for “interim” vouchers where the cases were not yet concluded.

SECTION ONE: LAW OFFICE MANAGEMENT

As a result of the COVID-19 crisis, law offices need to know the steps to take in the event of a future crisis. These issues involve not only maintaining certain procedures to remain safe, but also an alertness to the plethora of federal, state and local statutes, rules, executive and administrative orders, and the regular changes and updates to all of those.¹

Notably, wearing a mask and social distancing are a given. Sanitizing facilities and equipment is also recommended. In addition, protecting attorneys, staff, and clients requires measures such as staggering workforce hours, working from home, and reorganizing the office to provide barriers and distance. Staggering workforce hours could mean that portions of the staff come in on different days of the week, or on different hours of the day. All of this must be coordinated with childcare, family health care and other factors that affect the population in general and offices specifically.

Lawyers must understand family medical leave laws, unemployment insurance, and daily updates from government agencies. Failure to understand these laws will detrimentally impact offices and employees.

Upon return to the workplace setting, there must be constant daily vigilance. Every employee, client, and any other person coming into an office must be screened to ensure compliance with the most recent directives from the Office of Court Administration (OCA) or the Governor's office. Items to be screened for include prohibited or ill-advised travel, contact with a person who has tested positive, experience with illness-related symptoms, and observance of all required quarantines. All screening forms need to be updated on a regular basis.

Additional screening methods include temperature taking (which may not always be effective but at least sets a minimum standard), and basic observation of people who appear to be exhibiting symptoms despite saying that they have none during their visit.

Communication is the key to safety. Law offices should keep employees apprised of any positive tests on the premises, whether for coworkers or visitors, and assure employees

¹ For example, New York enacted a comprehensive revamp of the state's workplace health and safety laws, known as the "HERO Act." The law is intended to protect employees against exposure to disease during airborne infectious disease outbreaks.

that management is taking all necessary safety steps. Employees should be encouraged to be tested regularly. There needs to be two-way communication so that employees are comfortable with management and vice versa. Without good communication, safety measures will not succeed.

Listed below are safeguards the Task Force identified for the average office.

These measures are not exclusive.

1. Delineate appropriate social distancing throughout the office and throughout the building.
2. Install barriers where appropriate.
3. Prohibit sharing of desks, offices, and cubicles, and limit access to break rooms and other common areas.
4. Regularly clean surfaces according to Center for Disease Control (CDC) guidelines.
5. Encourage employees and attorneys to wipe down lavatory faucets, door handles, etc. with available wipes and cleansers. Wipe down common equipment before and after each use.
6. Ensure ventilation systems are adequate and install HEPA filtering devices.
7. Reduce break room population by a minimum of 50%.
8. See clients only by appointment so that appropriate safety measures can be effectuated in the waiting rooms, conference rooms, lobbies, etc. Wipe down these rooms before and after each use. Use only those conference rooms that are large enough to allow reasonable social distancing. Centralize scheduling of those rooms so that attorneys can stagger appointments for clients coming into the office.
9. Receive deliveries outside of the office if possible and terminate non-work-related deliveries to the office.
10. Consider the personal circumstances of staff which may include childcare in the event of school closures or infection, or care for elderly family members.
11. Implement an effective infection communications plan. If a person is exposed to an infection, that person must report it and be tested. Designate a specific person to be responsible for knowing all of the relevant rules and procedures. Have any exposed persons report to that individual. Conform all quarantines to current state standards.

12. Maintain a daily reporting form for both staff and visitors. Keep a log of visitors with names and contact information as well as time and date of visit in the event that they need to be contacted.
13. Schedule a staggered return for staff returning to work to ensure the greatest level of safety.
14. Inform staff of family leave benefits, family medical leave, quarantine standards, and other benefits that are available to protect them.
15. Provide staff with the ability to take a leave of absence in the event they cannot work remotely and they cannot safely come back into the office.
16. Take the temperature of everyone including staff, lawyers, and visitors before permitting entry into the office.
17. Monitor changes in health agency recommendations and implement them as needed.

Firm Management

Addressing the needs and requirements of a pandemic requires a constant review of staff and systems that comprise and support law office function. From a management perspective, this process requires partners to be alert, nimble, and flexible. Even with the best and most thoughtful approaches, first responses may not be perfect and strategies that worked once might not work later, so plans should be revisited frequently.

Partner Meetings and Firm Management

Each firm is different and management styles vary widely, but the following are some practices to consider:

- Have daily check-in calls with managing partners or all partners, depending on the size of the firm. The calls could last 15 minutes or longer, depending on the issues involved. Although not all of the calls may be necessary, schedule all of the calls in advance to reserve the time, and schedule corresponding partnership meetings.
- Review and revise the partners' organizational chart to confirm that the assignments still make sense and to prevent uneven distribution of administrative work among the partners. Encourage partners to handle only those tasks that are their responsibilities in the organizational chart unless otherwise requested. This streamlining helps to

ensure that each partner's administrative time is kept to a minimum and prevents multiple partners from unknowingly duplicating the same administrative work.

- Review the firm's budget and adjust as needed. In the COVID-19 pandemic, firms needed to spend more on technology as opposed to amounts budgeted for meals and travel. Consult with the firm's accountant to determine the effect of any tax law changes and the impact and eligibility of applications for government aid and assistance.
- Hold a one or two day partners' management meeting for in-depth discussion of firm management concerns. If pandemic or crisis issues overtake a usual management meeting, plan another meeting to discuss day-to-day issues. Do not neglect the routine business of the firm separate from the demands of crisis management.
- Review staffing needs and reallocate or adjust staff as needs change. Early in the COVID-19 pandemic, it was theorized that administrative staff might be reduced as firms became automated and relied more heavily on technology. Instead, administrative staff assumed new roles in scanning documents and supporting other staff who were working from home. In addition, plan for a loss of staff due to illness or emergency. Review and adjust policies regarding requests for paid time off.
- Review technology and cybersecurity needs. Consider whether the technology in place provides optimal support and whether other better technologies exist.
- Review and revise communication channels for meeting agendas, personnel matters, budget items, etc. During the pandemic, email use by clients, staff, and outside contacts increased. Consider using another platform such as "Slack" for management issues.² Slack provides an organizational framework and saves all communication in threads, which preserves running conversations on topics and a history of discussions.
- Be mindful of management and office morale. As everyone struggles to complete work under difficult circumstances, be attuned to staff stress and mental health needs. Consider personal check-ins and perks for all staff, including partners, which might consist of simple notes, food deliveries, or a workplace online event.

² Slack is a platform to streamline communication and workflow among people through the integration of hundreds of applications all in one place. Slack makes it possible to message a coworker, have a group chat, share files, and start a virtual meeting in Zoom or Microsoft Teams – all without leaving the Slack platform. See <https://slack.com/>

Administrative Team

Review the administrative team, which may include an office manager, administrative assistants, and receptionist. Make the office manager a part of all planning to take advantage of the office manager's insight into staff needs. Enlist the office manager to reaffirm the plans and messaging for the staff including guidance and updates to pandemic and crisis policies such as mask usage, physical distancing, and enforcement of these policies. Revisit administrative roles and adjust job descriptions where needed. Communicate with the administrative staff as they adjust to new roles and different jobs.

Attorneys and Staff

Supporting attorneys and staff with good communication is key to this stressful time.

- For efficient messaging, consider office memos with quick staff meetings to review important terms. Make the memos clear and provide relevant information and examples. Include the underlying rationale and public policies behind office procedures so that staff can understand why they were issued. Use law school case briefing techniques for these memos (i.e., Issue, Facts, Decision, and Rationale) to provide a clear and cogent outline that both staff and attorneys can understand and refer to later.
- Hold (or continue holding) regular staff meetings. If in-person meetings are not possible, meet by Zoom or other online platforms. Publish online meeting protocols and remind staff of meeting guidelines.
- Entrust the office manager with holding staff meetings without attorneys for procedural and training matters. This permits staff to candidly exchange questions and ideas in a smaller setting.
- If work from home (WFH) is needed, assess staff needs at home including technology, assistive devices (e.g., phone stands), office equipment (e.g., chairs, keyboards, and monitors), and supplies. Permit staff to choose the items they need, whether from a set budget amount or a menu of options.

- Review scheduling needs. In the COVID-19 pandemic, many staff with children needed flexible schedules to manage children and family needs. When “flexing” schedules, staff and attorneys need to be aware of other’s schedules and recognize that while everyone is working, it may be at different times, and they will need to be patient while waiting for an answer. Conversely, those who are flexing cannot expect on-premises support during off hours.

Continuing Legal Education

NYSBA has offered many webinars on law office management during this pandemic which can be found on the state bar’s website. The programs include:

- The Lawyer as Employer:
<https://nysba.org/products/the-lawyer-as-employer-2020/>
- Legal Project Management:
<https://nysba.org/products/legal-project-management-2020/>
- Lawyer as Employer: Handling Coronavirus Issues in the Workplace:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=gjB9j2OG1kB3a0PxmDncAQ==&ce21=true>
- A Pandemic Law Practice: Collaboration, Culture & Security:
<https://nysba.org/events/a-pandemic-law-practice-collaboration-culture-security-webinar/>
- Mindfulness for Lawyers in a Time of Stress:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=qdNuwl1IqICOT9KJsE20VMw==&ce21=true>
- COVID-19: Legal Malpractice Perspectives on Small and Mid-Sized Law Firms:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=b3UUWag1JKcfLw0b7G53CA==&ce21=true>
- Resilience Training: Performance & Interpersonal Management Skills:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=KJNPcwau73a7j35rPz8MSw==&ce21=true>

- Legal Ethics in the Age of COVID-19: What Lawyers Need to Know:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=Z7QDcHD4csG8eWUIY96yEQ=&ce21=true>
- Human Resources Issues in the Time of COVID-19:
<https://nysba.org/events/human-resource-issues-in-the-time-of-covid-19-webinar/>
- Successful Client Relationships are Based on Responsive, Ethical Communications:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=8I@@12eEkyXWjSGmCuAuPauJg=&ce21=true>
- Attorneys Guide to Navigating the Pandemic:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=a0SpGDTucS87jAi37NLjKg=&ce21=true>
- Finding the Compassion Balance: Mindful Lawyering & Vicarious Trauma:
<https://nysba.org/events/finding-the-compassion-balance-mindful-lawyering-vicarious-trauma-webinar/>
- Employment Handbooks: Updating and Addressing COVID-19:
<https://nysba.org/products/employment-handbooks-updating-and-addressing-covid-19/>
- What Makes a Virtual Lawyer Happy:
<https://nysba.org/products/what-makes-a-virtual-lawyer-happy/>
- Ethics, Impairment and COVID-19: The Toll of the Legal Profession:
<https://nysba.ce21.com/ViewerUnAuthenticatedlink?x=JUdKxPGdmayQDasPQ96cbw=&ce21=true>

Disaster Preparedness in General

Unlike some previous natural disasters, the COVID-19 pandemic cut people off from their physical office space and their fellow employees and colleagues. The preparation for pandemics is nevertheless similar to that for natural disasters and can keep such isolation to a minimum. Preparation can be as straightforward as securing the current workspace and files, and being able to work remotely with an internet connection.

Points to remember for disaster management include:

- Contact all employees to provide them with a status report and assign tasks.

- Recognize that the firm will need to work with each of the following entities:
 - Building management
 - Emergency management and other governmental agencies
 - Utility companies, including electric, gas, water, and phone
 - Insurance agent
 - Banker
 - Payroll company
 - Key vendors
 - Post office.
- Establish an emergency communication system to help the firm communicate with the courts, other lawyers, staff, clients, and vendors. Set up direct forwarding of calls from the office to an off-site receptionist or to individual cell phones. Voice-over-internet protocol (VOIP) readily allows for call forwarding. Firms may still need to contact their telecommunications vendor to implement VOIP. Use texting where appropriate to stay in touch with clients. Internally, consider using an online platform so that staff and attorneys can contact each other easily without having to resort to phone calls.
- If the firm cannot physically occupy the office, communicate that information to clients and to the Post Office. Set up temporary mail forwarding if necessary. Arrange for security protection for any unoccupied office space.
- Update the firm's website to let clients know that the office is open but not available for in-person visits. Be sure that anyone answering the phone informs all callers of limitations on in-person contact. If an attorney is working remotely, this information can be included in a revised e-mail signature block.
- Move files to cloud storage such as One Drive/Box/Dropbox so that they can be accessed remotely. Make sure that file backups are not kept in the same geographic location as the office. A true disaster can dislocate those connections as well.

- Decide what paper records are absolutely necessary to maintain. This is important even outside of a pandemic. Secure original hard copies of vital documents in fireproof safes. This includes wills, unrecorded deeds, trial evidence, firm accounting, bank, and insurance records.
- Make sure all attorneys and staff have an encrypted list of login information including URLs, user names, and passwords for the services they need so that they can continue to work. Nothing is more frustrating than not knowing how to log into something because the login and password is sitting in a binder at the office.
- Consider a cloud-based LPM (law practice management) system to give the firm access to contacts, communications, documents, and calendars for the practice. Physical calendars only work if they can be accessed. LPM allows everyone access to upcoming deadlines, current tasks, and client contact information.
- Contact the court and opposing counsel as needed for adjournments, scheduling, and the like. Collect those contact numbers in advance. Do not rely on the courts and the government to automatically push out dates. While courts may respond to law firm closings, they may not reschedule matters immediately. If the firm moves to a temporary location, update all records with the courts and court administration.
- To ensure the financial health of the office, prioritize collecting accounts receivable. Anticipate and prepare for work disruptions, including a drop off in referrals.
- Review insurance policies for appropriate coverage. For those who have business-interruption coverage, submit an insurance claim for any covered damages the office sustained. Determine eligibility for other forms of emergency relief and submit a claim if eligible.
- Ensure all attorneys have in place an Advance Exit Plan to protect clients' interests in the event of disability or death. For more information on such plans, see <https://nysba.org/attorney-resources/planning-ahead-guide/>.

SECTION TWO: COURTHOUSE SAFETY

As New York emerged from the pandemic's strong grip and as OCA and the judicial district administrative judges contemplated a gradual reopening of courthouses, their focus shifted to courthouse safety. This section of the Blueprint addresses such safety concerns.

Because of constitutional and due process issues, criminal courts were slated to be among the first to reopen. Due to the volume of people who access criminal courthouses in the metropolitan area, this section spotlights such courthouses. However, the recommendations apply to every courthouse in the state.

In June 2020, out of concern over in-person court operations in housing and criminal courts, The Legal Aid Society of New York City (LAS) retained CrowdRX. This entity performs disease screening to ensure workplace safety. LAS sought to assess the safety of New York City courthouses. It also solicited advice and guidance for criminal defense and civil legal service providers, their clients, unrepresented litigants, and OCA on safety measures that should be implemented before resuming in-person court appearances.

Between late June and August 2020, CrowdRx toured 25 courthouses as well as several immigration jails, immigration proceeding buildings, and the Rikers Island Justice Center. CrowdRX, and an expert hired by UAW Local 2325, raised significant concerns about the courts' reopening protocols that they found were unaddressed. CrowdRX's findings were included in LAS's testimony at a New York Senate hearing on September 4, 2020 on the reopening of the courts and can be found online.³

LAS convened working groups of a cross-section of its managers, staff attorneys, investigators, and social workers, to develop recommendations for steps to take before resuming in-court appearances. The recommendations from September 4, 2020 were the following for New York City:

- Personal protective equipment (PPE): The court system must establish and enforce mandatory use of PPE and provide PPE for the public entering the courthouse who do not have their own PPE.

³ https://www.nysenate.gov/sites/default/files/the_legal_aid_society_-_joint_senate_hearing_on_the_re-opening_of_the_courts.pdf

- Cleaning protocols: All stakeholders with expert guidance must establish and adopt stringent cleaning protocols throughout the court and court-based offices.
- Court facilities: All courthouses and their interior spaces must be assessed and altered per medical and expert guidance so that:
 - the HVAC is MERV 13 or higher, or remediated per specifics;
 - court rooms are configured for social distancing per specifics;
 - holding cells are reconfigured for social distancing in all phases including transportation, movement, counsel meetings, and court appearances;
 - restrooms for the public, stakeholders, and defendants are configured to prevent COVID spread;
 - hand sanitizers, soap, and hot water are available;
 - stakeholders reduce the number of staff in each court part to a minimum but safe number;
 - arraignment parts in small courtrooms are moved to larger courtrooms, arraignment parts that are located in basements that use poorly ventilated elevators should be moved to more safely accessible courtrooms;
 - repurpose large courtrooms with audio-visual equipment so members of the public can view proceedings while maintaining appropriate social distancing.
- Health screenings to enter the courthouse:
 - Everyone entering the courthouse including all staff from all stakeholders, court staff, judiciary, district attorney staff, department of corrections staff, NYPD, and members from agencies associated with the criminal system, must be screened outside the building;
 - If an individual is denied entry because of the screening, protocols are required to minimize adverse consequences including creating a containment room if the individual requires emergency medical services;
 - If an individual develops symptoms after entering the courthouse, protocols are required to address those situations including the health and safety of that individual, the people with whom they have come in contact, and privacy rights.

- Training and enforcement:
 - All stakeholder staff must be educated as to the public health risks of COVID and other communicable diseases and the proper procedures to mitigate risks of infection;
 - Designated professionals should be assigned to ensure that the cleaning protocols and practices are maintained;
 - Committees involving all stakeholders should be established in each county to assess these recommendations and monitor compliance.

The LAS testimony did not address local criminal courts outside the metropolitan area. However, in September 2020, OCA prepared a plan for the reopening of town and village courts. Safety and due process concerns in town and village courts outside of New York City remained a problem. The variety of local criminal courts outside of New York City is extraordinary, ranging from rural town and village courts to large urban city courts. All judicial districts created courtroom protocols for reopening and operating each of the courts under their jurisdiction. However, many town and village courts lack the resources and the expertise to create guidelines for court operations. To ensure that town and village courts operate safely, it is essential that county health officials provide guidance.

Also, around this time in July 2020, a commission created by OCA, The Commission to Reimagine the Future of New York Courts, issued an initial report on restarting courthouse in-person operations (See <https://www.nycourts.gov/LegacyPDFS/press/pdfs/Commission-on-Future-Report.pdf>). The report prioritized health and safety and recommended that each court generate its own plan for restarting in-person grand juries, jury trials, and related proceedings based on local conditions.

In August 2020, the Task Force surveyed New York State Bar Association members to gauge their confidence in returning to courthouses. Most reported that they had not yet returned to court for an in-person appearance. Of those that had already experienced an in-person appearance, they reported that they did not feel comfortable for their safety. Over sixty-two percent of all respondents reported that they would prefer not to appear in person during the duration of the pandemic (See Appendix A).

SECTION THREE: CRIMINAL MATTERS

Criminal practitioners and defendants confronted specific procedural and constitutional challenges during the pandemic. The Task Force observed the following problems and offered recommendations on how to address those problems.

Criminal Procedure Law Section 260 - Jury Trials

Criminal Procedure Law §260.20 provides generally that a defendant must be present in person during the trial of an indictment. As discussed in the preceding section, in July of 2020, the Commission to Reimagine the Future of New York's Courts' report included recommendations for re-starting in-person jury trials.

Pursuant to that report, the best practices for jury trials necessitate consultation with local and state health officials to ensure that safety measures are in place to create a safe environment and instill confidence in all participants. Health and safety considerations were also the focus of those involved in the criminal justice system, and resulted in the survey and report issued by CrowdRx on August 11, 2020, discussed in the section above.

Plans for jury trials and other in-person proceedings that have been implemented and approved should be reviewed periodically with the involvement of stakeholders not only from the judiciary but from defense counsel and prosecutors.

Article 350- Non-Jury Trials

This article of the Criminal Procedure Law (CPL) applies to non-jury trials in local criminal courts or, in certain cases, by judicial hearing officers.

Best practice in these cases should incorporate all of the provisions regarding the health and safety of the participants as provided in the analysis of CPL Article 260. These best practices in local criminal courts for both jury and non-jury trials create significant challenges for the solo and small firm practitioner. The variety of "local criminal courts" in New York State - from large urban city courts to rural town and village courts - is extraordinary. The lack of resources available to many town and village courts, including the lack of expertise in creating guidelines for court operations, is very problematic and has resulted in disparate application.

Best practices would dictate that uniform guidelines for town and village courts be adopted and implemented by all judicial districts with input from the county district attorney and defense providers.

CPL Article 360- Jury Trials in Local Criminal Courts

This Criminal Procedure Law section deals with jury trials in local criminal courts and best practices would be the same as those discussed above.

CPL Article 380- Sentencing

Criminal Procedure Law §380.40 (1) provides that, in general, the defendant must be personally present at the time sentence is pronounced. CPL §380.40(2) provides the exception, which includes sentences for misdemeanors or petit offenses with an appropriate waiver.

The New York State Court of Appeals in *People v. Rossborough*, 27 N.Y. 3d 485 (2016) held that a defendant convicted of a felony may expressly waive the right to be present at sentencing. While a defendant has the right to be present, under *Rossborough*, a defendant being sentenced on a felony could consent to a waiver of the right to be physically present and agree to a virtual appearance.

Strategy Issues Related to Waiving An Actual Appearance and Appearing Virtually

The Task Force examined the impact of the pandemic on solo and small firm defense counsel in criminal settings, and in particular the rights of defendants. The defense practitioner must consider strategy issues related to the waiver of in-person appearances. For example, will the sentencing court permit a defendant appearing virtually for sentencing to have a copy of the pre-sentence report before sentence is imposed? In the event the defendant waives the in-person appearance, the Task Force offers the following statutes and comments for consideration:

- A. CPL §390.20 requires a pre-sentence report in most felony cases;
- B. CPL §390.50 provides for the confidentiality of pre-sentence reports; however, it also provides that not less than one court date prior to sentencing the pre-sentence report be made available for examination and copying by the defendant's attorney;

- C. CPL §390.50 has been interpreted to permit a defendant to have a copy of the pre-sentence report only with the sentencing court's permission. Therefore, if defense counsel seek to consent to a virtual appearance, they must also seek the court's permission to provide a copy of the pre-sentence report to defendant prior to sentencing.
- D. CPL §390.60 provides that a copy of the pre-sentence report accompanies the defendant to the correctional facility. Best practice would be to ensure that any errors in the report are corrected before sentencing. This document will be utilized by the correctional system in determining programming, security levels, and potential release dates.
- E. CPL §390.50(b)(2) provides an opportunity for victims to make a statement at sentencing. Notice to defendant is required and best practices mandate that defense counsel consider whether a victim appearing in person at sentencing will impact the decision for the defendant to appear virtually or in-person.

SECTION FOUR: CIVIL MATTERS

The pandemic compelled OCA to adopt measures -- many long overdue -- to enable access to courthouses without requiring personal appearances, and to streamline litigation processes - all aimed at effectuating progressive and systemic change. The statewide shutdown forced the bench and bar alike to become more adept at using technology to access the court. Both now recognize that nearly every pre-trial matter can be conducted electronically. It is essential to build upon the momentum behind the technological advances that were initiated in 2020 and create a functional, 21st century-court system that uses the latest technology.⁴ There are also specific changes that should be made to the Uniform Rules to ensure that New York courts can withstand future challenges.

Several of the proposals outlined below have been proposed to OCA before. In the *Comprehensive Civil Justice Program 2005: Study and Recommendations*⁵, First Deputy Chief Administrative Judge Ann Pfau recommended expansion of the then-fledgling “e-court concept” to include e-scheduling and automated preliminary conferences. And in 2006, a panel of statewide attorneys appointed by the Honorable Judith Kaye issued the *Report of the Commission to Examine Solo and Small Firm Practice* which urged comprehensive change in all pre-trial proceedings and discovery, along with the use of technology in judicial proceedings⁶.

OCA tabled many of the recommendations in Judge Pfau’s report and nearly all of the recommendations in the Commission’s report. If the New York judicial system intends to remain the benchmark for substantive and procedural excellence, the proposals below will need to be revisited and implemented.

Scheduling and Calendaring

The Task Force recommends the following:

- Continue to schedule all pre-trial proceedings by email using Google calendar or a similar application.

⁴ The Online Courts Working Group of the Commission to Reimagine the Future of New York’s Courts made a variety of recommendations concerning the use of technology for virtual proceedings.

<http://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf>

⁵ http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/Civil_Justice_Program_2005.pdf

⁶ <https://www.nycourts.gov/LegacyPDFS/IP/jipl/pdf/ssfreport.pdf>

- Continue to conduct all conferences and motions by Microsoft Teams or a similar video-conference platform. Conducting pre-trial proceedings by videoconference has already become routine and is more efficient when specific times are designated and adhered to, thus avoiding wait time in the courtroom, and obviating the need for travel to the courthouse.
- Remedy the ongoing problem in Family Court where cases are not called on a time-certain basis causing attorneys and litigants to wait indefinitely and sometimes all day. In addition, use Microsoft Teams for conferencing for support matters in Family Court instead of by telephone calls that are initiated by the Court. While these conferences are generally scheduled on a time-certain basis, the court does not always make the call when scheduled which hampers an attorney's ability to attend other court proceedings while waiting for the Family Court magistrate. Conversely, if the call is not timely and counsel participates in another Court proceeding, the call from Family Court may be missed altogether.

Preliminary Conferences

The Task Force recommends the following:

- Modify the Uniform Rules to create a statewide uniform and downloadable preliminary conference form, similar to the uniform preliminary conference (PC) form that the Suffolk County matrimonial part has implemented. The uniform PC form can be e-filed within 45 days after an answer is interposed or within 30 days after an order is issued in connection with a motion to dismiss a complaint.
- Adopt statewide uniform procedures for the adjournment of preliminary conferences, for example, one adjournment on consent of counsel not to exceed 20 days and a second adjournment only for good cause; Require specific dates in the PC form for the disclosure of experts and a date by which to file the note of issue.

- Require a detailed discovery plan and a discovery cut-off date that cannot exceed nine months in the PC form. If counsel can stipulate to the terms in the PC form, the document can be e-filed to a non-judicial case manager (which Judge Pfau recommended in her 2005 report) or Part Clerk who can upload relevant data to the Court's calendar. If counsel cannot agree on the discovery plan or the cut-off date, each counsel should be required to submit a one-page summary of the underlying issue(s).
- Indicate on the PC form whether counsel requires the court's intervention. If there are issues such as discovery, the court can make an order based on the written summaries or it can schedule a conference with a designated court attorney or referee who is trained to address and resolve pre-trial discovery disputes.
- Hold a compliance conference ninety days after issuance of the PC form, with the Court Attorney/Referee. At that time, address outstanding discovery and discovery disputes, encourage early settlement/resolution, and schedule a pre-trial conference. If settlement cannot be achieved at that stage, schedule a follow-up compliance conference to address remaining discovery and settlement. Every effort should be made to avoid discovery motion practice.

Uniform Mandatory E-filing and Uniform Rules

The Task Force recommends the following:

- Continue implementation of uniform mandatory statewide e-filing in all courts. E-filing promotes efficiency in the court system and benefits counsel and litigants especially when motions do not have to be physically filed and served. E-filing must accommodate attorneys, particularly in certain rural counties, who do not have access to high-speed internet. Ensure that all court files, including historic files, are accessible to attorneys. The gains in e-filing that have already been achieved are undermined if counsel cannot access an older file because it has not been scanned and uploaded. While it is a Herculean undertaking to upload historic files, it is a task that needs to be done only once and can be accomplished over time.

- Redesign and regularly update OCA’s website. There should be one website for attorneys, judges, and pro-se litigants with links and access to (i) e-filing; (ii) Part information including an email address for the judge and the judge’s secretary, the court attorney and Part Clerk, and Microsoft Teams link and conference call telephone number with participant code; (iii) all court rules including uniform rules for the New York State Trial Courts and separate rules for the Court of Appeals, each Appellate Division, the Commercial Division and individual Part rules; (iv) downloadable forms for general use such as a retainer agreement, health care proxy, power of attorney, notice of appearance, Request for Judicial Intervention, stipulation to adjourn, bill of costs and the PC form; (v) separate categories of downloadable forms organized by area of law, i.e. housing/landlord-tenant (forms to include petition and answer) and matrimonial and family law (forms to include statement of client’s rights, affidavit of net worth, judgment of divorce, findings of fact and conclusions of law); and (vi) miscellaneous statutes and related documents, such as maintenance and child support statutes and sample questions for inquest for each branch of relief under Domestic Relations Law §170, etc.
- Achieve consistency in e-filing, even on an interim basis. Needless confusion occurs when the court issues conflicting directives requiring counsel to upload certain documents to EDDS, upload other documents to NYSCEF, and email other documents as pdf attachments to a judge’s individual Part.
- In order to ensure accurate and consistent usability, implement a help desk and chat feature for e-filing users. Inquiries to the help desk and chat feature should be monitored for systemic problems.
- Implement easily accessible, streamlined statewide uniform rules after consultation with the Bar.

SECTION FIVE: VIRTUAL EVIDENCE

The continued administration of justice during the global pandemic has required our Court system to establish innovative methods to replace in-person court appearances and trials. Judges throughout New York State have been called upon to decide novel issues due to the COVID-19 pandemic.

New York Judiciary Law §2-b(3) authorizes the court “to devise and make new process and forms of proceedings” that are “necessary to carry into effect the[ir] powers and jurisdiction.” This authority is vested in the Courts by the New York State Constitution, Article VI, § 30, which gives courts latitude to adopt procedures not specified in the statutes where such procedures are consistent with general practice as provided by the law. Since the onset of COVID-19, New York courts have exercised that authority by using technology to conduct court appearances, including virtual hearings and trials. Such authority was employed during COVID-19 despite objection by the parties. Interestingly, decisions rendered by the trial courts during this time reached opposite conclusions.⁷

The Task Force surveyed, considered, and researched the current climate regarding these matters. Some of the issues and concerns collected by the Task Force that arise during virtual hearings and trials included:

- Technical Issues: witness/camera placement including witnesses being “coached” during trial; objections; the use of the mute button; allocution by witnesses and attorneys about the “rules” of video trials;
- Virtual Platform Microsoft Teams Limitations: the limited number of people who may appear on screen; recording of proceedings by litigants/attorneys; interruption of internet service and/or freezing/bad audio/video; use of breakout rooms;

⁷ See, for example *S.C. v Y.L.*, 67 Misc.3d 1219 (a) (Sup Ct. NY Co. May 18, 2020) which held that criminal contempt is a bar to a virtual hearing and *C.C. v A.R.*, 69 Misc. 3d 983 (Sup. Ct Kings Co. Sept. 30, 2020) which held that criminal contempt is not a bar to a virtual hearing.

- Evidentiary Issues: best evidence rule and the introduction of scanned documents; better use of attorney certifications (see CPLR 2105 “Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared . . . with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk.”); procedure regarding evidence being admitted and objections; more pre-trial conferences in advance of trial to discuss specifics; “holding back” rebuttal or cross-examination evidence;
- Testimonial Integrity: keeping potential witnesses out of a virtual courtroom; how will judges be able to determine who is being coached or using notes; judge’s ability to assess witness demeanor;
- Comment: It is vital that counsel circulate advance copies of all documents they intend to introduce into evidence or use at trial. If additional documents need to be produced during the hearing, a mechanism for such production should be stipulated in advance of the hearing.

The Task Force discussed these issues with court reporters. They suggested and observed the following:

- Pre-marking of exhibits is crucial;
- Microsoft Teams allows for too many people on the screen; make an attempt to “pin” those people who will be regularly addressing the court;
- Mute your microphone if not speaking;
- Ensure that your full name is on the screen when signing in;
- Avoid speaking at the same time as someone else;
- Participants should identify themselves each time they speak;
- At the beginning of a proceeding the court reporter should have all participants’ cell phone numbers and the attorneys should have the court reporter’s number. This will enable contact with any participant who is dropped from the call.

Evidentiary Considerations in Virtual Hearings and Trials

At the outset of the health crisis, each judicial district adopted its own set of rules and protocols which were updated throughout the pandemic. In addition to the judicial district rules, individual trial parts or groups of parts in certain counties (e.g., matrimonial parts and commercial parts) also promulgated specific rules for virtual trials. In March 2021, New York issued instructions for the submission of evidence through the Virtual Evidence Courtroom (VEC). For judges who participate in the VEC format, attorneys and unrepresented litigants submit evidence electronically through VEC located on the NYSCEF website.⁸

Virtual hearings and trials are likely to continue for the foreseeable future. For that reason, the Task Force recommends that OCA promulgate uniform rules for the administration of virtual hearings and trials. A statewide electronic evidence policy for all civil cases should be the next step in managing this emerging area.

The Task Force researched what should be considered for state-wide rules by studying how two judges in Kings County, New York, the states of Maryland and Florida, and the National Center for State Courts handled such issues. A summary of what the Task Force learned is listed below.

Honorable Cenceria P. Edwards Rules For Virtual Bench Trials- Kings County Civil Court Part 71

1. All virtual bench trials are conducted via Microsoft Teams.
2. Parties shall inform court attorney, Dwayne Thomas, immediately upon receipt of these rules if any litigant and/or witness will require an interpreter.
3. Parties shall stipulate to matters and documents that are not in dispute and submit same via executed stipulation form, via email, to court attorney, Dwayne Thomas, seven business days prior to trial. Also, include in the stipulation that parties consent to a virtual bench trial.
4. Parties shall provide the name and contact information of all persons who will testify.

⁸ <https://iappscontent.courts.state.ny.us/NYSCEF/live/help/EvidenceCourtInstructions.pdf>

5. Parties shall mark, label and submit all exhibits (along with summary lead sheet) seven business days prior to trial.
6. Parties shall submit, via email, all exhibits, evidence lists, including documents, photographs, and videos, to the Judge and opposing counsel seven business days prior to trial.

Court Rules During Trial

IT IS NOT PERMISSIBLE TO RECORD VIDEO OR AUDIO OF THE TRIAL.

- Please make sure you are fully familiar with Microsoft Teams prior to trial and if you have any questions/concerns email same to my court attorney one week prior to trial.
- Be sure to test your audio and visuals with litigants and witness before trial.
- Parties are reminded that the trial shall be recorded and only one person shall speak at a time in a clear and audible voice.
- All parties shall remain muted unless they are speaking.
- Each time you speak please identify yourself by name and whether petitioner's or respondent's attorney.
- For each objection state your name with your basis for objection. Your objection shall be made after the other party has finished speaking.
- Reminder, all conversations shall be recorded and shall be transcribed as part of the trial record.
- All witness will be held in the waiting room until they are called to testify.
- Please remind your client/witness they must speak clearly and head nodding or hand gestures cannot be recorded so all responses must be verbal so that the court reporter can properly record the testimony.
- Please remind your client/witness to look at the camera when speaking.
- If attorneys desire to speak with their client during trial, please inform the court and request a brief recess.

**Kings County Matrimonial Part Uniform Rules and Protocols During Pandemic
Emergency [as of September 10, 2020]**

Suggested Protocol for Virtual Oral Arguments in Matrimonial Proceedings, Honorable
Jeffrey Sunshine

- Everyone identify themselves after case called in.
- Everyone identify how they are appearing (by phone or virtual).
- Everyone identify themselves each time they speak in order to be seen on the virtual system.
- No recording allowed except by the court reporter.
- Where practicable, when you are not speaking phone or video must be muted.
- When anyone speaks, including the Judge, identify themselves each time.
- Counsel and litigants may NOT interrupt each other or talk over each other.
- Judge articulates on the record before the argument begins the motions sequence and the papers being considered and confirms with counsel or litigants on the record. If appropriate, ADR alternatives are discussed.
- Appointments in advance for oral arguments with strict limited time period.
- Plaintiff or movant goes first.
- If court reporter has a question or cannot hear – the Court Reporter shall interrupt, and EVERYONE must stop speaking.
- Children are not to overhear the proceedings. If this is not possible due to safety concerns, the litigant or their attorney must notify the Court.
- If litigant is represented by counsel, then counsel speaks on behalf of the litigant.
- Professional attire by counsel is expected during virtual court appearances consistent with the rules established by the Appellate Division, Second Department for virtual appearances.

Guidelines for Remote Hearings in the Maryland Trial Courts:⁹

- Any platform used by the courts must provide for encryption for all remote court proceedings, role-based user security, and password protection.
- The court where the hearing is being scheduled should be contacted for more information regarding the process for participating in a remote hearing.
- All hearings will be recorded by the Judiciary and serve as the official court recording. The court or other designated court personnel are the only persons authorized to record the remote hearing by electronic means, stenography or any other method. Any recording, photograph, broadcast, or live stream by a party or other person of a remote hearing without the permission of the court is strictly forbidden.
- Any platform used by the trial courts to conduct remote court proceedings will include a means by which attorneys may confidentially speak with clients.
- Except as otherwise directed by the judicial officer, all remote judicial proceedings will be conducted in accordance with the same standards as hearings traditionally conducted in a courtroom.
- All remote judicial proceedings will be conducted in accordance with the Maryland Rules.
- If a remote hearing is disrupted due to audio or video technical difficulties, the judicial officer may delay, postpone, or require an in-person appearance.
- If a party is not able to participate by remote means, they should contact the court promptly.
- As remote proceedings rely on utilizing email contact information and telephone numbers to participate, a court may request that three court days prior to a remote hearing, or at such other time as the court may direct, the parties file a list containing the names and email addresses of the attorneys, parties and witnesses (if any) who will attend the hearing. Court personnel may also ask parties directly for email or telephonic contact information to ensure remote hearing details are adequately provided.

⁹<https://mdcourts.gov/sites/default/files/import/eservices/pdf/remotehearingsguidelines.pdf>

- All persons must use their real names (not nicknames or aliases) while online to ensure they will not be prevented from entering the hearing.
- On the day of a video hearing, it is the responsibility of the attorneys to ensure their clients and witnesses are available and ready to proceed at the appointed time.
- Where a witness attends the remote hearing, the witness will be sworn or affirmed by the clerk or the judicial officer prior to commencement of their testimony. In addition, unless otherwise ordered by the court:
 - 1) The witness is to be alone, in a secure room with the doors closed. A record will be made by the judicial officer of those conditions;
 - 2) Participants should wear appropriate attire and present themselves as they would if they were appearing in a physical courtroom;
 - 3) Participants are to ensure that there will be no interruptions or distractions for the duration of their appearance at the remote hearing.
- To the extent possible, the courts advise that exhibits should be pre-filed at least two court days in advance of your remote hearing. To properly prepare for remote hearings and to address any issues with the exhibits prior to the hearing, it is critical that the court receive the exhibits as timely as possible.
- There are two options for pre-filing proposed exhibits with the court which are pre-filing or emailing.
- The court may allow exhibits not submitted prior to the hearing to be used at the hearing, such as documents used for impeachment. At the court's discretion, the court may consider allowing a party to transmit an exhibit to the court during the hearing via email, e-filing, or other method approved by the court.
- Attorneys of record and self-represented litigants may receive a notice via email or telephone prior to a video hearing with access instructions.

The Florida Supreme Court COVID 19-Working Group promulgated the “Best Practices-Management of Evidence in Remote Hearings in Civil and Family Cases”¹⁰

This guide summarizes the requirements for the conduct of in-person and remote hearings specified in Florida Supreme Court Administrative Order 20-23, Amendment 1, and provides links to other general resources addressing remote hearings.

The guide envisions trial judges will issue administrative orders to establish procedures for the filing and management of exhibits and the taking of witness testimony in remote hearings. In issuing these orders, the trial judge should consider:

- Differences between represented and unrepresented parties;
- Differences among physical exhibits, exhibits that can be reproduced electronically, and witnesses;
- Exchanging and stipulating to exhibits before trial;
- Advance filing of and rulings on objections;
- Advance exchanging of witness lists;
- Ensuring that witnesses have authenticated exhibits;
- Ensuring that witnesses have remote access;
- Marking, indexing, and displaying exhibits;
- Emphasizing that due process and the rules of evidence still apply but encouraging flexibility;
- Resetting a trial date if technological issues become insurmountable;
- Maintaining the public’s right of access to judicial proceedings; and
- Ensuring litigants have an adequate record for post-trial proceedings.

With respect to witnesses, the presiding judge of a remote hearing should:

- Conduct essential and critical proceedings safely using all methods feasible to minimize risk of COVID-19 exposure to all, and conduct non-essential and non-critical court proceedings virtually unless a judge determines that remote conduct of the proceeding is subject to certain specified exceptions;

¹⁰ <https://www.flcourts.org/content/download/635272/file/management-of-evidence-remote-hearings.pdf>.

- Host the remote hearing so that the court can control witnesses' admittance into and removal from the hearing;
- Advise witnesses that during their testimony they must be alone in a quiet room, may not use a virtual background, must turn off all electronic devices except for the device enabling participation in the hearing or be subject to contempt of court, and refrain from exchanging any electronic messages during their testimony.
- Confirm that the witness is alone by having the camera scan the room before and after testimony and noting this for the record.
- Keep witnesses in a Zoom waiting room until they are called to testify and remove them from the hearing following their testimony.

Managing Evidence for Virtual Hearings – A National Perspective

On June 25, 2020, the Joint Technology Committee of the Conference of State Court Administrators, the National Association for Court Management, and the National Center for State Courts, offered the following proposals for managing evidence in virtual hearings.¹¹

Prior to a Hearing: It is helpful to hold a conference prior to the hearing to discuss the process and “test drive” the technologies that will be required. Planning is key. Individual judges/courts should provide detailed instructions outlining the process of submitting evidence.

Evidence Workflow: The court must provide a way for evidence to be submitted electronically and clearly communicate the process for doing so. While each judge and each court may have unique aspects to their workflow, evidence management processes occur before, during, and after a hearing. In some instances, evidence submission can eliminate the need for a hearing.

¹¹ https://www.ncsc.org/_data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf

Evidentiary File Formats: The choice of file format should be approved by the court and the parties. Some courts require evidence to be converted to a preferred format while others simply specify that the evidence be “readily accessible” and compatible with the court’s systems. Where practicable, digital evidence should also be retained in its original format, along with any required proprietary viewing software.

Naming Conventions for Exhibits: Evidence files should be marked in a consistent way so they are easy to locate and can be labeled and identified clearly for the record. Courts may wish to specify naming conventions with a sequenced document identifier (e.g., S-1 Victim Statement, or DEF_001_BankofAmerica_Statement). Any changes made to evidence files (including filenames) should be nondestructive and reversible.

Exhibit Numbering: If Bates-stamped numbers are preferred, they can be added to PDF files automatically using Adobe Acrobat or another PDF Bates numbering tool. Photos can also be pasted into PDFs and Bates stamped.

Document Preferences: Courts should specify PDF or PDF/A file format, image orientation, whether documents should be submitted in color or black and white, and if documents may be submitted as a single combined file or if each document should be submitted in a separate file.

Markup Restrictions: In some instances, both marked and unmarked versions of evidence should be submitted. The Judge may review and annotate document-based evidence electronically; many PDF viewers provide annotation features.

File Size Limitations: Participants’ computers and/or laptops may have file size limitations that cannot handle viewing exhibits.

Deadlines: For submitting evidence (e.g., five days prior to a hearing) and for filing any objections to exhibits.

Platforms and Mechanisms for Sharing: Parties should be informed about the court’s evidence submission platform and provided with step-by-step instructions for use.

How Recordings Will Be Handled: Private recordings may need to be shared more securely. Some courts are using conferencing platforms to make recordings part of the hearing recording. In some instances, parties may need to share videos in advance.

Screen Sharing: For security and privacy, conferencing platforms should be set to block participants other than the judge and/or clerk from screen sharing. For a participant to share evidence during a hearing, the individual managing the video conference platform would need to temporarily permit screen sharing.

Stipulations: Required if giving up rights to examine real evidence.

Physical Evidence: Who should have physical custody of evidence? Pictures or videos can be used to display physical evidence virtually, regardless of who retains physical custody of the item. In some instances, it may be sufficient to hold evidence up for display during a virtual hearing. Courts must specify which method is preferred/required.

Contact Information: Phone and/or email for all recipients (SRLs, opposing counsel, court clerk, law clerk, secretary, etc.).

Technical Support Options: Contact information (website, phone number) for technical assistance.

During a Hearing: Evidence for each day's hearings should be stored locally and available to judges on their devices. To prevent confusion, documents should generally be organized into individual case folders. Parties should "come" prepared to have digital access to any evidence to be used during the hearing. Usually, this means downloading all exhibits to a device available during the hearing to avoid any delays due to bandwidth, Wi-Fi access, or other technical issues. Additional evidence may be emailed or shared via video conference platform using either "screen sharing" (giving screen control briefly to someone other than the judge) or the platform's document sharing functionality, if the judge allows it. Evidence that is presented during the hearing (e.g., exhibits used in rebuttal) may be viewed via screen sharing, circulated by email, or shared via link to a cloud storage platform. Any document submitted during the hearing that was not previously available for prehearing filing can be forwarded electronically to the appropriate parties while the hearing proceeds, provided the opposing party does not object. If the document is very lengthy and/or the opposing party requests additional time, the judge may then grant a short adjournment (from a few hours to a day).

After a Hearing: After the hearing, the “view” versions of evidence (e.g., copies circulated electronically) no longer matter unless the evidence was annotated in some way during the hearing. Any document or page annotated becomes a new Exhibit that must then be filed and/or uploaded to the case file. For instance, if a detective report is used during the hearing and the Witness annotates this exhibit (drawing with pen the path the perpetrator followed during the commission of the crime), the copy with the witness marking becomes a new Exhibit. If the evidence was used without any annotations, the clerk’s copy can be uploaded to the case management system.

The court retains and files evidence. If the court has a case management or document management system that includes file attachment capabilities, evidence should be attached to the case file. In courts that require hardcopy, originals utilized during the hearing may need to be delivered to the court following the hearing. Parties and attorneys retain copies in case of appeal. Judges retain their virtual notes.

SECTION SIX: GOVERNOR'S EXECUTIVE ORDERS

Beginning in March 2020, Governor Andrew Cuomo aggressively responded to the health crisis by issuing a series of executive orders (EOs). The initial EOs declared a state of emergency, directed a lockdown of all non-essential work and addressed health and safety concerns such as quarantines, travel restrictions, school closings, large gatherings, and authorization of out-of-state physicians to practice medicine in New York. Over time, the scope of EOs expanded to include every sector of commercial activity in the state. As they pertain to solo and small firms in New York, several EOs are noteworthy, particularly:¹²

- EO 202.7 which modified in-person notary requirements and authorized the use of audio-video technology to provide notary services;
- EO 202.8 which suspended enforcement of an eviction proceeding for any residential or commercial tenant, as well as a foreclosure of any residential or commercial property;
- EO 202.14 which modified Estates Powers and Trusts Law (EPTL) 3-2.1(a)(2), EPTL 3-2.1(a)(4), Public Health Law 2981(2)(a), Public Health Law 4201(3), Article 9 of the Real Property Law, General Obligations Law 5-1514(9)(b), and EPTL 7-1.17, to allow witnessing of specified documents to be performed utilizing audio-video technology provided certain conditions were met;
- EO 202.15 which authorized the Department of Taxation and Finance to accept digital signatures in lieu of handwritten signatures on documents related to the determination or collection of tax liability; and
- EO 202.28 which authorizes landlords and tenants or licensees of residential properties to enter into a written agreement by which the security deposit and any accrued interest may be used to pay rent that is in arrears or will become due.

¹² See Appendix B for further summaries of several other selected Governor's Executive Orders.

The EOs had expiration dates but were extended on multiple occasions, many at the last minute. In that regard, the EOs became moving targets that were difficult to follow. The nomenclature used to catalog and reference the EOs made them tedious and time-consuming to track. Solo and small firm practitioners repeatedly expressed this sentiment to the Task Force.

The Governor's website provides a dropdown menu for all issued EOs and clarifies that COVID-19 directives are contained in the series of EOs beginning with 202 and 205. A search of the EOs on the Governor's website can be refined by specifying date restrictions and keyword queries, but the results can be inconsistent. For that reason, the Task Force recommends an index be created for the EOs. Search results should direct the user to the relevant EOs and show highlighted text. IT staff should tag the EOs with metadata so as to be searchable on Google and other internet platforms when similar words and phrases are used. For example, while restaurants yielded 410 results, pubs and eating establishments yielded none. If the goal is to have information available to an unprecedented number of persons, including unsophisticated users seeking guidance for individualized and community issues, a simple SEO (search engine optimization) approach can help reach those in need. Analytics can then also be employed to monitor and track search activity to inform further as to the effects of the pandemic and needed improvements for communication.

SECTION SEVEN: THE PRACTICE OF LAW AS ESSENTIAL

Throughout 2020, New York solo and small firm practitioners provided vital legal services to their clients notwithstanding the overwhelming risks and challenges they faced in doing so. The Task Force played a crucial role in assisting attorneys navigate the obstacles created by the pandemic by providing guidance on how to maintain a law practice and continue to serve the public without compromising anyone's health, safety, or welfare.

The Task Force opposed the shut-down of law offices. Apart from the economic blow to solos and small firms, a shut-down severely limits an attorney's ability to serve the public and is detrimental to the public's access to justice – a principle that our Association holds as sacrosanct.

At the outset of the health crisis, Governor Cuomo issued Executive Order 202.6 which set forth a list of restrictions covering in-person working arrangements. This Executive Order, together with Executive Order 202.8, authorized the New York Empire State Development (ESD) to establish formal guidelines on identifying businesses deemed “essential” and thereby exempt from shutdown restrictions. In general, lawyers were not deemed “essential.”

Law firms and local bar associations sought clarification from the ESD on whether restrictions pertained to all areas of practice and all attorneys in general. When the ESD did respond to inquiries - and a common complaint brought to the Task Force was that the ESD was not responsive – the rules permitting practice remained unclear. The Task Force also sought guidance and clarification from the ESD. It sent a letter to ESD's general counsel, but it too was ignored.

Whether an attorney was deemed essential during the pandemic depended on the state where the attorney practiced. A Clio blog post <https://www.clio.com/blog/lawyers-essential-services/> reported that as of April 6, 2020, 42 states had issued stay-at-home orders. Of the 42 states, 12 states deemed legal services non-essential, 23 states deemed legal services essential, six states had exceptions to what was non-essential, and several states did not take any position.

The Task Force urged the classification of the practice of law as essential. The Resolution attached in Appendix C was the culmination of the Task Force's presentation to NYSBA's Executive Committee for its consideration at its November 6, 2020 meeting. The attached Resolution, which the Executive Committee adopted, calls on state bar leaders to

appeal to state officials to fully understand the critical role that lawyers play in the delivery of justice to New Yorkers. A blanket ban on the practice of law is contrary to the urgent needs that New Yorkers face in the most common of times but crucially in the time of COVID when economic issues, family issues, end of life issues, and business failures all require access to and advice from attorneys.

On December 22, 2020, the CDC issued recommendations about the then next phase of vaccine eligibility. In addition to people over 65 and people over 16 with compromised medical conditions, the CDC recommended that this next distribution phase—dubbed Phase 1c—include vaccines for “essential workers not previously included” in earlier phases. The CDC guidance included legal workers in that group along with workers in transportation and logistics, water and wastewater, food service, construction, information technology, media and public health workers, among others.¹³ New York State’s accelerated vaccine roll-out eliminated the need to proceed category by category in terms of eligibility for this pandemic.

¹³ https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm?s_cid=mm695152e2_w

SECTION EIGHT: ECONOMIC ASSISTANCE TO MEMBERS

From the outset of the pandemic, the Task Force recognized that the COVID-19 crisis would have a particularly devastating financial effect on attorneys in small firm and solo practices. Courts were closed. Offices were shuttered. Attorneys could not serve their clients, or financially support themselves or their staff.

Early in the pandemic the Task Force gathered information about financial assistance available to firms, particularly economic relief through the CARES ACT and the Small Business Administration (SBA). The Task Force disseminated information to NYSBA members as it became available regarding various SBA loan and grant programs. In particular, the Task Force focused on the Paycheck Protection Program (PPP) loans/grants and Emergency Economic Injury Loans/Grants (EIDL).

The Task Force distributed information about PPP loan forgiveness procedures and mortgage and rent payment relief. The Task Force also sponsored and participated in a CLE program on PPP loan forgiveness.

When it became clear that the SBA programs were proving insufficient to meet the demands of small businesses, the Task Force recommended other ways for small firms and solo practitioners to avail themselves of economic relief.

The Task Force succeeded in accelerating the procedures by which attorneys handling court-appointed and assigned counsel matters in state and federal courts are compensated.

Normally, attorneys who serve as assigned counsel are paid at the conclusion of the matter to which they are assigned. Due to the shutdown and delays in moving cases forward, publicly paid attorneys faced an immediate cessation of income. The Task Force recommended that courts and other governing bodies streamline the processing and payment of vouchers not only for final bills for matters that were completed but also for interim bills on matters still pending.

In furtherance of this plan, the Task Force composed the letters that NYSBA's President sent to the chief judges of each of the four federal districts in New York State, the administrative judges of each of the four Appellate Divisions, appropriate assigned counsel plan administrators, and bar association leaders. NYSBA issued a press release and President Hank Greenberg wrote a letter to the editor of the New York Law Journal in favor of the Task Force's position. Due in large measure to these efforts, the processing of vouchers was expedited and attorneys were

timely paid for the services they provided indigent clients in federal and state courts.

The Task Force also supported a resolution from the Committee on Legal Aid, the Committee on Mandated Representation, and the Criminal Justice Section which called for the immediate vaccination of criminal defense and family court attorneys, Attorneys for the Children, prosecutors, family court and criminal court judges, and incarcerated defendants awaiting trial. The Task Force also reviewed the work of organizations such as AMEND at the University of California in San Francisco and the Marshall Project which likewise advocated for distributing COVID-19 vaccines to incarcerated individuals. (See Appendices D and E).

The Task Force was acutely aware that the increasing backlog of civil, criminal, and family court matters would increase pressure on the Office of Court Administration and other local, state, and federal court administrators to resume in-person court appearances, hearings, and trials. In the fall of 2020, the re-opening of courthouses, particularly in New York City, proved short-lived. The predicted spike of COVID-19 cases occurred, which forced most courts to return almost exclusively to remote proceedings. The Task Force recognized that vaccination was an essential step to fully reopen courts for in-person appearances. As a result, the Task Force endorsed a resolution proposed by the Criminal Justice Section, which urged the Governor to prioritize front-line attorneys and incarcerated individuals for vaccination. A copy of the Resolution adopted by the Executive Committee is included in Appendix F.

The House of Delegates subsequently adopted the report of the Health Law Committee which recommended that vaccines be equitably allocated and distributed, and that health care workers and other essential workers have priority access to vaccines.

Recommendations:

Based upon the Task Force members' experience of living through the pandemic this past year, the Task Force recommends the following in the event of either the resurgence of the COVID-19 virus or another health care emergency:

1. The practice of law be deemed essential;
2. Attorneys, court staff and members of the judiciary as well as inmates incarcerated in local, state and federal correctional institutions be prioritized for the receipt of any vaccine, once generally available, and that information regarding the availability,

- efficacy and safety of the vaccine be made readily available to the public, particularly those in underserved communities;
3. Procedures and processes be put in place by NYSBA to allow for the transmission of information to members regarding economic assistance available on the local, state and federal level;
 4. Federal and state court administrators keep in place the streamlined procedures for the payment of final and interim (for cases not yet completed) vouchers to attorneys who perform assigned work, especially in the event of a court shut down.

SUMMARY OF RECOMMENDATIONS

I. LAW OFFICE MANAGEMENT

Law offices should aim to reduce the spread of COVID-19 in the workplace. The recommended measures for the average law office include delineating social distancing, installing barriers when social distancing cannot be maintained, prohibiting or greatly reducing the amount of employee shared spaces and in-person contact with people other than other staff members, and regular sanitization of surfaces. Records to assist in contact tracing should be maintained. Law firms should accommodate staff's personal circumstances when possible and communicate with staff regularly regarding policies and possible virus exposure. An effective plan for implementing, maintaining, communicating and revising office policies to comply with mandates and guidelines should be developed and enforced.

Additional considerations for some law firms include facilitating communication between partners by scheduling daily calls, reviewing and revising the office's organizational chart for needed adjustments to the responsibilities of partners and staff, adjusting the firm's budget to accommodate new and increased areas of expense due to new demands placed upon the firm by the pandemic, increasing communication among all staff members, and ensuring all attorneys have an Advance Exit Plan in case of death or disability.

II. COURTHOUSE SAFETY

Courthouse safety during in-person interactions should focus on reducing the spread of COVID-19 while providing access to the justice system. Recommendations include ensuring that all participants are screened for symptoms of infection prior to entering the buildings, the use of personal protective equipment while inside, high sanitization standards, and to provide equipment when necessary. Courthouse interior spaces (including holding cells) should be reconfigured or otherwise altered to reduce the spread of infection. The Task Force recommends that input on protocols be solicited from all stakeholders, including the Bar, and that staff be trained in the dangers and mitigation measures of infection.

III. CRIMINAL MATTERS

Local and state health officials need to make informed decisions during the development, implementation, and revision of uniform protocols to enhance the safety of

participants during in-person appearances. Where in-person appearances may be waived, the Task Force recommends that defense practitioners consider not only the physical safety of their clients, but also the implications of waiving an in-person appearance as part of case strategy. Best practices would dictate that uniform guidelines for town and village courts be adopted and implemented by all judicial districts with input from the county district attorney and defense providers.

IV. CIVIL MATTERS

The Task Force urges the implementation of mandatory statewide e-filing and the enabling of electronic online access to entire case records for all courts. Technology should be used to electronically schedule pre-trial proceedings to reduce congestion in the courthouse. Reduce delays in case progression caused by adjournments or issues caused by discovery through the creation and implementation of a Preliminary Conference Form.

The OCA website should be enhanced so as to be able to provide users with a comprehensive source for all necessary information and forms.

V. VIRTUAL EVIDENCE

There should be standardization and consistency of process and protocols in virtual hearings and trials to reduce confusion for participants and promote efficiency. The Task Force recommends that OCA, in consultation with the Bar, promulgate uniform rules for the administration of virtual hearings and trials and develop a uniform statewide electronic evidence policy.

VI. GOVERNOR'S EXECUTIVE ORDERS

The Task Force recommendations regarding Governor's Executive Orders revolve around improving usability and accessibility of the information contained in the documents. The creation of an index, improved searchability of keywords with highlighted keywords in results, and implementation of metadata tagging to enable the Executive Orders to be searchable on Google all improve the usability and accessibility of the information contained in the Executive Orders.

VII. THE PRACTICE OF LAW AS ESSENTIAL

The practice of law should be deemed an essential occupation by New York State

leaders. Many offices faced difficulties providing critical services to clients due to forced shutdowns and mandatory workforce reductions. Classifying the practice of law as an essential occupation allows law offices to continue operations during a pandemic.

VIII. ECONOMIC ASSISTANCE TO MEMBERS

NYSBA members need reliable information and guidance on how to access economic assistance. NYSBA should put into place procedures and processes to allow for the transmission of information to members regarding economic assistance available from local, state, or federal governments. Court administrators should provide streamlined procedures for the payment of final and interim (for cases not yet completed) vouchers to attorneys who perform assigned work during a pandemic or other crisis that results in court shut-downs.

Attorneys, court staff, and members of the judiciary, as well as incarcerated inmates, should be prioritized for the receipt of any vaccine, once generally available.

CONCLUSION

The COVID-19 pandemic took everyone by surprise. Most New Yorkers had never before experienced anything like the myriad of drastic disruptions in daily living. The extraordinary number of lives lost, severity of health impacts on those sickened, as well as the extended duration of the virus' circulation, will cause COVID-19 to be forever known in American history as a monumental health catastrophe. Its aftermath will be felt for quite some time. No part of society escaped COVID's reach, including New York's legal system.

The Task Force hopes that the information and recommendations contained in this Blueprint will provide guidance to those looking to know how to persevere during the remainder of this pandemic and to those who may endeavor to keep their law practice functioning should a future pandemic occur. This Blueprint's recommendations, while developed in response to COVID-19, can apply to any future pandemic that requires restrictions similar to those imposed by COVID. It may be easier to continue many of the recommendations rather than completely discard the protocols designed to curb transmission. That will avoid the need to embark on a dramatic restart in the event of a future pandemic. Safety and sanitization procedures kept in place may help reduce the severity of any similar event.

As of this writing, daily life is beginning to regain some resemblance to a pre-pandemic definition of "normal," but it will never be truly the same. COVID-19 caused lasting changes to New York's legal system. Many new practices, such as the use of technology to conduct remote court appearances, are here to stay. Such COVID changes, among others, now have a momentum of their own that will prevent a reversion to pre-pandemic standard operating procedures.

APPENDIX A
SURVEY OF BAR MEMBERS AND RESULTS

Q1 Have you participated in a virtual appearance? And if so, was it through Skype or exclusively by phone?

Answered: 106 Skipped: 0

Q1 Have you participated in a virtual appearance? And if so, was it through Skype or exclusively by phone?

Answered: 107 Skipped: 0

#	RESPONSES	DATE
1	Yes. Skype.	9/9/2020 9:54 AM
2	I have and yes its been through Skype.	8/28/2020 5:02 PM
3	Skype	8/27/2020 10:48 AM
4	Skype and phone conferences.	8/27/2020 9:42 AM
5	Yes. Skype and phone	8/27/2020 9:17 AM
6	Zoom	8/27/2020 8:58 AM
7	Phone and Zoom	8/27/2020 8:41 AM
8	Yes. I have used Skype. I am not happy with that platform.	8/27/2020 8:32 AM
9	Skype and phone.	8/27/2020 6:48 AM
10	Both by Skype and also other times just by phone	8/26/2020 9:39 PM
11	Both	8/26/2020 9:20 PM
12	Skype	8/26/2020 5:56 PM
13	yes. skype	8/26/2020 5:35 PM
14	yes. both skype for business and by phone	8/26/2020 5:11 PM
15	Skype	8/26/2020 4:52 PM
16	Yes via Skype for Business.	8/26/2020 4:50 PM
17	by skype	8/26/2020 4:49 PM
18	By Phone, Skype doesn't work for me.	8/26/2020 4:42 PM
19	no	8/26/2020 4:41 PM
20	No	8/25/2020 9:35 PM
21	No	8/25/2020 2:37 PM
22	Both Skype and phone	8/25/2020 2:09 PM
23	I have not yet appeared in a Virtual appearance	8/25/2020 11:13 AM
24	Skype	8/25/2020 10:39 AM
25	Both	8/25/2020 9:45 AM
26	both	8/25/2020 9:38 AM
27	Yes; I have done both Skype/Zoom and by phone.	8/25/2020 9:03 AM
28	yes	8/24/2020 9:39 PM
29	Skype and phone	8/24/2020 9:18 PM
30	Skype	8/24/2020 7:48 PM
31	Yes. Skype and phone	8/24/2020 6:07 PM

Court Reopenings and Virtual Appearances

32	Yes. Skype for business	8/24/2020 6:03 PM
33	both	8/24/2020 5:50 PM
34	Skype and by phone	8/24/2020 5:38 PM
35	Skype for Business	8/24/2020 5:38 PM
36	Yes. Via Skype	8/24/2020 5:09 PM
37	I have participated in several virtual appearances via Skype.	8/24/2020 5:08 PM
38	Yes via skype	8/24/2020 5:06 PM
39	Both	8/24/2020 5:02 PM
40	yes by skype	8/24/2020 4:57 PM
41	Skype	8/24/2020 4:54 PM
42	Yes.....both	8/24/2020 2:56 PM
43	Video - not through Skype	8/24/2020 2:12 PM
44	Yes, by Skype	8/24/2020 6:30 AM
45	Yes. Both Skype and telephone	8/23/2020 9:01 PM
46	yes - skype	8/23/2020 7:53 PM
47	By phone.	8/23/2020 5:16 AM
48	yes, skype	8/22/2020 9:43 PM
49	yes; Skype	8/22/2020 4:14 PM
50	Phone.	8/21/2020 4:54 PM
51	Yes. Tried two times to use Skype both on my office computer and personal laptop without success. Had to rely on my cell phone putting me at a disadvantage over opposing counsel.	8/21/2020 4:28 PM
52	Yes; Skype	8/21/2020 1:41 PM
53	Skype via phone. No difference as a phone conference	8/21/2020 10:39 AM
54	Yes, by Skype and Zoom	8/21/2020 10:13 AM
55	Yes By Skype, Google Meetings, Microsoft Teams and by phone.	8/21/2020 10:06 AM
56	Both	8/21/2020 9:42 AM
57	Yes. Both Skype and by phone. One judge uses Skype to call in.	8/21/2020 8:57 AM
58	Zoom	8/20/2020 10:04 PM
59	Yes, through Skype	8/20/2020 9:34 PM
60	Skype	8/20/2020 8:52 PM
61	Yes both.	8/20/2020 7:45 PM
62	Yes. Zoom, I believe.	8/20/2020 7:16 PM
63	Federal Court by phone and zoom mediation.	8/20/2020 5:58 PM
64	both	8/20/2020 5:38 PM
65	Have participated in Skype, phone and 1 Zoom court appearance. The majority of cases before Judges has been by Skype and all others by phone.	8/20/2020 5:33 PM
66	No	8/20/2020 5:27 PM
67	yes. Skype.	8/20/2020 5:26 PM
68	Usually Skype and once by phone when Skype was not working/available	8/20/2020 5:17 PM

Court Reopenings and Virtual Appearances

69	Skype.	8/20/2020 5:15 PM
70	Yes. Both via Skype and phone.	8/20/2020 5:15 PM
71	Yes - Skype	8/20/2020 5:14 PM
72	Skype	8/20/2020 8:34 AM
73	Yes, through Skype	8/19/2020 10:21 PM
74	Yes, Skype in Family Court; phone in Supreme Court	8/19/2020 5:10 PM
75	No	8/19/2020 3:27 PM
76	No	8/19/2020 3:16 PM
77	Yes, Skype for Business	8/19/2020 2:57 PM
78	yes , some with skype State courts some with zoom Federal cases. Web ex for state administrative agency hearings	8/19/2020 2:52 PM
79	both	8/19/2020 2:28 PM
80	Yes Skype I'm just gonna wait to get them back fix up them Yes. Skype	8/19/2020 2:27 PM
81	yes, skype and phone	8/19/2020 1:50 PM
82	yes, both	8/19/2020 1:49 PM
83	Yes. Both via Skype & telephone.	8/19/2020 12:35 PM
84	YES, SKYPE	8/19/2020 12:08 PM
85	Skype mostly and telephone once or twice	8/19/2020 11:55 AM
86	Yes, all have been Skype for Business	8/19/2020 11:34 AM
87	Yes. Skype and phone	8/19/2020 11:29 AM
88	yes...it has been both skype and phone	8/19/2020 11:26 AM
89	Yes By phone and zoom	8/19/2020 11:25 AM
90	yes, both	8/19/2020 11:24 AM
91	Many and I've done both by phone and Skype.	8/19/2020 11:23 AM
92	skyte and phone	8/19/2020 11:16 AM
93	Yes, both.	8/19/2020 9:16 AM
94	Both	8/19/2020 7:42 AM
95	Skype	8/18/2020 10:03 PM
96	Skype	8/18/2020 8:17 PM
97	Yes	8/18/2020 8:04 PM
98	It was through WebEx the NYS Workermers Compensation Board	8/18/2020 6:38 PM
99	both ways	8/18/2020 5:55 PM
100	By Skype and by phone.	8/18/2020 5:55 PM
101	Skype	8/18/2020 5:48 PM
102	Skype and phone	8/18/2020 5:48 PM
103	Skype	8/18/2020 5:47 PM
104	Skype and Zoom	8/18/2020 5:38 PM
105	Yes, several, on Skype for business.	8/18/2020 5:32 PM
106	Yes, by telephone no Skype yet.	8/18/2020 5:28 PM

Court Reopenings and Virtual Appearances

107	Not yet, one appearance (motion oral argument) is scheduled to occur by Skype in September 2020	8/18/2020 5:28 PM
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Q2 What stage in the proceeding was your case and please state the reason for your appearance, such as motion return date, preliminary or pre-trial conference, first appearance, etc.

Answered: 103 Skipped: 3

Q2 What stage in the proceeding was your case and please state the reason for your appearance, such as motion return date, preliminary or pre-trial conference, first appearance, etc.

Answered: 104 Skipped: 3

#	RESPONSES	DATE
1	Motion Return Date, dispositive evidentiary hearing/bench trial.	9/9/2020 9:54 AM
2	All conferences were preliminary	8/28/2020 5:02 PM
3	Hearing - Family Court guardianship	8/27/2020 10:48 AM
4	Preliminary and second conferences, motion return dates, pre-trial conferences	8/27/2020 9:42 AM
5	Preliminary conferences, custody proceedings, adoption finalizations, first appearances	8/27/2020 9:17 AM
6	Appearance and disposition	8/27/2020 8:58 AM
7	settlement conference	8/27/2020 8:41 AM
8	It was a scheduled court appearance	8/27/2020 8:32 AM
9	Hearings.	8/27/2020 6:48 AM
10	First appearance Further conferences Hearing	8/26/2020 9:39 PM
11	All of the above	8/26/2020 9:20 PM
12	Pre-trial	8/26/2020 5:56 PM
13	It was a Character & Fitness subcommittee hearing on my client's reinstatement application.	8/26/2020 5:35 PM
14	pretrial	8/26/2020 5:11 PM
15	Covid conference.	8/26/2020 4:52 PM
16	Status, decision of motion, guilty pleas and sentences in Supreme, Criminal Term.	8/26/2020 4:50 PM
17	preliminary conference	8/26/2020 4:49 PM
18	Preliminary, first appearance	8/26/2020 4:42 PM
19	n/a	8/26/2020 4:41 PM
20	N/A	8/25/2020 9:35 PM
21	Appearances were for return of a motion; preliminary conference and pre-trial conference.	8/25/2020 2:09 PM
22	I have appeared on a motion return date, status conferences, and an inquest	8/25/2020 10:39 AM
23	Preliminary conference	8/25/2020 9:45 AM
24	I have attended several at all stages of proceeding including support hearing by telephone.	8/25/2020 9:38 AM
25	Pretrial conferences, early settlement conferences, and compliance conferences.	8/25/2020 9:03 AM
26	all of the above	8/24/2020 9:39 PM
27	Pre-indictment conferences, prettified conferences	8/24/2020 9:18 PM
28	Pre-trial. P.C. Conference, Compliance Conference & Pre-trial Conference; Emergency TOP Applications.	8/24/2020 7:48 PM
29	Motions, status conference, Settlement conference	8/24/2020 6:07 PM
30	pre-trial conference on state court matters; arraignment in federal court	8/24/2020 6:03 PM

Court Reopenings and Virtual Appearances

31	all of the above	8/24/2020 5:50 PM
32	Motion and pretrial conferences.	8/24/2020 5:38 PM
33	Conferences	8/24/2020 5:38 PM
34	I have participated in numerous appearances for numerous matters all in different stages of litigation.	8/24/2020 5:09 PM
35	I appeared twice on the same proceeding for a status conference and a third time for a settlement conference.	8/24/2020 5:08 PM
36	Postjudgment conference following motion return	8/24/2020 5:06 PM
37	I have appeared in all apperances listed above	8/24/2020 5:02 PM
38	status conf, motions, preliminary and pre trial	8/24/2020 4:57 PM
39	Criminal disposition	8/24/2020 4:54 PM
40	Motion return date; first appearances	8/24/2020 2:56 PM
41	Status conference and oral argument on motion to dismiss.	8/24/2020 2:12 PM
42	All stages.	8/24/2020 6:30 AM
43	First time on; compliance conferences; status conferences	8/23/2020 9:01 PM
44	motions, preliminary, pre-trial and other conferences	8/23/2020 7:53 PM
45	Bond hearings--immigration court.	8/23/2020 5:16 AM
46	motion return date	8/22/2020 9:43 PM
47	oral argument on motion settlement conferene	8/22/2020 4:14 PM
48	Compliance conference.	8/21/2020 4:54 PM
49	The case was on for a preliminary conference on the same case twice with another preliminary conference on another case the first week of September. I'm dreading it.	8/21/2020 4:28 PM
50	Today was an OTSC hearing in Family Court	8/21/2020 1:41 PM
51	motions after summary judgment heading toward a damages inquest	8/21/2020 10:39 AM
52	Motions, preliminary conferences, Pre-trial conferences	8/21/2020 10:13 AM
53	Pre=trial	8/21/2020 10:06 AM
54	motion and pre trial conference	8/21/2020 9:42 AM
55	Order to show cause, and compliance conferences	8/21/2020 8:57 AM
56	Conferences, pre-trail, motions	8/20/2020 10:04 PM
57	Surrogate Court return date; Surrogate court conference	8/20/2020 9:34 PM
58	Otto hearing, writ of habeas corpus, criminal sentencing, many pre-trial conferences, CAP arraignments	8/20/2020 8:52 PM
59	Initial Conferences / First Appearance	8/20/2020 7:45 PM
60	It was for a motion to be relieved.	8/20/2020 7:16 PM
61	Initial conference and court ordered mediation.	8/20/2020 5:58 PM
62	pretrial conference settlement conference	8/20/2020 5:38 PM
63	The majority of my cases have had appearances on family offense proceedings especially when there is an exclusion against the party, so the first appearance and exclusion hearing occurred within a short period of time.	8/20/2020 5:33 PM
64	N/a	8/20/2020 5:27 PM
65	Settlement conference	8/20/2020 5:26 PM

Court Reopenings and Virtual Appearances

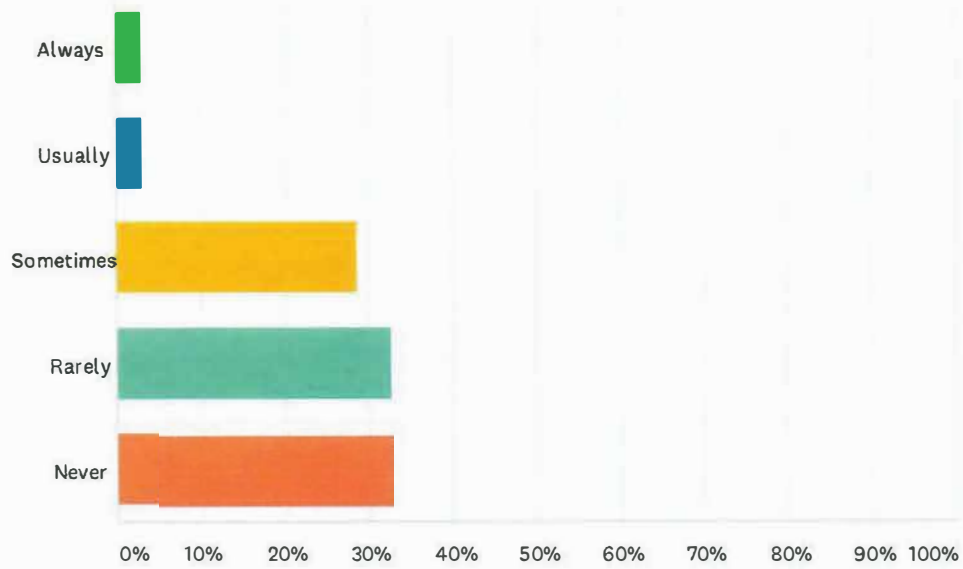
66	Motion, temp guardianship, status conferences, initial appearance on civil commitment matter	8/20/2020 5:17 PM
67	Argument of motion.	8/20/2020 5:15 PM
68	I've conducted status conferences, depositions, and mediations virtually.	8/20/2020 5:15 PM
69	Pre- trial conferences, first appearances and hearings	8/20/2020 5:14 PM
70	Family Court, all aspects of every case, because they were all considered "essential matters"	8/20/2020 8:34 AM
71	settlement conferences and motion arguments	8/19/2020 10:21 PM
72	Both cases were conferences in pending cases.	8/19/2020 5:10 PM
73	N/A	8/19/2020 3:16 PM
74	Conference with Court Attorney.	8/19/2020 2:57 PM
75	Federal arraignment, plea in criminal case motion oral argument.. State arraignment , further proceedings, pre trial cival cases	8/19/2020 2:52 PM
76	1. settling a divorce case 2. Sentencing a defendant	8/19/2020 2:28 PM
77	Conference	8/19/2020 2:27 PM
78	skype for hearing, skype for conf, phone for conf	8/19/2020 1:50 PM
79	pretrial	8/19/2020 1:49 PM
80	Arraignments, pre-trial conferences, motion arguments, pleas & bail hearings.	8/19/2020 12:35 PM
81	PRE-TRIAL CONFERENCE, SETTLEMENT NEGOTIATIONS, MOTIONS	8/19/2020 12:08 PM
82	Conferences only.	8/19/2020 11:55 AM
83	I have appeared for status conferences and oral argument.	8/19/2020 11:34 AM
84	Settlement Conference	8/19/2020 11:29 AM
85	motions, conferences,	8/19/2020 11:26 AM
86	Compliance conference, Deposition	8/19/2020 11:25 AM
87	discovery, and settlement conference	8/19/2020 11:24 AM
88	All of the above plus a virtual trial.	8/19/2020 11:23 AM
89	discovery , prelim coference	8/19/2020 11:16 AM
90	I've appeared for virtual conferences in every stage of a civil proceedings except for trial. This includes preliminary conferences, compliance conferences, pre-trial conferences, and motion return dates.	8/19/2020 9:16 AM
91	preliminary conferences and pre-trial conferences as well as motion return date	8/19/2020 7:42 AM
92	Motion return date and pre-trial conferences	8/18/2020 10:03 PM
93	Preliminary conference	8/18/2020 8:17 PM
94	Motion return date	8/18/2020 8:04 PM
95	Ongoing administrative proceedings	8/18/2020 6:38 PM
96	motion return dates	8/18/2020 5:55 PM
97	Motions and first time on as well as status conference and preliminary conference.	8/18/2020 5:55 PM
98	Return dates of motions, conferences.	8/18/2020 5:48 PM
99	Arraignment on new arrest. Preliminary hearing. Felony sentence. Violation plea. Status conference	8/18/2020 5:48 PM
100	motions and conferences	8/18/2020 5:47 PM
101	Pre-trial conference Settlement conference Motion return date	8/18/2020 5:38 PM

Court Reopenings and Virtual Appearances

102	pre-trial conference and pre-trial motion	8/18/2020 5:32 PM
103	Pre-trial conference both times.	8/18/2020 5:28 PM
104	Oral argument on motion.	8/18/2020 5:28 PM

Q3 Did you have any problems connecting virtually?

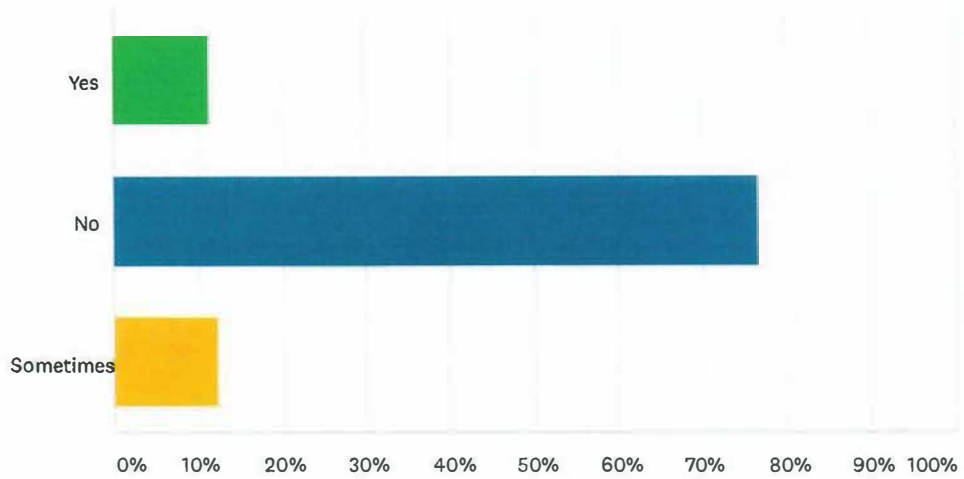
Answered: 98 Skipped: 8



ANSWER CHOICES	RESPONSES	
Always	3.06%	3
Usually	3.06%	3
Sometimes	28.57%	28
Rarely	32.65%	32
Never	32.65%	32
TOTAL		98

Q4 Do you believe the virtual appearance compromised your client's position at all?

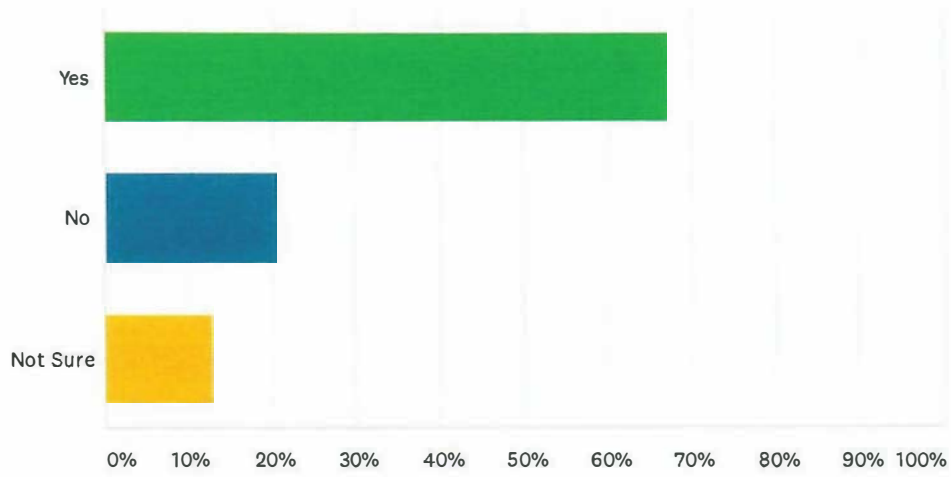
Answered: 98 Skipped: 8



ANSWER CHOICES	RESPONSES	
Yes	11.22%	11
No	76.53%	75
Sometimes	12.24%	12
TOTAL		98

Q5 Would you consider participating in virtual appearances indefinitely?

Answered: 103 Skipped: 3



ANSWER CHOICES	RESPONSES	
Yes	66.99%	69
No	20.39%	21
Not Sure	12.62%	13
TOTAL		103

Q6 Have you conducted a virtual trial or hearing? And if so, what was your impression of how the trial or hearing was conducted?

Answered: 102 Skipped: 4

Q6 Have you conducted a virtual trial or hearing? And if so, what was your impression of how the trial or hearing was conducted?

Answered: 103 Skipped: 4

#	RESPONSES	DATE
1	Yes. Although the matter was resolved, the only issue I foresaw was that the Court and court reporter were unclear on how we would submit, use, and enter exhibits.	9/9/2020 9:54 AM
2	No I actual had an in person trial	8/28/2020 5:02 PM
3	As best as could be done under the circumstances	8/27/2020 10:48 AM
4	No.	8/27/2020 9:42 AM
5	I have not conducted a virtual matter which was contested. I believe that contested trials should be held in-person.	8/27/2020 9:17 AM
6	Yes, no issues	8/27/2020 8:58 AM
7	No	8/27/2020 8:41 AM
8	Yes I have. I have participated in a virtual arbitrations. I have lost visual on the platform that the State was using. It was a 2 day hearing.	8/27/2020 8:32 AM
9	Hearing- after the initial issues, it went well.	8/27/2020 6:48 AM
10	Yes but then the case settled So the hearing was not determinative	8/26/2020 9:39 PM
11	No	8/26/2020 9:20 PM
12	no	8/26/2020 5:56 PM
13	no.	8/26/2020 5:11 PM
14	No	8/26/2020 4:52 PM
15	No	8/26/2020 4:50 PM
16	no and I don't look forward to it. The rules and procedures as they now exist, e.g., marking exhibits, can make a virtual civil trial a nightmare.	8/26/2020 4:49 PM
17	No	8/26/2020 4:42 PM
18	no	8/26/2020 4:41 PM
19	No	8/25/2020 9:35 PM
20	No	8/25/2020 2:37 PM
21	No and am trying not to!	8/25/2020 2:09 PM
22	I have not appeared in a Virtual trial or hearing.	8/25/2020 11:13 AM
23	No	8/25/2020 10:39 AM
24	No	8/25/2020 9:45 AM
25	I did a support hearing by telephone. It is very difficult because you have to submit all exhibits in advance and if anything comes up at trial you can't submit more exhibits.	8/25/2020 9:38 AM
26	Virtual Arbitration. It was okay; I would have preferred it being in person.	8/25/2020 9:03 AM
27	NO	8/24/2020 9:39 PM
28	Suppression hearing-very difficult to observe demeanor of police witness	8/24/2020 9:18 PM
29	No	8/24/2020 7:48 PM

Court Reopenings and Virtual Appearances

30	No	8/24/2020 6:07 PM
31	No. I would oppose a virtual trial.	8/24/2020 6:03 PM
32	not yet	8/24/2020 5:50 PM
33	I have not done a virtual trial or hearing yet.	8/24/2020 5:38 PM
34	No.	8/24/2020 5:38 PM
35	No	8/24/2020 5:09 PM
36	No. I have not conducted a virtual trial or hearing.	8/24/2020 5:08 PM
37	No	8/24/2020 5:06 PM
38	I have a virtual trial scheduled but have not participated in one. I am willing to do so though.	8/24/2020 5:02 PM
39	no	8/24/2020 4:57 PM
40	No	8/24/2020 4:54 PM
41	No	8/24/2020 2:56 PM
42	None yet.	8/24/2020 2:12 PM
43	No	8/24/2020 6:30 AM
44	no	8/23/2020 9:01 PM
45	no - and I prefer not to do so	8/23/2020 7:53 PM
46	Several bond hearings--bond granted. Trials/final hearings were in person.	8/23/2020 5:16 AM
47	hearing. It depends on the judge.	8/22/2020 9:43 PM
48	no	8/22/2020 4:14 PM
49	No.	8/21/2020 4:54 PM
50	No	8/21/2020 4:28 PM
51	Yes. It was fine; no issue except for a few times unable to hear person, but Judge allowed a repeat of what was said.	8/21/2020 1:41 PM
52	no	8/21/2020 10:39 AM
53	No	8/21/2020 10:13 AM
54	No	8/21/2020 10:06 AM
55	As a trustee in bankruptcy, I have been conducting phone hearings since March 2020. By and large it has gone well.	8/21/2020 9:42 AM
56	Not yet but have one scheduled	8/21/2020 8:57 AM
57	No	8/20/2020 10:04 PM
58	No.	8/20/2020 9:34 PM
59	It went fine, but the other side didn't show and had no lawyer. (However, workers compensation hearings have been virtual for years if you choose to (now mandatory) and generally it goes ok).	8/20/2020 8:52 PM
60	Very professional and well-managed.	8/20/2020 7:45 PM
61	No.	8/20/2020 7:16 PM
62	I have participated in a successful federal zoom mediation. It was awesome! Several years ago I represented a client who I never met at a DOL UIB telephone hearing. He lied under oath and when I successfully rehabilitated his testimony without leading him (DOL audited that proceeding) I realized we don't have to meet even litigation clients in person. Opened my eyes.	8/20/2020 5:58 PM
63	no	8/20/2020 5:38 PM

Court Reopenings and Virtual Appearances

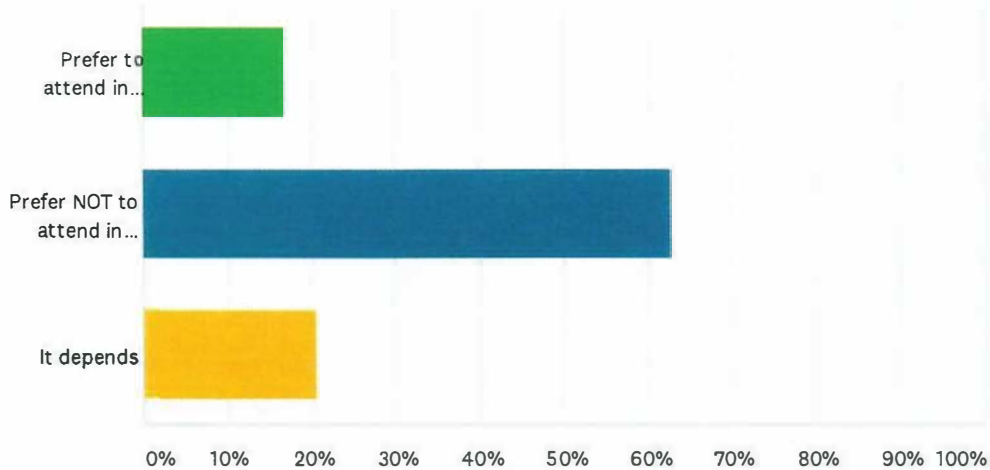
64	Yes - a hearing on a child support case, an exclusion hearing for an order of protection, and a hearing on issues of custody and visitation as part of a divorce in Supreme Court. So far I think the Supreme Court proceedings worked best due to how it was run. Half of the case could be disposed of by submitting written affidavits by all the witnesses and submitting all evidence in advance, so the only testimony elicited was cross examination of the witness and then any redirect. The witnesses were also instructed that they had to be available by video to testify.	8/20/2020 5:33 PM
65	no	8/20/2020 5:26 PM
66	Client also appeared via Skype. It went very smoothly. One difficulty is speaking with client confidentially during the proceeding.	8/20/2020 5:17 PM
67	no	8/20/2020 5:15 PM
68	Hearing - I do not feel it's as effective as in person. You can't judge their body language as well, you run into tech issues and I feel it's too easy for someone to be coached	8/20/2020 5:14 PM
69	It was weird; it was, in my opinion, only really possible because the Family Court judges were excellent in keeping things moving forward in a fair fashion.	8/20/2020 8:34 AM
70	No, I have not	8/19/2020 10:21 PM
71	No.	8/19/2020 5:10 PM
72	No	8/19/2020 3:27 PM
73	No.	8/19/2020 3:16 PM
74	No, I have not done a virtual trial or hearing.	8/19/2020 2:57 PM
75	yes administrative. it went ok but much chaos with technical problems with webex. it saved travel to Schenectady for witnesses the race driver who appealed sanction and the State Veterinarian. If they used zoom it would have been flawless exhibits easy to share	8/19/2020 2:52 PM
76	No	8/19/2020 2:27 PM
77	As noted above, it was awkward and felt like a third-rate circus, not a court of justice.	8/19/2020 1:50 PM
78	yes, went great, mostly because Support Magistrate managed it very patiently and skillfully for both parties	8/19/2020 1:49 PM
79	I have conducted virtual hearings. For some purposes - bail, motions, competency, as examples, virtual is preferable. However, in person is still preferable for testimonial types of proceedings.	8/19/2020 12:35 PM
80	NO	8/19/2020 12:08 PM
81	Not yet.	8/19/2020 11:55 AM
82	I have not.	8/19/2020 11:34 AM
83	No.	8/19/2020 11:29 AM
84	I was part of conference that ended up being a hearing with a proposed order filed based upon the judge's ruling which I understood was only a conference. There must be a clear understanding of conference vs. hearing.	8/19/2020 11:26 AM
85	Not yet	8/19/2020 11:25 AM
86	no	8/19/2020 11:24 AM
87	Yes. It was ok. Not perfect. Connectivity issues with the court reporter. Evidence issues.	8/19/2020 11:23 AM
88	No	8/19/2020 11:16 AM
89	N/A	8/19/2020 9:16 AM
90	no	8/19/2020 7:42 AM
91	Three times the judge did not have motions submitted by EDDS. So our conference was submitting the docs or tracking info and holding a later conference. Initial hearing was a waste of time.	8/18/2020 10:03 PM

Court Reopenings and Virtual Appearances

92	No	8/18/2020 8:17 PM
93	No	8/18/2020 8:04 PM
94	Yes. It is horrible. The transcript when listened to (WCB has a digital recording system) sometimes does not catch everyone and sometimes it's blank this calling for a do-over in the event of an appeal or issue.	8/18/2020 6:38 PM
95	yes. it was not as effective as in person.	8/18/2020 5:55 PM
96	No.	8/18/2020 5:55 PM
97	No, the one trial I did would not have been effective virtually. Elderly clients are not adaptable and are easily confused by the remote process.	8/18/2020 5:48 PM
98	Preliminary hearing. There was break up of sound intermittently	8/18/2020 5:48 PM
99	no	8/18/2020 5:47 PM
100	No I have not	8/18/2020 5:38 PM
101	I have not done a virtual trial or hearing. I feel these MUST be in person. Often I defend high-exposure cases. My answer might be different if I had a high-volume practice of 25 / 50K and/or threshold cases that are good for summary jury or virtual trials.	8/18/2020 5:32 PM
102	n/A	8/18/2020 5:28 PM
103	No	8/18/2020 5:28 PM

Q7 Do you prefer to attend appearances in person during the pandemic or prefer NOT to attend appearances in person during the pandemic?

Answered: 102 Skipped: 4



ANSWER CHOICES	RESPONSES	
Prefer to attend in person	16.67%	17
Prefer NOT to attend in person	62.75%	64
It depends	20.59%	21
TOTAL		102

Q8 Have you encountered technological problems during a virtual court appearance? And if so, were you able to overcome any such technological problems?

Answered: 95 Skipped: 11

Q8 Have you encountered technological problems during a virtual court appearance? And if so, were you able to overcome any such technological problems?

Answered: 96 Skipped: 11

#	RESPONSES	DATE
1	see above re skype not working with audio and video from my computer (mac device) even with the skype business app downloaded. I was able to overcome the technological difficulty but others may not be as tech savvy. Also, the court system should demand that skype fix the problem or move over to Microsoft Teams which is a much better platform.	9/9/2020 9:54 AM
2	Not at all.	8/28/2020 5:02 PM
3	Problems generally were resolved	8/27/2020 10:48 AM
4	Yes I have encountered them but was able to correct the problem once I talked with the OCA technical team.	8/27/2020 9:42 AM
5	Clients sometimes have difficulty in entering a virtual appearance. The courts have been patient in those instances (in one uncontested adoption finalization case, the judge gave the clients his cell phone number so that they could connect via Facetime!)	8/27/2020 9:17 AM
6	No	8/27/2020 8:58 AM
7	As stated in #6 I had lost visual contact.	8/27/2020 8:32 AM
8	Able to overcome.	8/27/2020 6:48 AM
9	Yes In one instance I hung up and just participated over the phone	8/26/2020 9:39 PM
10	Yes for the most part as long as no one becomes petty or pretentious	8/26/2020 9:20 PM
11	Yes. And no as I was unable to fix it.	8/26/2020 4:52 PM
12	Yes, I overcame the issue by using the Skype for Business app instead of the desktop.	8/26/2020 4:50 PM
13	no problems; it actually works well, congrats to whoever put this in place on about a minutes worth of notice.	8/26/2020 4:49 PM
14	As previously stated, my single appearance was by ordinary telephone without any problem. In my opinion, video is not really necessary in most preliminary matters.	8/26/2020 4:42 PM
15	n/a	8/26/2020 4:41 PM
16	N/A	8/25/2020 9:35 PM
17	Yes. Difficulties with virtual appearances became telephone conferences.	8/25/2020 2:09 PM
18	Yes, at times the screen froze and participants either had difficulty logging on or were knocked off and had to log in again	8/25/2020 10:39 AM
19	There have been a few problems, but everyone has been cooperative and understanding and in most cases we were able to continue. There is nothing in these glitches that would or should limit future use.	8/25/2020 9:38 AM
20	Yes; but generally speaking, you log back into the meeting and it is not a problem. Depositions have been somewhat more challenging, but the hearings/conferences generally do not experience problems, and if so, they are easily corrected.	8/25/2020 9:03 AM
21	NO	8/24/2020 9:39 PM
22	No	8/24/2020 9:18 PM
23	NoProblems. But concerned with upcoming switch from Skype to Teams.	8/24/2020 7:48 PM

Court Reopenings and Virtual Appearances

24	No	8/24/2020 6:07 PM
25	Some connection problems were not resolved.	8/24/2020 6:03 PM
26	no, I am lucky to have good internet connection	8/24/2020 5:50 PM
27	None	8/24/2020 5:38 PM
28	Yes, and we were able to overcome them.	8/24/2020 5:38 PM
29	I have. I have been able to get through although it is not perfect	8/24/2020 5:09 PM
30	Fortunately, I have not encountered any technological problems during my virtual court appearances.	8/24/2020 5:08 PM
31	As stated above the court reporter froze. Also when I click accept the skype link disappears (i think this is the nature of my calendar program) so if I don't send it to my self before accepting I would have no link.	8/24/2020 5:06 PM
32	Yes and yes	8/24/2020 5:02 PM
33	yes. parties disappear and have to sign back in or call in.	8/24/2020 4:57 PM
34	No	8/24/2020 4:54 PM
35	No	8/24/2020 2:56 PM
36	None.	8/24/2020 2:12 PM
37	No, it has been seamless and wonderful	8/24/2020 6:30 AM
38	No	8/23/2020 9:01 PM
39	No - but I have seen others with problems	8/23/2020 7:53 PM
40	No.	8/23/2020 5:16 AM
41	No	8/22/2020 9:43 PM
42	no problem	8/22/2020 4:14 PM
43	No.	8/21/2020 4:54 PM
44	Yes, Had to rely on a phone call .	8/21/2020 4:28 PM
45	On 2 appearances, my computer would not connect to the Skype meeting; I tried a different computer, without success. The skype.com gentlemen suggested I reboot my computer just prior to the Skype, which I have done and no problems since.	8/21/2020 1:41 PM
46	no. still can't joint skype meetings with video from my I phone	8/21/2020 10:39 AM
47	no problems	8/21/2020 10:13 AM
48	Yes and Yes	8/21/2020 10:06 AM
49	No, just the learning curve.	8/21/2020 9:42 AM
50	Yes. Not everyone can get on so it forces the meeting to a different format.	8/21/2020 8:57 AM
51	Yes	8/20/2020 10:04 PM
52	Yes, but they were overcome quickly.	8/20/2020 9:34 PM
53	Yes	8/20/2020 8:52 PM
54	Very few and they were easily overcome.	8/20/2020 7:45 PM
55	No, not with a court appearance. I did, however, have a deposition that had to be rescheduled because technical difficulties.	8/20/2020 7:16 PM
56	occasional signal loss. But do in person appearances occur without hitches. Anyone ever travel 2 hours and be informed the hearing is off?	8/20/2020 5:58 PM
57	i have always been able to overcome. the court has been very accepting of lateness due to	8/20/2020 5:38 PM

Court Reopenings and Virtual Appearances

	problems with technology	
58	Yes - for a period of time my mic was not being picked up. I restarted my computer and it was all fixed.	8/20/2020 5:33 PM
59	no	8/20/2020 5:26 PM
60	Yes and yes	8/20/2020 5:17 PM
61	I have had some minor problems that I was able to either fix or find a work-around for with relative ease.	8/20/2020 5:15 PM
62	Yes - and yes very quickly. It has rarely been an issue	8/20/2020 5:14 PM
63	No problems; however, my home points directly to a Verizon Wireless tower. Many of my attorney colleagues had to do virtual appearances on their cell phones. Not ideal.	8/20/2020 8:34 AM
64	no technological problems	8/19/2020 10:21 PM
65	No	8/19/2020 5:10 PM
66	Minor glitches; all overcome quickly and easily.	8/19/2020 2:57 PM
67	yes with webex and skype very volatile platforms	8/19/2020 2:52 PM
68	no	8/19/2020 2:28 PM
69	Yes	8/19/2020 2:27 PM
70	YES. see answers above.	8/19/2020 1:50 PM
71	no	8/19/2020 1:49 PM
72	A few, but mostly the technology works very well.	8/19/2020 12:35 PM
73	YES. ON ONE OCCASION, AFTER ABOUT 45 MINUTES, I LOST THE CONNECTION AND COULD NOT RECONNECT. I BELIEVE SKYPE ONLY ALLOWS A PERSON A SET AMOUNT OF TIME.	8/19/2020 12:08 PM
74	Yes we have - our audio going across as "chipmunk-ish" . Restarting the program to join the meeting resolved issue. Using a different machine also resolved the issue. Problem was on our side.	8/19/2020 11:55 AM
75	As stated above, yes, several phone calls were required to address the virtual problems in one instance. For virtual oral argument, a planning session before the argument was required to make sure everyone could connect and I believe that that required some fixes to allow the oral argument to work.	8/19/2020 11:34 AM
76	I have not.	8/19/2020 11:29 AM
77	Not during, but yes, in signing in I have had problems and that is stressful.	8/19/2020 11:26 AM
78	No problems	8/19/2020 11:25 AM
79	no	8/19/2020 11:24 AM
80	Yes. But I've called into the Skype and it was doable.	8/19/2020 11:23 AM
81	yes	8/19/2020 11:16 AM
82	No technical issues yet.	8/19/2020 9:16 AM
83	yes and yes	8/19/2020 7:42 AM
84	No	8/18/2020 10:03 PM
85	Yes and yes	8/18/2020 8:17 PM
86	No	8/18/2020 8:04 PM
87	Yes and sometimes no. Sometimes attorneys had to be called on their personal cell phones.	8/18/2020 6:38 PM
88	no	8/18/2020 5:55 PM

Court Reopenings and Virtual Appearances

89	Yes, I have had trouble logging on at times. However, that problem has been resolved by hard wiring at the office and buying a new computer all-in-one with hard wiring at home. Many times, I have not been able to see all the participants on the Skype but rather see only a few. I can't tell if the participant is still there or has lost the connection. I have been able to overcome the technological problems but I have had adversaries have trouble logging on. Wireless is a problem in my opinion since when I used wireless I got disconnected, the screen froze, I couldn't hear participants and the visual was bad. The court's Skype test is excellent and very helpful.	8/18/2020 5:55 PM
90	Almost all of my appearances have involved technical difficulties. I have used Zoom and several other comparable technologies without problem, but Skype disappoints every time.	8/18/2020 5:48 PM
91	Yes and no	8/18/2020 5:48 PM
92	yes. Breaking up	8/18/2020 5:47 PM
93	The judge in one appearance was not competent in Office Zoom which was his choice. He repeatedly told the parties to press a prompt that would disconnect us. We had to repeatedly sign in and he was getting annoyed. No one wanted to tell the judge it was his own doing. All parties have to be proficient in the technology including the judge.	8/18/2020 5:38 PM
94	One time my camera would not face the correct way. I ended up winning the motion, so no big deal I guess.	8/18/2020 5:32 PM
95	n/a	8/18/2020 5:28 PM
96	Have not yet appeared	8/18/2020 5:28 PM

Q9 Have you returned to your local courthouse for court appearances? If not, would you feel comfortable returning to your local courthouse?

Answered: 104 Skipped: 2

Court Reopenings and Virtual Appearances

#	RESPONSES	DATE
1	I have and it was ok	8/28/2020 5:04 PM
2	Yes	8/27/2020 10:50 AM
3	I have not returned to the courthouse yet, but am scheduled to do an in-person divorce trial at the end of September. I am not looking forward to that.	8/27/2020 9:43 AM
4	I am not very comfortable with in-person appearances, but I have done several.	8/27/2020 9:18 AM
5	No...undecided	8/27/2020 8:59 AM
6	No and no	8/27/2020 8:42 AM
7	Yes. I have appeared in Watertown City Court for a trial.	8/27/2020 8:34 AM
8	I have not returned. I would rather not return because of the concern of the court building and the MTA.	8/27/2020 6:49 AM
9	Not yet Yes, I would I will be going next week	8/26/2020 9:40 PM
10	Maybe if I don't need to ride in a packed elevator, wait on long lines or appear at several different times during one day	8/26/2020 9:23 PM
11	no	8/26/2020 5:35 PM
12	yes and yes	8/26/2020 5:12 PM
13	No but I would like to return.	8/26/2020 4:54 PM
14	I do not fell comfortable returning to in person court at this time in light of the conditions I stated in an earlier response.	8/26/2020 4:53 PM
15	no and right now I would not be comfortable	8/26/2020 4:50 PM
16	No, but I would be OK with it.	8/26/2020 4:43 PM
17	no	8/26/2020 4:41 PM
18	No, no	8/25/2020 9:35 PM
19	Yes	8/25/2020 2:38 PM
20	No I have not and NO I do not feel comfortable. I have heard from others that many court rooms have not been cleaned!	8/25/2020 2:10 PM
21	I was comfortable insofar as the courthouse and staff were well prepared. I was comfortable.	8/25/2020 11:17 AM
22	I have not returned to our courthouses other than to tour 2 buildings to observe COVID-19 procedures. I do not feel comfortable returning without more plexiglass installed to protect lawyers and litigants, more safety precautions with ventilation, more signs directing people to hand sanitizing stations, and more intense cleaning	8/25/2020 10:53 AM
23	No have not and would not want to at this time.	8/25/2020 9:46 AM
24	Yes.	8/25/2020 9:40 AM
25	No; I am scheduled to in October. I am not entirely comfortable with the idea, but I am curious to see how things will be.	8/25/2020 9:04 AM
26	Yes but I'm not uncomfortable doing so	8/24/2020 9:40 PM
27	Been there; it's ok	8/24/2020 9:21 PM
28	Town Court yes; Supreme & Family Court no. If the mall could not open until MERV-13 filtration Proven, then how could 100+ year old courthouses open with their ventilation being an open window? It was/is a mistake to open courthouses without proof of high level air filtration in place.	8/24/2020 7:53 PM
29	No. Yes.	8/24/2020 6:07 PM
30	Yes. Twice so far. Another personal appearance is scheduled tomorrow. I am not completely comfortable.	8/24/2020 6:07 PM

Court Reopenings and Virtual Appearances

31	Yes,	8/24/2020 5:51 PM
32	There is always worry. I believe OCA should get rid of the insignificant appearances. All pretrial, bail review, motions and preliminary hearings and conferences should be done via Skype. I believe it is sound from a cost-benefit analysis.	8/24/2020 5:41 PM
33	Not just yet -- but coming soon.	8/24/2020 5:38 PM
34	I have not yet returned to my local courthouse. I'm not sure I would feel uncomfortable perhaps uneasy is a better word to describe my feelings.	8/24/2020 5:15 PM
35	No. Not at this time	8/24/2020 5:09 PM
36	have not returned and would not feel comfortable doing so.	8/24/2020 5:07 PM
37	I went to the ctchse during the shutdown so i am unafraid to return. I have made no appearances.	8/24/2020 5:04 PM
38	yes	8/24/2020 4:58 PM
39	No	8/24/2020 4:55 PM
40	No.....Yes	8/24/2020 2:57 PM
41	No return yet. Yes, would be comfortable.	8/24/2020 2:12 PM
42	I have not. My first in person appearance is scheduled for September 11 and I am a little nervous and find myself wondering why we are doing it	8/24/2020 6:31 AM
43	Yes. And I wasn't happy about it.	8/23/2020 9:02 PM
44	I have not returned, but would feel comfortable	8/23/2020 7:53 PM
45	We had individual/final hearing(s) in person.	8/23/2020 5:17 AM
46	no	8/22/2020 9:44 PM
47	no an do not feel comfortable	8/22/2020 4:14 PM
48	No. Would feel comfortable returning.	8/21/2020 4:54 PM
49	No but I would go and will be going next week	8/21/2020 4:29 PM
50	No and no.	8/21/2020 1:42 PM
51	no	8/21/2020 10:40 AM
52	Twice and yes, I found the precautions to be sufficient. I would prefer not to be there every day as I often was in the before times.	8/21/2020 10:16 AM
53	No Not Yet	8/21/2020 10:06 AM
54	NO and yes.	8/21/2020 9:44 AM
55	I have not had anything in person, but went to drop off a file for a paper case. I would be worried about getting to the court house and how crowded the court will be	8/21/2020 8:59 AM
56	Yes	8/20/2020 10:06 PM
57	No. Would prefer not to appear in person.	8/20/2020 9:35 PM
58	I have and it is uncomfortable	8/20/2020 8:55 PM
59	No. I would only attend if absolutely necessary.	8/20/2020 7:45 PM
60	No. It depends.	8/20/2020 7:16 PM
61	no and no	8/20/2020 6:00 PM
62	not yet, i would on a v limited basis	8/20/2020 5:39 PM
63	I have not - I only appear in NYC and I do not feel comfortable returning to my local courthouses right now.	8/20/2020 5:33 PM

Court Reopenings and Virtual Appearances

64	Yes	8/20/2020 5:28 PM
65	no and no	8/20/2020 5:27 PM
66	No and no	8/20/2020 5:18 PM
67	No.	8/20/2020 5:16 PM
68	Yes - for some	8/20/2020 5:15 PM
69	I have made one appearance at a courthouse for a child custody matter and that's it. I would not mind a personal appearance at a courthouse for a conference or motion argument, but only if I am not in an enclosed area with numerous other people.	8/20/2020 5:15 PM
70	No; see above.	8/20/2020 8:36 AM
71	Only once due to miscommunication	8/19/2020 10:22 PM
72	Not yet	8/19/2020 5:11 PM
73	No	8/19/2020 3:28 PM
74	No. Yes.	8/19/2020 3:16 PM
75	I have not returned to the Courthouse. In a low person occupancy setting, I think I would be comfortable. In a Courtroom with 75 to 100 people present and waiting, I would not be comfortable.	8/19/2020 3:02 PM
76	yes	8/19/2020 2:59 PM
77	no	8/19/2020 2:28 PM
78	Not yet	8/19/2020 2:28 PM
79	I go grocery shopping. Yes, I would feel comfortable being in court.	8/19/2020 1:51 PM
80	yes, not pleasant or very productive	8/19/2020 1:50 PM
81	Yes. I have made a number of in person appearances, but not without discomfort.	8/19/2020 12:40 PM
82	NOT YET, EXCEPT FOR ONE VISIT TO NY COUNTY SUPREME COURT. IT DEPENDS ON THE SOCIAL DISTANCING IMPLEMENTED BY THE COURT HOUSE.	8/19/2020 12:11 PM
83	I have - No issues with comfort.	8/19/2020 11:56 AM
84	I felt comfortable three months ago, and continue to feel comfortable. Frankly, even if I had been required to go during the shut down, I would have gone. The needs of my client to access the justice system are greater than my fears. None of my appearances to date have been scheduled for in person.	8/19/2020 11:36 AM
85	No.	8/19/2020 11:30 AM
86	I wouldn't feel comfortable returning to the court houses	8/19/2020 11:26 AM
87	NOT YET...	8/19/2020 11:26 AM
88	no, not until there is a vaccine	8/19/2020 11:25 AM
89	No and no!	8/19/2020 11:24 AM
90	no	8/19/2020 11:17 AM
91	No, I have not returned to a courthouse. Yes, I would feel comfortable doing so.	8/19/2020 9:17 AM
92	Town Court - yes	8/19/2020 7:47 AM
93	No	8/18/2020 10:03 PM
94	Yes	8/18/2020 8:18 PM
95	No	8/18/2020 8:04 PM
96	No. And yes I would.	8/18/2020 6:39 PM
97	yes	8/18/2020 5:56 PM

Court Reopenings and Virtual Appearances

98	No and I wouldn't feel comfortable returning.	8/18/2020 5:55 PM
99	I have, and I would be very comfortable doing so again. Upstate courthouses are not known for crowding even in good times.	8/18/2020 5:51 PM
100	Once not comfortable as the air circulation is onafaquete	8/18/2020 5:49 PM
101	Yes	8/18/2020 5:48 PM
102	I have not returned and I will not feel comfortable at all.	8/18/2020 5:39 PM
103	No, I have not returned in person. I would feel comfortable if it was "in and out" and there were not many people around.	8/18/2020 5:34 PM
104	Have not yet appeared	8/18/2020 5:28 PM

Q10 If you have returned to the courthouse, did you observe any COVID-19- related procedures in effect? If Yes, please describe.

Answered: 78 Skipped: 28

Court Reopenings and Virtual Appearances

#	RESPONSES	DATE
1	I observed all protective measures in place no issues there.	8/28/2020 5:04 PM
2	Social distancing and masks. Was told courtrooms were wiped down following prior appearance.	8/27/2020 10:50 AM
3	temperature checks upon entering were about the only measures I observed.	8/27/2020 9:18 AM
4	Yes	8/27/2020 8:59 AM
5	Yes. Temperature check, questions, masks, separation of litigants	8/27/2020 8:34 AM
6	N/A	8/27/2020 6:49 AM
7	yes. temperature taking before going thru security. called into court room one case at a time.	8/26/2020 5:12 PM
8	NA	8/26/2020 4:54 PM
9	There's a temperature scanner. There are partitions in the courtroom but they are not high enough between attorney and client if the parties are standing.	8/26/2020 4:53 PM
10	no	8/26/2020 4:50 PM
11	N/A	8/26/2020 4:43 PM
12	N/A	8/25/2020 9:35 PM
13	Temperature Check, limitations for elevators, mandatory hand sanitizer, spots to stand in the court room.	8/25/2020 2:38 PM
14	No	8/25/2020 2:10 PM
15	I was questioned by the UCO at the door and reminded to wear a mask.	8/25/2020 11:17 AM
16	Yes. I observed floor markings, plexiglass partitions, and hand sanitizing stations. The floor markings were too small. The hand sanitizing stations were not near the entrance to the buildings but instead well inside and easily overlooked or next to the elevators. The plexiglass installed in the courtrooms protected court personnel on more than one side, but the plexiglass at counsel table only provided protection at the front of the table. There was no plexiglass in between attorney and client We were informed DCAS would replace central A/C filters monthly. When asked about in-window A/C units in the courtroom, we were informed that neither DCAS nor the janitor handles those because NYC contracts with one company that is responsible for changing filters in the all city buildings. No one was able to provide answers as to how often in-window unit filters would be changed.	8/25/2020 10:53 AM
17	N/A	8/25/2020 9:46 AM
18	Yes. I was tested at the door and asked several questions. Had to wear a mask the entire time in the courthouse and conduct social distancing.	8/25/2020 9:40 AM
19	N/A	8/25/2020 9:04 AM
20	yes...masks required	8/24/2020 9:40 PM
21	Temperature, hand sanitizers available; NO MASKS AVAILABLE	8/24/2020 9:21 PM
22	Yes. Temp taken, questionnaire, chairs spread out & lower capacity in courtrooms.	8/24/2020 7:53 PM
23	N/a	8/24/2020 6:07 PM
24	Yes. Temperature taken. Questionnaire re covid contact, travel, etc upon entry to the building. Masks. Shields. Some sanitizer. But no sanitizer or wipes in the courtrooms. We are told it's too expensive.	8/24/2020 6:07 PM
25	yes, wearing mask, had temperature taken, answered questions	8/24/2020 5:51 PM
26	I have returned to night court and mask requirements are being followed. Doesn't mean I may not contract COVID...flu season is coming.	8/24/2020 5:41 PM
27	I appeared in Suffolk County District Court and observed safe distancing, sanitizing stations, plexiglass, and mask requirement protocols in effect. However, I was surprised at the amount of persons in the courthouse.	8/24/2020 5:15 PM

Court Reopenings and Virtual Appearances

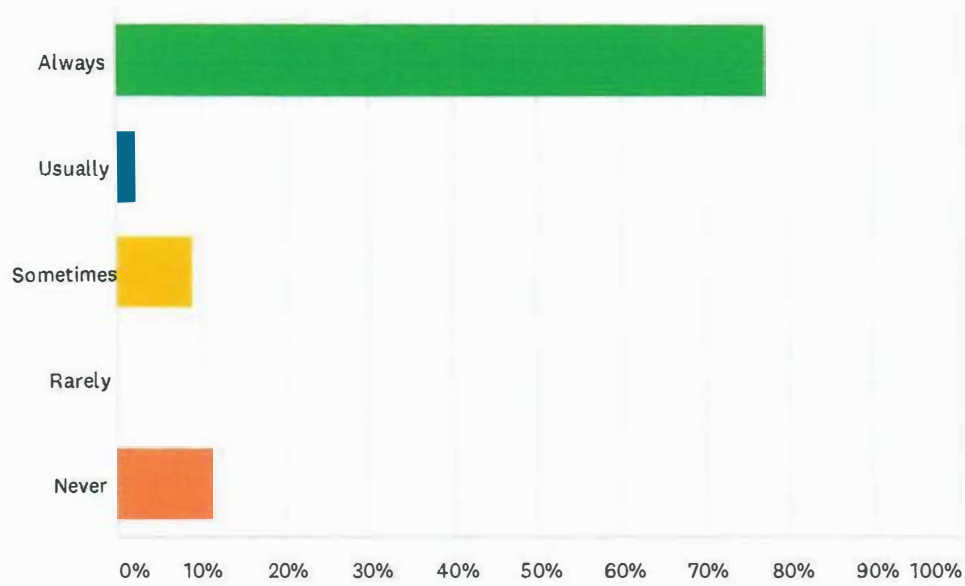
28	N/A	8/24/2020 5:09 PM
29	I have not been to the ctse for appearances.	8/24/2020 5:04 PM
30	yes. in Supreme Court screened at door, temp taken, masks on, clean up when done, limited use of conference areas.	8/24/2020 4:58 PM
31	N/Z	8/24/2020 2:12 PM
32	I haven't returned	8/24/2020 6:31 AM
33	Yes. Masks.	8/23/2020 9:02 PM
34	not applicable	8/23/2020 7:53 PM
35	Masks were mandatory and made communications more difficult.	8/23/2020 5:17 AM
36	NA	8/22/2020 9:44 PM
37	N/A	8/21/2020 4:29 PM
38	N/A	8/21/2020 1:42 PM
39	Plexiglass barriers; temperature checks; questioning about travel and symptoms; physically being distanced in the courtroom	8/21/2020 10:16 AM
40	Social distancing and security	8/21/2020 9:44 AM
41	Yes. Was screened before entering and had my temperature checked. There were signs on the floor about which way to walk and signs that limited elevator capacity	8/21/2020 8:59 AM
42	Courts are closed due to CoVId. Just like everything else, seems to be closed.	8/20/2020 10:06 PM
43	Not applicable.	8/20/2020 9:35 PM
44	Yes. Bailiffs taking names and temperatures, X's on the floor that are "6" feet apart, everyone in masks	8/20/2020 8:55 PM
45	N/A	8/20/2020 7:16 PM
46	I have yet to return to federal court. Or to a state administrative hearing.	8/20/2020 6:00 PM
47	n/a	8/20/2020 5:39 PM
48	N.A.	8/20/2020 5:33 PM
49	Yes. Temperature taking	8/20/2020 5:28 PM
50	Temps at door, plexiglass screens, masks	8/20/2020 5:18 PM
51	Cleaning.	8/20/2020 5:16 PM
52	Yes - wearing masks, staying 8 feet apart as well as the different position of chairs	8/20/2020 5:15 PM
53	Yes, I was required to wear a mask.	8/20/2020 5:15 PM
54	Security personnel screen and temperature check everyone entering the building; without an appointment or a scheduled court appearance, you don't get in.	8/20/2020 8:36 AM
55	Yes, temperature taking and questions about exposure	8/19/2020 10:22 PM
56	I was in the Courthouse one time to obtain a copy of letters testamentary from Surrogate's Court. The only change I observed was that my temperature was taken at the entrance to the Courthouse.	8/19/2020 3:02 PM
57	yes great social distancing	8/19/2020 2:59 PM
58	n/a	8/19/2020 1:51 PM
59	yes, cursory screening at entrance - but inside people were disregarding the 2 to an elevator rule and other procedures	8/19/2020 1:50 PM
60	Yes. Masks, questionnaires and temperature checks. Physical distancing is hit or miss. Masks are helpful, but far from foolproof.	8/19/2020 12:40 PM

Court Reopenings and Virtual Appearances

61	THE COURT HOUSE WAS PRACTICALLY EMPTY OF NON COURT PERSONNEL. THERE WAS THE TEMPERATURE CHECK BY THE COURT OFFICER BEFORE ENTERING. THERE WERE SOCIAL DISTANCING SIGNS	8/19/2020 12:11 PM
62	Yes - screening on entrance. Distancing on the waiting areas as well as in court. Sanitizers available in court.	8/19/2020 11:56 AM
63	n/a	8/19/2020 11:36 AM
64	N/a	8/19/2020 11:30 AM
65	N/A	8/19/2020 11:26 AM
66	n/a	8/19/2020 11:25 AM
67	N/A	8/19/2020 11:24 AM
68	N/A	8/19/2020 9:17 AM
69	yes Court officers screening clients and going thru COVUD questions and limiting number of people in the court room and making sure everyone had a mask on.	8/19/2020 7:47 AM
70	Yes, temperatures and face masks. Social distancing	8/18/2020 8:18 PM
71	N/A	8/18/2020 6:39 PM
72	yes.	8/18/2020 5:56 PM
73	N/A	8/18/2020 5:55 PM
74	Masks are required, hand sanitizer is available and use encouraged, and everyone has cooperated with social distancing.	8/18/2020 5:51 PM
75	Temperature checks , masks minimal dividers in courtroom	8/18/2020 5:49 PM
76	no havent returned	8/18/2020 5:48 PM
77	N/A	8/18/2020 5:34 PM
78	Have not yet appeared	8/18/2020 5:28 PM

Q11 When you entered the courthouse, was your temperature taken?

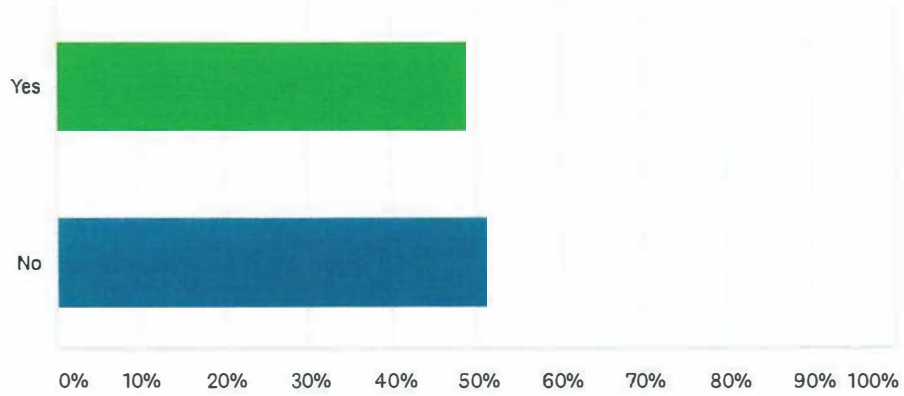
Answered: 44 Skipped: 62



ANSWER CHOICES	RESPONSES	
Always	77.27%	34
Usually	2.27%	1
Sometimes	9.09%	4
Rarely	0.00%	0
Never	11.36%	5
TOTAL		44

Q12 When you entered the courtroom did you observe any disinfecting practices?

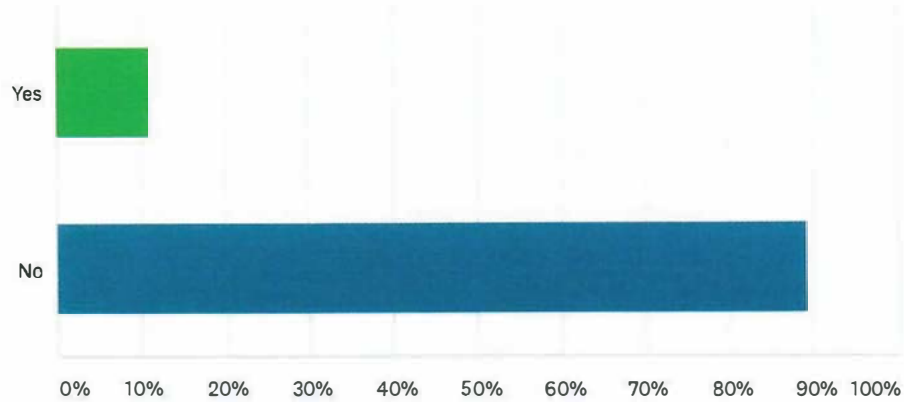
Answered: 41 Skipped: 65



ANSWER CHOICES	RESPONSES	
Yes	48.78%	20
No	51.22%	21
TOTAL		41

Q13 Were you asked to disinfect any surfaces or items that you came into contact with inside the courtroom or courthouse?

Answered: 46 Skipped: 60



ANSWER CHOICES	RESPONSES	
Yes	10.87%	5
No	89.13%	41
TOTAL		46

Q14 What county or counties do you practice in? (Please list all)

Answered: 101 Skipped: 5

Court Reopenings and Virtual Appearances

#	RESPONSES	DATE
1	All 5 counties of NYC	8/28/2020 5:05 PM
2	Rockland, Orange, Westchester, Bronx	8/27/2020 10:51 AM
3	Monroe, Ontario, Livingston	8/27/2020 9:44 AM
4	Monroe, Ontario, Wayne, Orleans, Livingston, Yates, Seneca	8/27/2020 9:20 AM
5	Jefferson, St. Lawrence, Erie, Essex	8/27/2020 8:43 AM
6	NY and Kings	8/27/2020 8:42 AM
7	Kings and New York	8/27/2020 6:50 AM
8	Monroe Wayne Ontario Livingston Or leans	8/26/2020 9:42 PM
9	9th district bronx and Ulster	8/26/2020 9:25 PM
10	Niagara	8/26/2020 5:57 PM
11	Monroe, Clinton, Wayne, Onondaga, Cortland, Onondaga, Chautauqua, Steuben, Ontario, Wyoming.	8/26/2020 5:14 PM
12	NY, Kings, Bronx, Queens, Westchester, Nassau and Suffolk.	8/26/2020 4:56 PM
13	Queens	8/26/2020 4:55 PM
14	orange, Rockland, ulster, Sullivan, Westchester, putnam	8/26/2020 4:50 PM
15	Oneida, Madison, Herkimer, Oswego	8/26/2020 4:46 PM
16	Tompkins	8/26/2020 4:42 PM
17	Albany, Schenectady, Saratoga, Ulster	8/25/2020 9:36 PM
18	Albany, Schenectady, Rensselaer, Saratoga, Schoharie.	8/25/2020 2:38 PM
19	NYC	8/25/2020 2:12 PM
20	New York, Queens, Nassau and Suffolk	8/25/2020 11:19 AM
21	Richmond	8/25/2020 11:01 AM
22	Erie, Monroe, Onondaga, Niagara, Albany, Genesee, Chautauqua	8/25/2020 9:47 AM
23	Monroe, Wayne, Ontario, Llivingston and Genesee	8/25/2020 9:42 AM
24	Suffolk, Nassau, Queens, Kings, New York, Bronx, Westchester (rarely).	8/25/2020 9:05 AM
25	Nassau Suffolk	8/24/2020 9:40 PM
26	Monroe County	8/24/2020 9:21 PM
27	Dutchess, Putnam, Orange, Columbia, Sullivan, Ulster & Westchester	8/24/2020 7:56 PM
28	Onondaga, usually. Cayuga, Oswego, Cortland on limited occasions but not during the pandemic	8/24/2020 6:09 PM
29	Kings, New York, Queens	8/24/2020 6:08 PM
30	Saratoga, Albany, Rensselaer, Schenectady, Washington Warren	8/24/2020 5:51 PM
31	Cortland, onondaga, Oswego, madison, wayne, seneca, and Cayuga.	8/24/2020 5:42 PM
32	New York, Kings, Westchester, Nassau	8/24/2020 5:39 PM
33	Primarily in Queens County but I have cases in most of the other boroughs.	8/24/2020 5:18 PM
34	Richmond and Kings	8/24/2020 5:12 PM
35	Westchester	8/24/2020 5:09 PM
36	New York, Kings, Bronx, Queens, Richmond, Nassau, Westchester, Suffolk	8/24/2020 5:07 PM

Court Reopenings and Virtual Appearances

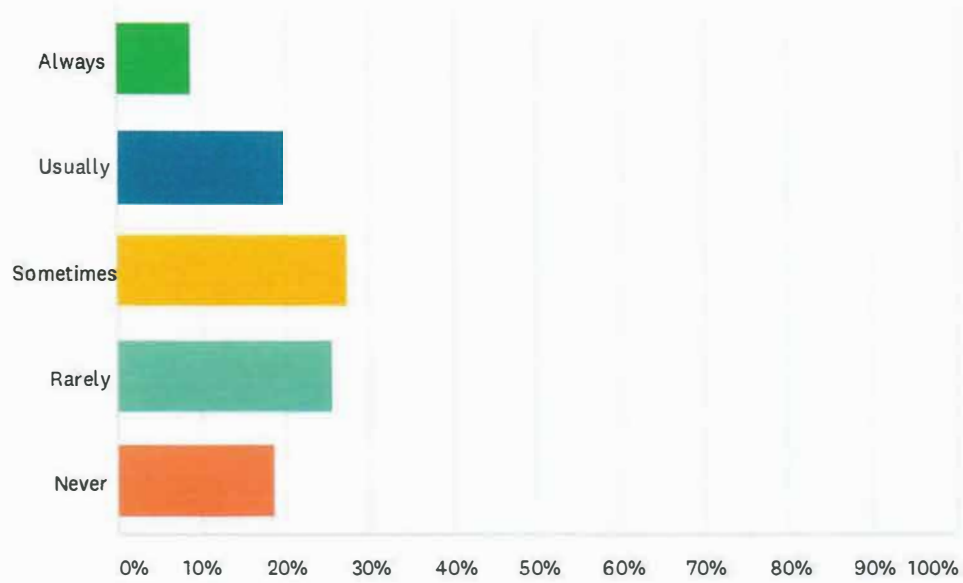
37	oswego, cayuga, jefferson, onondaga	8/24/2020 4:58 PM
38	Kings	8/24/2020 4:55 PM
39	Chemung; Steuben	8/24/2020 2:58 PM
40	New York, Westchester, Suffolk, Kings, Queens, Bronx, Rockland, ...	8/24/2020 2:13 PM
41	Otsego, Delaware, Chenango, Schoharie	8/24/2020 6:32 AM
42	All NYC; Westchester, Rockland, Nassau, Suffolk	8/23/2020 9:03 PM
43	Tompkins, Seneca, Cayuga, Cortland	8/23/2020 7:54 PM
44	US	8/23/2020 5:18 AM
45	New York, Queens, Kings	8/22/2020 9:44 PM
46	NY, Kings, Queens	8/22/2020 4:15 PM
47	New York, Kings, Queens, Bronx.	8/21/2020 4:55 PM
48	Ulster, Orange & Dutchess	8/21/2020 4:29 PM
49	Westchester	8/21/2020 1:43 PM
50	Allegany and Cattaraugus	8/21/2020 10:41 AM
51	Onondaga, Oswego	8/21/2020 10:17 AM
52	Oneida, Onondaga, NDNY 2d Cir. WDNY Albany Jefferson Lewis etc.	8/21/2020 10:07 AM
53	Niagara and Erie	8/21/2020 9:45 AM
54	New York, Kings, Queens	8/21/2020 9:01 AM
55	New York, Westchester	8/20/2020 10:06 PM
56	Broome, Tioga, Tompkins	8/20/2020 9:35 PM
57	Oswego, Onondaga, Jefferson	8/20/2020 8:58 PM
58	All over the state of NY.	8/20/2020 7:46 PM
59	New York	8/20/2020 7:18 PM
60	statewide	8/20/2020 6:06 PM
61	nassau, suffolk, queens, kings, bronx, new york, westchester, albany, monroe, erie, duchess, orange,	8/20/2020 5:42 PM
62	New York County, Bronx County, Kings County, Queens County, Westchester County.	8/20/2020 5:34 PM
63	Delaware	8/20/2020 5:28 PM
64	Jefferson and Lewis	8/20/2020 5:28 PM
65	Dutchess	8/20/2020 5:18 PM
66	NYC Counties and Nassau.	8/20/2020 5:16 PM
67	Lewis	8/20/2020 5:16 PM
68	Onondaga, Madison, Oswego, Oneida, Cayuga, Erie, Monroe, Cortland, Wayne, Lewis	8/20/2020 5:16 PM
69	Otsego	8/20/2020 8:38 AM
70	New York County, Kings County, Queens County, and Bronx	8/19/2020 10:23 PM
71	NY, Kings, Nassau	8/19/2020 5:11 PM
72	Kings, Queens, Bronx, NY and SI	8/19/2020 3:29 PM
73	Oneida	8/19/2020 3:17 PM
74	Westchester primarily. Occasionally in surrounding Counties, particularly New York.	8/19/2020 3:04 PM

Court Reopenings and Virtual Appearances

75	NYC	8/19/2020 2:29 PM
76	Nassau	8/19/2020 2:29 PM
77	all five boroughs of NYC	8/19/2020 1:53 PM
78	Monroe	8/19/2020 1:51 PM
79	Onondaga primarily. Also Oneida, St. Lawrence, Madison, Cortland, Cayuga and Oswego on occasion.	8/19/2020 12:42 PM
80	QUEENS, KINGS, NASSAU	8/19/2020 12:12 PM
81	Monroe	8/19/2020 11:59 AM
82	Albany, Rensselaer, Saratoga, Greene, Columbia, Putnam, Orange, Herkimer, Onondaga, and any others as needed for clients.	8/19/2020 11:39 AM
83	Kings, New York, Bronx, Queens, Nassau, Westchester, Rockland, Suffolk and Monroe.	8/19/2020 11:31 AM
84	Westchester, NYC counties, Long Island	8/19/2020 11:27 AM
85	From Dutchess to Suffolk	8/19/2020 11:26 AM
86	Most Courts in NYC and Nassau and Westchester	8/19/2020 11:25 AM
87	most downstate counties	8/19/2020 11:18 AM
88	Albany, Ulster, Orange, Dutchess, Fulton, Montgomery, Warren, Saratoga, Westchester	8/19/2020 9:18 AM
89	Ulster, Orange and Dutchess	8/19/2020 7:51 AM
90	New York, Kings, Queens	8/18/2020 10:05 PM
91	Chemung, Steuben, and Schuyler	8/18/2020 8:19 PM
92	NY Queens Kings	8/18/2020 8:04 PM
93	Orange, Westchester, Rockland, Dutchess, Albany	8/18/2020 6:40 PM
94	New York, Kings, Queens, Westchester, Rockland, Richmond and the Bronx.	8/18/2020 5:57 PM
95	nassau, suffolk, queens, new york	8/18/2020 5:56 PM
96	Albany, Schenectady, Schoharie, Saratoga, Rensselaer, Columbia, Greene.	8/18/2020 5:54 PM
97	NYC except Staten Island	8/18/2020 5:50 PM
98	Kings Richmond Queens	8/18/2020 5:49 PM
99	Nassau and Suffolk Rarely in Queens	8/18/2020 5:39 PM
100	Kings, New York, and sometimes Richmond.	8/18/2020 5:35 PM
101	Oneida, Herkimer, Onondaga, Monroe	8/18/2020 5:29 PM

Q15 Do you see clients in your office?

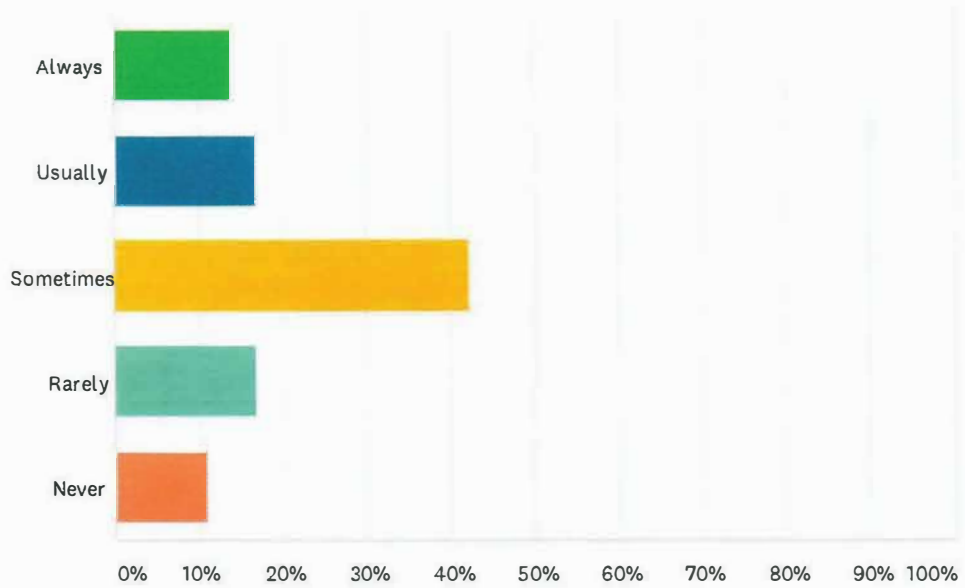
Answered: 102 Skipped: 4



ANSWER CHOICES	RESPONSES	
Always	8.82%	9
Usually	19.61%	20
Sometimes	27.45%	28
Rarely	25.49%	26
Never	18.63%	19
TOTAL		102

Q16 Do you see clients virtually?

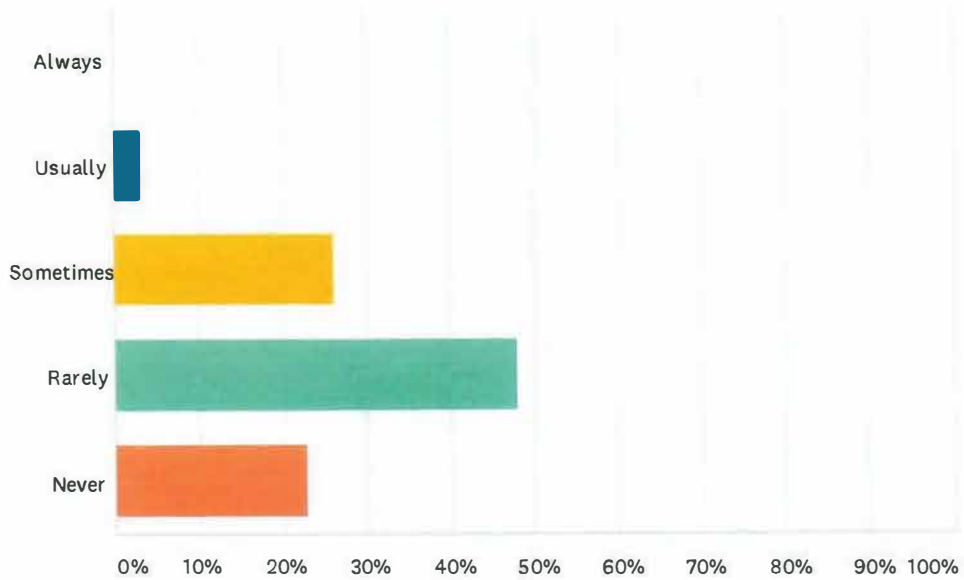
Answered: 102 Skipped: 4



ANSWER CHOICES	RESPONSES	
Always	13.73%	14
Usually	16.67%	17
Sometimes	42.16%	43
Rarely	16.67%	17
Never	10.78%	11
TOTAL		102

Q17 Have you encountered technological problems when meeting clients virtually?

Answered: 92 Skipped: 14



ANSWER CHOICES	RESPONSES	
Always	0.00%	0
Usually	3.26%	3
Sometimes	26.09%	24
Rarely	47.83%	44
Never	22.83%	21
TOTAL		92

APPENDIX B
A SUMMARY OF SELECTED GOVERNOR'S EXECUTIVE ORDERS

Criminal Law Procedure

March 2020

No. 202.1 - March 12, 2020

Suspensions of law relating to appearances by defendants:

Notwithstanding any other provision of law and except as provided in section 182.30 of Article 182 of the Criminal Procedure Law, the court, in its discretion, may dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action pending in any county in New York State, provided that the chief administrator of the courts has authorized the use of electronic appearance due to the outbreak of COVID-19, and the defendant, after consultation with counsel, consents on the record. Such consent shall be required at the commencement of each electronic appearance to such electronic appearance.

Notary Publics

March 2020

No. 202.7 - March 19, 2020

Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:

- The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;
- The video conference must allow for direct interaction between the person and the Notary (e.g., no pre-recorded videos of the person signing);
The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;

The Notary may notarize the transmitted copy of the document and transmit the same back to the person;

- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

Tolling Matters

April 2020

No. 202.17 - April 15, 2020

The directive contained in Executive Order 202.16 related to issuance of no-action or no-filing letters is modified to require such letters be issued by the Attorney General.

No. 202.18 - April 16, 2020

Section 352-e (7)(a) of the General Business law, and any order, rule, or regulation in furtherance of the requirements thereof, to the extent it requires certain filing fees be made at the time of submission and filing of each offering statement or prospectus, shall be exempted during the duration of this executive order, it being understood that such filing fees shall be remitted in full to the department of law within 90 days from the expiration of this executive order.

October 2020

No. 202.67- October 4, 2020

The suspension in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby continued, as modified by prior executive orders, provided however, for any civil case, such suspension is only effective

until November 3, 2020, and after such date any such time limit will no longer be tolled, and provided further.

Real Property Tax Matters

April 2020

No. 202.22 - April 20, 2020

Article 5 of the Real Property Tax Law, and analogous provisions of any other general or special laws that require a tentative assessment roll to be filed on or before June 1, 2020, to allow the tentative and final assessment rolls to be filed, at local option, up to 30 days later than otherwise allowable, to allow an assessing unit to set a date for hearing assessment complaints that is at least 21 days after the filing of the tentative roll, to allow notice of the filing of the tentative roll to be published solely online so long as the date for hearing complaints is prominently displayed, to suspend in-person inspection of the tentative roll, and to allow local Boards of Assessment Review to hear complaints remotely by conference call or similar service, provided that complainants can present their complaints through such service and the public has the ability to view or listen to such proceeding.

Section 1212 of the Real Property Tax Law, to the extent necessary to allow the commissioner of taxation and finance to certify final state equalization rate, class ratios, and class equalization rates, if required, no later than ten days prior to the last date set by law for levy of taxes of any municipal corporation to which such equalization rate, class ratios, and class equalization rates are applicable.

Section 1512(1) of the Real Property Tax Law and Sections 283.291 and 283.221 of the Laws of Westchester County, are suspended to allow the County Executive to negotiate with any town supervisor or mayor of any city, to accept a lesser percentage of taxes, special ad valorem levies or special assessments which are otherwise due on May 25, provided that in no event shall any town or city be required to pay more than sixty percent. The County Executive is empowered to determine whether or not penalties for late payment or interest are able to be waived dependent on whether or not such town or city applies the County Executive's criteria for determining hardship due to COVID-19.

Section 283.221 of the Laws of Westchester County is further suspended to the extent necessary to require the supervisor of a town, to waive payment of penalties for late payment of county and county district taxes under section 283.221 up to July 15, 2020, and waive payment of penalties for late payment of town and town district taxes and assessments in the same manner, provided such town applies the County Executive's criteria for the determination of hardship due to COVID-19.

Section 1512(1) of the Real Property Tax Law and any penalty provision of the tax code of a city within Westchester County is further suspended to the extent necessary to allow the mayor of that City to waive the payment of penalties for late payment of county and county district taxes and to further waive payment of penalties for late payment of city and city district taxes and assessments in the same manner, provided such city applies the County Executive's criteria for the determination of hardship due to COVID-19.

Section 5-18.0(2) of the Nassau County Administrative Code, to the extent necessary to allow the Nassau County Executive to extend until June 1, 2020, the deadline to pay without interest or penalty the final one-half of school taxes upon real estate in such county.

Subdivision 2 of section 238-a of the Real Property Law to provide that no landlord, lessor, sub-lessor, or grantor shall demand or be entitled to any payment, fee, or charge for late payment of rent occurring during the time period from March 20, 2020, through August 20, 2020.

May 2020

No. 202.31 - May 14, 2020

The directive contained in Executive Order 202.15 authorizing the Department of Taxation and Finance to accept digital signatures in lieu of handwritten signatures on documents related to the determination or collection of tax liability, is hereby modified to authorize such acceptance for the duration of the disaster emergency.

No. 202.32 - May 21, 2020

Retroactively extends by twenty-one days the period for paying without interest or penalty the property taxes that were due by April 1, 2020, in the Village of Head of the Harbor, Suffolk County, and the Village of Russell Gardens, Nassau County.

June 2020

No. 202.45- June 26, 2020

Extends during a State disaster emergency the period for paying property taxes without interest or penalties upon request of the chief executive officer of an affected county, city, town, village or school district, I do hereby extend by twenty-one days the period for paying, without interest or penalty, property taxes that are due in the following localities that have requested such an extension: Village of Ossining, Westchester County; Village of Pomona, Rockland County.

No. 202.43- June 18, 2020

Extends during a State disaster emergency the period for paying property taxes without interest or penalties upon request of the chief executive officer of an affected county, city, town, village or school district, I do hereby extend by twenty-one days the period for paying, without interest or penalty, property taxes that are due in the following localities that have requested such an extension: Village of Alfred, Allegany County; Village of Cambridge, Washington County; Village of Greenwood Lake, Orange County; Village of Honeoye Falls, Monroe County; Village of Lake George, Warren County; Village of Manorhaven, Nassau County; Village of New Square, Rockland County; Village of Old, Field Suffolk County; Village of Palmyra, Wayne County; Village of Piermont, Rockland County; Village of Schaghticoke, Rensselaer County; Village of South Nyack, Rockland County; and the Village of Tupper Lake, Franklin County.

No. 202.44 - June 21, 2020

Real Property Tax Law Article 5, to allow tentative and final real property tax assessment rolls to be filed up to 30 days late; allows hearing assessment complaints for tax assessing units to be at a date 21 days after the filing of the tentative roll; allows notice

of the tentative roll filing to be published online and to suspend in-person inspection of tentative rolls; and to allow Boards of Assessment Review to hear complaints remotely.

Real Property Tax Law § 1212, to allow the commissioner of Dept. of Tax and Finance to certify final state equalization rates, class ratios, and class equalization rates no later than 10 days before the last date sent by law.

The authority of the Commissioner of Taxation and Finance to abate late filing and payment penalties pursuant to section 1145 of the Tax Law is hereby expanded to authorize abatement of interest and penalties for a period of up to 100 days for taxpayers who were required to file returns and remit sales and use taxes by March 20, 2020, for the sales tax quarterly period that ended February 29, 2020.

July 2020

No. 202.54 - July 13, 2020

Any extension of the period for paying property taxes without interest or penalties pursuant to Real Property Tax Law Section 925-a is no longer in effect.

Retroactively extends by twenty-one days the period for paying without interest or penalty the property taxes that were due by July 1, 2020, in the Village of Atlantic Beach, Nassau County.

August 2020

No. 202.59- August 28, 2020

Any extension of the period for paying property taxes without interest or penalties pursuant to Real Property Tax Law Section 925-a is no longer in effect.

No. 202.55 - August 5, 2020

Section 730(3) of the Real Property Tax Law, to the extent necessary to extend the deadline for filing a 2020 small claims assessment review petition in relation to property located in Nassau County to September 4, 2020; provided that such deadline shall not be further extended unless expressly provided otherwise by an Executive Order issued hereafter.

Section 711 of the Real Property and Proceedings Law, Section 232-a of the Real Property Law, and subdivisions 8 and 9 of section 4 of the Multiple Dwelling Law, and any other law or regulation are suspended and modified to the extent that such laws would otherwise create a landlord tenant relationship between any individual assisting with the response to COVID-19 or any individual that has been displaced due to COVID-19, and any individual or entity, including but not limited to any hotel owner, hospital, not-for-profit housing provider, hospital, or any other temporary housing provider who provides temporary housing for a period of thirty days or more solely for purposes of assisting in the response to COVID-19.

September 2020

No. 202.60 - September 4, 2020

Title 5 of Article 11 of the Real Property Tax Law is suspended with respect to the ability of a municipality to sell liens.

December 2020

No. 202.83 - December 18, 2020

Subdivisions 7, 7-a and 8 of section 459-c of the Real Property Tax Law, and subdivisions 5, 5-a, 5-b, 5-c and 6 of section 467 of the Real Property Tax Law, to the extent necessary to permit the governing body of an assessing unit to adopt a resolution directing the assessor to grant exemptions pursuant to such section on the 2021 assessment roll to all property owners who received that exemption on the 2020 assessment roll, thereby dispensing with the need for renewal applications from such persons, and further dispensing with the requirement for assessors to mail renewal applications to such persons. Provided however, that the governing body may, at its option, include in such resolution procedures by which the assessor may require a renewal application to be filed when he or she has reason to believe that an owner who qualified for the exemption on the 2020 assessment roll may have since changed his or her primary residence, added another owner to the deed, transferred the property to a new owner, or died.

Chapter 125 of 2020 enacting the COVID - 19 Rent Relief Act to the extent necessary to authorize the payment of rent relief as otherwise provided in such Act, without requiring that a tenant provide proof that they were paying more than 30 percent of gross monthly income towards rent prior to March 2020.

Landlord & Tenant Matters

March 2020

No. 202.8- March 20, 2020

There shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days.

May 2020

No. 202.28 - May 7, 2020

Modified Sections 7-103, 7-107 and 7-108 of the General Obligations Law to the extent necessary to provide that:

- Landlords and tenants or licensees of residential properties may, upon the consent of the tenant or licensee, enter into a written agreement by which the security deposit and any interest accrued thereof, shall be used to pay rent that is in arrears or will become due. If the amount of the deposit represents less than a full month rent payment, this consent does not constitute a waiver of the remaining rent due and owing for that month. Execution in counterpart by email will constitute sufficient execution for consent.
- Landlords shall provide such relief to tenants or licensees who so request it that are eligible for unemployment insurance or benefits under state or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic.
- It shall be at the tenant or licensee's option to enter into such an agreement and landlords shall not harass, threaten, or engage in any harmful act to compel such agreement.

- Any security deposit used as a payment of rent shall be replenished by the tenant or licensee, to be paid at the rate of 1/12 the amount used as rent per month. The payments to replenish the security deposit shall become due and owing no less than 90 days from the date of the usage of the security deposit as rent. The tenant or licensee may, at their sole option, retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment, which the landlord, must accept such insurance as replenishment.

November 2020

No. 202.72 - November 3, 2020

Sections 732 and 743 of the Real Property Actions and Proceedings Law are modified to the extent necessary to provide that the time to answer in any summary eviction proceeding for nonpayment of rent that is pending on the date of the issuance of this Executive Order will be sixty days.

September 2020

No. 202.66 - September 29, 2020

Chapter 127 of the laws of 2020 is modified to the extent necessary to prevent, for any residential tenant suffering financial hardship during the COVID-19 state disaster emergency declared by Executive Order 202, the execution or enforcement of such judgment or warrant, including those cases where a judgment or warrant of eviction for a residential property was granted prior to March 7, 2020, through January 1, 2021.

Mortgage

July 2020

No. 202.48 - July 6, 2020

The directive contained in Executive Order 202.28, as extended, that prohibited initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, is continued only insofar as it

applies to a commercial tenant or commercial mortgagor, as it has been superseded by legislation for a residential tenant, and residential mortgagor, in Chapters 112, 126, and 127 of the Laws of 2020.

September 2020

No. 202.64- September 18, 2020

The directive contained in Executive Order 202.48, which modified the directive in Executive Order in 202.28 that prohibited the initiation of a proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through October 20, 2020.

October 2020

No. 202.70 - October 20, 2020

The directive contained in Executive Order 202.64, which modified the directive in Executive Order om 202.28 that relates to eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through January 1, 2021.

December 2020

No. 202.81 - December 11, 2020

The directive contained in Executive Order 202.48, which modified the directive in Executive Order in 202.28, as continued by Executive Oder 202.75 that prohibited the initiation of a proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment is hereby continued until January 31, 2021.

Banking Matters

March 2020

No. 202.9 - March 21,2020

Subdivision two of Section 39 of the Banking Law is hereby modified to provide that it shall be deemed an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of the Department shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic for a period of ninety days.

APPENDIX C

NYSBA RESOLUTION

WHEREAS, we have learned from the experience of the early months of this global pandemic that it is important to designate the practice of law as “essential.” The absence of such a designation, beyond the limited areas delineated as emergencies by the New York State Office of Court Administration, has caused practitioners great concern, and has harmed the public.

WHEREAS, in an orderly and just society, the practice of law is both necessary and essential. Under the emergency orders issued by the Governor at the outset of the pandemic, lawyers were subject to financial sanctions for the operation of a law practice while trying to serve the public who sought legal assistance and advice. The exceptions that were carved out were inconsistent and confusing. Accountants were deemed essential, despite tax deadlines being extended. Financial institutions and insurance companies were exempted and found essential. However, the practice of law, one of the hallmarks of the society we live in and the pillar of the advocacy system that ensures access to justice, was inexplicably excluded.

WHEREAS, the edict was unduly burdensome for health care workers and other essential workers who, faced with life and death situations every day, sought to execute wills, powers of attorney, health-care proxies, or other advanced directives, in an informed and proper manner. Parents and children involved in Family Court or matrimonial proceedings, in particular clients navigating custody and visitation issues brought about by the pandemic restrictions, and issues involving domestic violence, needed immediate counsel and support. Business owners who faced a myriad of employment, leasing and contractual issues, as well as issues related to COVID relief programs needed advice. Clients needed to meet with their lawyers to prepare for hearings that affected their benefits in areas such as worker’s compensation and social security. Personal injury claimants and defendants were deprived of access to counsel. Sellers and buyers needed to complete closings on residential and commercial property. This list is by no means exhaustive and illustrates just some of the many critical issues facing the public.

WHEREAS, lawyers are responsible members of society. We are licensed and regulated. We do not desire to place the public, clients, staff or ourselves at any risk. However, the members of the Task Force for Solo and Small Firm Practitioners believe that the practice of law is essential and can be accomplished using social distance guidelines and safe practices. The only result of not

designating the practice of law as “essential” is to harm the very people we are sworn to protect. As a profession, lawyers play an integral role in guiding the public we serve through these most difficult and unprecedented times. While we recognize that there may be certain aspects of law, e.g., attorneys engaged in academia, that may not be considered “essential” during extraordinary times, without question, those of us representing the public in critical legal situations that impact on our clients’ day-to-day lives should be permitted to provide advice and counsel in a safe and supportive manner so as to ensure the public has access to our justice system.

THEREFORE, BE IT RESOLVED that in the event that New York State finds it necessary to restrict business activities in the future due to this or any other public health crisis, we believe that the historical need for lawyers to assist the public to access justice should be recognized and that the practice of law should not be restricted, and that the New York State Bar Association should take all reasonable steps to urge this position be adopted by state leaders

APPENDIX D

AMEND FAQ SHEET



Frequently Asked Questions about the COVID-19 Vaccines: Information for Residents of Correctional Facilities

Leah Rorvig, MD, MS, Director of Health Education, AMEND at UCSF
David Sears, MD, Director of Healthcare Quality, AMEND at UCSF
Zoe Kopp, MD, Internal Medicine Resident Physician, UCSF
Ilana Garcia-Grossman, MD, Internal Medicine Resident Physician, UCSF
Brie Williams, MD, MS, Founder and Director, AMEND at UCSF

AMEND at the University of California, San Francisco, draws on the principles of public health and human rights to bring transformative change to incarceration in the U.S. Our mission is to create stronger communities by transforming prisons and jails into places of humanity, dignity, and health.

***See page 4 for the list of our partners on this FAQ!**

COVID-19 VACCINES: THE BASICS

- Vaccines teach the immune system how to recognize and fight off the virus that causes COVID-19. This can prevent vaccinated people from getting sick.
- When you get the vaccine you also protect other people around you by making it less likely for them to get COVID-19. Vaccines are not used to treat people who currently have COVID-19.
- There are currently three vaccines available in the United States, made by the drug companies Pfizer, Moderna, and Johnson & Johnson.
- The Pfizer and Moderna vaccines both have two shots that are given three weeks apart (Pfizer) or four weeks apart (Moderna). The Johnson & Johnson vaccine is one shot.
- All three vaccines are **SAFE** and **HIGHLY EFFECTIVE** at **preventing serious illness from COVID-19**.
- The vaccines have been given to tens of millions of people and have a strong record of safety.
- While it may seem like the vaccines were developed in record time, the science has been in development for many years and they have gone through all of the steps required for any vaccine to be approved.

SAFETY & EFFICACY

How effective are each of the three vaccines at preventing COVID-19?

- All three vaccines are **highly effective at preventing serious illness** due to COVID-19. Nearly 60,000 people were fully vaccinated in studies of the three vaccines and only one fully vaccinated person was hospitalized with COVID-19.
- So far, research shows that the Moderna and Pfizer vaccines were more than 90% effective in preventing mild COVID-19 illness, while Johnson & Johnson was 66% effective. The Johnson & Johnson vaccine was studied in locations where more contagious COVID-19 variants (“strains”) were circulating, so right now it is not possible to directly compare the effectiveness of the vaccines.
- Because all three vaccines are effective and limited in supply, **doctors and public health experts recommend taking whichever vaccine is offered to you first.**

Are the Pfizer and Moderna COVID-19 vaccines safe? Should I worry that they were developed so quickly?

- Both vaccines were found to be safe and effective in tens of thousands of adults (including Black and Latinx people) who participated in high quality research – the same research that any new vaccine or medicine must undergo before it is approved.
- Both vaccines were reviewed faster than normal. This is because so many people are getting sick and dying of COVID-19 that it is considered a national emergency.

What about the Johnson & Johnson vaccine's safety?

- Out of nearly 8 million people who have received that vaccine so far, fifteen people have been found to develop unusual blood clots within 5 to 24 days after getting the vaccine. These blood clots are very serious and have happened mostly in women between 18 and 50 years old.
- Because these unusual blood clots are extremely rare, and because COVID-19 is very dangerous, medical experts recommend continuing to give the Johnson & Johnson COVID-19 vaccine.
- For more information, please read our FAQ specifically about the Johnson & Johnson vaccine.

Did AMEND staff get the COVID-19 vaccine?

Yes. All AMEND team members received the COVID-19 vaccine as soon as it was offered to them.

SIDE EFFECTS & MEDICAL QUESTIONS

What are the possible side effects of the vaccines?

- The most common vaccine side effects are arm soreness, tiredness, headache, muscle pain, chills, joint pain, and fever. These side effects are more common after the second dose of the vaccine (for the Pfizer and Moderna vaccines) and – if they occur – should stop within 2 days.
- These symptoms are **normal** and they are a sign that your body is building protection against the virus that causes COVID-19.
- Among the millions of people who have received COVID-19 vaccines, a very small number of people have experienced severe allergic reactions. If you have ever had a severe allergic reaction to a vaccine or other substance, you should tell the health care professionals giving the vaccine so they can make sure that giving you the vaccine is safe.

Can I get COVID-19 from the vaccines?

- No. Because of how the vaccines work, **it is impossible to get COVID-19 from the vaccines.** The vaccines also cannot make you test positive for COVID-19.
- Even if you have been vaccinated, if you have a cough, fever, or other symptoms, then there is a chance you could have COVID-19, and you should ask to speak to medical staff right away.

I have diabetes, high blood pressure, hepatitis C, and/or HIV. Is it safe to get the COVID-19 vaccine?

- Yes. It is safe for people with diabetes and high blood pressure to receive the COVID-19 vaccine. It is also safe for people with hepatitis C and HIV to receive the COVID-19 vaccine.
- Only people who have had allergies to ingredients of the COVID-19 vaccine in the past should potentially not receive the vaccine – if this is the case for you, ask your doctor!
- None of the vaccines contain eggs, gelatin, latex or any preservatives.

If I already had COVID-19, do I need to get the COVID-19 vaccine?

- COVID-19 vaccination should be offered to you even if you already had COVID-19.
- Research shows that COVID-19 vaccination is safe for people who have already had COVID-19.
- Right now, research shows that reinfection with the virus that causes COVID-19 is very rare in the first few months after you first get sick with COVID-19. This is why some health systems are first giving the vaccine to people who have not had COVID-19 until the vaccine supply is better.
- You should not get the vaccine if you are currently sick with COVID-19.

AFTER VACCINATION

Do I need to keep wearing a mask after I receive the COVID-19 vaccine?

Yes. Unfortunately, even people who have had the COVID-19 vaccine may be able to get infected, and although the vaccine protects them from getting seriously sick, they may spread COVID-19 to others. (We do

not think this is common but we need more information about this.) Until the majority of all people have been vaccinated against COVID-19, everyone needs to continue wearing masks, practicing physical distancing, and frequently washing their hands.

I got the Johnson & Johnson vaccine. How do I know if I have one of these unusual blood clots related to the vaccine?

If you received the Johnson & Johnson vaccine within the last 28 days and have a bad headache, difficulty breathing, leg swelling, or abdominal pain, you could have an unusual blood clot related to the vaccine, and should contact a health care provider immediately. Keep in mind that these blood clots are extremely rare. Experts estimate there is about 1 case of unusual blood clots for every 500,000 people who get the vaccine.

COMMON MISUNDERSTANDINGS ABOUT THE COVID-19 VACCINES

I heard that some of the officers, health care staff, or the warden at my facility are refusing to get the vaccine. If they aren't getting it, why should I?

There are many reasons that people don't get the vaccine. These include a lack of knowledge about the safety and effectiveness of the vaccines, a lack of understanding about COVID-19 itself, mistrust of the medical system, and more. We encourage you to empower yourself by learning as much as you can about the COVID-19 vaccine, and make your own decision about getting the vaccine based on facts, and regardless of what other people are doing.

Should I even bother getting this vaccine given all the mutant "variant forms" of COVID-19?

Yes. So far, research suggests that all three vaccines in the US continue to provide protection against the most common COVID-19 variants. The vaccines are **very good at preventing people from getting seriously sick** (meaning so sick that they have to be hospitalized) from COVID-19. Scientists are still studying the effect that COVID-19 variants have on how well the vaccines work.

Will the COVID-19 vaccine harm my fertility?

No. There is no evidence that the vaccine affects the fertility of men or women. There is also no evidence of infertility caused by the COVID-19 virus among the many millions of men and women who have recovered from COVID-19.

The Pfizer and Moderna COVID-19 vaccines are mRNA vaccines. Does that mean they change your DNA (also called your genetic code)?

- The Pfizer and Moderna vaccines both use "messenger RNA" (also called mRNA) to teach the cells in your body to recognize the outside part of the virus that causes COVID-19. That way, if you are exposed to the virus, your immune system will stop it from making you sick.
- The COVID-19 vaccine **does not change your DNA**. mRNA cannot combine with your DNA.

The AMEND team and our partners on this FAQ all support vaccination. See page 4 for our partner list.

MORE RESOURCES

Ask your friends or family to get more information about COVID-19 vaccines at these trusted sites:

<https://covid19.ca.gov/vaccines/>

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

<https://www.youtube.com/watch?v=zvncqnojjDU>

If you or your loved ones have more questions we should answer on the next version of this FAQ, email us at info@amend.us or write to AMEND, 490 Illinois St, Floor 8, UCSF Box 1265, San Francisco, CA 94143.

References

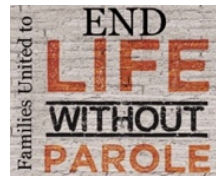
Centers for Disease Control and Prevention <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

State of California COVID-19 Vaccine Information Center <https://covid19.ca.gov/vaccines/>

UCSF COVID-19 Vaccine Information Hub <https://coronavirus.ucsf.edu/vaccines>



Frequently Asked Questions about the COVID-19 Vaccines:
Information for Residents of Correctional Facilities



Prisonerreentrynetwork.org



Preguntas Frecuentes Sobre las Vacunas Contra el COVID-19: Información para los Residentes de Instituciones Correccionales

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El programa AMEND de la University of California, San Francisco se inspira en los principios de la salud pública y los derechos humanos para traer cambios transformadores a la encarcelación en los EE. UU. Nuestra misión consiste en crear comunidades más robustas al transformar las prisiones y cárceles en lugares con humanidad, dignidad y salud.

***Consulte la página 4 en estas preguntas frecuentes para ver la lista de nuestros socios.**

LAS VACUNAS CONTRA EL COVID-19: NOCIONES FUNDAMENTALES

- Las vacunas enseñan al sistema inmunitario a reconocer y combatir el virus que causa el COVID-19. Esto puede evitar que las personas vacunadas se enfermen.
- Cuando usted recibe la vacuna también está protegiendo a otras personas de su entorno porque ayuda a reducir las probabilidades de que se enfermen de COVID-19. Las vacunas no se usan para dar tratamiento a las personas que padecen actualmente del COVID-19.
- Actualmente hay tres vacunas disponibles en los Estados Unidos, producidas por las compañías farmacéuticas Pfizer, Moderna y Johnson & Johnson.
- Las vacunas de Pfizer y Moderna consisten de dos dosis que se inyectan con tres semanas de diferencia (Pfizer) o cuatro semanas de diferencia (Moderna). La vacuna de Johnson & Johnson es de una sola dosis.
- Las tres vacunas son **SEGURAS** y **MUY EFICACES** para **prevenir la grave enfermedad causada por el COVID-19**.
- Las vacunas han sido administradas a decenas de millones de personas y tienen un buen historial de seguridad.
- Aunque puede parecer que las vacunas se desarrollaron en muy poco tiempo, estos descubrimientos científicos han estado en desarrollo por muchos años, y las empresas farmacéuticas han cumplido con todas las exigencias para que una vacuna sea aprobada para uso.

SEGURIDAD Y EFICACIA

¿Cuán eficaces son las tres vacunas para prevenir el COVID-19?

- Las tres vacunas son **muy eficaces para prevenir la enfermedad grave causada por el COVID-19**. Casi 60 000 personas fueron completamente vacunadas durante la investigación de las tres vacunas y solo una de ellas fue hospitalizada con el COVID-19.
- Hasta ahora las investigaciones muestran que las vacunas de Moderna y Pfizer tuvieron una eficacia de más del 90% para prevenir síntomas leves causados por el COVID-19, mientras que la vacuna de Johnson & Johnson tuvo una eficacia del 66%. La investigación para la vacuna de Johnson & Johnson se realizó en lugares donde se estaban propagando variantes (cepas) más contagiosas del COVID-19, por lo que al momento no es posible comparar directamente la eficacia de las vacunas.
- Debido a que las tres vacunas son eficaces y por su disponibilidad limitada, **los médicos y los expertos en salud pública recomiendan ponerse la vacuna que le ofrezcan primero**.

¿Son seguras las vacunas de Pfizer y Moderna contra el COVID-19? ¿Debo sentir preocupación por el hecho de que fueron desarrolladas tan rápidamente?

- Las dos vacunas resultaron ser seguras y eficaces en decenas de miles de adultos (incluyendo a personas afroamericanas y latinas) que participaron en una investigación de alta calidad (la misma investigación que se hace para la aprobación de cualquier medicamento o vacuna nuevos).
- La revisión de ambas vacunas se hizo más rápidamente que lo usual. Esto se debe a que tantas personas se fueron enfermando y murieron por el COVID-19, que se considera una emergencia nacional.

¿Qué sucede con la seguridad de la vacuna de Johnson & Johnson?

- De casi 8 millones de personas que han recibido esa vacuna hasta el momento, se ha descubierto que quince personas desarrollaron coágulos de sangre inusuales dentro de los 5 a 24 días posteriores a la vacunación. Estos coágulos de sangre son muy graves y se han presentado principalmente en mujeres de entre 18 y 50 años.
- Debido a que estos coágulos de sangre inusuales son extremadamente raros y debido a que el COVID-19 es muy peligroso, los expertos médicos recomiendan continuar administrando la vacuna contra el COVID-19 de Johnson & Johnson.
- Para obtener más información, lea nuestras preguntas frecuentes específicas sobre la vacuna Johnson & Johnson.

¿Los empleados de AMEND han recibido la vacuna contra el COVID-19?

Ciertamente. Todos los miembros del equipo de AMEND recibieron la vacuna contra el COVID-19 tan pronto como estuvo disponible.

EFFECTOS SECUNDARIOS Y PREGUNTAS MÉDICAS

¿Cuáles son los posibles efectos secundarios de las vacunas?

- Los efectos secundarios más comunes son: dolor en el brazo, cansancio, dolor de cabeza, dolor muscular, escalofríos, dolor en las articulaciones y fiebre. Estos efectos secundarios son más frecuentes tras la segunda dosis de la vacuna (en el caso de las vacunas de Pfizer y Moderna) y — si los hay— suelen desaparecer en 2 días.
- Estos síntomas son **normales** y son una señal de que su cuerpo está desarrollando protección contra el virus que causa el COVID-19.
- De las millones de personas que han recibido las vacunas contra el COVID-19, un pequeño número de personas ha experimentado reacciones alérgicas severas. Si una vacuna u otra sustancia le han causado alguna vez una reacción alérgica severa, debe decírselo a los profesionales de la salud que estén administrando la vacuna, para que puedan asegurarse de que su vacunación sea segura.

¿Me puedo contagiar de COVID-19 por ponerme la vacuna?

- De ninguna manera. Debido al funcionamiento de las vacunas **es imposible que las vacunas le den el COVID-19.** Las vacunas tampoco pueden hacer que su prueba del COVID-19 de resultado positivo.
- Aunque usted se haya vacunado, si tiene un resaca, fiebre u otros síntomas, hay posibilidades de que tenga el COVID-19 debe ponerse en contacto con el personal médico de inmediato.

Padezco de diabetes, hipertensión, hepatitis C y/o VIH. ¿Es seguro vacunarme contra el COVID-19?

- Ciertamente. Es seguro para las personas con diabetes e hipertensión recibir la vacuna contra el COVID-19. Lo mismo aplica a las personas con hepatitis C y el VIH.
- Las únicas personas que no deben vacunarse son aquellas que hayan tenido reacciones alérgicas a los componentes de la vacuna contra el COVID-19. Si este es su caso, ¡hable con su médico!
- Las vacunas no contienen huevos, gelatina, látex, ni ningún tipo de conservante.

Si ya tuve el COVID-19, ¿debo ponerme la vacuna?

- La vacuna debe estar a su disponibilidad, aunque ya haya tenido el COVID-19.
- Los estudios muestran que la vacuna contra el COVID-19 es segura para las personas que ya han tenido el COVID-19.
- En este momento los estudios muestran que la reinfección es poco común durante los primeros meses tras haberse enfermado de COVID-19. Por esta razón algunos sistemas de salud están vacunando primero a las personas que no han tenido el COVID-19, hasta que mejore la oferta de vacunas.
- Usted no debe ponerse la vacuna si está enfermo(a) actualmente de COVID-19.

DESPUÉS DE LA VACUNA

¿Tengo que seguir usando la mascarilla tras recibir la vacuna contra el COVID-19?

Sí, debe hacerlo. Desafortunadamente, aun quienes han recibido la vacuna contra el COVID-19 pueden contagiarse; y aunque la vacuna los protege de enfermarse gravemente, pueden contagiar a otros. (En nuestra opinión esto no es común, pero nos hace falta más información al respecto). Hasta que la mayoría de las personas haya sido vacunada contra el COVID-19, todos tienen que seguir usando las mascarillas, mantener el distanciamiento físico y lavarse las manos con frecuencia.

Recibí la vacuna de Johnson & Johnson. ¿Cómo sé si tengo uno de estos coágulos de sangre inusuales relacionados con la vacuna?

Si recibió la vacuna de Johnson & Johnson en los últimos 28 días y tiene un fuerte dolor de cabeza, dificultad para respirar, hinchazón en las piernas o dolor abdominal, podría tener un coágulo de sangre inusual relacionado con la vacuna y debe comunicarse con un proveedor de atención médica de inmediato. Tenga en cuenta que estos coágulos de sangre son extremadamente raros. Los expertos estiman que hay aproximadamente 1 caso de coágulos de sangre inusuales por cada 500,000 personas que reciben la vacuna.

ERRORES FRECUENTES SOBRE LAS VACUNAS CONTRA EL COVID-19

He oído que algunos empleados del personal de salud o el alcaide de mi institución correccional se rehúsan a ponerse la vacuna. Si ellos no se la ponen, ¿por qué debo hacerlo yo?

Hay muchas razones por las cuales algunas personas no quieren vacunarse. Estas incluyen el desconocimiento de la seguridad y eficacia de las vacunas, el desconocimiento del virus del COVID-19, la falta de confianza en el sistema de salud y otras. Recomendamos que se informe todo lo que pueda sobre la vacuna contra el COVID-19 para tomar una decisión sobre su vacunación basándose en datos, independientemente de lo que otras personas estén haciendo.

¿Debería vacunarme aun teniendo en cuenta la cantidad de “mutaciones” (variantes) del COVID-19 que existen actualmente?

Sí. Hasta ahora los estudios indican que las tres vacunas en los EE. UU. son efectivas contra las variantes más comunes del COVID-19. Las vacunas son **muy eficaces para prevenir que las personas se enfermen gravemente** por el COVID-19 (aquellos casos tan graves que requieren hospitalización). Los científicos todavía están estudiando la eficacia de las vacunas sobre las nuevas variantes del COVID-19.

¿La vacuna contra el COVID-19 podría afectar mi fertilidad?

No hay pruebas de que la vacuna afecte la fertilidad del hombre o de la mujer. Tampoco hay pruebas de que el virus del COVID-19 haya causado infertilidad entre los millones de hombres y mujeres que se han recuperado de un contagio del COVID-19.

Las vacunas de Pfizer y Moderna contra el COVID-19 son vacunas de ARNm. ¿Significa eso que podrían alterar mi ADN (el código genético)?

- Las vacunas de Pfizer y Moderna emplean el «ARN mensajero» (también llamado «ARNm») para enseñar a las células de su cuerpo a reconocer la parte externa del virus que causa el COVID-19. De esta manera, si se expone al virus el sistema inmunitario impedirá que el virus le cause una enfermedad.
- La vacuna contra el COVID-19 **no altera su ADN**. El ARNm no puede combinarse con su ADN.

El equipo de AMEND y los patrocinadores de esta hoja informativa están a favor de la vacunación. Para ver la lista de nuestros socios, consulte la página 4.

RECURSOS ADICIONALES

Todavía tengo preguntas ¿Qué debo hacer?

Puede recomendar a sus amigos o familiares que obtengan más información sobre el COVID-19 en los siguientes sitios de confianza:

<https://covid19.ca.gov/vaccines/>

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

<https://www.youtube.com/watch?v=zvncqnojjDU>

- Si usted o sus seres queridos tienen más preguntas que deberíamos contestar en la próxima versión de estas preguntas frecuentes, envíenos un correo electrónico a info@amend.us o escriba a AMEND, 490 Illinois St, Floor 8, UCSF Box 1265, San Francisco, CA 94143.
- Si se encuentra en California, también puede llamar al **Transitions Clinic Network Reentry Healthcare Hotline** para hablar con un profesional de la salud en la comunidad el cual tenga un historial de encarcelamiento. Esta línea directa acepta llamadas a cobro revertido desde las prisiones estatales de California y desde las cárceles de los condados que emplean el GTL. La línea directa está disponible de lunes a viernes de 9:00 AM-5:00 PM. Llame al: 510-606-6400. También puede contactarlos mediante el JPAY en tcninfo@ucsf.edu, en caso de estar disponible.

Referencias

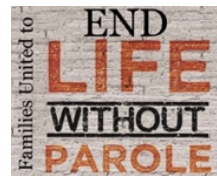
Centros para el Control y Prevención de Enfermedades <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

Centro de Información sobre el COVID-19 del Estado de California <https://covid19.ca.gov/vaccines/>

Centro de Información sobre las Vacunas contra el COVID-19 de la UCSF <https://coronavirus.ucsf.edu/vaccines>



**Preguntas frecuentes sobre las vacunas contra el COVID-19:
Información para residentes de instituciones correccionales**



Prisonerreentrynetwork.org



03.02.2021
NEWS INSIDE

What People in Prison Need to Know About the COVID- 19 Vaccine

Over 100 incarcerated people around the country told us their questions about the vaccine. Here's information about whether it's safe, when it could be available and more.



By ARIEL GOODMAN

Mail this story to your loved one in prison by downloading Amealio ([App Store](#) or [Google Play Store](#)) and going to the Information & Resources section within the Gift Shop. The Marshall Project will cover the cost of postage.

Incarcerated people have been among the hardest hit by the coronavirus in the United States. At least one in every five people in state and federal prisons have caught the virus since the pandemic began, and over 2,000 have died.

Since COVID-19 vaccines became available, incarcerated people and their families have been telling The Marshall Project that they're not getting key information. So we surveyed 136 imprisoned people to collect the most common questions. Then we got answers from vaccine experts, Centers for Disease Control and Prevention (CDC) fact sheets and other reliable sources.

How does the vaccine work?

There are two COVID-19 vaccine brands widely distributed in the U.S.: Pfizer-BioNTech, which requires two shots 21 days apart, and Moderna, which requires two shots 28 days apart.

Both work by injecting a small piece of genetic material called “messenger RNA” into your body. Messenger RNA teaches the body to make a harmless “spike protein” like the one found on the coronavirus. Your body learns to recognize the spike protein as something foreign and produces virus-fighting antibodies to protect you against it.

The Federal Drug Administration (FDA) authorized a Johnson & Johnson vaccine on February 27, and distribution will ramp up in March. Unlike the other two vaccines, it only requires one shot. It works by injecting an inactive version of a common virus called an adenovirus into your body. The adenovirus carries instructions to your cells to create the spike protein, which sparks an immune response.

All three vaccines are highly effective in preventing hospitalization and death from COVID-19. Because the vaccine supply is so scarce, most people in or outside of prisons can’t choose which brand they get.

What are the most common side effects of the vaccine?

All three vaccines can cause mild side effects one to three days after receiving a shot. Some common side effects are irritation, swelling, tenderness and muscle pain in the area of your arm where you got the shot. Some people have reported fever, chills, headache and tiredness, especially after the second dose. Experts suggest you plan for a day of rest and take a pain reliever.

Are there any serious side effects?

A tiny percentage of people who received the Pfizer-BioNTech and Moderna vaccines had a severe allergic reaction called anaphylaxis. Most of these reactions occurred shortly after the shot, which is why you should wait about 15 minutes before you leave the place where you were vaccinated. Be sure to tell the person giving you the shot if you have a history of severe allergic reactions or if you’ve ever had to use an EpiPen.

While no one who participated in the Johnson & Johnson clinical trial had an anaphylactic reaction after receiving the vaccine, a small percentage of people experienced blood clotting. Experts are still studying whether this was related to the vaccine.

How do I know the vaccine is safe?

Health officials have not reported any deaths caused by the COVID-19 vaccines. Compare this with over 500,000 people who have died of coronavirus in this country. “COVID is a very severe disease,” said Larry Corey, a virus expert who leads the COVID-19 Prevention Network. “The vaccines are effective in preventing death, hospitalization and being on a ventilator.”

Some people who took our survey said they feared companies were using prisoners as guinea pigs. More than 100,000 people participated in clinical trials for the Moderna, Pfizer-BioNTech or Johnson & Johnson vaccines before they were released to the public. The overwhelming majority of those participants were in the free world. The clinical trials for all the vaccines showed that they have an equal effect on people from different racial and ethnic groups.

At publication time, more than 75 million people—roughly 15 percent of the U.S. population—have received at least one dose.

How are prisons distributing the COVID-19 vaccine?

The first thing to note is that it’s up to states to decide when their residents get the vaccine. Most states are distributing the shots in three phases. The phases are based on whom the state government determines is most at risk of contracting COVID-19.

Medical experts have argued that incarcerated people should be in the first phase because they are at such high risk. But so far, only nine states have explicitly included imprisoned people in Phase 1. Eighteen states have placed them in Phase 2. Many of the remaining states have vaguely-worded plans that may include incarcerated people. To find out where incarcerated people fall in your state’s vaccination plan, search this list compiled by the Prison Policy Initiative.

Who gets the vaccine first in prison?

There are no universal distribution guidelines for state prisons, local jails and detention centers. According to the CDC, jurisdictions will make their own plans.

The Federal Bureau of Prisons does have clinical guidelines that they’ve made public. According to those guidelines, federal prisons will distribute the shots to people based on four “priority levels.” People who work in “health service unit jobs” or live in nursing care centers are the first priority. Second priority are people 65 and older, and those with health conditions that put them at a high risk of being hospitalized or dying from COVID-19, such as cancer, heart disease, sickle cell anemia or type 2 diabetes. On the third priority level are people ages 50 through 64, and those with medical conditions that may put them at risk of severe COVID-19 infection such as asthma, high blood

pressure and liver disease. After these three groups get their shots, prison officials are instructed to give them to anyone else who wants to take it.

Should I take the vaccine if I've already had COVID-19?

When you recover from COVID-19, your body begins to produce protective antibodies. If you are exposed to it again, these antibodies can identify and, in most cases, defeat the virus. This is called “natural immunity.”

But the amount of natural immunity that people build up varies, and experts are still studying how effective it is in preventing future COVID-19 infections. That’s why the CDC advises that people wait to take the vaccine at least 90 days after recovering from the virus.

“We don't know how long [natural] immunity is going to last,” said Monica Gandhi, a professor of Medicine at the University of San Francisco. “It could be really long, but the current recommendations are still to get the vaccine. That’s not because we don't think you're immune after you've gotten COVID, but because it could just boost your response so that you have lifelong immunity.”

Does the vaccine prevent me from contracting the new strains of the coronavirus?

Experts are still researching how well each vaccine protects against the new coronavirus strains that have emerged in different parts of the world. Though every strain is different, early studies have shown all three vaccines to be effective in preventing severe infection. “The only real tool we have to combat the virus, besides not acquiring COVID, is vaccination,” said Corey, of the COVID-19 Prevention Network.

So if I get the vaccine can I still spread the coronavirus?

Maybe. Experts are still studying whether vaccinated people can carry and transmit the coronavirus to others. For that reason, the CDC still recommends using precautions such as masks, social distancing and frequent hand-washing even if you are vaccinated. 𐀀

APPENDIX E

NYSBA RESOLUTION

RESOLUTION FOR THE IMMEDIATE VACCINATION OF CRIMINAL DEFENSE ATTORNEYS, CIVIL LEGAL SERVICES ATTORNEYS, MANDATED FAMILY COURT ATTORNEYS, ATTORNEYS FOR THE CHILDREN (AFC), PROSECUTORS, AND FAMILY AND CRIMINAL COURT JUDICIARY

WHEREAS As known and widely reported, COVID-19 is a pandemic the likes of which has not been seen in over a century since the influenza pandemic of 1918.

WHEREAS On November 7, 2020 The New York State Bar Association passed a resolution regarding the COVID-19 pandemic stating that “Once available, a vaccine should first be equitably allocated and distributed based upon widely accepted ethical principles including maximizing benefit to the society as a whole through reducing transmission and morbidity and mortality; recognizing the equal value, worth and dignity of all human persons and human lives; mitigating suffering, health inequities and disparities; and ensuring fairness and transparency in decision making. Health care workers and other essential workers most endangered by COVID-19 and populations at highest risk must be afforded priority access to a vaccine.”

WHEREAS Public defenders, civil legal services attorneys (employed by civil legal services law firms under Judiciary Law Section 495(7)), assigned counsel, attorneys for the children (AFCs), retained criminal defense counsel, and their support staff who see clients in person across the country are arguing that they should be among priority groups to receive the COVID-19 vaccine.

WHEREAS These lawyers provide services that are essential to ensuring access to justice for some of the most at-risk members of our communities.

WHEREAS Public defenders, civil legal services attorneys (employed by civil legal services law firms under Judiciary Law Section 495(7)), assigned counsel, attorneys for the children (AFCs), and retained criminal defense counsel must often provide space within their offices for clients to appear in virtual court and must appear in person in court with clients because it is often difficult to communicate with their clients virtually and virtual communications can raise privacy concerns.

WHEREAS Often the courtrooms do not adequately allow for social distancing between attorneys and their clients when appearing in person in court.

WHEREAS Criminal defense attorneys also must represent incarcerated clients accused of the most serious crimes and should be vaccinated in short order so that they can visit clients as there are serious privacy issues with virtual or telephonic communications in these instances.

WHEREAS Prosecutors must be available to appear in court on a daily basis and they must meet with witnesses and law enforcement regularly.

WHEREAS People who are incarcerated should be afforded the same protections as all other personages in criminal proceedings. These individuals are unable to sufficiently engage in social distancing and other protective techniques available to the public at large and therefore are at a heightened risk of COVID-19 infection.

WHEREAS In Family Court, indigent parents and their children have a right to counsel in child neglect proceedings, Article 10 & 6, which are urgent proceedings dealing with the removal of a child from a parent and home. These attorneys must meet with their clients.

WHEREAS Civil legal services attorneys and support staff interact with and represent indigent clients in urgent civil proceedings such as domestic violence and housing matters, at times in person.

WHEREAS Members of the judiciary are required to be in court in these proceedings and these judges preside over numerous cases in a day and are in contact with all the parties to each action.

THEREFORE, IT IS RESOLVED THAT:

For all the reasons stated herein, public defenders, assigned counsel attorneys, attorneys for the children (AFCs), client-facing civil legal services attorneys, mandated family court attorneys, retained criminal defense attorneys, prosecutors, incarcerated people including pre-trial detainees, criminal court judges and magistrates, and family court judges and the client-facing staff of these attorneys and judges as well as all lawyers who are by Court order or otherwise obligated to make an in-person appearance, either in a legal proceeding or elsewhere if related to an existing or contemplated court proceeding or process, should be prioritized for the vaccine as essential workers and individuals at high risk and that they immediately be moved into the New York State 1(b) vaccine category.

From: [David Louis Cohen](#)
To: [reportsgroup](#)
Cc: [Jasiewicz, Amy](#); [Leah Nowotarski](#); COHND@dany.nyc.gov; [Ben Ostrer](#)
Subject: Pandemic Blue Print
Date: Thursday, October 14, 2021 2:13:33 PM

The Executive Committee of the Criminal Justice Section has reviewed The Blue Print prepared by the NYSBA Emergency Task Force for Small Firm and Solo Practitioners. Sections Three and Eight of the Blue Print relate directly to the practice of criminal law and access to justice. The Section is especially pleased that the Report continues to stress the importance of an increase in the rates for assigned counsel. This has been a long standing priority of the Association. In addition the recommendation for the continuation of the ability to submit interim vouchers is vitally important to many small firm and solo practitioners. Interim vouchers allow lawyers to be paid without having to wait for a case to be concluded. With the delays caused by the pandemic, assigned counsel need the ability to bill and be paid for work done as the cases progresses rather than having to wait for a final resolution. The Criminal Justice Section also supports the adoption of this Report as it provides guidance with respect to many other issues that are faced by those attorneys who must appear in Court and deal with the new normal. David Louis Cohen, Chair

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From: reportsgroup <reportsgroup@NYSBA.ORG>
Sent: Thursday, October 7, 2021 11:56:11 AM
To: Richards, Thomas <TRICHARDS@NYSBA.ORG>
Subject: FW: A report from the Emergency Task Force on Solo and Small Firm Practitioners entitled "The Pandemic Blueprint: A Lawyer's Guide and Recommendations for the Solo and Small Firm Practitioner."

From: William S. Friedlander <wsf@friedlanderlaw.com>
Sent: Thursday, October 7, 2021 11:42 AM
To: reportsgroup <reportsgroup@NYSBA.ORG>; Bartosiewicz, Gina <GBartosiewicz@nysba.org>; Richards, Thomas <TRICHARDS@NYSBA.ORG>; domenick@napoletanolaw.com; June Castellano <june@junecastellano.com>
Cc: Soller, Christian <CJSoller@hodgsonruss.com>; Daniel Ecker <decker@leverecker.com>; angelicque moreno <amoreno@jkavanzino.com>
Subject: A report from the Emergency Task Force on Solo and Small Firm Practitioners entitled "The Pandemic Blueprint: A Lawyer's Guide and Recommendations for the Solo and Small Firm Practitioner."

The Trial Lawyer Section endorses this report from the Emergency Task Force on Solo and Small Firm Practitioners entitled "The Pandemic Blueprint: A Lawyer's Guide and Recommendations for the Solo and Small Firm Practitioner."

Thank you
Bill

--

William S. Friedlander
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Chair NYSBA Trial Lawyer Section
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Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 10

REQUESTED ACTION: Approval of the proposed amendments to the comments to Rule 5.6 of the rules of Professional Conduct offered by the Committee on Standards of Attorney Conduct.

Attached is a memorandum from the Committee on Standards of Attorney Conduct proposing amendments to the comments of Rule 5.6 regarding restrictions on a lawyer's right to practice after leaving a law firm. It should be noted that the proposed changes are to the comments only, not the black-letter provisions of the Rule. The proposed revisions are intended to provide additional guidance to law firms regarding the meaning of Rule 5.6.

The committee will be presenting two additional reports on an informational basis. The first, a new Rule 5.9 and accompanying comments, sets out procedures that lawyers and law firms should follow when a lawyer is planning to leave the but before the lawyer has actually left the firm. The second proposes a possible regulatory structure for legal intermediary and referral services. As a result of comments received regarding these proposals the committee is not seeking House approval at this meeting.

The report will be presented by committee members James B. Kobak, Jr., Ronald C. Minkoff, and James Q. Walker.

MEMORANDUM

Revised October 20, 2021

TO: NYSBA Executive Committee and House of Delegates

FROM: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)

SUBJECT: (1) Proposed New Comments to Rule 5.6 Providing Guidance on Post-Termination Conduct Regarding Lawyers Who Have Left a Law Firm; and

(2) Proposed New Rule 5.9 Regarding Pre-Termination Conduct with Respect to Departing Lawyers and Dissolving Law Firms

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is comprehensively reviewing the New York Rules of Professional Conduct. On July 20, 2021 COSAC sought public comment on two related sets of proposals – proposed new Comments to existing Rule 5.6, and a proposed new Rule 5.9 and Comments. COSAC received comments on these proposals from the following individuals and groups:

- Marj Gross
- Robert Hillman
- Leslie Corwin
- Art and Maria Ciampi
- Kevin Szanyi
- NYSBA Committee on Legal Aid (“COLA”)

On October 15, 2021, COSAC met in plenary session to consider the public comments and to make appropriate revisions to the proposals in light of those comments. In response to the public comments, COSAC made some changes to the proposed Comments to Rule 5.6 and new Rule 5.9, and decided to present proposed Rule 5.9 for informational purposes only at the October EC and House meetings to give COSAC more time to consider the issues raised by the public comments. (The Rule 5.6 proposals will still be an action item to be voted on at the meetings.)

COSAC’s revised proposals appear beginning on the next page.

Proposed New and Amended Comments to Rule 5.6 Restrictions on Right to Practice

[Note from COSAC: COSAC is not proposing any changes to the black letter text of Rule 5.6. COSAC is proposing changes only to the Comments to Rule 5.6. COSAC's proposed new language is in blue font and underscored. The black letter text of Rule 5.6 is reprinted here for convenient reference.]

(a) A lawyer shall not:

- (1) participate in offering or making a partnership, shareholder, operating, employment or other similar type of agreement, except an agreement concerning benefits upon retirement, that restricts the right of a lawyer to practice after termination of the relationship;**
- (2) participate in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.**

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comment

[1] Agreements restricting the right of a lawyer who has left a law firm (a "departed lawyer") to practice after leaving the firm limit a client's freedom to choose a lawyer as well as a lawyer's professional autonomy. Paragraph (a) prohibits such agreements, except agreements imposing restrictions relating to retirement benefits arising from service with the firm or restrictions justified by special circumstances described in this Comment. This Rule and the Comments to this Rule are intended to address the duties of lawyers and law firms solely under the Rules of Professional Conduct. They are not intended to address the obligations of a law firm or a departed lawyer under the law of fiduciary duty, partnership law, contract law, tort law, or other substantive law. Throughout these Comments, the phrase "law firm" shall have the meaning given in the definition in Rule 1.0(h).

Scope of Rule

[1A] Paragraph (a)(1) applies to any written or oral agreement governing or intended to govern:

- (i) the operation of a law firm;
- (ii) the terms of partnership, shareholding, or of counsel status at a law firm; and

- (iii) the terms of an individual lawyer's full-time or part-time employment at a law firm or other entity.

[1C] Paragraph (a)(1) applies whether the agreement is embodied in a written or oral contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph (a)(1) prohibits any agreement (other than a provision relating to retirement) that prohibits or limits a departed lawyer from contacting or serving the firm's present, former, or prospective clients, except that an agreement may include provisions to protect proprietary law firm information, or confidential or proprietary client information, and may include provisions requiring the departed lawyer to take reasonable and proportionate measures to protect such information.

[1D] Paragraph (a)(1) applies not only to agreements regarding lawyers in private practice but also to agreements between employed ("in-house") attorneys and the clients or entities that employ them, whether in a legal or nonlegal capacity. However, paragraph (a)(1) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure non-legal functions. In every type of law firm, the departed lawyer and the law firm must balance their rights and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests and client autonomy. Comment [1E] addresses restrictions that ordinarily violate the Rule and Comment [1F] addresses restrictions that ordinarily do not violate the Rule.

Prohibited Agreements

[1E] Agreements that will ordinarily violate paragraph (a)(1) include, but are not limited to, agreements that purport to do any of the following:

- (i) prohibit or limit the departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm;
- (ii) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal (e.g., imposing a mandatory "garden leave");
- (iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer has departed from the firm; or
- (iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, or are suspected of or presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

Permissible Agreements

[1F] Agreements that are ordinarily permitted under paragraph (a)(1) include, but are not limited to, agreements permitting a firm to impose reasonable restrictions or proportionate financial penalties on a departed lawyer who:

- (i) has approved, within a reasonable time before departing from the firm, a specific, significant financial undertaking with respect to the firm that remains

- outstanding where the lawyer's departure will have a material effect on the firm's ability to satisfy that undertaking;
- (ii) has breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm; or
 - (iii) has breached, or has taken actions which threaten to breach, non-disclosure obligations or agreements intended to protect proprietary information, trade secrets, or confidential information belonging to the firm or the firm's clients.

Reasonable Management Discretion

[1G] Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm's operations, finances, and management. The Rule is intended to prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm).

[1H] Paragraph (a)(1) addresses agreements governing the relationship between a departed lawyer and the prior law firm *after* the departed lawyer has left the firm. [Rule 5.9, in contrast, addresses the relationship between a law firm and a lawyer intending or planning to depart the firm *before* the lawyer has left the firm.]¹

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

***Proposed* New Rule 5.9**

Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms

[Note from COSAC: Proposed Rule 5.9 and the proposed Comments are entirely new – New York currently has no equivalent to Rule 5.9 -- but COSAC is reprinting these proposals in normal font (without color or underscoring) to make the proposals easier to read. COSAC is presenting these proposals to the October 2021 meetings of the Executive Committee and House of Delegates solely for informational purposes so that COSAC can have more time to reflect on the public comments received to date and to solicit further public comments.]

(a) In the case of a lawyer who is planning to leave a law firm (a “departing lawyer”), neither the departing lawyer nor lawyers in the firm who are not planning to leave the firm

¹ *Note from COSAC:* The bracketed language referring to Rule 5.9 will be included only if Rule 5.9 is approved by the House of Delegates and by the Administrative Board of the Courts.

shall unilaterally contact clients of the law firm for purposes of (i) notifying them about the departing lawyer's anticipated departure or (ii) soliciting continued or future representation of the clients, unless either:

- (1) after bona fide negotiations between the departing lawyer and an authorized representative of the law firm, held promptly after notice of departure has been given, the departing lawyer and the firm have been unable to agree on a joint communication to the clients concerning the departing lawyer; or
- (2) the circumstances of or leading up to the departing lawyer's departure, or the law firm's policies, past practices, or current actions directed at the departing lawyer or the departing lawyer's client contacts with regard to client notification, make such bona fide prompt negotiations reasonably unlikely to succeed.

(b) The law firm and the departing lawyer, either jointly or unilaterally, shall make reasonable efforts to give written notice to all clients for whom the departing lawyer had primary or substantial responsibility regarding the following matters:

- (1) the departing lawyer's intention to leave the law firm and the anticipated date of departure;
- (2) the departing lawyer's future contact information;
- (3) the status and location of the client's file or files;
- (4) a description of any property of the client in the possession of the law firm; and
- (5) with respect to each matter in which the firm is representing the client, the client's option to make one of the following choices:
 - (i) to remain a client of the law firm;
 - (ii) to be represented by the departing lawyer after departure; or
 - (iii) to be represented by other lawyers or law firms.
- (6) The notice or other communication to a client pursuant to this paragraph, whether written or oral, shall not contain false, deceptive, or misleading statements of fact or law.

(c) In the case of a law firm that intends to dissolve, the dissolving law firm and its members, as well as the individual lawyer or lawyers with primary or substantial responsibility for a client's matter or matters, shall make reasonable efforts to give written notice to all current clients of the firm regarding the following matters:

- (1) the fact that the firm is being dissolved and the anticipated date of dissolution;
- (2) the future contact information for each lawyer in the firm who has had primary or substantial responsibility for the client's matters;
- (3) the status and location of the client's file or files;

- (4) a description of any property of the client in the possession of the law firm; and
 - (5) with respect to each matter in which the firm is representing the client, the client's option to make one of the following choices after the firm has dissolved:
 - (i) to be represented by any member of the dissolving law firm; or
 - (ii) to be represented by other lawyers or law firms.
 - (6) The notice and other communications to a client pursuant to this paragraph, whether written or oral, shall not contain false, deceptive, or misleading statements of fact or law.
- (d) Whether in the case of a departing lawyer or a dissolving law firm, the written notice to the client shall provide the following information:
- (1) the client's potential liability (if any) for fees for legal services previously rendered by the law firm, or for expenses incurred by the law firm on the client's behalf;
 - (2) how any advance deposits for fees, expenses, or costs will be handled or applied; and
 - (3) how a transfer of the client's file to the client or to another lawyer or law firm may be effectuated.
- (e) If a client of a departing lawyer fails to advise the lawyer or law firm of the client's choice regarding who is to provide future legal services for a particular matter, the client shall be deemed to remain a client of the law firm for that matter until the client advises that the client has retained other counsel or the law firm has terminated the representation pursuant to Rule 1.16.
- (f) In the case of a dissolving law firm:
- (1) A lawyer in a dissolving law firm shall not unilaterally contact clients of the law firm unless, after bona fide prompt negotiations:
 - (i) an authorized member of the law firm has been unable to agree with that lawyer on a method to provide notice to clients; or
 - (ii) the members of the law firm have been unable to agree among themselves on a method to provide notice to clients.
 - (2) If a client of a dissolving law firm fails to advise the lawyers at the dissolving firm of the client's choice regarding who is to provide future legal services with respect to a particular matter, the client shall be deemed to remain a client of the lawyer who primarily provided legal services to the client on behalf of the firm with respect to that matter until either:
 - (i) the client gives notice to that lawyer or to the dissolving firm that the client has retained other counsel for that matter; or

- (ii) the lawyer who primarily provided legal services for that matter withdraws from the representation pursuant to Rule 1.16.

(g) This Rule does not apply to offices or organizations that are described in Rule 7.2(b)(1-4).

Comment

[1] This rule addresses the rights of clients, pursuant to a lawyer's obligations under Rule 1.4, to be given sufficient information to make informed decisions about their representation. In order to minimize any disruption of client service, a joint communication from the departing lawyer and the firm best serves the client's interests, and is the preferred means of communicating the impending departure of a lawyer who is primarily or substantially responsible for handling the client's matter, and for setting out the client's choices with respect to the representation going forward. Clients of the departing lawyer are entitled to receive, ordinarily before the lawyer's departure, the following information: (i) contact information for the departing lawyer; (ii) information about the status of the client's file and any other property – including advance legal fees – in the possession of the departing lawyer or law firm; and (iii) information about the ability and willingness of the departing lawyer and/or the lawyers remaining in the firm to continue the representation (subject to Rule 1.16, the rules governing conflicts of interest, and other Rules). Similar considerations apply when a law firm is in the process of dissolution, so when a law firm intends to dissolve, clients are entitled to the same information to which they are entitled when a lawyer is departing from a law firm. Nothing in this Rule alters the ethical obligations that any individual lawyer has to a client as provided elsewhere in these Rules. Lawyers may have fiduciary, contractual, or other obligations to their firms that are outside the scope of these Rules.

[2] When a lawyer primarily or substantially responsible for a client is leaving a law firm, this Rule requires the departing lawyer and the law firm to make a bona fide effort to develop and promptly make a joint communication to the departing lawyer's clients in order to avoid prejudicing the client. Both the departing lawyer and the firm have this duty. Accordingly, the negotiations required by paragraph (a) of this Rule must be initiated and completed promptly once the lawyer has made and announced concrete plans to leave the firm (or the firm has learned about these plans). If bona fide negotiations between the departing lawyer and the law firm fail, either the lawyer or the law firm (or both) must promptly communicate with clients as provided by paragraph (b) (or at least make a reasonable attempt to do so) to ensure that the affected clients are informed about the lawyer's departure and the clients' options for continued representation. While the level of promptness may depend on the circumstances, neither the departing lawyer nor the firm may unduly delay the process so as to jeopardize clients' rights to prompt notification of material developments in the client's matter under Rule 1.4. However, if the level of contention or animus between the departing lawyer and the law firm is high, this may make the prospects for successful negotiations reasonably unlikely. For example, the firm may have removed the departing lawyer for cause, may have failed to follow the provisions of this Rule with respect to the departing lawyer (or other departing lawyers), may have already unilaterally begun to contact the

clients for whom the departing lawyer had substantial or primary responsibility, or may have exhibited animus toward the departing lawyer in other ways. If continued representation by the departing lawyer and/or by the law firm is not possible, the communication shall clearly state that fact and advise the client of the remaining options for continued representation, including the client's right to choose other lawyers or law firms. Nevertheless, the law firm and the individual lawyers may not terminate the representation except in compliance with Rule 1.16.

[3] For purposes of contact with a client by a departing lawyer or a law firm, "client" includes (i) clients for whom the departing lawyer is currently the primary lawyer responsible for the client's active or prospective matters; (ii) clients to whom the departing lawyer is currently or has in the past provided or supervised substantial legal services; and (iii) clients with whom the departing lawyer has had significant contact.

[4] Clients have the right to choose to continue or change counsel upon a lawyer's departure, but a client's change in representation may implicate certain obligations, including the client's obligation to pay for legal services rendered and costs expended to date in connection with the representation. A departing partner may have a legal or contractual obligation to assist in the collection of such fees and costs, and the departing lawyer and law firm must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and promptly refunding any part of the fee paid in advance that has not been earned. *See* Rule 1.16(e).

[5] A law firm may not impose an unreasonably long notice period before allowing a departing lawyer to transition to another firm. Reasonableness in this context will depend on the facts and circumstances, but the length of the notice period should balance (i) the firm's need for the departing lawyer to complete administrative tasks connected to departure, such as notifying clients, sending invoices, and transitioning files with (ii) the client's right to the lawyer of its choice; and (iii) the lawyer's right to autonomy and mobility. Likewise, after a departing lawyer has announced an intention to leave but before the notice period has expired, a law firm may not suspend, prohibit, or limit the departing lawyer from continuing to practice at the firm unless the firm has a reasonable, good faith basis for believing that the lawyer may be accessing or planning to access the firm's confidential or proprietary information or the firm's resources for reasons unrelated to fulfilling ongoing responsibilities to clients, to the firm, or to civic or law reform organizations. An unreasonably long notice period or a lengthy mandatory leave period prior to departure (or prior to the departing lawyer's right to resume practice at another law firm) impairs client choice and lawyer autonomy. To that end, notice periods should be applied flexibly and should not unduly restrict lawyer mobility.

[6] A departing lawyer, both when contemplating departure and after announcing an intention to leave a firm, may have ethical duties to the firm and its clients as long as the lawyer remains at the firm. For example, absent informed consent of the client or as otherwise permitted by Rule 1.6 (see Comments [18A]-[18F]) and by Rule 1.10 (see

Comments [4A]-[5B]), a departing lawyer may not share confidential information with a prospective new firm, even as to matters on which the lawyer is currently working or is contemplating working. More broadly, a departing lawyer may not, without the client's informed consent, use a client's confidential information to the disadvantage of the client or for the advantage of the lawyer or a third person – see Rule 1.6(a). Consequently, the departing lawyer's firm may be justified in taking reasonable and proportionate measures to prevent the departing lawyer from improperly using such information (or to mitigate the effects of such improper use if it has already occurred). Such reasonable and proportionate measures do not violate Rule 5.9. A lawyer may also have fiduciary or other duties under partnership, contract, or other law, and the firm may have rights to take reasonable measures to protect itself from harm from violation of those duties.

[7] A lawyer who represents a client in litigation may have duties to notify the tribunal if a lawyer leaves the firm or if the lawyer's firm has dissolved or is in the process of dissolution. In either case, if the lawyer is counsel of record before a tribunal but will no longer be representing the client before that tribunal, the lawyer ordinarily (depending on the rules of the tribunal) must either file a motion to withdraw or a motion to substitute other counsel. *See* Rule 1.16(d).

COSAC's Reasons for Proposing New Comments to Rule 5.6 and a New Rule 5.9

COSAC believes that lawyers and law firms need more guidance on permitted and prohibited conduct regarding lawyers who have left their law firms (or are planning to leave their firms) to practice elsewhere. The relative lack of ethical guidance on lateral movement has created confusion and uncertainty for lawyers intending to leave a firm, for the law firms they are leaving, for the law firms to which they are moving, and, ultimately and most importantly, for their clients. As a result, COSAC has considered whether the New York Rules of Professional Conduct should be amended to help regulate the conduct in which lawyers and law firms may and may not engage when a firm becomes aware that a lawyer will be departing from the firm.

Rule 5.6 creates a problem because, by its terms, Rule 5.6(a)(1) applies only to agreements that restrict the right of a lawyer to practice “after termination” of the relationship between the lawyer and the law firm, but restrictive conduct by a law firm *before* a lawyer leaves a firm may, as a practical matter, restrict a departing lawyer's ability to practice *after* the lawyer leaves the firm.

To address the problem, COSAC has developed two related and complementary approaches. The first approach is a series of proposed new Comments to Rule 5.6 to provide guidance to law firms on the meaning and limits of Rule 5.6(a)(1). The second approach is a new Rule 5.9 that sets out procedures that lawyers and law firms should follow when a lawyer is planning to leave the firm (or the firm intends to dissolve) but before the lawyer has actually

left the firm (or before the firm has dissolved). COSAC's proposed new Rule 5.9 follows the lead of Virginia (Va. R. of Prof'l Conduct 5.8) and Florida (amended Comment to Fla. Bar. R. 4-5:8 (2018)), which have adopted a similar approach. COSAC recommends adopting both approaches – adding new Comments to Rule 5.6 to provide guidance regarding permissible and impermissible *post-termination* provisions and adding a new Rule 5.9 (with interpretive Comments) to provide guidance regarding *pre-termination* (and pre-dissolution) conduct.

Background

In December 2019, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued ABA Formal Ethics Op. 489 ("ABA 489"), entitled "Obligations Related to Notice When Lawyers Change Firms." ABA 489 applies the ABA Model Rules of Professional Conduct to a variety of important issues concerning the lateral movement of attorneys from one law firm or in-house position to another. For example, ABA 489 provides guidance on a lawyer's ethical right to switch firms, the problem of non-compete clauses in partnership agreements, limitations on formal pre-departure notice requirements, the obligation to notify clients of the lateral move, and the mechanics of transitioning client files.

ABA 489 is just one of many ethics opinions over the past thirty years to address these fraught issues. *See, e.g.*, ABA Formal Op. 09-455 (2009); ABA Formal Op. 99-414 (1999); Ill. Attorney Registration & Disciplinary Commission, "Leaving a Law Firm: A Guide to the Ethical Obligations of Law Firm Departure" (Revised Jan. 2020); Colo. Bar Ass'n Ethics Op. 116 (2007); Pa. Bar Ass'n & Phila. Bar Ass'n Joint Formal Op. 2007-300 (2007); Wash. State Bar Ass'n Advisory Op. 2118 (2006); State Bar of Arizona Formal Op. 99-14 (1999); and D.C. Bar 273 (1997).

The issues surrounding lateral lawyers are especially vexing because they raise questions not only regarding the Rules of Professional Conduct but also regarding a lawyer's fiduciary and contractual obligations to clients, law partners, and employers. While the various ethics opinions addressing lateral lawyers differ in their focus and in their nuances, the opinions provide remarkably consistent guidance. The opinions uniformly stress that the Rules of Professional Conduct favor lawyer mobility and client choice; that clients are not the property of individual lawyers or their law firms; that lawyers and law firms must promptly notify clients about a lawyer's planned departure; and that it is preferable (though not required) that the law firm and the departing lawyer provide joint notice of the move to the client.

For New York lawyers, however, guidance on these issues has been remarkably thin. Ethics opinions on these subjects are virtually non-existent, and the handful of appellate court decisions tend to focus on specific, discrete issues rather than providing comprehensive guidance regarding the ethical obligations and restrictions on departing lawyers and their law firms. *See, e.g.*, *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989) (disapproving of financial penalties for partners who compete after departure); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995) (upholding an arbitrator's decision permitting a law firm to take into account a departing lawyer's future income); *Feiner & Lavy v. Zohar*, 2021 WL

2196723 (App. Div. 1st Dep't June 1, 2021) (addressing a non-compete and non-solicitation agreement for an associate who moved to another firm); and *Gibbs v. Breed Abbot & Morgan*, 271 A.D.2d 180 (App. Div. 1st Dep't 2001) (evaluating a departing lawyer's disclosure of information about, and recruitment of, firm employees); *see also* N.Y. State 1221 (2021) (lawyer who has left firm has right to contact her current and former clients about continuing to handle their matters) The only New York Court of Appeals decision that broadly examines issues regarding lateral movement is *Graubard Mollen Dannett & Horowitz v. Moskowitz*, 86 N.Y.2d 112 (1995), but that decision is more than a quarter-century old, focuses more on fiduciary obligations than on ethics rules, and does not answer many important questions about lateral movement. In sum, New York lawyers need more guidance in this area.

COSAC believes that its proposals for new and amended Comments to Rule 5.6, together with new Rule 5.9 and its Comments, will provide the necessary guidance for New York lawyers and law firms in the context of lateral movement and dissolving firms. Because our proposal as to Rule 5.6 involves only Comments to an existing Rule, we believe it is ready to be presented to the House of Delegates for a vote at the October 30, 2021 meeting. Our proposed Rule 5.9, on the other hand, although it is designed to work hand in hand in conjunction with Rule 5.6, is entirely new to New York, so we wish to present it for informational purposes only to give COSAC and the Bar more time to consider it and provide comments.

COSAC: Public comments on proposed Rules 5.6 and 5.9
NYSBA COMMITTEE ON LEGAL AID (COLA)

Maria L. Ciampi, Esq.

Leslie Corwin, Esq.

Kevin Szanyi, Esq.

Robert Hillman, Esq.

Marjorie Gross, Esq.

Comments by Kevin Szanyi of Webster Szanyi LLP in Buffalo (received 10-10-2021)

MEMORANDUM

Revised September 15, 2021

TO: Members of the Bar and Public – For Public Comment
FROM: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
SUBJECT: (1) Proposed New Comments to Rule 5.6 Providing Guidance on Post-Termination Conduct Regarding Lawyers Who Have Left a Law Firm; and
(2) Proposed New Rule 5.9 Regarding Pre-Termination Conduct with Respect to Departing Lawyers and Dissolving Law Firms

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is comprehensively reviewing the New York Rules of Professional Conduct. This memorandum seeks public comment on two related sets of proposals – proposed new Comments to existing Rule 5.6, and a proposed new Rule 5.9 and Comments. The proposals appear first, followed by COSAC’s reasons for making these proposals.

Members of the public and members of the Bar (including bar sections, committees, and other bar groups, as well as individual lawyers and nonlawyers) are invited to submit comments on these proposals. The deadline for public comments is **Monday, October 11, 2021 at 5:00 pm**. Please send your comments directly to the Chair of COSAC, Roy D. Simon, at roy.d.simon@gmail.com.

Proposed New and Amended Comments to Rule 5.6 Restrictions on Right to Practice

[Note from COSAC: COSAC is not proposing any changes to the black letter text of Rule 5.6. COSAC is proposing changes only to the Comments to Rule 5.6. COSAC’s proposed new language is in blue font and underscored. The black letter text of Rule 5.6 is reprinted here for convenient reference.]

(a) A lawyer shall not:

- (1) participate in offering or making a partnership, shareholder, operating, employment or other similar type of agreement, except an agreement concerning benefits upon retirement, that restricts the right of a lawyer to practice after termination of the relationship;
- (2) participate in offering or making an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comment

[1] An agreement restricting the right of a lawyer who has left a law firm (a “departed lawyer”) to practice after leaving a the firm ~~not only limits the departed lawyer’s professional autonomy but also~~ limits the freedom of clients to choose a lawyer ~~and, concomitantly, limits the departed lawyer’s professional autonomy~~. Paragraph (a) prohibits such agreements, except agreements imposing restrictions incident to provisions concerning retirement benefits for service with the firm ~~or restrictions justified by special circumstances described in this Comment~~.

Scope of Rule

[1A] Paragraph (a)(1) applies to any written or oral agreement governing or intended to govern:

- (i) the operation of a law firm (including an in-house legal department);
- (ii) the terms of partnership, shareholding, or of counsel status at a law firm; and
- (iii) the terms of an individual lawyer’s full-time or part-time employment at a law firm or other entity.

[1B] Paragraph (a)(1) applies whether the agreement is embodied in a formal contract, a provision in a contract, an amendment or rider to a contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph (a)(1) prohibits any agreement (other than a provision relating to retirement) that prohibits or limits a departed lawyer from contacting or serving the firm’s present, former, or prospective clients who used or considered using the lawyer’s services while the lawyer worked at the firm, or who might wish to use the lawyer’s services after the lawyer and the firm have terminated the relationship, except that an agreement may include provisions to protect proprietary law firm information or confidential or proprietary client information, and may include provisions requiring the departed lawyer to take reasonable and proportionate measures to protect such information.

[1C] Paragraph (a)(1) applies not only to agreements regarding lawyers in private practice but also to agreements between employed (“in-house”) attorneys and the clients or entities that employ them, whether in a legal or nonlegal capacity. However, paragraph (a)(1) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure non-legal functions. In every type of law firm (see Rule 1.0(h), which defines “law firm”), the departed lawyer and the law firm must balance their rights and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests ~~and client autonomy~~. Comment [1D] addresses restrictions that ordinarily violate the Rule and Comment [1E] addresses restrictions that ordinarily do not violate the Rule.

Prohibited Agreements

[1D] Agreements that will ordinarily violate paragraph (a)(1) include, but are not limited to, agreements that purport to do any of the following:

Commented [KS1]: The concern at the root of the rule is client choice (*Cohen*, 75 NY2d @ 108), not the attorney’s financial well-being, so this should be stated first. Attorney mobility is merely “concomitant” – i.e., collateral to the main issue (*Thelan*, 24 NY3d @ 32)

Commented [KS2]: Did you mean “attorney autonomy”? If so, I do not think this is the “prime” motivation for the rule (see prior comment).

- (i) prohibit or limit the departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm, except as set forth in Comment [1E](i) below;
- (ii) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal (e.g., imposing a mandatory “garden leave”);
- (iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer and the firm have formally terminated their relationship; or
- (iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, or are suspected of or presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

Permissible Agreements

[1E] Agreements that are ordinarily permitted under paragraph (a)(1) include, but are not limited to, agreements permitting a firm to impose reasonable restrictions or proportionate financial penalties on a departed lawyer who:

- (i) knowingly contacts or seeks to contact firm clients for work in areas that are the same as or substantially related to the work the firm has done for those clients, if the departed lawyer did not actively and substantially work on matters for, and did not have significant contact with, those clients while at the firm;
- (ii) has undertaken a specific, significant financial undertaking with respect to the firm that remains outstanding (e.g., guaranteeing a loan to renovate the firm’s premises, or entering a new lease or other contract with significant financial consequences for the firm);
- (iii) has agreed with other firm lawyers, prior to departure, that those other lawyers will join the departed lawyer at his or her new affiliation upon or shortly after departure;
- (iv) has breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm; or
- (v) has breached, or has taken actions which threaten to breach, non-disclosure obligations or agreements intended to protect proprietary information, trade secrets, or confidential information belonging to the firm or the firm’s clients.

Reasonable Management Discretion

[1F] Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm’s operations, finances, and management. The Rule is intended to ~~prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm)~~ensure that clients can choose freely the counsel that they determine will best represent their interests by prohibiting agreements that impose a loss of benefits that is triggered by the departed lawyer’s decision to compete.

[1G] Paragraph (a)(1) addresses agreements governing the relationship between a departed lawyer and the prior law firm *after* the departed lawyer has left the firm. Rule 5.9, in contrast, addresses the relationship between a law firm and a lawyer intending or planning to depart the firm *before* the lawyer has left the firm.

Commented [KS3]: I think this more accurately states the purpose of the rule. This is taken loosely from the *Pierce v Morrison Mahoney* case (452 Mass. 718)

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Proposed New Rule 5.9

Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms

[Note from COSAC: Proposed Rule 5.9 and the proposed Comments are entirely new - New York currently has no equivalent to Rule 5.9 - but COSAC is reprinting these proposals in normal font (without color or underscoring) to make the proposals easier to read.]

(a) In the case of a lawyer who is planning to leave a law firm (a “departing lawyer”), neither the departing lawyer nor lawyers in the firm who are not planning to leave the firm shall unilaterally contact clients of the law firm for purposes of (i) notifying them about the departing lawyer’s anticipated departure or (ii) soliciting continued or future representation of the clients, unless either:

- (1) after bona fide negotiations between the departing lawyer and an authorized representative of the law firm, held promptly after notice of departure has been given, the departing lawyer and the firm have been unable to agree on a joint communication to the clients concerning the departing lawyer; or
- (2) the circumstances of or leading up to the departing lawyer’s departure, or the law firm’s policies, past practices, or current actions directed at the departing lawyer or the departing lawyer’s client contacts with regard to client notification, make such bona fide prompt negotiations reasonably unlikely to succeed.

(b) The law firm and the departing lawyer, either jointly or unilaterally, shall make reasonable efforts to give written notice to all clients for whom the departing lawyer had primary or substantial responsibility regarding the following matters:

- (1) the departing lawyer’s intention to leave the law firm and the anticipated date of departure;
- (2) the departing lawyer’s future contact information;
- (3) the status and location of the client’s file or files;
- (4) a description of any property of the client in the possession of the law firm; and
- (5) the client’s right, with respect to each matter in which the firm is representing the client, to choose one of the following options after the departing lawyer has left the firm:
 - (i) to remain a client of the law firm;
 - (ii) to be represented by the departing lawyer after departure;
 - (iii) to be represented by other lawyers or law firms; or

Commented [KS4]: IMO, lawyers will routinely rely on this provision and not even attempt to negotiate. I would prefer a mandatory rule requiring some attempt to negotiate a joint communication. See Florida’s RPC 4-5.8(c)(1)

(iv) to take possession of the client files and make a decision later.

(6) The notice or other communication to a client pursuant to this paragraph, whether written or oral, shall not contain false, deceptive, or misleading statements of fact or law.

(c) In the case of a law firm that intends to dissolve, the dissolving law firm and its members, as well as the individual lawyer or lawyers with primary or substantial responsibility for a client's matter or matters, shall make reasonable efforts to give written notice to all current clients of the firm regarding the following matters:

- (1) the fact that the firm is being dissolved and the anticipated date of dissolution;
- (2) the future contact information for each lawyer in the firm who has had primary or substantial responsibility for the client's matters;
- (3) the status and location of the client's file or files;
- (4) a description of any property of the client in the possession of the law firm; and
- (5) the client's right to choose one of the following options after the firm has dissolved:
 - (i) to be represented by any member of the dissolving law firm;
 - (ii) to be represented by other lawyers or law firms; or
 - (iii) to take possession of the client's files and make a decision later.

(6) The notice and other communications to a client pursuant to this paragraph, whether written or oral, shall not contain false, deceptive, or misleading statements of fact or law.

(d) Whether in the case of a departing lawyer or a dissolving law firm, the written notice to the client shall provide the following information:

- (1) the client's potential liability (if any) for fees for legal services previously rendered by the law firm, or for expenses incurred by the law firm on the client's behalf;
- (2) how any advance deposits for fees, expenses, or costs will be handled or applied; and
- (3) how a transfer of the client's file to the client or to another lawyer or law firm may be effectuated.

(e) If a client of a departing lawyer fails to advise the lawyer or law firm of the client's choice regarding who is to provide future legal services for a particular matter, the client shall be deemed to remain a client of the law firm for that matter until the client advises that the client has retained other counsel or the law firm has terminated the representation pursuant to Rule 1.16.

(f) In the case of a dissolving law firm:

- (1) A lawyer in a dissolving law firm shall not unilaterally contact clients of the law firm unless, after bona fide prompt negotiations:
 - (i) an authorized member of the law firm has been unable to agree with that lawyer on a method to provide notice to clients; or

- (ii) the members of the law firm have been unable to agree among themselves on a method to provide notice to clients.
- (2) If a client of a dissolving law firm fails to advise the lawyers at the dissolving firm of the client's choice regarding who is to provide future legal services with respect to a particular matter, the client shall be deemed to remain a client of the lawyer who primarily provided legal services to the client on behalf of the firm with respect to that matter until either:
 - (i) the client gives notice to that lawyer or to the dissolving firm that the client has retained other counsel for that matter; or
 - (ii) the lawyer who primarily provided legal services for that matter withdraws from the representation pursuant to Rule 1.16.

Comment

[1] This rule addresses the rights of clients, pursuant to a lawyer's obligations under Rule 1.4, to be given sufficient information to make informed decisions about their representation. In order to minimize any disruption of client service, a joint communication from the departing lawyer and the firm best serves the client's interests, and is the preferred means of communicating the impending departure of a lawyer who is primarily or substantially responsible for handling the client's matter, and for setting out the client's choices with respect to the representation going forward. Clients of the departing lawyer are entitled to receive, ordinarily before the lawyer's departure, the following information: (i) contact information for the departing lawyer; (ii) information about the status of the client's file and any other property – including advance legal fees – in the possession of the departing lawyer or law firm; and (iii) information about the ability and willingness of the departing lawyer and/or the lawyers remaining in the firm to continue the representation (subject to Rule 1.16, the rules governing conflicts of interest, and other Rules). Similar considerations apply when a law firm is in the process of dissolution, so when a law firm intends to dissolve, clients are entitled to the same information to which they are entitled when a lawyer is departing from a law firm. Nothing in this Rule alters the ethical obligations that any individual lawyer has to a client as provided elsewhere in these Rules. Lawyers may have fiduciary, contractual, or other obligations to their firms that are outside the scope of these Rules.

[2] When a lawyer primarily or substantially responsible for a client is leaving a law firm, this Rule requires the departing lawyer and the law firm to make a bona fide effort to develop and promptly make a joint communication to the departing lawyer's clients in order to avoid prejudicing the client. Both the departing lawyer and the firm have this duty. Accordingly, the negotiations required by paragraph (a) of this Rule must be initiated promptly once the lawyer has made and announced concrete plans to leave the firm (or the firm has learned about these plans). If bona fide negotiations between the departing lawyer and the law firm fail, either the lawyer or the law firm (or both) must promptly communicate with clients as provided by paragraph (b) (or at least make a reasonable attempt to do so) to ensure that the affected clients are informed about the lawyer's departure and the clients' options for continued representation. While the level of promptness may depend on the circumstances, neither the departing lawyer nor the firm may unduly delay the process so as to jeopardize clients' rights to prompt notification of material developments in the client's matter under Rule 1.4. However, if the level of contention or animus between the departing lawyer and the law firm is high, this may make the prospects for successful negotiations reasonably unlikely. For

example, the firm may have removed the departing lawyer for cause, may have failed to follow the provisions of this Rule with respect to the departing lawyer (or other departing lawyers), may have already unilaterally begun to contact the clients for whom the departing lawyer had substantial or primary responsibility, or may have exhibited animus toward the departing lawyer in other ways. If continued representation by the departing lawyer and/or by the law firm is not possible, the communication shall clearly state that fact and advise the client of the remaining options for continued representation, including the client's right to choose other lawyers or law firms. Nevertheless, the law firm and the individual lawyers may not terminate the representation except in compliance with Rule 1.16.

[3] For purposes of contact with a client by a departing lawyer or a law firm, "client" includes (i) clients for whom the departing lawyer is currently the primary lawyer responsible for the client's active or prospective matters; (ii) clients to whom the departing lawyer is currently or has in the past provided or supervised substantial legal services; and (iii) clients with whom the departing lawyer has had significant contact.

[4] Clients have the right to choose to continue or change counsel upon a lawyer's departure, but a client's change in representation may implicate certain obligations, including the client's obligation to pay for legal services rendered and costs expended to date in connection with the representation. A departing partner may have a legal or contractual obligation to assist in the collection of such fees and costs, and the departing lawyer and law firm must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and promptly refunding any part of the fee paid in advance that has not been earned. See Rule 1.16(e).

[5] A law firm may not provide for an unreasonably long notice period, unrelated to any need to complete a matter or transaction, before allowing a departing lawyer to transition to another firm. Likewise, after a departing lawyer has announced an intention to leave but before the notice period has expired, a law firm may not suspend, prohibit, or limit the departing lawyer from continuing to practice at the firm, unless the firm has a reasonable, good faith basis for believing that the lawyer may be accessing or planning to access the firm's confidential or proprietary information or the firm's resources for reasons unrelated to fulfilling ongoing responsibilities to clients, to the firm, or to civic or law reform organizations. An unreasonably long notice period or a lengthy mandatory leave period prior to departure (or prior to the departing lawyer's right to resume practice at another law firm) impairs lawyer autonomy and client choice.

[6] A departing lawyer, both when contemplating departure and after announcing an intention to leave a firm, may have ethical duties to the firm and its clients as long as the lawyer remains at the firm. For example, absent informed consent of the client or as otherwise permitted by Rule 1.6 (see Comments [18A]-[18F]) and by Rule 1.10 (see Comments [4A]-[5B]), a departing lawyer may not share confidential information with a prospective new firm, even as to matters on which the lawyer is currently working or is contemplating working. More broadly, a departing lawyer may not, without the client's informed consent, use a client's confidential information to the disadvantage of the client or for the advantage of the lawyer or a third person - see Rule 1.6(a). Consequently, the departing lawyer's firm may be justified in taking reasonable and proportionate measures to prevent the departing lawyer from improperly using such information (or to mitigate the effects of such improper use if it has already occurred). Such reasonable and proportionate measures do not violate Rule

Commented [KS5]: I'm kind of surprised there is nothing in the actual rule about this. I would like to see something that says a law firm cannot require an unreasonably long notice of a departing lawyer's intention to depart but, by the same token, a departing lawyer must provide the firm with reasonable notice of the intended departure to notify clients, transition files that are staying behind, etc.

5.9. The firm may also have rights under partnership, contract, or other law to take measures to protect the firm’s proprietary information.

[7] A lawyer who represents a client in litigation may have duties to notify the tribunal if a lawyer leaves the firm or if the lawyer’s firm has dissolved or is in the process of dissolution. In either case, if the lawyer is counsel of record before a tribunal but will no longer be representing the client before that tribunal, the lawyer ordinarily (depending on the rules of the tribunal) must either file a motion to withdraw or a motion to substitute other counsel. *See* Rule 1.16(d).

COSAC’s Reasons for Proposing New Comments to Rule 5.6 and New Rule 5.9

COSAC believes that lawyers and law firms need more guidance on permitted and prohibited conduct regarding lawyers who have left their law firms (or are planning to leave their firms) to practice elsewhere. The relative lack of ethical guidance on lateral movement has created confusion and uncertainty for lawyers intending to leave a firm, for the law firms they are leaving, for the law firms to which they are moving, and for their clients. As a result, COSAC has considered whether the New York Rules of Professional Conduct should be amended to help regulate the conduct in which lawyers and law firms may and may not engage when a firm becomes aware that a lawyer will be departing from the firm.

Rule 5.6 creates a problem because, by its terms, Rule 5.6(a)(1) applies only to agreements that restrict the right of a lawyer to practice “after termination” of the relationship between the lawyer and the law firm, but restrictive conduct by a law firm *before* a lawyer leaves a firm may, as a practical matter, restrict a departing lawyer’s ability to practice *after* the lawyer leaves the firm.

To address the problem, COSAC has developed two related and complementary approaches. The first approach is a series of proposed new Comments to Rule 5.6 to provide guidance to law firms on the meaning and limits of Rule 5.6(a)(1). The second approach is a new Rule 5.9 that sets out procedures that lawyers and law firms should follow when a lawyer is planning to leave the firm (or the firm intends to dissolve) but before the lawyer has actually left the firm (or before the firm has dissolved). COSAC’s proposed new Rule 5.9 follows the lead of Virginia (Va. R. of Prof’l Conduct 5.8) and Florida (amended Comment to Fla. Bar. R. 4-5:8 (2018)), which have adopted a similar approach. COSAC recommends adopting both approaches – adding new Comments to Rule 5.6 to provide guidance regarding permissible and impermissible *post-termination* provisions and adding a new Rule 5.9 (with interpretive Comments) to provide guidance regarding *pre-termination* (and pre-dissolution) conduct.

Background

In December 2019, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued ABA Formal Ethics Op. 489 (“ABA 489”), entitled “Obligations Related to Notice When Lawyers Change Firms.” ABA 489 applies the ABA Model Rules of Professional Conduct to a variety of important issues concerning the lateral movement of attorneys from one law firm or in-house position to another. For example, ABA 489 provides guidance on a lawyer’s ethical right to switch firms, the problem of non-compete clauses in partnership agreements, limitations on

formal pre-departure notice requirements, the obligation to notify clients of the lateral move, and the mechanics of transitioning client files.

ABA 489 is just one of many ethics opinions over the past thirty years to address these fraught issues. *See, e.g.*, ABA Formal Op. 09-455 (2009); ABA Formal Op. 99-414 (1999); Ill. Attorney Registration & Disciplinary Commission, “Leaving a Law Firm: A Guide to the Ethical Obligations of Law Firm Departure” (Revised Jan. 2020); Colo. Bar Ass’n Ethics Op. 116 (2007); Pa. Bar Ass’n & Phila. Bar Ass’n Joint Formal Op. 2007-300 (2007); Wash. State Bar Ass’n Advisory Op. 2118 (2006); State Bar of Arizona Formal Op. 99-14 (1999); and D.C. Bar 273 (1997).

The issues surrounding lateral lawyers are especially vexing because they raise questions not only regarding the Rules of Professional Conduct but also regarding a lawyer’s fiduciary and contractual obligations to clients, law partners, and employers. While the various ethics opinions addressing lateral lawyers differ in their focus and in their nuances, the opinions provide remarkably consistent guidance. The opinions uniformly stress that the Rules of Professional Conduct favor **lawyer mobility** and client choice; that clients are not the property of individual lawyers or their law firms; that lawyers and law firms must promptly notify clients about a lawyer’s planned departure; and that it is preferable (though not required) that the law firm and the departing lawyer provide joint notice of the move to the client.

For New York lawyers, however, guidance on these issues has been remarkably thin. Ethics opinions on these subjects are virtually non-existent, and the handful of appellate court decisions tend to focus on specific, discrete issues rather than providing comprehensive guidance regarding the ethical obligations and restrictions on departing lawyers and their law firms. *See, e.g.*, *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989) (disapproving of financial penalties for partners who compete after departure); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995) (upholding an arbitrator’s decision permitting a law firm to take into account a departing lawyer’s future income); *Feiner & Lavy v. Zohar*, 2021 WL 2196723 (App. Div. 1st Dep’t June 1, 2021) (addressing a non-compete and non-solicitation agreement for an associate who moved to another firm); and *Gibbs v. Breed Abbot & Morgan*, 271 A.D.2d 180 (App. Div. 1st Dep’t 2001) (evaluating a departing lawyer’s disclosure of information about, and recruitment of, firm employees). The only New York Court of Appeals decision that broadly examines issues regarding lateral movement is *Graubard Mollen Dammitt & Horowitz v. Moskowitz*, 86 N.Y.2d 112 (1995), but that decision is more than a quarter-century old, focuses more on fiduciary obligations than on ethics rules, and does not answer many important questions about lateral movement. In sum, New York lawyers need more guidance in this area.

COSAC believes that its proposals for new and amended Comments to Rule 5.6, together with new Rule 5.9 and its Comments, will provide the necessary guidance for New York lawyers and law firms in the context of lateral movement and dissolving firms.

Commented [KS6]: There may be opinions from other states that support this, but I am not aware of any in NY. To my knowledge, only *Thelan* comes close but, again, the court there stated that attorney mobility is merely concomitant to client choice. Webster defines concomitant as “accompanying especially in an incidental or subordinate way” and I think that nails it. Client choice is paramount. Attorney mobility is merely an incidental byproduct of this... I think the Mass. Sup. Ct. said it best in *Pierce v Morrison Mahoney*: “The purpose of rule 5.6 is not to protect lawyer mobility.” 452 Mass @ 726.

From: Maria Ciampi mciampi@ciampilaw.com
Subject: Re: COSAC proposals on Rules 5.6 & 5.9
Date: October 13, 2021 at 4:55 PM
To: Roy Simon roy.d.simon@gmail.com
Cc: Arthur Ciampi aciampi@ciampilaw.com



Dear Roy,

Thank you so much for providing this material to us. Very interesting, and I wish we had more time to explore!

Unfortunately, we can only provide a general comment because of the timing: “Except for the provisions regarding dissolution in Rule 5.9, the proposed Rules and Comments unduly favor the law firm, would muddy the existing case law, do not reflect the actuality of how departures occur in law firms, and in some cases conflict with ABA Formal Opinion 489, other ethics opinions, and other comments to the Rules, such as those concerning lateral partner hires and information that can be disclosed in that process. It would lead to more litigation and not provide clarity for departing lawyers, law firms, or courts and other tribunals.”

Take care,
Maria L. Ciampi
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From: Roy Simon <roy.d.simon@gmail.com>
Date: Sunday, October 10, 2021 at 8:34 AM
To: Arthur Ciampi <aciampi@ciampilaw.com>, AUTHOR 2 Ciampi <mciampi@ciampilaw.com>
Subject: COSAC proposals on Rules 5.6 & 5.9

I read your column on *Jacobson Holman, PLLC* from D.C. and meant to send you the attached proposals from COSAC, which are circulating for public comment and will be on the agenda for the State Bar House of Delegates on October 30. Formally, the deadline for public comment is tomorrow. but if you have time to submit even a short reaction by late on Thursday. that would

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October 11, 2021

VIA E-MAIL

roy.d.simon@gmail.com

Professor Roy D. Simon
Chair of NYSBA Committee on Standard
of Attorney Conduct (“COSAC”)

Re: Proposed New Comments to Rule 5.6 Providing Guidance on Post-Termination Conduct Regarding Lawyers Who Have Left a Law Firm; and Proposed New Rule 5.9 Regarding Pre-Termination Conduct with Respect to Departing Lawyers and Dissolving Law Firms

Dear Professor Simon:

Thank you for sharing with me the Proposed New Comments to Rule 5.6 and Proposed New Rule 5.9 of the New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”).

As the Co-Author of Law Firm Partnership Agreements, I am quite familiar with and have been writing about and researching for years the issues addressed in COSAC’s proposals. The life of a law firm and law firm life for its partners is no longer static, but has become remarkably fluid and complex (even more so with the advent of COVID 19) as lawyers and entire practice groups often change where and with whom they practice. The practice of law is indeed a mobile profession.

Volatile issues in the modern day law firm in New York are created by the departure or retirement of partners and the balancing of corollary and ethical responsibilities between a departing/retiring partner and the law firm from which the partner is leaving. COSAC’s Proposals are excellent; provide clarity which should hopefully help to avoid future litigation; and I enthusiastically endorse them.

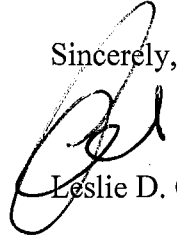
Congratulations to you and your Committee for a job truly well done!

Professor Roy D. Simon
October 11, 2021
Page 2

Duane Morris

Best personal regards.

Sincerely,

A handwritten signature in black ink, appearing to read 'LDC', written over a faint, larger signature that is partially obscured.

Leslie D. Corwin

LDC/ng

MEMORANDUM

TO: NYSBA & COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT (“COSAC”)
FROM: NYSBA COMMITTEE ON LEGAL AID (COLA)
SUBJECT: COMMENTARY ON PROPOSED NEW RULE 5.9 REGARDING PRE-TERMINATION CONDUCT WITH REPECT TO DEPARTING LAWYERS AND DISSOLVING LAW FIRMS.

COSAC proposed amendments to Rule 5.6 (Restrictions on Right to Practice), and creation of a new standard designated as 5.9 (Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms). The Comments indicate the rules have been generated to support client’s rights to know about their cases and avoid prejudicing the case. It imposes requirements to contact individual clients by both the firm and the departing attorney. It directs the law firm and departing attorney to promptly make a joint communication to affected clients regarding the departing attorney.

The organizations represented in COLA would not be directly impacted by Rule 5.6 (Restrictions on Right to Practice). Similarly, 5.9 (Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms) paragraphs (c), (d) and (e) are not problematic conditions for institutional providers. However, Rule 5.9 paragraphs (a) and (b) violate the basic tenants of free and low-cost representation of eligible clients. Rule 5.9 (a) and (b) set out the procedures that lawyers and law firms should follow when a lawyer is planning to leave a law firm. Rule 5.9 (a) and 5.9(b) should exempt Not-for-Profit/Institutional Providers and Pro Bono Providers for the following reasons: 1) the requirements interfere with our contracts to provide representation to the poor; 2) they are too onerous a financial burden for the institution; 3) the rule is overly broad in the definition of which clients should be contacted; and 4) they have the potential to violate Rule 4.2(a) (Communications with Person Represented by Counsel)ⁱ and Rule 8.4 (a) (Misconduct)ⁱⁱ.

Institutional providers often have contracts to provide representation to economically eligible persons or are governmental entities- such as public defender offices – that provide representation under county law § 722. Contracts come from a variety of sources including governmental (federal, state and county) in addition to foundational grants and fund-raising activities. Clients may have multiple attorneys who meet the definition of a lawyer had primary or substantial responsibility. However, all these attorneys are staff attorneys working in a team, even when there is one attorney assigned to a client. it is the institutional provider that is assigned to represent the client. Clients of an institutional provider have been deemed to NEED assistance and determined to be financially eligible for representation – they do not have the resources to retain and attorney. If the departing attorney goes to another institution, the assignment for representation does not change. If the departing attorney goes into a for profit law firm, the client may or may not follow that attorney, but the client will be required to pay for representation previously provided free of charge to the client. The nature of that interaction, conversations regarding continued representation of the client can be considered violating

Rule 4.2 (a) and 8.4 in that it is a false statement regarding the institutional client has the right to be represented by the departing lawyer and may interfere with the representation provided on the current case.ⁱⁱⁱ

The proposed rule 5.9 (a) and (b) are overly broad in the requirement to give notice to “all clients for whom the departing lawyer had primary of substantial responsibility.” This requirement appears to cover those cases which are both active and those cases which are closed. For an institutional provider this catch-all could include thousands of cases with exorbitant costs to comply with the directive to provide “written” notice to the individual clients.^{iv}

Indeed, under the Assigned Counsel Plan guidance from ILS prohibits additional payment from a client.

“8.3.c. Additional Payment. On the matter to which counsel is assigned, he or she shall not seek to be privately retained to represent the client, shall not agree to be privately retained upon request of the client, and shall neither seek nor accept payment from a client or any other person. Noncompliance with this rule is a ground for removal from the panel. Assigned counsel should not seek nor accept payment from a client or any other source to supplement fees and expenses for non-attorney professional services authorized by the ACP.^v “

Accordingly, Rule 5.9 (a) and (b) should be removed entirely and any reference of a “departing lawyer” would be removed from the rule. The guidance pursuant to Rule 5.9 regarding the closing of a law firm would remain intact. Alternatively, Not-for-Profit, Institutional Provider or Pro Bono programs are exempted from Rule 5.9 (a) and (b).

ⁱ Rule 4.2 (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.”

ⁱⁱ Rule 8.4 (a) A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist, or induce another to do so, or do so through the acts of another.

ⁱⁱⁱ Civil Law institutional provider relayed an incident of a departing attorney who left the institution and informed all her clients about her departure. The clients followed her to her new practice and did not understand that her representation, unlike the institutional provider, was not free of charge. Once the clients realized they needed to pay a fee for the representation, they returned to the institutional provider, having lost several months on their cases, and possibly having less favorable outcomes.

^{iv} Written notice for institutional clients means the United States Postal Service mailings. Our clients do not have consistent access to emails – and many clients experience housing insecurities meaning they may not have a stable address to receive USPS mail.

^v <https://www.ils.ny.gov/files/ACP>: ILS Standards for Establishing and Administering Assigned Counsel Programs Black Letter Standards, July 2019.

From: Robert Hillman rwhillman@ucdavis.edu
Subject: RE: NY proposals on Rule 5.6 & (new) Rule 5.9
Date: October 11, 2021 at 4:19 PM
To: Roy Simon roy.d.simon@gmail.com

RH

Roy,

Thanks for giving me the opportunity to comment on the Rule 5.6 commentary changes and the new Rule 5.9.

Hats off to you and COSAC for attempting to bring some clarity to the area and also for suggesting some bold new approaches to problems that have been lingering for some time. The implementation of these proposals would be a major development in the law and ethics of lawyer mobility, not just in New York but elsewhere as well. And they represent one of the best attempts I have seen to balance the interests of firms, departing lawyers, and clients.

As to specific comments, I have a few. In 1(D)(iii), I am not sure of the meaning of “formally terminated their relationship” inasmuch as some type of relationship may continue to exist after a lawyer has withdrawn. I think a better phrase would be “after the lawyer has departed from the firm,” or something to that effect.

If implemented, I(E) will prove the most important part of these proposals. The concept is excellent, but there are some issues that I urge you to address before finalizing. For example, what are reasonable restrictions (as opposed to financial penalties)? The most plausible interpretation of “restrictions” independent of financial penalties is some type of restraint on the departing lawyers’ ability to provide legal services. If this is intended, you should spell it out. More broadly, I wonder if it would not be better simply to delete the “reasonable restrictions” phrase and let financial penalties do the work

PENALTIES ON THE WORK.

In 1(E)(ii), the allowance of financial penalties imposed on a departing lawyer who “has undertaken a specific, significant financial undertaking with respect to the firm that remains outstanding” is a major statement/change in existing standards. I am very sympathetic to what is being proposed here, but I worry that defining applicable financial undertakings will prove problematic. For example, you provide an example – “entering a new lease or other contract with significant financial consequences for the firm.” What does this mean? Most law firms have leases. Are you talking about a lease specifically guaranteed by the departing partner (which is rare)? If that is the case, the partner would presumably remain liable on the guarantee after withdrawal, so why further penalize the partner? If you are talking about a lease without regard to any guarantee of the departing partner, then inasmuch as most law firms have leases you are allowing most partnership agreements to impose departure penalties. I doubt that you want something this broad, but the language and examples in the commentary could be clearer.

1(E)(iii) allows financial penalties when a departing partner “has agreed with other firm lawyers, prior to departure, that those other lawyers will join the departed lawyer at his or her new affiliation upon or shortly after departure.” This is much broader than simply prohibiting pre-departure solicitation of staff. Would you apply this to a handful of partners who discuss leaving together? Effectively, that would allow significant penalties on group departures. Such a change in the current environment would be nothing short of breathtaking. Is that really what is intended?

.....

Must financial penalties be tied to compensation for harm to the firm, or may harsh penalties be imposed to deter targeted conduct? I don't think "proportionate" really addresses this issue.

I find it very interesting that the financial penalties you allow do not parallel those that are permitted in California under *Howard v. Babcock*, which allows some compensation to the firm when lawyers leave and take clients. Your financial penalties may be quite steep but imposing them for compensatory purposes when clients are taken is not allowed. I have long thought that Howard's approach is sound, but I assume you have discussed this fully and reached a contrary conclusion.

In 1(E)(iv), "partnership responsibilities" is a little vague. Perhaps "duties to the firm" would be better.

I like your proposed Rule 5.9. But there may be some problems with the 5.9(a) prohibition of unilateral notification of clients of departure plans. Existing ethics standards indicate clients have a right to know, and the attempt to delay any notification until after post-notice bona fide negotiations with the firm is inconsistent with these standards. The better approach is to focus on timing of solicitation rather than notification.

Comment 5 addresses reasonable notice, which as you know is a major issue. You should consider providing more guidance here. If the phrase "unrelated to any need to complete a matter or transaction" is intended to guide what is a reasonable notice, I think it misses the mark. It would be helpful to say that (1) notice is context specific.

(2) reasonableness considers the interests of clients, the departing lawyers, and firms, (3) firms should be encouraged to include notice provisions in their partnership/employment agreements, and (4) firms should apply notice provisions flexibly (again considering the interests of clients, departing lawyers, and firms). Many roads to Rome on this one, but I do think it would be helpful to have more guidance given widespread interest in notice issues.

I would be happy to discuss further any of these points if you like.

Best,

Bob

From: Roy Simon <roy.d.simon@gmail.com>
Sent: Monday, October 11, 2021 10:33 AM
To: Robert Hillman <rwhillman@ucdavis.edu>
Subject: NY proposals on Rule 5.6 & (new) Rule 5.9

Professor — I should have thought of this in July when my committee, the New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC"), circulated the for public comment the attached proposals to add (a) new Comments to help explain Rule 5.6, and (b) a new Rule 5.9.

COSAC is meeting this Friday (Oct. 15) to discuss public comments, and if you have any time to give us some reactions, that would help us make better decisions. Even if you can get me a few sentences by late Thursday, or focus on a few words or phrases that you especially like or

...read on a few words or phrases that you especially like or don't like, that would enable me to share your views with the Committee.

I apologize for not sending these sooner, and hope you can comment. Thanks for whatever you can do. We are trying to get things right up here in the Empire State. If it's easier for you to talk than to write, feel free to give me a call anytime at (607) 342-0840. Be well.

Professor Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus
Author, Simon's New York Rules of Professional Conduct Annotated
Chair of NYSBA Committee on Standards of Attorney Conduct ("COSAC")

(607) 342-0840

www.linkedin.com/in/roydsimon

From: Marjorie Gross marjgross@verizon.net
Subject: COSAC
Date: September 21, 2021 at 3:17 PM
To: Roy Simon roy.d.simon@gmail.com

MG

A quick comment on the 5.6/5.9 proposal -- actually the section "Cosac's Reasons for Proposing."

Relevant and useful is the Restatement of the Law Governing Lawyers, Section 9, Cmt. i and the materials cited in the Reporter's Note to Cmt. i, even though it purports to be a restatement of law and not ethics

NY State 1221 (2021), while hardly comprehensive, is also relevant, and indicative of the problems a departing lawyer can have.

Marj

MEMORANDUM

October 20, 2021

TO: NYSBA Executive Committee and House of Delegates
FROM: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
SUBJECT: Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is comprehensively reviewing the New York Rules of Professional Conduct. On July 16, 2021, COSAC circulated for public comment on a proposed statute or court rule to regulate Legal Intermediary Referral and Information Services (sometimes called “lawyer-client matching services”). The existing New York Rules of Professional Conduct regulate some aspects of the conduct of lawyers who form, cooperate with, or participate in Legal Intermediary Referral and Information Services, but the Rules of Professional Conduct do not and cannot govern the conduct of nonlawyers who own or operate such services. Nevertheless, the need for regulation of such services is apparent. COSAC has therefore developed a new regulatory structure that could be enacted as a statute or adopted as a Court of Appeals rule.

COSAC received public comments from two individuals (Sarah Gold and David Miranda) and from a group of bar associations that operate lawyer referral and information services on a not-for-profit basis. On October 15, 2021, COSAC held a plenary meeting at which it voted to present the proposals below solely for informational purposes at the October 2021 meetings of the NYSBA Executive Committee and House of Delegates.

COSAC has not revised the proposals that it circulated for public comment in July 2021, but intends to work with those who have already submitted comments and with others to revise and improve the proposals and to examine the larger context in which for-profit legal intermediary referral and information services operate.

Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

Section One. Applicability of Chapter and Definitions.

(A) A “*legal intermediary referral and information Service*” (a “Service”) shall, except as set forth in Paragraph B hereof, include any individual or entity providing or offering any one or more of the following services to attorneys or users or potential users of the service in New York, whether on-line, in person, by email, in writing, or by any other means of communication, and whether organized in corporate or other form and operated on a for profit or not for profit basis:

- (1) a lawyer network;
- (2) a matching or matchmaking service for connecting potential clients to attorneys;
- (3) a legal bidding site in which lawyers bid to provide specified legal services to a specific client or category of clients in need of those legal services;

COSAC Proposals for Legal Intermediary Referral and Information Services
October 20, 2021 - For Informational Purposes Only

- (4) a legal question and answer site in which a lawyer answers questions for a fee; or
- (5) any similar marketplace or service of any kind, including an on-line service, that connects customers, members, subscribers, users, or the like to participating lawyers for a fee paid either by the attorney, the user or both.

(B) A “*participating attorney*” means an attorney licensed or authorized to practice law in New York who uses or seeks to use a legal intermediary referral and information service to offer or render legal services.

(C) A “*legal intermediary referral and information service*” shall not include:

- (1) individual referrals from lawyer-to-lawyer, lawyer-to-client, client-to-client, or client-to-lawyer;
- (2) reciprocal referrals from lawyer-to-lawyer, lawyer-to-nonlawyer-professional, or nonlawyer-professional-to-lawyer;
- (3) a service operated by a legal services organization or by a bar association that connects potential clients to attorneys;
- (4) a tribunal appointing or assigning lawyers to represent parties to a proceeding before the tribunal; or
- (5) a prepaid or group legal services plan that meets the criteria of Rule 7.2(b)(4) of the New York Rules of Professional Conduct.

(D) The “*Authority*” means an agency or authority established or authorized to promulgate regulations, forms, procedures, and guidelines to implement this Chapter.

Section Two. Referral Fees to Legal Intermediary Referral and Information Services.

An attorney authorized to practice in this State may pay a fee to a legal intermediary referral and information service in exchange for referral of a client, or may share legal fees with a Service, only if:

- (A) the Service is registered in accordance with the provisions of this Chapter and
- (B) the Service and the attorney each comply with the provisions hereinafter set forth.
- (C) A Service that is registered in accordance with the terms of this Chapter and complies with its provisions shall be exempt from Section 491 of the Judiciary Law.

Section Three. Registration and Other Requirements for Legal Intermediary Referral and Information Services.

- (A) To qualify for registration under this Chapter, a Service serving or seeking to serve clients in New York shall comply with all of the following:
 - (1) The Service shall operate for the purpose of referring prospective clients to lawyers (whether the lawyers are in private practice or other settings) who can provide needed assistance to a prospective client in light of the prospective client’s financial ability, language capabilities, geographical convenience, legal needs, and other circumstances;

- (2) The Service shall establish rules that prohibit attorneys from agreeing to, charging, or collecting excessive fees within the meaning of Rule 1.5(a) of the New York Rules of Professional Conduct;
 - (3) The Service shall establish procedures to govern the following:
 - a. procedures to evaluate whether attorneys participating in the Service comply with the Service's policies and procedures;
 - b. procedures for clients to communicate with the Service regarding their satisfaction or dissatisfaction with the Service or its agents or employees;
 - c. procedures for clients to communicate with the Service regarding their satisfaction or dissatisfaction with any participating attorney or attorneys;
 - d. procedures to investigate and take appropriate action with respect to client complaints or expressions of dissatisfaction regarding attorneys participating in the Service or regarding the Service and its agents or employees; and
 - e. procedures for admitting, suspending, or removing attorneys from the Service.
 - (4) The Service shall prohibit a fee-generating referral to any attorney who has an ownership interest in the service, or who operates, controls, or is employed by the Service, or who is associated with a law firm that has an ownership interest in, or that operates or is employed by, the Service.
 - (5) The Service shall establish procedures and objective, neutral criteria for referring prospective clients to lawyers. To implement these neutral criteria, the Service may establish panels of attorneys based on specific factors (or a combination of factors), such as:
 - a. Subject matter panels organized around fields of law, eligibility for which may be based on a lawyer's experience, current involvement with the subject matter, degree of concentration in the subject matter, and similar objective criteria relating to the subject matter;
 - b. Geographic panels, eligibility for which may be based on the jurisdictions in which a lawyer is admitted to practice, the location of a lawyer's bona fide offices, and similar objective geographic criteria; and
 - c. Panels organized around other factors relevant to the selection of counsel.
- (B) To remain qualified for registration under this Chapter, a Service must not limit an attorney's independent judgment regarding provision of legal services to clients or limit an attorney's right to select co-counsel, whether or not co-counsel participates in the Service.
- (C) (1) **Registration and Annual Report.**
- a. A legal intermediary referral and information service that is already operating in New York on the effective date of this Chapter shall register with the Authority within ninety days of the effective date of this Chapter.

- b. A Service that begins operating in New York after the effective date of this Chapter shall register with the Authority ninety days before the Service begins operations in New York.
- c. To register, a Service shall: (i) complete and file a registration form prescribed by the Authority and (ii) pay a fee set by the Authority.
- d. On or before the [first day of March] of each succeeding year, the Service shall file an annual report with the Authority, in a form prescribed by the Authority, containing information about (i) the activity of the Service for the preceding year and (ii) any changes to its immediately preceding registration form.
- e. The Service shall pay required assessments based on fees that the Service charges to participating attorneys. These assessments shall be calculated in accordance with schedules prescribed by the Authority. The Authority may levy assessments not to exceed [one] per cent of fees collected in the relevant period by the Service from participating attorneys to fund the Authority's operations.

(2) **Criteria for Denial or Revocation of Registration.**

- a. The Authority may deny or revoke registration if the Authority determines that: (i) the Service or any of its attorneys do not meet the criteria established by this Chapter; (ii) the Service has not provided all information requested by the Authority; or (iii) the Service has provided materially false or misleading information to the Authority.
- b. The Authority may deny or revoke registration if the Authority determines that any individual who owns or controls the service, directly or indirectly, in whole or in part: (i) has been publicly disciplined or convicted of a felony or crime involving moral turpitude in New York or another U.S. or non-U.S. jurisdiction; or (ii) has owned, controlled, or had a substantial affiliation with one or more other legal referral and information services that have been publicly disciplined or have had a registration denied or revoked, either in this State or another jurisdiction whose criteria for registration are substantially equivalent to those of this Chapter.
- c. The Authority shall explain in writing the basis for any denial or revocation of registration.
- d. Upon receiving notice that the Authority has denied or revoked registration, the Service may submit an amended registration form [or seek court review]. The Authority may charge an additional fee to a Service for submitting an amended registration form.

(3) **Effect of Denial or Revocation of Registration.**

- a. Denial or revocation of a Service's registration shall not be a bar to discipline of attorneys participating in the Service, but the facts on which the denial or revocation was based shall not be given collateral estoppel effect unless the parties to the disciplinary proceeding so stipulate.
- b. The Authority shall (i) promptly notify participating attorneys and the Attorney Grievance Committee of any revocation or denial and (ii) make the record of

the revocation or denial process available to an Attorney Grievance Committee or law enforcement authority upon request.

- c. No fee may be charged by a Service or shared between a Service and a participating attorney for legal services rendered by a participating attorney after the date on which the Service's registration was revoked.

- (4) **Registration Is Not an Endorsement.** A registered Service may state that it is registered with the Authority as a legal intermediary referral and information service in the State of New York but may not otherwise assert or imply that registration is or can be construed as an endorsement or rating of the Service by the Authority, by the Courts, or by the State of New York.

(C) **Permissible Conduct by Legal Intermediary Referral and Information Services.** A legal intermediary referral and information service operating in New York may do one or more of the following:

- (1) Charge participating attorneys a fee, whether calculated as a percentage of legal fees earned or otherwise, for matters referred to the attorney by the Service. The Authority may require the Service to designate a portion[, not to exceed five percent,] of the fees charged to participating attorneys to fund public service activities engaged in by the Service or affiliated entities, or otherwise to fund support for delivery of pro bono or other legal services for the indigent;
- (2) Charge a membership or participation fee to participating attorneys and/or to actual or potential clients; and
- (3) Establish and require attorneys to participate in low-fee, moderate-fee, and no-fee panels and other special panels established by the Service to increase access to justice for those who cannot afford market rates or to respond to other referral needs of the public.

Section Four. Conditions for Participation by Individual Attorneys in Legal Intermediary Referral and Information Services.

(A) An individual attorney may participate in and share fees with a legal intermediary referral and information service registered under this Chapter provided that:

- (1) the Service does not direct, regulate, or interfere with the attorney's professional judgment in rendering legal services to any client;
- (2) the amount that the Service charges to the participating attorney for a referral may depend on the amount of the fee the attorney charges to the client in accordance with Section Three (C)(1);
- (3) the participating attorney discloses the referral fee arrangement to the client in writing at the inception of the attorney-client relationship or within a reasonable time thereafter, the attorney's fee is reasonable, and the attorney does not charge the referral fee to the client as an expense;

- (3) any rating system or referral determination by the Service is not affected by payments or anything else of value given by the attorney, directly or indirectly, to the Service, including payments or anything else of value to the Service in exchange for (i) advertising by the participating attorney on the Service's website or otherwise or (ii) plaques, certificates, or other evidence of the participating attorney's membership in the Service;
- (4) the attorney takes reasonable steps to ensure that the Service's advertisements or other communications concerning the participating attorney or the attorney's practice or legal services (i) are not false and misleading and (ii) otherwise comply with the New York Rules of Professional Conduct; and
- (5) the right of the participating attorney to practice law apart from the Service, during or after the attorney's participation in the Service, is not directly or indirectly restricted by the Service.

(B) Each legal intermediary referral and information service shall include the following provisions in the documents governing an attorney's participation in the service:

- (1) The attorney shall be suspended or removed from further participation in the Service if:
 - a. the attorney is disbarred or suspended from the practice of law in New York;
 - b. the attorney resigns from the New York Bar or takes inactive status;
 - c. the attorney is convicted of a crime that warrants or results in automatic disbarment; or
 - d. the attorney is convicted of a crime that involves moral turpitude or dishonesty.
- (2) An attorney participating in a Service shall promptly notify the Service, in writing, if the attorney:
 - a. is not in full compliance with the terms of the Service's agreement with the attorney;
 - b. is suspended or disbarred in New York;
 - c. has been convicted of a crime that results in automatic disbarment or involves moral turpitude or dishonesty;
 - d. resigns from the New York Bar or takes inactive status; or
 - e. comes to know that any material information in the attorney's application to participate in the service is false, deceptive, or misleading in any respect.

(C) The requirements set forth in this Chapter represent minimum standards applicable to each Service. A Service may impose more restrictive provisions on attorney participants.

Section Five. Treatment of Certain Communications with Intermediary Legal Referral and Reporting Services.

(A) Communications between a client or potential client and a registered legal intermediary lawyer referral and information service for the purposes of (1) seeking or obtaining an introduction to a lawyer participating in the Service for the rendition of legal services, or (2) for the Service to facilitate the rendition of legal services by a lawyer participating in the Service:

- (1) constitute “confidential information” within the meaning of Rule 1.6(a) of the New York Rules of Professional Conduct; and
- (2) constitute privileged communications within the meaning of New York CPLR § 4503 and New York Judiciary Law § 498(2).

(B) An attorney participating in a Service that has referred a client to the attorney shall give written notice to the client informing the client that the attorney may be required to provide the Service with information regarding the client’s matter, including but not limited to the status of the matter and the amount of the attorney’s fee for handling the matter. The Authority may prescribe procedures for requesting and reviewing client information and may prescribe or recommend a form for notice to and acknowledgement by the client.

(C) Disclosure of information pursuant to this Section Five shall not, by itself, be deemed (i) a waiver of attorney-client privilege, work product protection, or any other applicable protection, or (ii) a breach of the attorney’s duty of confidentiality under the New York Rules of Professional Conduct.

Section Six. Authority Rule Making Consistent with This Chapter.

The Authority may promulgate rules, regulations, forms, procedures, and guidelines to implement the provisions of this Chapter.

COSAC Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

David Miranda, Esq.

Sarah Gold, Esq.

LIRSs

TO: NYSBA Committee on Standards of Attorney Conduct
("COSAC")

FROM: David P. Miranda
Past President, NYSBA (2015 – 16)

RE: Comment in Opposition to Proposed Statute or Court Rule to Regulate Legal
Intermediary Referral and Information Services

Dated: October 4, 2021

This is submitted in opposition to the COSAC proposal seeking a new regulatory scheme to permit nonlawyer legal services providers to engage in conduct related to the provision of legal services, otherwise precluded by the New York Rules of Professional Conduct and New York's Judiciary Law §495. The COSAC proposal is contrary to long-standing policy of NYSBA and has the potential to cause substantial harm to New York lawyers, the public and the core values of the legal profession. The COSAC proposal should be rejected in its entirety.

Executive Summary of Opposition

The New York State Bar Association's (NYSBA) Committee on Standards of Attorney Conduct (COSAC) seeks to permit what is referred to as "Legal Intermediary Referral and Information Services" or "lawyer-client matching services" (hereinafter "nonlawyer legal services providers" or "NLSPs") to engage in conduct related to the provision of legal services that is currently prohibited. The proposal, recognizing the proliferation of nonlawyer legal services providers, seeks to create a new regulatory scheme that is contrary to existing NYSBA policy and the core values of the legal profession.¹

The COSAC proposal seeks to permit NLSPs to engage in conduct that licensed attorneys are prohibited from engaging in. Specifically, the proposal permits NLSPs to receive fees from lawyers for client referrals, in a manner that lawyers would otherwise be prohibited from sharing pursuant to Rule 7.2.² Under the proposal such referral fees to NLSPs are not limited in amount or "percentage of legal fees earned" and may also include "a membership or participation fee" regardless of any referral.³

Permitting NLSPs to control the flow of clients, and fees, to lawyers is a step towards nonlawyer ownership of lawyers and law firms, and is contrary to existing NYSBA policy.⁴ The

¹ Preserving the Core Values of the American Legal Profession, (MacCrate Report) NYSBA April 2000; Report of Task Force on Nonlawyer Ownership, NYSBA November 2012; Report and Recommendation of the Working Group on Regulatory Innovation, Commission to Imagine the Future of New York Courts, December 2020.

² Rule 7.2 of the New York Rules of Professional Conduct

³ Proposal p. 5, Section C

⁴ In 2000, NYSBA's MacCrate Report concluded:

Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.

The MacCrate Report noted, it is reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership."

COSAC proposal permits mostly unfettered control by NLSPs over a participating lawyer, including establishing rules regarding the charging of legal fees, potentially implicating anti-competitive and antitrust issues.⁵ In addition, the proposal permits NLSPs to create policies and procedures for attorneys, procedures for client communications, and procedures for admitting, suspending or removing attorneys from an NLSP service, all of which provides the NLSP with substantial control over a participating attorney's law practice. Furthermore, by providing a regulatory mechanism for commercial NLSPs to control the flow of business to attorneys, the proposal devalues bar association lawyer referral services already permitted by the Rules.⁶

The COSAC Proposal is harmful to the legal profession

The proposal recognizes that our profession, and the public we serve, is threatened by NLSPs, businesses that not only demean the profession, but also diminish the complexity and nuances of providing competent and effective legal services and the attorney-client relationship. NLSPs claim to be innovative, but they are not bound by, and often subvert, the fundamental principles of our profession.

Each year hundreds of millions of dollars of venture capital fund NLSPs; well over 1,000 legal tech start-up companies are selling legal services to the public, and their numbers are growing.⁷ NLSPs attract venture capital, not because they want to help close the justice gap for the poor, but because they want to profit from consumers with money for legal services. NLSPs target lower and middle income consumers, with resources to pay for legal services. Operating mostly unfettered, they have blossomed into marketing machines for legal services and legal advice.

Although the COSAC proposal will impact the entire legal profession, it is especially harmful to attorneys who are newly admitted, practice as solos, or in small firms, who report difficulty finding new ways to connect with clients. COSAC's proposal encourages the legal profession to become co-opted by the influx of venture capitalists and internet entrepreneurs who "market" legal services without being encumbered by rules of professional responsibility and other rules that apply to our profession.

If the COSAC proposal is implemented, solos and small firms will be further impaired in their ability to attract clients. Rather than compete on a difficult, but even, playing field for clients, attorneys will be forced to either pay a substantial portion of their legal fees to NLSPs or compete against the well-funded advertising and marketing of the NLSPs.

The COSAC proposal permits NLSPs to advertise in a way that attorneys are prohibited

The well-funded marketing campaigns of NLSPs raise many ethical concerns as they employ a tone that is both bold and deliberately vague. They offer legal services. They are simply facilitators so attorneys and clients can find each other. They furnish legal help. They do not furnish legal help. They give legal advice. They do not give legal advice. They create one impression to an unknowing public. They include disclaimers for the regulators.

⁵ Proposal Sec. 3 (A)(2)

⁶ Rule 7.2(b)(3)

⁷ American Bar Association Commission on the Future of Legal Services 2016, pg. 2.

For example, LegalZoom, provides a small-print disclaimer on its site, “We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies,” but its marketing campaign aims to create a very different impression: “Whatever your legal need, we have an answer. Let us help you protect all that matters easily and affordably.” Some of this advertising, if used by a lawyer, or to market a law firm, might put the lawyer on the wrong side of the Rules of Professional Conduct.⁸

The proposal suggests a new regulatory scheme is necessary since the Rules of Professional Conduct do not apply to NLSPs because they are nonlawyer corporations, not law firms. However, New York’s Judiciary Law §495 already prohibits a nonlawyer corporation from providing or promoting legal services.

Many attorneys are innovative in their methods of seeking clients, and have adapted to the use of new technologies. However, attorneys are limited by the Rules of Professional Conduct with respect to how they can advertise, seek clients, and conduct their law practice. If attorney rules and regulations are outdated, or too restrictive, then it is incumbent upon our bar association to discuss and advocate for changes to the rules impacting a lawyer’s ability to advertise and practice law. The COSAC proposal offers no changes to the Rules for lawyers, but rather proposes that nonlawyers be permitted to advertise legal services and collect legal fees in ways that lawyers are prohibited.

The COSAC Proposal undermines the Rules prohibiting fee splitting with nonlawyers

Clients seeking services via an NLSP are steered toward a list of attorneys in certain geographic and practice areas, which according to the proposal may, or may not, be based on the attorney’s experience or admission to practice.⁹ The COSAC proposal permits NLSPs to set rules limiting the fees attorneys may charge, but there is no limitation on the amount of fees NLSPs may charge attorneys.

Under the current Rules, paying a business for advertising is of course permissible, however, fee-splitting violates Rule 5.4, “Professional Independence of a Lawyer,” which states: “A lawyer or law firm shall not share legal fees with a nonlawyer.”¹⁰

⁸ For example, Rule 7.1(a) “Advertising” states: “(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule.” Rule 8.4(a), “Misconduct,” states: “A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

⁹ Proposal Section 3(A)(3)

¹⁰ NYSBA Ethics Opinion, No. 1081, discussed the topic:

Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. . . . Rule 5.4(a) provides that a lawyer “shall not share legal fees with a nonlawyer”. . . . If the Company’s clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a).

Rule 7.2(a) states:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client¹¹

The COSAC proposal removes the prohibition against fee splitting with “registered” NLSPs, but otherwise keeps the prohibition in place between lawyers and others. If Rules against fee splitting are outdated or overly restrictive, we as a profession should consider amending them in a way that benefits the profession and the public we serve, not encourage lawyer advertising to be co-opted by nonlawyer commercial entities seeking to profit from legal fees.

The COSAC proposal permits NLSPs to engage in the unauthorized practice of law prohibited by Judiciary Law § 495

There is some debate about whether NLSPs are engaging in the unauthorized practice of law. By their own account, NLSPs purport to connect clients with licensed attorneys that perform legal work. NLSPs imply in their advertising that they are offering legal services, that is the only service they advertise and promote.

If NLSPs are not already on the wrong side of ethics rules, they may be in violation of the N.Y. Judiciary Law, Section 495(1) which provides:

No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

Our bar association must stand against the unauthorized practice of law, not create ways to enable such conduct. The COSAC proposal gives NLSPs a free pass to violate the Judiciary Law.

¹¹ Significantly, Comment [1] to Rule 7.2 adds:

Paying Others to Recommend a Lawyer

[1] [L]awyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. . . . [A] lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer’s independent professional judgment by a person who recommends the lawyer’s services), and (iv) the lead generator’s communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment).

The COSAC proposal hurts bar association lawyer referral services

The COSAC proposal devalues the Rule that permits bar association lawyer referral services, by permitting commercial NLSPs to engage in such services.¹² NYSBA and many local bar associations have lawyer referral services that help support its members and connect the public with qualified lawyers. These bar association lawyer referral services, although not always lucrative for the association, perform an important function for lawyers and the public. This year NYSBA was awarded the ABA's prestigious Harrison Tweed award, for its efforts to extend pro bono services to the underserved during the coronavirus pandemic, including an extensive COVID-19 Pro Bono Network across the state, an Unemployment Insurance Initiative, and connecting volunteer attorneys with families of New Yorkers who died from COVID.

Along with other bar associations, NYSBA should enhance properly authorized lawyer referral services to provide greater support to newly admitted attorneys, as well as solo and small firms. Many bar association lawyer referral services could be improved with additional funding and marketing. NYSBA should take the lead in proposing a statewide, comprehensive, coordinated, marketing program that enhances and benefits the many bar association lawyer referral programs throughout the state. The COSAC proposal harms bar association lawyer referral programs, forcing them to compete with well-funded, profit seeking, commercial enterprises.

Impact on the public and the profession

The Rules of Professional Conduct are in place not to protect lawyers, but the public from unscrupulous lawyers that fail to meet the highest standards that we expect from officers of the court and defenders of justice. The Judiciary Law is in place to prevent unregulated nonlawyers from preying on an unknowing public.

NLSPs are not required to adhere to rules of professional conduct or the core principles of our profession. They are not bound by ethics rules. They do not check for conflicts of interest. They do not have a duty of vigorous advocacy. As attorneys we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. Our system of examination to test knowledge and competency, determination of character and fitness, and adherence to a prescribed set of rules of professional conduct throughout an attorney's career, not only serves to protect the public from untrained and unscrupulous would-be practitioners, but also far surpasses what is required of a business.

Our Rules of Professional Conduct reflect the core values of our profession, and are designed to protect the public we are licensed and privileged to serve. If the Rules are outdated or too restrictive, our Association should be studying, debating and making proposals to change how they apply to lawyers and their clients, rather than make it easier for nonlawyers to engage in activity related to the provision of legal services.

¹² Rule 7.2(b) lists approved lawyer referral programs:

(1) a legal aid office or public defender office; (2) a military legal assistance office; (3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or (4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries ...

Notably, for-profit corporate entities are not included among authorized law referral providers.

Rather than create a new regulatory agency to permit NLSPs to engage in activities related to the provision of legal services, our bar association should do the following:

1. Perform a comprehensive analysis of the Rules of Professional Conduct, determine if they are outdated or overly restrictive, and propose relevant changes to the manner in which attorneys are permitted to advertise, practice law, and share fees.
2. Propose a statewide, comprehensive, coordinated, marketing program that enhances and benefits the many bar association lawyer referral programs throughout the state.
3. Assist regulatory and enforcement entities in protecting against the unauthorized practice of law.

Change to our profession should not benefit profit-seeking entrepreneurs unencumbered by rules of ethical conduct. The COSAC proposal is not beneficial to the profession, the public we serve, or the provision of access to justice. It should be rejected in its entirety.

October 14, 2021

By Email

New York State Bar Association
Committee on Standards of Attorney Conduct (COSAC)
Attn: Professor Roy Simon, roy.d.simon@gmail.com

Re: Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

To the members of COSAC:

The undersigned bar associations all operate lawyer referral and information services (“LRISs”) on a not-for-profit basis. The vast majority of the work of these LRISs is to provide assistance to members of the public who cannot afford to retain private counsel, have limited means to do so or do not actually need to engage private counsel.¹ The public is never charged for our services; rather, fees are paid by lawyers to whom referrals are made. Often, LRISs represent the largest pro bono activity of a bar association. We and many bar associations operate our LRISs in accordance with the American Bar Association (“ABA”) model rules and minimum standards for lawyer referral and information services that assure that LRISs are operated for the public benefit and that LRISs employ consumer protection measures, such as having panels of lawyers for different kinds of matters that are carefully vetted to assure that the panel members are qualified and survey those who do retain panel counsel. As you know, the ABA is in the process of updating its Model Rules for Lawyer Referral and Information Services (“Revised Model Rules”) and appears to be near the end of that process.

We deeply respect the work of the New York State Bar Association Committee on Standards of Attorney Conduct (“COSAC”) and we understand and appreciate the time it has invested in preparing the memorandum on “Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services” (the “Report”). We further appreciate the willingness of COSAC to engage with us in a meaningful and good faith dialogue about our concerns regarding the operation of the proposed Legal Intermediary Referral and Information Services (“Intermediaries”) in New York. We believe that the Report and COSAC’s proposal will benefit from such a dialogue with those who currently provide services like those that COSAC contemplates the Intermediaries will offer to the public on a for-profit basis. In particular, as we have informally discussed with you, there are important consumer protection, access to justice, and public service considerations that the COSAC proposal raises and which we believe call for further reflection and conversation. Given this view, we were pleased to learn

¹ By way of illustration, over the past 5 years the New York City Bar’s LRIS has had an average of 58,000 contacts from the public per year, but only 40% result in a referral to a lawyer and only approximately 6% of those referrals to a lawyer result in a retained case. These numbers may vary as among LRISs. New York has 19 LRISs—18 county, metropolitan or other bar association-sponsored LRISs and one LRIS sponsored by the New York State Bar Association. The 18 LRISs service limited geographical areas within the state and the New York State Bar Association’s LRIS offers statewide assistance, including for rural areas not serviced by the other LRISs.

that the Report is being presented to the House of Delegates on October 30 on an informational basis only.

In order to elucidate and be transparent about our thinking, we propose to discuss with you foundational questions, such as:

- What impact would the existence of Intermediaries have on the free services currently provided to members of the public who cannot afford private lawyers, have limited means to retain counsel or do not need a private attorney?
- Will Intermediaries afford more or less consumer protections, services to the public, and access to justice? How should these issues be addressed?
- What potential problems do Intermediaries solve and what potential problems and unintended consequences do they create?
- Do the benefits of Intermediaries as proposed by COSAC outweigh their possible negative impact?
- Can any such negative impact be ameliorated by regulations, and if so what should those regulations say?
- What other entities should be regulated and/or enabled at the same time; should not-for-profit and for-profit providers be regulated at the same time and in the same way, or in different ways?

Undoubtedly, discussion and assessment of these types of questions would also inform refinement of the proposal and perhaps generate new or additional solutions.

In addition, we believe that in order properly to evaluate the changes that COSAC has proposed, it is necessary to consider the regulatory structure that COSAC proposes be put in place to govern Intermediaries. The Report, however, does not include any proposed regulations beyond an Intermediary registration requirement and general statements about issues that such regulations might address. We suggest that COSAC consider fleshing out its regulatory proposal using the final or perhaps draft ABA Revised Model Rules as an exemplar.

We believe that the fruits of the efforts described above will benefit both COSAC and better inform the deliberations of the delegates. Thank you for your consideration and your willingness to engage in further dialogue.

Sincerely,

Armena Gayle
President, Brooklyn Bar Association

Soma Syed
Chair, New York State Bar Association Committee on Lawyer Referral and Information Service

Joseph Tremiti
Chair, New York City Bar Association Legal Referral Service

P.B. Wu
Chair, Asian American Bar Association of New York Legal Referral and Information Service

From: Sarah Gold sg@goldlawny.com
Subject: Proposed Statute or Court Rule to Regulate Legal Intermediary Referral
Date: July 16, 2021 at 10:37 AM
To: roy.d.simon@gmail.com

SG

Roy:

I read the memo, and as someone who has previously participated in groups like those, I took specific interest. Three issues that popped up for me:

1. In Section 1(C), it might be good to further define other groups that may not fall into this definition, like networking groups like BNI or LeTip. That has been an ongoing discussion for years, as some states are very specific that this is considered fee splitting with non-attorneys. I believe that that is not the case in NY, but it might be worth a mention here.
2. I do like the idea of registering these groups, especially in light of the regulatory sandboxes currently in operation in the western US, but I am not as keen on the fact that attorneys here will have to suss out whether or not these businesses are registered in order to participate. The one that springs to mind that always seems to have skirted the rules here in NY is UpCounsel, which has changed its business plan and gone to a high per month charge for attorneys wanting to have the opportunity to bid. Not only do they take money upfront from attorneys, but also charge fees based on the income generated on the back side through direct billing platforms between the attorney and the client. While it seems to fit the definition well of Section 1(A)(3), many attorneys may not necessarily see it as a legal intermediary referral service and as such not seek to see if they are registered before participating. Putting the onus on the lawyers to see

participating. Putting the onus on the lawyers to see if these businesses are registered might not even cross the minds of many. Yes, I understand that ignorance is no excuse, but not seeing what these organizations are might preclude the seeking of the info in the first place.

3. Finally, and this is niggly to say the least, in Section 1(C)(3), there is reference to legal services organizations. I believe this refers to organizations like Legal Aid? If this is a defined term, could a reference be included as to the rule or law in which it is referenced? It's circular, I know, but the drafter in me wants to know what defined terms I'm dealing with and the fact that it's not capitalized makes me nervous that perhaps I've misconstrued the concept.

Thank you and your committee for this really good work.

Sarah Gold --



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 11

REQUESTED ACTION: Approval of the resolution offered by the Committee on Immigration Representation, the Committee on Mandated Representation, the Committee on Legal Aid, and the Criminal Justice Section.

Attached is a memorandum from the above-noted groups calling for the New York Governor and Legislature to adopt the findings of a February 2020 American Bar Association report regarding the treatment of immigrants who have contact with the criminal legal system. The ABA resolution and report are attached, together with a resolution being offered by the proponents. The resolution notes that improper Department of Justice administrative opinions have caused hundreds of thousands of disproportionately Black people and other people of color to be civilly detained, deported, denied immigrations status, and criminally incarcerated and calls for authorities to address this impropriety.

The report will be presented by Joanne Macri and Hasan Shafiqullah of the Committee on Immigration Representation.



NEW YORK STATE
BAR ASSOCIATION

A report from the **Committee on Immigration Representation, Committee on Legal Aid, and Committee on Mandated Representation**

October 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

Memorandum

From: Shayna Kessler and Hasan Shafiqullah, Co-Chairs, NYSBA Committee on Immigration Representation
Robert Dean, Chair, NYSBA Committee on Mandated Representation
Aдриene Holder and Sally Curran, Co-Chairs, NYSBA Committee on Legal Aid
David Louis Cohen, Chair, NYSBA Criminal Justice Section

To: Andrew Brown, NYSBA President

Date: September 15, 2021

Re: Request to adopt American Bar Association Resolution 103B, calling for the United States Attorney General to use the Attorney General certification process to address certain administrative law decisions that subject people with prior contact with the criminal legal system to immigration law consequences that are unlawful and inconsistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations.

The Committee on Immigration Representation, the Committee on Mandated Representation, the Committee on Legal Aid, and the Criminal Justice Section recognize that there are grave consequences for noncitizens who have had prior contact with the criminal legal system, whether that contact resulted in a criminal conviction. The merger of criminal legal and immigration systems has caused a cascade of consequences, resulting in the disparate treatment of immigrants who have contact with the criminal legal system. This interplay between the criminal and immigration systems disproportionately impacts Black immigrants and other immigrants of color, who are also disproportionately arrested, convicted, and sentenced more harshly than white people.¹ These immigration consequences of criminal legal contact can include mandatory civil detention and deportation, inability to obtain lawful permanent residency or citizenship, and ineligibility for protection based upon persecution, torture, domestic violence, human trafficking, and more.²

¹ See, e.g., Carl Lipscombe, Juliana Morgan-Trostle, and Kexin Zheng, *The State of Black Immigrants: Black Immigrants in the Mass Criminalization System*, NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 20 (2016) (“while Black immigrants make up only 7.2% of the unauthorized population in the U.S., they make up over 20% of all immigrants facing deportation on criminal grounds”); *Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community*, Southeast Asia Resource Action Center 3 (Oct. 2016) (“while 29% of other immigration deportations are based on old convictions, 78% of Southeast Asian American immigrants are in deportation proceedings because of old criminal convictions”)

² See 8 U.S.C. 1227(a)(2), INA 237(a)(2); 8 U.S.C. 1182(a)(2), INA 212(a)(2) (deportability, inadmissibility, and relief ineligibility grounds based on prior certain prior convictions and findings of criminal conduct); 8 U.S.C. 1229b(a)(3), INA 240A(a)(3) (aggravated felony bar to cancellation of removal); 8 U.S.C. 1226(c), INA 236(c) (conviction-based civil detention); 8 U.S.C. 1158(b)(2)(A)(ii), INA 208(b)(2)(A)(ii); 8 U.S.C. 1231(b)(3)(B)(ii), INA 241(b)(3)(B)(ii) (particularly serious crime bar to asylum and withholding of removal); 8 U.S.C. 1254a(c), INA 244(c) (criminal bars to Temporary Protected Status); 8 U.S.C. 1154(a)(1), INA 204(a)(1); 8 U.S.C. 1101(f), INA 101(f) (criminal bars to lawful permanent residence and cancellation of removal under VAWA); 8 U.S.C. 1255(h), INA 245(h) (criminal bars to lawful permanent residence for abused, neglected, and abandoned special immigrant juveniles); 8 U.S.C. 1326(b), INA 276(b) (enhanced federal sentences in immigration-related prosecutions for unlawful reentry into the United States); 8 U.S.C. 1427(a)(3), INA 316(a)(3); 8 U.S.C. 1101(f), INA 101(f) (criminal disqualification—in some instances, permanent—from naturalization eligibility).

The deep entanglement of the criminal and immigration systems should be resolved through federal legislative reform that disentangles the two systems. Until that reform is enacted, the U.S. Department of Justice (“DOJ”) has an opportunity to significantly limit the harsh and unfair consequences that noncitizens face after contact with criminal law enforcement by revisiting a body of administrative opinions that wrongly interpret immigration law. Through the certification process, the U.S. Attorney General can use his authority to review and address prior harmful Board of Immigration Appeals and Attorney General decisions that adversely impact people in immigration proceedings.³ These prior decisions have resulted in hundreds of thousands of people subjected to detention and deportation, separating families and destabilizing communities.⁴ Nevertheless, they are unfounded, based upon interpretations of the law that misconstrue congressional intent.

In its Resolution 103B and the accompanying report and recommendations, the American Bar Association documents the body of administrative law decisions that improperly subject noncitizens – predominantly noncitizens of color – to harsh and unintended immigration consequences.⁵ There, they call upon the U.S. Attorney General to withdraw prior opinions and certify to himself the following several matters for reconsideration. First, they call for the Attorney General to issue an opinion affirming that immigration authorities should defer to the intent of the convicting jurisdiction when that jurisdiction vacates, expunges, or otherwise eliminates or modifies a conviction. Likewise, immigration authorities should give full authority to newly enacted sentencing reforms that a local jurisdiction applies retroactively for the purpose of mitigating immigration consequences. Second, when criminal court documents are incomplete or unavailable, noncitizens should nevertheless remain eligible for discretionary immigration relief. Third, under the categorical approach to analyzing penal law provisions, the express language of a statute of prior conviction should be sufficient to establish the “least-acts-

³ For an overview of the Attorney General’s referral policy, see Alberto R. Gonzalez & Patrick Glen, *Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 Iowa L.Rev. 841 (2016). Only four Attorney General opinions were issued during the eight years of the Obama Administration, sixteen during the eight years of the Bush Administration. By contrast, fifteen were issued in the immigration context during the four years of the Trump Administration: *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (limiting continuances); *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018) (limiting administrative closure); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (limiting termination); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (limiting asylum particular social groups (PSG) based on domestic violence and some other grounds); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (limiting asylum PSG based on family unit); *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) (eliminating duress exception to persecutor bar to asylum and withholding of removal); *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (introducing de novo review of asylum to second-guess IJ fact-finding; tightening PSG requirements); *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019) (undermining immigration effect of vacatur of criminal convictions); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (denying bond hearings for individuals subject to expedited removal); *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020) (criminal convictions); *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020) (Convention Against Torture); *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020) (asylum persecutor bars); *Matter of R-A-F-*, 27 I&N Dec. 778 (A.G. 2020) (Convention Against Torture); *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) (good moral character); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (asylum); *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020) (exceptional and extremely unusual hardship standard).

⁴ See Human Rights Watch, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses* (June 16, 2015); Race Forward, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (2011).

⁵ American Bar Association Resolution 103B, Adopted by the House of Delegates Feb. 22, 2021, available at <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103b-midyear-2021.pdf>

criminalized,” without a further “realistic probability” showing.⁶ This would ensure that people with criminal convictions are not precluded from eligibility for immigration relief based upon an improper analysis of the elements of the crime of conviction. Fourth, they call for the rescission of decisions that establish criminal bars to asylum and withholding of removal that improperly limit asylum eligibility.

While federal legislative reform is needed to address the unfairly harsh impact of the interplay between the criminal and immigration legal systems, the ABA has outlined key steps that the DOJ can take immediately to reduce this harm. NYSBA should add its support to the establishment of administrative law that comports with congressional intent and sound policy.

The NYSBA Committees on Immigration Representation, Mandated Representation, and Legal Aid, and the Criminal Justice Section, urge NYSBA to adopt the ABA Resolution 103B, and to join the many other voices calling for an end to the harsh and unfair immigration consequences of criminal legal system engagement.

⁶ For an overview of the categorical analysis, see Katherine Brady, "How to Use the Categorical Approach Now," (Immigrant Legal Resource Center, Dec. 2019) https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf

New York State Bar Association
Committee on Immigration Representation,
Committee on Mandated Representation,
Committee on Legal Aid,
And Criminal Justice Section
Proposed Resolution

WHEREAS, the New York State Bar Association (NYSBA) has long supported and encouraged measures to foster equity and racial justice for immigrants and all New Yorkers; and

WHEREAS, in the past, NYSBA has actively promoted and participated in efforts to provide immigrants in New York and nationwide with access to justice by promoting access to legal representation through the establishment of a committee specifically for that purpose, support for policies that invest in universal representation, and through partnerships with the Liberty Defense Project and;

WHEREAS, numerous provisions of immigration law impact people who have had contact with the criminal legal system; and

WHEREAS, the United States Department of Justice (“DOJ”) has the authority to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and wrongfully expand the application of the criminal provisions of the immigration laws and which improperly interpret the immigration laws; and

WHEREAS, Improper DOJ administrative opinions have caused hundreds of thousands of disproportionately Black people and other people of color to be civilly detained, deported, denied immigrations status, and criminally incarcerated; and

WHEREAS, the American Bar Association has adopted a resolution calling for the United States Attorney General to limit the immigration law impacts of criminal legal system engagement by utilizing the “certification process to withdraw certain Attorney General opinions and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations, and which uphold . . . well-settled legal concepts;” and

WHEREAS, immigration detention and enforcement poses grave risks to immigrant New Yorkers, particularly immigrant New Yorkers who are people of color; and

WHEREAS, NYSBA believes that an immigration system that is welcoming and inclusive will benefit all New Yorkers;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby urges the United States Department of Justice to use the Attorney General certification process to withdraw the Attorney General opinions delineated in American Bar Association Resolution 103B and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations.

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 22, 2021

RESOLUTION

RESOLVED, That the American Bar Association recommends the United States Department of Justice use the Attorney General certification process to withdraw certain Attorney General opinions and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations, and which uphold the following well-settled legal concepts:

1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:
 - a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;
 - b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and
 - c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.
2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.
3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.
4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

REPORT

Numerous provisions of U.S. immigration laws attach immigration consequences to prior criminal arrests, convictions, and essentially any interaction with a domestic or international penal system. The list of possible immigration consequences is vast: mandatory deportation, including of lawful permanent residents; mandatory civil detention pending removal proceedings; ineligibility for lawful permanent residence through family members and through employment; ineligibility for asylum, withholding of removal, and Temporary Protected Status; ineligibility for status under the Violence Against Women Act, Trafficking Victims Protection Reauthorization Act, and Victims of Trafficking and Violence Prevention Act; sentencing enhancement in federal criminal prosecutions; and denial of naturalization.¹ The American Bar Association (“ABA”) has long criticized the excessive integration of the immigration and criminal systems in the United States, and continues to strongly urge Congress to enact and the President to sign immigration reform legislation that substantially reduces the range and severity of immigration consequences of criminal system interactions.² In this Resolution, however, the ABA focuses on actions that may be properly taken by the United States Department of Justice (“DOJ”) to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and substantially, but wrongfully, expand the application of the criminal provisions of the immigration laws. These decisions improperly interpret the immigration laws in violation of congressional intent, often in violation of U.S. treaty obligations, and have resulted in hundreds of thousands of people civilly detained, deported, denied immigrations status, and criminally incarcerated.³ Moreover, these decisions have had a disproportionately harsh and discriminatory impact on Black, Latino, and Asian immigrant communities.⁴

¹ See 8 U.S.C. 1227(a)(2), INA 237(a)(2); 8 U.S.C. 1182(a)(2), INA 212(a)(2) (deportability, inadmissibility, and relief ineligibility grounds based on prior certain prior convictions and findings of criminal conduct); 8 U.S.C. 1229b(a)(3), INA 240A(a)(3) (aggravated felony bar to cancellation of removal); 8 U.S.C. 1226(c), INA 236(c) (conviction-based civil detention); 8 U.S.C. 1158(b)(2)(A)(ii), INA 208(b)(2)(A)(ii); 8 U.S.C. 1231(b)(3)(B)(ii), INA 241(b)(3)(B)(ii) (particularly serious crime bar to asylum and withholding of removal); 8 U.S.C. 1254a(c), INA 244(c) (criminal bars to Temporary Protected Status); 8 U.S.C. 1154(a)(1), INA 204(a)(1); 8 U.S.C. 1101(f), INA 101(f) (criminal bars to lawful permanent residence and cancellation of removal under VAWA); 8 U.S.C. 1255(h), INA 245(h) (criminal bars to lawful permanent residence for abused, neglected, and abandoned special immigrant juveniles); 8 U.S.C. 1326(b), INA 276(b) (enhanced federal sentences in immigration-related prosecutions for unlawful reentry into the United States); 8 U.S.C. 1427(a)(3), INA 316(a)(3); 8 U.S.C. 1101(f), INA 101(f) (criminal disqualification—in some instances, permanent—from naturalization eligibility).

² ABA Resolution 06M300 (urging congressional and executive actions to reduce the immigration impacts of the criminal system); ABA Resolution 12M101F (opposing “amendments” to the immigration laws that further expand the definition of “conviction”).

³ See Human Rights Watch, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses* (June 16, 2015); Race Forward, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (2011).

⁴ See, e.g., Carl Lipscombe, Juliana Morgan-Trostle, and Kexin Zheng, *The State of Black Immigrants: Black Immigrants in the Mass Criminalization System*, NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 20 (2016) (“while Black immigrants make up only 7.2% of the unauthorized population in the U.S., they make up over 20% of all immigrants facing deportation on

103B

This resolution and accompanying report address the following legal questions that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability: 1) the meaning of the statutory term "conviction" in immigration law, when and whether it encapsulates criminal court dispositions that have been given post-conviction relief treatment by the adjudicating court, and the related questions of when and whether immigration law recognizes modifications to prior criminal sentences and retroactive sentencing reform laws, 2) proper application of the Supreme Court's categorical approach in immigration adjudications, and the improper and unfair restrictions on immigration relief where noncitizens cannot supply the immigration adjudicator with specific criminal record documents that are unavailable, 3) proper application of the Supreme Court's categorical approach in immigration adjudications, and specifically how immigration adjudicators identify the elements of a prior conviction for purposes of categorical comparison, and 4) the "particularly serious crime" bar to asylum and withholding of removal and the improper framework the DOJ has developed for making that determination. For each of these issues, this report provides legal and factual background, and a specific recommendation for the revised legal standards and rules the DOJ should establish through the adjudicative rulemaking functions of the Board of Immigration Appeals ("BIA") and the United States Attorney General ("AG") through the certification process.⁵

First, this resolution recommends that the AG certify to himself⁶ the question of the scope of the definition of the statutory term "conviction"⁷ in the Immigration and Nationality Act ("INA"), and issue a decision⁸ holding that for purposes of the INA, the "conviction" definition does not include past offenses that have been eliminated by the adjudicating jurisdiction through expungement, rehabilitation, prospective and retroactive decriminalization of previously criminal conduct, or the court's desire to alleviate immigration hardships. The BIA already correctly recognizes that prior convictions

criminal grounds"); *Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community*, Southeast Asia Resource Action Center 3 (Oct. 2016) ("while 29% of other immigration deportations are based on old convictions, 78% of Southeast Asian American immigrants are in deportation proceedings because of old criminal convictions").

⁵ The ABA recommends that for any legal issues addressed through the AG certification power, the certification process provide: 1) notice to the public of the AG's intent to certify the case and issue to herself, 2) identification of the specific legal questions the AG intends to review, 3) an opportunity for public comment and briefing prior to issuance of any final decision, and 4) release of the underlying decision(s) in the case. See ABA Resolution 19A121A.

⁶ At the time this resolution and report were drafted, the Attorney General was William Barr.

⁷ 8 U.S.C. 1101(a)(48)(A), INA 101(a)(48)(A).

⁸ By statute and regulation, the BIA and AG may issue administrative opinions that "serve as precedents in all proceedings involving the same issue or issue." 8 C.F.R. 1003.1(g)(2)-(3). See also ABA Resolution 19A121A, at pg 1 of the Report.

vacated for legal defect in the underlying proceeding fall outside the INA statutory term “conviction.”⁹

“Under our federal system, the States possess primary authority for defining and enforcing the criminal law.”¹⁰ Pursuant to this “usual constitutional balance between the States and the Federal Government,” the states have developed multiple legal mechanisms for modifying and often ultimately eliminating a conviction for all purposes as part of the criminal adjudication process.¹¹ These measures have become absolutely crucial as the criminal legal and incarceration systems have ballooned over the past 40 years.¹² For most of the modern immigration era, the DOJ’s administrative opinions generally recognized modifications and expungements of adjudicating jurisdictions, regardless of whether the reason for the modification or expungement was for underlying legal defect, demonstrated rehabilitation, satisfaction of sentencing requirements, or alleviating immigration hardships.¹³ See *Matter of G-*, 9 I&N Dec. 159, 169 (BIA 1960, AG 1961) (“an expungement of” a noncitizen’s “conviction under section 1203.4 of the California Penal Code withdraws the support of that conviction from a deportation order”);¹⁴ *Matter of Luviano-Rodriguez*, 21 I&N Dec. 235 (BIA 1996) (en banc), *rev’d on other grounds*, 23 I&N Dec. 718 (AG 2005); *Matter of F-*, 1 I&N Dec. 343 (BIA 1942); *Matter of Ozkok*, 19 I&N Dec. 546, 550 (BIA 1988) (“a conviction for a crime involving moral turpitude may not support an order of deportation if it has been expunged”); *Matter of O-T-*, 4 I&N Dec. 265 (BIA 1951) (same). Reinstating, strengthening, and rendering these decisions internally consistent will give effect to this history of decisional law that created the legislative backdrop for Congress codifying the “conviction” definition in 1996, and will respect the federalist balance between state and federal regulation of criminal

⁹ See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

¹⁰ *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted).

¹¹ See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). See also *50-State Comparison Judicial Expungement, Sealing, and Set-Aside*, Restoration of Rights Project, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>.

¹² See John F. Pfaff, *The Growth of Prisons: Toward a Second Generation Approach* (2007), <http://ssrn.com/abstract=976373>; The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state->.

¹³ See James A.R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. Mich. J.L. Reform 915, 915 (2003) (“For most of the twentieth century, a non-citizen was generally not subject to removal on the basis of a criminal conviction which had been expunged by the state that rendered the conviction.”).

¹⁴ In *Matter of G-*, the AG declined to recognize expungements in immigration cases with respect to prior narcotics convictions. The AG’s distinction between narcotics and non-narcotics convictions and the effect of expungement was based on differences in the statutory scheme that have since been superseded. Under the current INA, the statutory definition of “conviction” applies to all provisions within the INA that use the term “conviction,” including the provisions that attach deportability, inadmissibility, and relief ineligibility to controlled substance offenses. See 8 U.S.C. 1227(a)(2)(B)(i), INA 237(B)(2)(i); 8 U.S.C. 1182(a)(2)(A)(i), INA 212(a)(2)(A)(i).

103B

and immigration law.¹⁵ This interpretation also avoids equal protection violations by eliminating severe immigration consequences that disproportionately impact people of color protected by antidiscrimination laws.¹⁶ Through the certification and re-decision process, the AG should rescind *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), and *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (2005), and in their place issue an opinion adopting the holding in the BIA's prior decision in *Matter of G-*, 9 I&N Dec. 159 (BIA 1960, AG 1961).

As a related matter, with respect to the immigration consequences of prior criminal sentences, this resolution further recommends the AG rescind *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (AG 2019). *Matter of Thomas & Matter of Thompson* overruled the BIA's prior decisions in *Matter of Song*, 23 I&N Dec. 173 (BIA 2011), and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), which, for immigration purposes, recognized sentencing modifications by the sentencing/conviction jurisdiction. The Board's precedents in *Song* and *Cota-Vargas* properly understood the history of immigration law recognizing sentencing modifications.¹⁷ The two decisions also appropriately protected the federalist balance where states determine the penalties for violations of their criminal laws. For these reasons, *Thomas/Thompson* should be withdrawn. Similarly, the BIA's decision in *Matter of Velasquez-Rios* fails to recognize California's retroactive sentencing reform law for immigration purposes. In 2015, California followed several states by reforming its sentencing laws to reduce the sentencing maximum on misdemeanor offenses.¹⁸ Under *Velasquez-Rios*, the BIA will not give effect to the portion of the California law that retroactively alters the sentencing maximum on all prior misdemeanor convictions. The decision fails to appropriately adhere to settled principles of federalism.¹⁹

¹⁵ See Lauren-Brooke Elsen, Brennan Center for Justice, *Criminal Justice Reform at the State Level: Most incarcerated people in America are held in state and county facilities. That is why state reform is so crucial.* (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level>.

¹⁶ See *Washington v. Davis*, 446 U.S. 229, 239 (1976) (“[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”). See also Karla McKanders, *Immigration and Blackness*, 44 Human Rights 20 (2019) (“America’s history of immigration policies has traditionally operated to the exclusion of immigrants of color.”).

¹⁷ See, e.g., *Matter of H-*, 9 I&N Dec. 380, 383 (BIA 1961); *Matter of Martin*, 18 I&N Dec. 226, 227 (BIA 1982).

¹⁸ California Penal Code 18.5(a).

¹⁹ “Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.” *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012). See also *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal citation omitted) (“respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action”).

Second, this resolution recommends that the AG certify to himself the categorical approach legal question of whether a removable noncitizen is eligible for relief where the available components of the *Taylor/Shepard*²⁰ “record of conviction” do not reveal whether the noncitizen was convicted of the relief-disqualifying prong of the statute, and issue an opinion adopting the legal interpretations of the Circuit Courts of Appeals in *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc), and *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008). To the extent that *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), is inconsistent with the reasoning of these federal courts, the AG should overrule *Almanza-Arenas* on this legal question. The Supreme Court developed the categorical approach because of its “constitutional, statutory, and equitable” underpinnings. *Mathis v. U.S.*, 136 S. Ct. 2243, 2256 (2016). For these reasons, the Supreme Court created a presumption that a person was convicted of the least-acts-criminalized under a statute of conviction.²¹ At least three Courts of Appeals, including the First, Second, and Ninth Circuits²², apply this presumption in holding that unless a statute of conviction or the conviction documents that are lawfully reviewable under the categorical or modified categorical approach prove with certainty that the noncitizen was convicted of a relief-disqualifying offense, the least-acts-criminalized presumption remains undisturbed and the noncitizen may apply for relief. Through *Almanza-Arenas* and the rule it endorses, the Board has improperly abandoned the least-acts-criminalized presumption in cases where the “record of conviction” is reviewable, but it does not reflect conviction under the relief-qualifying or relief-disqualifying prong of the statute of conviction. As these Circuit Courts of Appeals have found, this rule violates the Supreme Court’s instructions on how immigration adjudicators are to apply the categorical and modified categorical approaches. In addition, as a practical and equitable matter, this holding has hugely disproportionate impact on noncitizens who are people of color and overrepresented in the criminal legal system, and on noncitizens who are detained,²³ indigent, not English-proficient,²⁴ or mentally and physically disabled,²⁵ as these

²⁰ *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

²¹ See *Moncrieffe v. Holder*, 559 U.S. 184 (2013).

²² *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc); *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008).

²³ According to one study, only 14 percent of detained noncitizens in removal proceedings are represented by counsel. See Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Penn. L. Rev. 1, 33 (2015). ICE detained almost 50,000 noncitizens on a given day in 2019, of which 36 percent, or over 17,000 detainees, had criminal convictions. See Transactional Records Access Clearinghouse, Syracuse University, Growth in ICE Detention Fueled by Immigrants With No Criminal Conviction (Nov. 2019), <https://trac.syr.edu/immigration/reports/583/>.

²⁴ Eighty-nine percent of noncitizens (or 162,923 individuals in all) proceeded in a language other than English for immigration court cases completed in Fiscal Year 2018. See Executive Office for Immigration Review, U.S. Department of Justice, Statistics Yearbook, <https://www.justice.gov/eoir/file/1198896/download> (data compiled for fiscal year 2018), at pg 18.

²⁵ “[U]p to 60,000 detained individuals with some type of mental illness face deportation each year.” Fatma E. Marouf, *Incompetent But Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 Hastings L.J. 929, 937 (2014). These individuals suffer from cognitive delays, schizophrenia, bipolar disorder, or post-traumatic stress disorder. *Id.* At 936. This population struggles to

103B

populations lack the resources to obtain complete conviction records from courts around the United States, often from cases that took place many years prior, and often in criminal courts far from the location of detention and removal proceedings.

Third, this resolution recommends that the AG certify to himself a related categorical approach question of how immigration adjudicators identify the least-acts-criminalized under a statute of conviction for purposes of the categorical comparison, and in doing so rescind *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019); *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014); and *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016), and replace them instead with an opinion adopting the decisions of the Circuit Courts of Appeals in *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Chavez-Solis v. Lynch*, 803 F.3d 10004 (9th Cir. 2015); and *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017). In a 2007 categorical approach case before the Supreme Court, the justices used the phrase “realistic probability” to deny a litigant’s argument that a person can be convicted for “aiding and abetting” under California law for conduct that is beyond the federal requirements for accessory liability.²⁶ The Court rejected the use of “legal imagination” for identifying the least-acts-criminalized under a statute of prior conviction. The Board, through *Navarro Guadarrama* and *Ferreira*, has wrongfully interpreted the “realistic probability” and “legal imagination” language to fail to recognize conduct that convicting jurisdictions explicitly legislate as covered by a statute of conviction. Through *Mendoza Osorio*, the Board has further improperly restricted the methodology for identifying the least-acts-criminalized by refusing to recognize documents from actual arrests and prosecutions for conduct that does not trigger immigration consequences. The Board’s rule, rejected by a majority of Courts of Appeals, including the First, Second, Third, Fourth, Ninth, and Tenth Circuits (and adopted by the Fifth Circuit in a sharply divided en banc opinion)²⁷, requires that a noncitizen (or federal defendant) produce evidence of prosecutions for conduct that does not trigger immigration consequences, even where the statute of conviction explicitly covers that conduct. This rule runs contrary to the Supreme Court’s jurisprudence on the categorical approach, which has never applied the realistic probability in this manner. This rule causes the same equitable and practical flaws discussed above, by disproportionately impacting and disadvantaging noncitizens of color who are overrepresented in the criminal system, and on noncitizens who are detained, indigent, not English proficient, or mentally and physically disabled, all of whom face nearly insurmountable barriers to making the kind of evidentiary showing the Board now requires.

Fourth, this resolution recommends the AG, through the certification power, rescind three BIA decisions that bar immigration adjudicators from granting asylum and

participate in their cases. See generally Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System* (2010).

²⁶ *Gonzales v. Duenas Alvarez*, 549 U.S. 183 (2007).

²⁷ *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Singh v. Attorney General*, 839 F.3d 273 (3d Cir. 2016); *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015); *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017). But see *U.S. v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

withholding of removal, and replace them with administrative decisions that comply with U.S. treaty obligations as incorporated into statutory immigration law.²⁸ This resolution recommends rescission of *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); and *Matter of Y-L-*, 23 I&N Dec. 270 (AG 2002), which establish a framework that is in violation of U.S. treaty obligations for determining whether a person has been convicted of a “particularly serious crime” barring asylum or withholding of removal. These decisions should be replaced with an administrative opinion requiring that a “particularly serious crime” be an “offence” that is “a capital crime (murder, arson, rape, armed robbery, etc.)”²⁹ or “a very grave punishable act.”³⁰ International law scholars, who are recognized experts in international refugee conventions and their treatment under U.S. law, all agree that this is the correct interpretation of the statutory term “particularly serious crime.”³¹

Through this resolution and accompanying report, the ABA provides a framework for the DOJ to correct a flawed body of administrative law that—without proper statutory or constitutional authority, and at times in violation of international law—has led to hundreds of thousands of people detained, deported, excluded, and denied immigration protections and status based on prior criminal arrests and convictions. This resolution would restore faith in federal agencies and in the rule of law, prevent continued discriminatory harm against communities of color, and facilitate the fair and proper functioning of the immigration system of the United States.

Respectfully submitted,



Wendy S. Wayne
Chair, Commission on Immigration
February 2021

²⁸ “[T]he United Nations Protocol Relating to the Status of Refugees ... provided the motivation for the enactment of the Refugee Act of 1980.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). See also *Cardoza-Fonseca*, 480 U.S. at 432-433 (citing “the abundant evidence of an intent to conform the definition of “refugee” and federal asylum law to the United Nation’s Protocol to which the United States has been bound since 1968”).

²⁹ Atle Grahl-Madsen, Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (1963), ¶9.

³⁰ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1, ¶ 155 (1979, re-edited Jan. 1992).

³¹ See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); Atle Grahl-Madsen, Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (1963); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992).

103B

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Wendy S. Wayne

1. Summary of Resolution(s). This resolution and accompanying report address the following legal matters that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability:
 1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:
 - a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;
 - b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and
 - c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.
 2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.
 3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.
 4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.
2. Approval by Submitting Entity. Yes
3. Has this or a similar resolution been submitted to the House or Board previously? No
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

19A121A "Recommends that the Executive Office for Immigration Review amend 8

C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process.”

06M300 "That the American Bar Association urges Congress to restore authority to state and federal sentencing courts to waive a non-citizen's deportation or removal based upon conviction of a crime, by making a "judicial recommendation against deportation" upon a finding at sentencing that removal is unwarranted in the particular case; or, alternatively, to give such waiver authority to an administrative court or agency"

"That the American Bar Association urges states, territories, and the federal government to expand the use of the pardon power to provide relief to noncitizens otherwise subject to deportation or removal on grounds related to conviction, where the circumstances of the particular case warrant it"

09A113 "That the American Bar Association supports legislation, policies, and practices that pre-serve the categorical approach used to determine the immigration consequences of past criminal convictions..."

06M101F "That the American Bar Association supports legislation, policies, and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual.... That the American Bar Association urges that provisions of the Immigration and Nationality Act that are determined to be ambiguous be construed in favor of the use of rehabilitative problem-solving courts. That the American Bar Association opposes interpretations of, and amendments to, the Immigration and Nationality Act that classify participation in, or the entry of a provisional plea upon commencement of a drug treatment or other treatment program offered in relation to problem-solving courts or other diversion programs as a "conviction" for immigration purposes"

06M107C "... the American Bar Association urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include...the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal."

20M117 " urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law"

The policy proposal would complement and support existing policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

103B

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudications system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.

9. Disclosure of Interest. (If applicable) No known conflict of interest exists.

10. Referrals.
Criminal Justice Section
Administrative Law Section
Labor and Employment Law
Center for Human Rights
International Law Section
StC on National Security
Judicial Division
Civil Rights and Social Justice

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Meredith A. Linsky, Director, Commission on Immigration, 1050 Connecticut Ave NW, Suite 400, Washington, DC 20036, tel 202-662-1006, meredith.linsky@americanbar.org.

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*) Wendy S. Wayne, Chair, Commission on Immigration, CPCS Immigration Impact Unit, 21 McGrath Highway, Somerville, MA 02143, tel. 508-641-9209, wwayne@publiccounsel.net.

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution and accompanying report address the following legal matters that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability:

1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:
 - a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;
 - b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and
 - c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.
2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.
3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.
4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

2. Summary of the Issue that the Resolution Addresses

Numerous provisions of U.S. immigration laws attach immigration consequences to prior criminal arrests, convictions, and essentially any interaction with a domestic or international penal system. The larger solution is for Congress and the President to issue immigration reform legislation that substantially reduces the range and severity of immigration consequences of criminal system interactions. In the absence of that, this proposal focuses on actions that may be properly taken by the United States Department of Justice ("DOJ") to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and substantially, but wrongfully, expand the application of the criminal provisions of the immigration laws. These decisions improperly interpret the immigration laws in violation of congressional intent, often in violation of U.S. treaty

103B

obligations, and have resulted in hundreds of thousands of people civilly detained, deported, denied immigrations status, and criminally incarcerated.

3. Please Explain How the Proposed Policy Position Will Address the Issue

For each of these issues, this report provides legal and factual background, and a specific recommendation for the revised legal standards and rules the DOJ should establish through the adjudicative rulemaking functions of the Board of Immigration Appeals and the AG through the certification process.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

There are no minority views of which we are aware.

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
JUNE 11, 2021**

PRESENT: Simeon H. Baum, Mark A. Berman, T. Andrew Brown, Orin J. Cohen, David Louis Cohen, Norman P. Effman, Donna England, Jean F. Gerbini, Sarah E. Gold, Taa R. Grays, LaMarr J. Jackson, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Thomas J. Maroney, Michael J. McNamara, Ronald C. Minkoff, Mark J. Moretti, Domenick Napoletano, Aimee L. Richter, Mirna M. Santiago, Robert T. Schofield, IV, Nancy Sciocchetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Jean Marie Westlake.

Guests: Cynthia S. Arato, June M. Castellano, Robert S. Dean, Hermes Fernandez, Sharon Stern Gerstman, Matthew J. Kelly, Andrew Kossover, Joanne Macri, David E. McCraw, David P. Miranda, Michael Miller, Sandra Rivera, Hon. Alan D. Scheinkman, Prof. Roy D. Simon, Prof. Ellen Yaroshefsky.

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

1. Mr. Brown called the meeting to order, and Simeon H. Baum, Orin J. Cohen, Taa R. Grays, LaMarr J. Jackson, Thomas J. Maroney, Michael J. McNamara, Sandra Rivera, Lauren E. Sharkey, and Kathleen M. Sweet were welcomed as new members of the Executive Committee.
2. Approval of minutes of meeting. The minutes of the April 9, 2021 and May 18, 2021 meetings were accepted as distributed.
3. Consent Calendar.
 - a. Approval of presidential appointments to House of Delegates
 - b. Amendments of bylaws of Environmental and Energy Law Section

The consent calendar, consisting of the items listed above, was approved by voice vote.

4. Report of the Treasurer. In his capacity as Treasurer, Mr. Napoletano provided an update with respect to the results of operations for the first four months of 2021. Items covered included dues revenue of \$8,996,000; CLE net revenue of \$709,300; and Annual Meeting net revenue of \$466,000. The report was received with thanks.
5. Report and recommendation of Lease Negotiation Committee and Finance Committee. David P. Miranda, chair of the Lease Negotiation Committee, and Finance Committee member Michael Miller reported on the negotiations between the Association and The New York Bar Foundation with respect to a potential transfer of One Elk Street from The Foundation to the Association. They reported that a Memorandum of Understanding

(MOU) between the parties had been executed, by which ownership of One Elk will be transferred from the Foundation to the Association; the Association would provide office space for Foundation staff and in-kind services to the Foundation; the Association would bear responsibility for renovation and maintenance costs of One Elk; and the Association and Foundation would work closely in joint fundraising in order to meet common goals. The MOU is contingent upon approval of the Association's House, the Foundation's Board, and the New York State Attorney General. After discussion, a motion to adopt the following resolution was endorsed for favorable action by the House:

Whereas, the New York State Bar Association and The New York Bar Foundation are parties to a lease, as tenant and landlord respectively, for property at One Elk Street, Albany, New York, that ends on December 31, 2021; and

Whereas, the Association and Foundation have concluded negotiations regarding future use of One Elk Street; and

Whereas, the Association President signed a Memorandum of Understanding with the Foundation on May 20, 2021 calling for the transfer of One Elk Street from the Foundation to the Association subject to, inter alia, the approval of the Association's House of Delegates;

Now, therefore, it is

Resolved, that the House of Delegates hereby approves the May 20, 2021 Memorandum of Understanding, subject to the terms and conditions set forth therein and the provisions of this Resolution:

Further resolved, that the Association President is authorized to conduct necessary due diligence, including but not limited to obtaining the written opinions of counsel regarding any tax implications, fundraising matters, and approval of the Attorney General concerning the proposed transaction;

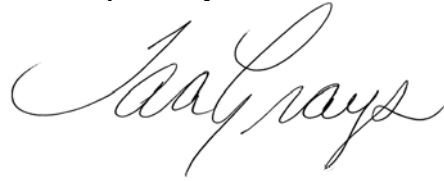
Further resolved, that the Association President is authorized to enter into a final agreement regarding the property transfer as outlined in the Memorandum of Understanding.

6. Report of President. Mr. Brown highlighted the information contained in his printed report, a copy of which is appended to these minutes.
7. Report and recommendations of Task Force on Racial Injustice and Police Reform. In their capacities as co-chairs of the Task Force, Mr. Brown and Ms. Grays outlined the Task Force's recommendations with respect to 21st century policing; improving policing at key stages; and additional accountability within the criminal justice system. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.

8. Report of Emergency Task Force on Solo and Small Firm Practitioners. Mr. Napoletano and June M. Castellano, co-chairs of the Task Force, presented an informational report on the Task Force and its work to date to prepare a report to act as a blueprint for solo and small firm practitioners. The report and recommendations will be presented at the November meeting. The report was received with thanks.
9. Report of Task Force on the Uniform Rules. In his capacity as chair of the Task Force, Mr. Lewis, together with members Sharon Stern Gerstman and Matthew J. Kelly, provided an informational report on the Task Force's work to date, including four hearings it had held on the impact of the rules. The report was received with thanks.
10. Report and recommendations of Task Force on Free Expression in the Digital Age. Cynthia S. Arato and David E. McCraw, co-chairs of the Task Force, reviewed the Task Force's recommendations on (a) amendment of the Freedom of Information Law (FOIL); (b) the advancement of government transparency outside of FOIL; (c) the growth of non-profit journalism; and (d) the expansion of legal services for news organizations. After discussion, a motion was made to endorse the report and recommendations for favorable action by the House. One member abstained.
11. Report and recommendations of Task Force on the New York Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, outlined the Task Force's report on the remote administration of the exam and the long-term future of the New York bar examination, together with its recommendation that New York replace the Uniform Bar Examination with its own examination. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House. One member abstained.
12. Report and recommendations of Committee on Standards of Attorney Conduct. Prof. Roy D. Simon, chair of the committee, together with committee member Prof. Ellen Yaroshefsky reviewed proposed amendments to Rule 8.4 of the Rules of Professional Conduct with respect to discrimination in the practice of law to prohibit improper behavior in the practice of law; expand the protected classes to conform to New York anti-discrimination law; define and prohibit "harassment"; and eliminate the requirement to exhaust administrative remedies. After discussion, a motion was made to endorse the report and recommendations for favorable action by the House. Two members abstained.
13. Report and recommendations of Task Force on Nursing Homes and Long-Term Care. Hermes Fernandez and Sandra Rivera, co-chairs of the Task Force, reviewed the Task Force's report on the effect of the pandemic on the long-term care sector and its recommendations for protecting public health; preparing for emergencies; providing clear guidance; preventing the spread of communicable diseases; collecting and disseminating information; and allocating resources. After discussion, a motion was made to endorse the report and recommendations for favorable action by the House.

14. Report and recommendations of Committee on Mandated Representation. Committee chair Robert S. Dean, together with past chair Andrew Kossover, outlined a legislative proposal to amend the Criminal Procedure Law with respect to arraignments. Under this proposal, (1) fingerprints would be transmitted electronically rather than via mail; (2) a report prepared by the Division of Criminal Justice services would be referred to as a criminal history report; (3) require the court to provide a defendant or counsel with basic information including the criminal history report, the arrest report, a copy of the charging instrument and all referenced attachments prior to defense counsel's interview of the accused person at arraignment; and (4) require courts to provide defendants and their counsel ample opportunity to confer and review all the materials required to be disclosed by the court to the defendant. After discussion, a motion was adopted to approve the report and recommendations.
15. Report and recommendations of Committee on Immigration Representation and Committee on Mandated Representation. Ms. Wallach, on behalf of the Committee on Mandated Representation, and Joanne Macri, past chair of the Committee on Immigration Representation, presented a report recommending amendments to the Model Plea Colloquy under the New York Criminal Jury Instructions. After discussion, a motion was adopted to approve the report and recommendations.
16. Reports and recommendations of Committee on Courts of Appellate Jurisdiction. The reports were presented by committee member Robert S. Dean.
 - a. Assigned appellate counsel for indigent defendants. The committee's affirmative legislative proposal would add a new subsection two to section 380.55 of the Criminal Procedure Law to allow an additional mechanism for requesting the appellate court to assign appellate counsel. After discussion, a motion was adopted to approve the report and recommendations.
 - b. Criminal appeal delays. The committee's report and recommendations addresses delays in perfecting intermediate appeals focusing on three areas: gathering a complete set of documents filed with the court, locating the exhibits, and obtaining the transcript. The report makes several recommendations for remedying these issues. After discussion, a motion was adopted to approve the report and recommendations.
17. New Business. Orin noted that courts have instituted credit card fees of 3% and asked that this issue be raised with the Chief Judge.
18. Date and place of next meeting. The next meeting of the Executive Committee will be held on Friday, October 29 at the Otesaga in Cooperstown.
19. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Taa R. Grays', written in a cursive style.

Taa R. Grays
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
August 27, 2021**

Present: Simeon H. Baum, Mark A. Berman, T. Andrew Brown, David Louis Cohen, Orin Cohen, Donna England, Sarah E. Gold, Taa R. Grays, LaMarr Jackson, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Thomas J. Maroney, Michael Marinaccio, Thomas J. Maroney, Michael McNamara, Mark J. Moretti, Domenick Napoletano, Aimee L. Richter, Nancy Sciochetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet.

Guest: Mary Beth Morrissey.

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

1. **Member-at-Large Vacancy.** Mr. Brown reported that Sandra Rivera had resigned as Executive Committee Member-at-Large and that he would like to designate Christopher R. Riano to fill the vacancy. A motion was adopted to approve the designation. Pursuant to the Bylaws, this designation is subject to confirmation by the House of Delegates.
2. **Report and recommendations of Emergency Task Force on Mandatory Vaccination and Safeguarding The Public's Health.** Mary Beth Morrissey, chair of the Task Force, outlined the Task Force's recommendations that, *inter alia*, call on association members to get Covid-19 vaccines and that law firms mandate vaccines for employees. After discussion, a motion was adopted to approve the report and recommendations.
3. **Adjournment.** There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Taa R. Grays
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
August 6, 2021**

Present: Simeon H. Baum, Mark A. Berman, T. Andrew Brown, David Louis Cohen, Orin Cohen, Donna England, Jean Gerbini, Sarah E. Gold, LaMarr Jackson, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael Marinaccio, Thomas J. Maroney, Michael McNamara, Mark Moretti, Domenick Napoletano, Aimee L. Richter, Sandra Rivera, Robert T. Schofield, IV, Nancy Sciochetti, Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Tucker C. Stanclift, Kathleen M. Sweet.

Guest: Sharon Stern Gerstman.

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

1. Report and recommendations of Task Force on Uniform Rules. Mr. Lewis, chair of the Task Force, together with Task Force member Sharon Stern Gerstman, outlined the Task Force report addressing the 29 new rules adopted into the Uniform Rules for Supreme Court and County Court. If approved, the report will be submitted to the Office of Court Administration. After discussion, a motion was adopted to approve the report and recommendations.
2. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully Submitted,



Taa R. Grays
Secretary