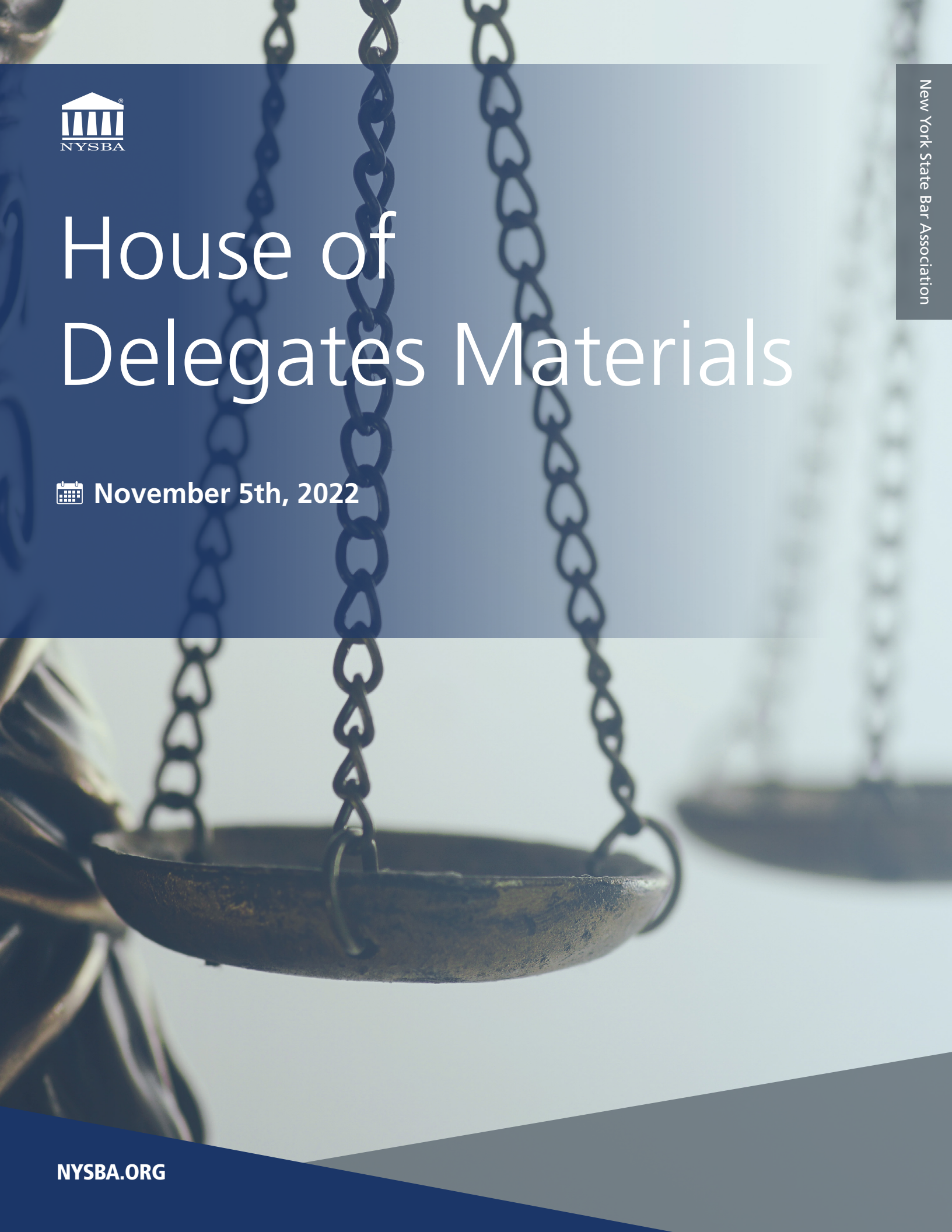


NYSBA

New York State Bar Association

House of Delegates Materials

November 5th, 2022

NYSBA.ORG

NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
BAR CENTER, ALBANY, NEW YORK
AND REMOTE MEETING
SATURDAY, NOVEMBER 5, 2022 – 8:30 A.M.

AGENDA

1.	Approval of minutes of June 18, 2022, meeting	8:30 a.m.
2.	Report and recommendations of Committee on Bylaws – Robert T. Schofield IV., Esq.	8:35 a.m.
3.	Report and recommendations re the Rules of the House of Delegates – Justin S. Teff, Esq.	8:50 a.m.
4.	Report of Treasurer – Domenick Napoletano, Esq.	9:05 a.m.
5.	Report of President – Sherry Levin Wallach, Esq.	9:15 a.m.
6.	Report and recommendations of Finance Committee re proposed 2023 income and expense budget – Michael J. McNamara, Esq.	9:35 a.m.
7.	Memorial for Hon. Richard D. Simons – Hon. Howard A. Levine	9:50 a.m.
8.	Report of Nominating Committee – Henry M. Greenberg, Esq.	10:00 a.m.
9.	Report and recommendations of Committee on Procedures for Judicial Discipline – Justin S. Teff, Esq.	10:05 a.m.
10.	Report of Task Force on Emerging Digital Finance and Currency – Jacqueline J. Drohan, Esq. and Dana V. Syracuse, Esq.	10:30 a.m.
11.	Presentation of 2022 Root/Stimson Award to Samantha I.V. White – Sherry Levin Wallach, Esq.	10:40 a.m.
12.	Report and recommendations of Committee on Legal Aid and President's Committee on Access to Justice – Hon. Edwina F. Martin	10:55 a.m.
13.	Report of Task Force on Modernization of Criminal Practice – Catherine A. Christian, Esq. and Andrew Kossover, Esq.	11:20 a.m.

14.	Report and recommendations of Task Force on the U.S. Territories – Prof. Natalie M. Gomez-Velez and Mirna Martinez Santiago, Esq.	11:30 a.m.
15.	Report and recommendations of Women in Law Section – Susan L. Harper, Esq. and Terri A. Mazur, Esq.	11:45 a.m.
16.	Report of The New York Bar Foundation – Hon. Cheryl E. Chambers	12:10 p.m.
17.	Administrative items – Richard C. Lewis, Esq.	12:20 p.m.
18.	New business	12:25 p.m.
19.	Date and place of next meeting: Friday, January 20, 2023 New York Hilton Midtown, New York City	

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK, AND REMOTE MEETING
JUNE 18, 2022

PRESENT: Ahn, Aidala, Alcott, Arenson, Barreiro, Baum, Beltran, Ben-Asher, Berlin, Berman, Bladykas, Braiterman, Braunstein, Braverman, Bray, Brown, Buholtz, Burke, Buzard, Carbajal-Evangelista, Carter, Chandrasekhar, Chang, Christian, B. Cohen, D. Cohen, O. Cohen, Cohn, Cooper, Coreno, D'Angelo, Davidoff, Degnan, Doyle, D'Souza, Dubowski, Effman, Feal, Filemyr, Finerty, Fogel, Fox, French, Gauntlett, Gerstman, Getnick, Gilbert, Gilmartin, Gold, Good, Graber, Grays, Griffin, Gross, Gutekunst, Haig, Harper, Heath, Himes, Holder, Houth, Islam, Jackson, Jaglom, James, Jimenez, Johnson, Jones, Kamins, Karson, Kaufman, Kean, Kelley, Kenney, Kimura, Ko, Kobak, Koch, Kretser, Lau-Kee, Leber, Lenci, Leventhal, Levin, Levin Wallach, Lewis, Livshits, Loyola, Lynn, Mack, Madigan, Marinaccio, Markowitz, Maroney, Martin, May, Mazur, McCann, McElwreath, McFadden, McGinn, McNamara, C. Miller, M. Miller, Minkoff, Minkowitz, Montagnino, Moreno, Moretti, Morrissey, Mukerji, Muller, Mulry, Murphy, Napoletano, Nielson, Nowotarski, O'Connor, Palermo, Parker, Petterchak, Quaye, Quiñones, Randall, Riano, Richardson, Richman, Richter, Riedel, Rothberg, Russell, Ryan, Safer, Samuels, Santiago, Sargente, Schram, Schraver, Schwartz-Wallace, Sciocchetti, Seiden, Sen, Shafiqullah, Sharkey, Sikkander, Silkenat, Sonberg, Spring, Standard, Starkman, Stephenson, Stoeckmann, Stong, Swanson, Sweet, Tambasco, Terranova, Treff, Triebwasser, Vaughn, Ward, Waterman-Marshall, Wesson, Westlake, Whittingham, Wolff, Woodley, Yeung-Ha, Younger

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

1. Call to order, Pledge of Allegiance, and introduction of new members. The meeting was called to order and the Pledge of Allegiance was recited. A moment of silence was observed in honor of the victims of recent mass shootings in New York State and across the country. Mr. Lewis welcomed the new members of the House.

2. Approval of Minutes of April 2, 2022, meeting. The minutes were deemed accepted as distributed.

3. Installation of President. Ms. Levin Wallach was formally installed as the one-hundred and twenty-fifth President of the New York State Bar Association. The oath of office was administered by Hon. Cheryl E. Chambers, associate justice of the New York State Supreme Court Appellate Division, Second Department.

4. Report of President. Ms. Levin Wallach addressed the House with respect to her planned initiatives for her term as President. A copy of the written report is appended to these minutes.

5. Videoconference Address by Hon. Jenny Rivera – Associate Judge, New York State Court of Appeals. Judge Rivera addressed the House, speaking on topics including the role of the judiciary in a changing society, support for the rule of law, and the importance of judicial

independence, judicial integrity, and the safety and security of judges. Judge Rivera also noted her participation as a member of the Task Force on the U.S. Territories and commented on the mission of the recently created Task Force on the Modernization of Criminal Practice. The Chair received the report with thanks.

6. Reports of Treasurer. Domenick Napoletano, treasurer, reported that through April 30, 2022, the Association's total revenue was $11,973,929, a decrease of approximately $888,462 from the previous year, noting the increased expenses associated with the relocation of the print shop, the April 2022 meetings of the Executive Committee and House of Delegates held in New York City, software licensing fees, and increased health insurance premiums. Mr. Napoletano also reported on the status of the Association's investment portfolio and reviewed the status of larger income items including member dues, section dues, and CLE income. The report was received with thanks.

7. Report of Task Force on Racism, Social Equity, and the Law. Task Force co-chairs Taa R. Grays and Lillian M. Moy presented on the Task Force's ongoing work in anticipation of submission of a final report for consideration at the November 2022 meeting of the House of Delegates. The report was received with thanks.

8. Report of Strategic Planning Committee. Strategic Planning Committee co-chairs Taa R. Grays and Christopher R. Riano reported to the House members on the mandate and composition of the Strategic Planning Committee, the anticipated work of the committee, and the timeline for this work. The report was received with thanks.

9. Report and recommendations of Task Force on Voting Rights and Democracy. Jerry H. Goldfeder, chair of the Task Force on Voting Rights and Democracy, outlined the recommendations contained in the report pertaining to election administration in New York State. After discussion, a motion was made to approve the report and recommendations, after which a motion to amend the report to delete the fifth recommendation on appointment of an Elections Inspector General failed for lack of a second. The main motion to approve the report and recommendations was then adopted.

10. Report and recommendations of Committee on Diversity, Equity, and Inclusion. Mirna Martinez Santiago, immediate past chair of the committee, together with committee member Lillian M. Moy, reviewed the committee's recommendation to remove the sunset clauses from Bylaws provisions V.3.H. and VII.1.F.1., thereby permanently providing for the diversity delegates and diversity Executive Committee members-at-large positions. After discussion, a motion was made to adopt the resolution, after which a motion to amend the resolution to extend the sunset provisions for an additional ten years through May 31, 2034, failed. The main motion was then approved, and the following resolution was adopted by the House:

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association reaffirms its unwavering and longstanding commitment to increase racial and ethnic diversity within its

leadership ranks based upon its firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large.

FURTHER RESOLVED, that the mission of the New York State Bar Association's Committee on Diversity, Equity and Inclusion is to promote the full and equal participation of attorneys of color and other diverse attorneys in the Association and in all sectors and at every level of the legal profession.

FURTHER RESOLVED, that the Association is made stronger and more capable of implementing change through the law when its membership reflects the diversity of the individuals and communities served by the legal profession.

FURTHER RESOLVED, that the subject bylaws provisions institutes a deliberate and thoughtful process to identify and recruit diverse members whose perspectives help inform and strengthen the Association's decisions and policies.

FURTHER RESOLVED, that the increased participation of attorneys of color in leadership positions also helps foster a welcoming environment for and serves as an incentive to diverse lawyers considering membership within the Association.

FURTHER RESOLVED, that the subject bylaws provisions promote the objectives approved by the Association in its adoption of the 2020 Diversity Plan which commits the Association to require diversity as an emphasis in all leadership nomination processes, including diversity among the decision-makers on the Nominating Committee.

RESOLVED, that consistent with these stated principles and commitments, the Association hereby approves the continuation of the bylaws provisions, without any sunset clause, to ensure that at least 12 members of the Association will be appointed by the President from underrepresented racial and ethnic groups to serve in the House of Delegates and that two members-at-large of the Executive Committee of the Association shall be selected to further ethnic and racial diversity.

11. Report and recommendations of Committee on Standards of Attorney Conduct. Committee vice chair James Q. Walker, together with committee members James B. Kobak, Jr., and Ronald C. Minkoff, outlined the committee's proposal to add new comments to Rules 1.4 and 5.6 of the New York Rules of Professional Conduct concerning the obligations of departing lawyers and law firms to notify clients when a lawyer with primary or substantial responsibility for specific matters or clients intends to leave a law firm to join a different firm. After discussion, the report was acted on in two parts. First, a motion was adopted to approve the recommendation on new comments to Rule 1.4. Second, a motion was adopted to approve the recommendation on new comments to Rule 5.6. Mr. Doyle abstained from both votes.

12. Report of The New York Bar Foundation. Hon. Cheryl E. Chambers, vice president of the New York Bar Foundation, updated the House members on the ongoing work and mission of The Foundation. The report was received with thanks.

13. Administrative items. Mr. Lewis reported on the following:

a. Confirmation of Tenth District Representatives to Nominating Committee. At the April 2, 2022, meeting of the House of Delegates, when the members of the Nominating Committee for the 2022-2023 Association year were elected, all representatives for the Tenth District were not included on the list. The Tenth District representatives are Justin Block, Dorian Ronald Glover, Lynn-Poster Zimmerman, Sanford Strenger, Steven Leventhal (1st alternate) and Ilene Cooper (2nd alternate). A motion was adopted to confirm the election of these members to the Nominating Committee for the 2022-2023 Association year. One member abstained from the vote.

b. Ratification of appointments to Audit Committee. At its June 1, 2022, meeting, the Executive Committee had confirmed the reappointment of Elizabeth J. Shampnoi as chair of the Audit Committee, and the reappointment of Michael L. Costello, Hermes Fernandez, Bryan Hetherington, Naomi K. Hills, Hon. Edwina F. Martin, and Robert T. Schofield, IV, as members of the Audit Committee. Pursuant to the Bylaws, the House is required to ratify the selection of these members. A motion was adopted to ratify the members' selection. Two members abstained from the vote.

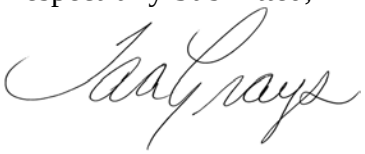
c. Ratification of appointments to Finance Committee. At its June 1, 2022, meeting, the Executive Committee had confirmed the reappointment of Michael J. McNamara as chair of the Finance Committee, the reappointment of Taa R. Grays as a member of the Finance Committee, and the appointment of Hon. Cheryl E. Chambers as a member of the Finance Committee. Pursuant to the Bylaws, the House is required to ratify the selection of these members. A motion was adopted to ratify the members' selection.

14. New Business. House member Vincent T. Chang, president of the New York County Lawyers Association, spoke to the constitutional issues surrounding a vacancy in the position of lieutenant governor and commended the New York State Bar Association's Committee on the New York State Constitution for its efforts in forming a Subcommittee on the Lieutenant Governor to review and make recommendations on this topic.

15. Date and place of next meeting. Mr. Lewis announced that the next meeting of the House of Delegates would take place on Saturday, November 5, 2022, with options for participation in person at the Bar Center in Albany or remotely via Zoom.

16. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Taa R. Grays
Secretary

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Report of President Sherry Levin Wallach to the
House of Delegates of the New York State Bar Association
June 18, 2022

"Investing in the Future of Our Profession" will be the focus of my year as president. This is what we must do to continue to grow our membership, be relevant to our current membership and to address the ever-changing needs of our new reality of practice. We will maintain our position as a voice for the profession by focusing on the future of the legal system as lawyers, judges, and members of this great profession and Association. Our Association will continue to work with Chief Judge Janet DiFiore and our court system to continue to improve our justice system. I believe that the work that we do together will continue to remind each and every one of you of the value in and need for bar association membership and assist you in joining me in engaging new members.

I owe so much to the bar leaders who came before me. You have given so much of your time, knowledge, and support to me over the years. Many of you are my trusted mentors. To the one-hundred and twenty-four presidents who came before me, I salute you all, and pledge that I will do my utmost to strengthen, preserve, and advance the work and mission of our Association. To the presidents and leaders who will come after me, perhaps some of whom are here today in the room, I challenge you to lead by example, and serve our profession well.

My presidency is the opportunity of a lifetime to give back to the Association and the profession that has enriched my life. My membership in the New York State Bar Association has been driven by our mission "to shape the development of law, educate and inform the public, and respond to the demands of our diverse and ever-changing legal profession." My career path has always been consistent with the New York State Bar Association motto, "Do the Public Good." From the beginning of my career as a prosecutor in the Bronx, to my time in private practice, to my current role as deputy executive director of one of the largest providers of mandated representation in the state, I have zealously worked to improve the lives of others and lead by example, and by that, demonstrate the true potential and capacity of lawyers as changemakers in the world.

The New York State Bar Association has been a home for me for the last three decades! If I could have one wish, it would be to see all of you partake in the kind of rewarding journey that I have enjoyed through my bar leadership. I have served and led on many Association committees, sections, and task forces over the years – from the Young Lawyers Section to the Criminal Justice Section, from the Task Force on Incarceration Release Planning and Programs to the Committee on Membership, I have had wonderful experiences, met and worked with amazing people, and

earned professional accomplishments and accolades that would have been impossible with the support provided and nurtured by our New York State Bar Association community.

Becoming the one-hundred and twenty-fifth president of this remarkable Association is more than just meeting one of the most important professional goals. It is an opportunity to lead our lawyers during challenging times and to speak out against injustice. As just the eighth woman president, I also recognize there is still so much to be done to diversify our profession, Association, and leadership.

It is important that you, our membership, recognize how significant and necessary it is for you all be part of the conversation. We are the leaders of the legal profession in the most important state in the nation. We must recognize the enormous power and potential that we all have to impact law and society. Indeed, it is the recognition of this responsibility, and the proper execution of deliberate action, which makes us all capable leaders and trustees of our profession's future. When the New York State Bar Association adopts a policy position, it is a collaborative, collegial process in which our members examine and discuss the issues reasonably and rationally. We make the best decisions when we hear all perspectives and everyone's voice.

Every voice counts and every thought matters. We are so much stronger and more capable when we have input from as many associations and practitioners as possible.

I will challenge you all to engage and bring in new members to our Association, In the coming weeks, you will hear how this challenge will work and how the New York State Bar Association will recognize you for your efforts in working together to turn the membership trend upwards toward growth again.

Building Membership is a Winning Proposition!

Let me ask you to "REMEMBERship:

- Remember why we became members in the first place.
- Remember why we have stayed members.
- Remember the impact we have on fellow attorneys and the rule of law in New York State.
- Remember why membership matters now more than ever.

We can execute this by:

- *RETAINING* existing members, particularly newly admitted attorneys, by engaging with them. Assign them projects for your Section or Committee; invite them to deliver programs; tap into their skillsets and resources and appoint them to positions of leadership early on.

- *ENGAG*ING with others, making them aware of association events and activities, including Section and Committee-specific efforts. Utilize social media to let folks know events or programs you are attending; repost/share articles you have read and liked and repost/share when NYSBA is in the news and subsequent media hits so current and prospective members know what we are working on.

- *RECRUITING* new members by being evangelists for both NYSBA and your individual Section(s) or Committee(s). All current members should make it their mission to encourage new members to join, and we will soon launch a referral program allowing them to do just that – with some rewards and recognition in place for those topping the list of members referred.

In the words of my hero, the Honorable Ruth Bader Ginsberg, "Real change, enduring change, happens one step at a time." To blend our voices together, we follow a democratic process that starts with our task forces, leads to NYSBA policy, moves on to the legislature and courts and finally prompts real changes in the lives of New Yorkers, people across the country, and the world.

As the largest voluntary bar association, often, what we do in New York has a domino effect. Yes, it may take years to affect certain changes, but we get it done. You should be proud of our influence across the nation and sometimes the world. Our work is never done, and we are often challenged but we must, in the words of our newest supreme court Justice Ketanji Brown Jackson, "persevere."

We are facing challenging times. Many of us are on edge waiting for the Supreme Court to issue its decisions on their interpretation of the Second Amendment and a woman's right to choose. As an Association, we are ready to act, react, and teach. I have been working daily with our Government Relations team and many of our members who are leaders in the field of constitutional law, the Second Amendment, and equal protection. I have been in close contact with our Women in the Law Section, and I have reconvened the Task Force on Mass Shootings and Assault Weapons to work in conjunction with the leaders of our Criminal Justice Section. We will examine what policy we have to address these decisions when they are released and discuss the work that needs to be done to ensure that we continue our mission and to have a voice where appropriate on these issues.

Our Government Relations team has worked hard this year. We have been successful with supporting bills including those related to the Brownfields Clean Up Program, the elimination of large capacity ammunition and licensing for purchase of semiautomatic rifles, the Immigration Court Notification Bill, and a bill to grandfather previously executed statutory short form powers of attorney.

We still have work to do to push through Clean Slate, the repeal of Judiciary Law 470, the removal of question 26 from the bar application, and increase assigned counsel rates.

While we must continue to work hard to push these issues, we must also continue to use our democratic processes to move other issues forward, improve the practice of law, and to provide our clients with the best possible representation. To do this I have launched five task forces.

The Task Force on the Modernization of Criminal Practice will focus on improving access to justice and ensuring fairness and efficiency in the practice and the administration of the criminal justice system. Aptly chaired by Catherine Christian and Andy Kossover, this Task Force, which is composed of practitioners from across the state, including prosecutors, public defenders, and members in private practice, has already scheduled its first meeting, and I am sure will quickly get

to work to develop thoughtful and impactful recommendations and best practices for the criminal justice lawyer amidst this time of great change in the profession and practice of law.

We all have heard about Bitcoin and non-fungible tokens (NFTs), but do we really understand it? I have formed a new Task Force on Emerging Digital Finance and Currency. Thank you, Jackie Drohan and Dana Syracuse, for leading on this innovative initiative for the bar.

I have formed a Task Force on Mental Health and Trauma Impacted Representation, chaired by Sheila Shea, with the assistance of Patricia Warth, which will explore the issues that our clients living with mental illness and trauma face and the challenges we face as lawyers representing them. The Task Force will develop recommendations and encourage best practices for providing the best possible representation and support of this vulnerable group.

Over the last year, I have worked with the NYSBA Committee on Diversity, Equity, and Inclusion to bring considerable awareness to the line of Supreme Court cases from the beginning of the 1900s known as the Insular Cases, with focus on the impact of these cases on jurisprudence today and their racist ideas that have been the basis of the formation of the second-class citizenship that exists for U.S. Citizens who are residents of the U.S. Territories. I have done this through a series of CLE programs. We will now explore what can and must be done to eliminate the reliance on these cases and their racist doctrines to be sure that all citizens of the United States are treated equally under the law. To accomplish this goal and explore other legal issues facing the residents of the U.S. Territories, I have appointed a Task Force on the U.S. Territories. This group will be led by Mirna Martinez Santiago, my good friend, colleague, and leader within the bar, and Professor Natalie Gomez-Velez and Anthony Ciolli, former president of the Virgin Islands Bar.

Finally, I have formed a Task Force on the Ethics of Local Public Sector Lawyering chaired by Steven Leventhal. This task force will work review the ethical guidelines, opinions and challenges that lawyers representing municipalities, school districts, and other local public sector entities face and work to develop best practices and/or guidelines to assist them.

I pledge to you that these initiatives will develop tangible results – recommendations, reports, and best practices of great utility to the practitioner and the practice of law – and create a body of work and achievements that will aid and assist our member attorneys for years to come, especially as we continue to steer our practice, and our lives, from out of the rapids of the COVID crisis. I will also ensure that the focus on attorney wellbeing – a matter of utmost importance which was so acutely and at times painfully realized during the challenges of the last few years – stays front and center in everything that we do as a bar association. And that our members, from rural communities to the five boroughs, from the upstate cities to our many international chapters overseas – feel and remain vested participants in the work, activity, and governance of our association. New York State is the global leader of law – we will maintain this primacy and safeguard the practice of law and the integrity of our member-practitioners as well.

We are in the process of finalizing the transfer of our building at One Elk Street from the New York Bar Foundation to the New York State Bar Association. I hope you will join me in my vision to recreate our Bar Center into an improved and updated space where we can continue to serve and support our members and provide them with access to the most innovative legal technology. Our building is a center piece in Albany and the state. It is space where people can learn, work, network,

collaborate, and celebrate. I hope you will join me in seizing this fantastic opportunity to provide improved resources to serve us and the profession even better.

The work that I have done with the sections, committees, and task forces has been a driving force in my career. It has provided me with countless opportunities to collaborate with my colleagues on the most significant issues facing the legal profession. At the same time, as I attend bar events across the state, I see fewer young attorneys. I get it. I recall the challenges of maintaining my practice, caring for my family, and having time for bar events. Yet we as active bar members have a responsibility to the profession and the Association to engage young attorneys. Engagement will ensure that our good work with continue, long after we are retired from the practice of law and leadership within the Association. It will guarantee that we will have another one-hundred and twenty-five presidents after me, at least, guiding our Association in the future.

Years ago, I co-founded the NYSBA Trial Academy. Just a few weeks ago, we presented the thirteenth annual Trial Academy at Syracuse Law Center. This is an example of providing the value of bar membership directly toward new lawyers. Our sections, committees, and task forces provide many opportunities for flexible and engaging participation – our CLE programming, publications, and advocacy work as well. Get involved. Stay involved. Encourage others to get involved. You and your practice only stand to gain from involvement with the New York State Bar Association– as I said at the beginning, together we can accomplish so much.

A few months ago, the New York State Bar Association celebrated International Women's Day on social media by honoring the female past presidents: Maryann, Catherine, Lorraine, Kate, Bernice, Claire, and Sharon. These trailblazers are my role models and my inspiration in seeking this position. I would not be standing here today if not for them. To be in the company of these remarkable women is indescribable. I promise to live up to their examples and be the same kind of role model to the next generation of lawyers as they were to me. I am honored by the trust they have put in me. I am so proud to be your President.

NYSBA

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 amendments to the association Bylaws in three parts. First, as outlined in Part One of the report, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1). Second, as outlined in Part Two of the report, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6. Third, as outlined in Part Three of the report, to correct an internal citation error at Article IV, Section 7.

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 20, 2023.

The report will be presented at the November 5 meeting by Robert T. Schofield, IV, chair of the Committee on Bylaws.

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COMMITTEE ON BYLAWS

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Chair
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October 27, 2022

To: Members of the House of Delegates

Re: AMENDED Report on Proposed Bylaws Amendments

INTRODUCTION

The stated purpose of the Committee on Bylaws is to examine and report on proposed amendments to the Bylaws of the Association and to observe the activities of the Association under the present Bylaws and, from time to time, report to the Executive Committee and the House of Delegates on such amendments as, in its opinion, will promote the efficiency of the Association.

This report proposes amendments to the Bylaws in three parts. First, as outlined in Part One, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1). Second, as outlined in Part Two, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6. Third, as outlined in Part Three, to correct an internal citation error at Article IV, Section 7.

PART ONE – DIVERSITY, EQUITY, AND INCLUSION AMENDMENTS
Addition of new Section 2 to Article II and proposed amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1).

The Association Bylaws presently provide for the President to appoint twelve members "from a range of racial and ethnic minority groups identified by the National Association for Law Placement" to the House of Delegates each year (Article V, Section 3(H)). The Bylaws also provide that two members-at-large of the Executive Committee shall be selected to further ethnic and racial diversity (Article VII, Section 1(F)(1)). The provisions providing for these positions will expire and be removed from the Bylaws on May 31, 2025 (the "sunset clauses"), without further action by the Association.

At its June 18, 2022, meeting, the House of Delegates adopted a resolution from the Committee on Diversity, Equity, and Inclusion recommending that the sunset clauses be removed from Article V, Section 3(H) and Article VII, Section 1(F)(1), thereby permanently providing for the twelve diversity delegates and two diversity member-at-large positions. The Committee on

Diversity, Equity, and Inclusion's report and resolution, as adopted by the House of Delegates, is attached as Exhibit "A" to the report.

The Committee on Bylaws was subsequently charged to develop Bylaws amendments to implement this House action. After considering the issues, we have recommended several changes to the Bylaws to express more fully the Association's commitment to Diversity, Equity, and Inclusion.

First, our committee's prior communications to the House in June 2022,[1] and the Special Committee on Association Structure and Operations in December 2019, noted that the Association's Diversity Plan[2] and the history of the Association's efforts to grow and sustain diversity within all aspects of its existence, have not been carried into the Bylaws. While the Association has adopted and repeatedly restated a strong policy in favor of diversity, that policy is not adequately reflected in bylaw text. Our committee feels that amending the Bylaws to do so would constitute an important demonstration of the Association's focus on this critical goal.

An amendment to accomplish this is proposed in the form of a new Section B of Article II, to incorporate a written commitment to diversity in the Bylaws. This new language, proposed to be added to the Purposes Article, is drawn from the current and prior reports of the Committee on Diversity, Equity, and Inclusion and its predecessor, the Committee on Diversity and Inclusion. It adds a clear statement of commitment to diversity directly into one of the first articles a reader confronts when reviewing the Association's Bylaws.

Second, in accordance with the resolution of the House passed at the June 2022 meeting, it is incumbent upon this committee to propose modifications to remove the sunset provisions of Article V, Section 3(H) and Article VII, Section 1(F)(1). While the goals of both amendments are consistent, the approach to each differs.

Article V, Section 3(H) includes (and has, for many years) a reference to "racial and ethnic minority groups" identified by the National Association for Law Placement in defining who is eligible to hold one of the twelve diversity seats. Since the Bylaws language first made reference to the NALP standard in 2004, the understanding and scope of the concept of diversity has evolved in public discourse. The current NALP definition, last amended in 2021, reads:

> "*There shall be no barriers to full participation in the Association on the basis of sex, actual or perceived gender, age, race, color, religion, creed, national or ethnic origin, disability, sexual orientation, gender identity and expression, genetic information, parental, marital, domestic partner, civil union, military, or veteran status. Diverse members, for purposes of this policy, shall include, but not be limited to, individuals who identify as Black, Indigenous, and People of Color (BIPOC); LGBTQ+; people with disabilities; neuro-diverse; and active military and veterans." https://www.nalp.org/diversitywithinnalp*

[1] Attached as Exhibit "B" to the report.
[2] Adopted by the House of Delegates on January 31, 2020. Attached as Exhibit "C" to the report.

The committee reviewed the presence of the NALP standard in the Association's Bylaws. We found its continued use appropriate and concluded that incorporation of the most recent NALP language was consistent with the Association's current Diversity Plan. We therefore initially recommended adoption of the current NALP definition, updated to reflect this current, broader view of diversity.

After further discussion with the Committee on Diversity, Equity, and Inclusion, caused by our receipt of comments from them in opposition to this aspect of our work, we concluded the use of the current standard was actually inconsistent with the intent of the bylaws language establishing these positions for members of "racial and ethnic minority groups." Indeed, the broader language was a definition of "diversity," and not a definition that reflected the Association's long-standing policy of advancing membership in the House and on the Executive Committee by representatives of racial and ethnic minority groups. Both Committees found that the intent of the House would be better reflected by amending the provision to utilize NALP's definition of "lawyers of color," which includes Asian, Black or African American, Latinx, Native American or Alaska Native, Native Hawaiian or other Pacific Islander, and multiracial lawyers.

We believe this definition is consistent with our Association's long-standing commitment to diversity and the original intent for the inclusion of the diversity seats in the Bylaws. We also recognize that the inclusion of the definition within the Bylaws, in the form of a footnote, serves to remind the reader of this important policy, consistent with the Association's current Diversity Plan. The remaining portion of the amendment to this section is simply the deletion of the second sentence of the sub-section, which served to sunset the twelve diversity seats on May 31, 2025. By deleting that sentence, the provision creating the diversity seats becomes permanent.

Third, concerning the two diversity member-at-large positions, the committee takes a slightly different approach to its proposed amendment of Article VII, Section 1(F)(1) because the current language of that provision does not contain a definitional reference to the NALP Standard. In the absence of such a reference, our proposed revision is more limited. We merely suggest use of the now defined term Racial and Ethnic Minority Groups and the deletion of the final two sentences of the subsection, which served to sunset the two diversity member-at-large positions on May 31, 2025. By deleting these sentences, the provision creating the two diversity member-at-large positions becomes permanent.

The Bylaws Committee recognizes the evolving nature of the definitions used in the legal community's on-going efforts to enhance Diversity, Equity, and Inclusion. As such, we recommend that those definitions be reviewed regularly in the future.

Based on the foregoing, the committee proposes the Bylaws amendments set forth below:

Article II:

II. PURPOSES

Section 1. The purposes of the Association are to cultivate the science of jurisprudence; to promote reform in the law; to facilitate the administration of

justice; to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession; to cherish and foster a spirit of collegiality among the members of the Association; to apply its knowledge and experience in the field of the law to promote the public good; to promote and correlate the same and similar objectives in and among the Bar organizations in the State of New York in the interest of the legal profession and of the public and to uphold and defend the Constitution of the United States and the Constitution of the State of New York.

Section 2. The Association holds an unwavering and longstanding commitment to diversity within its membership and leadership ranks based upon its firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large. The Association is made stronger and more capable of implementing positive change through the law when its membership reflects the diversity of the individuals and communities served by the legal profession. Accordingly, the Association will promote and advance the full and equal participation of diverse attorneys in the profession and the Association, including diversity based on gender, race, color, ethnic origin, national origin, religion, sexual orientation, gender identity and expression, age, and disability.

Article V, Section 3(H):

V. HOUSE OF DELEGATES
Section 3. Composition. The House of Delegates shall be composed of:

* * *

H. Twelve delegates to be appointed by the President then in office from the range of ~~racial and ethnic minority groups~~Racial and Ethnic Minority Groups identified by the National Association for Law Placement.[1] At least two and no more than four of such delegates shall be appointed from each Judicial Department, and all appointments shall be subject to confirmation by the Executive Committee. ~~This subsection shall expire ten years from the date of amendment (January 31, 2014) and shall be removed from these Bylaws without further action of the Association. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, 2025.~~

[1] *Following NALP's definition of "lawyers of color," Racial and Ethnic Minority Groups include Asian, Black or African American, Latinx, Native American or Alaska Native, Native Hawaiian or other Pacific Islander, and multiracial lawyers. See, NALP 2021 Report on Diversity in U.S. Law Firms available at: https://www.nalp.org/reportondiversity (last accessed on October 27, 2022)*

Article VII, Section 1(F)(1):

VII. EXECUTIVE COMMITTEE

Section 1. Composition. The Executive Committee shall be a committee of the House of Delegates and shall consist of:

* * *

F. 1. Eight members-at-large who shall be Active members of the Association. Not less than two of the members-at-large shall be selected from the First Judicial District. Two of the members-at-large shall be selected ~~to further ethnic and racial diversity~~from Racial and Ethnic Minority Groups and may not be drawn from the same Judicial District. ~~Ten years from the date of amendment (January 31, 2014), the provision for the two members-at-large selected to further ethnic and racial diversity shall expire and be removed from these Bylaws without further action of the Association, and the number of these members-at-large on the Executive Committee shall revert to six. Notwithstanding such expiration, the final term authorized under this provision shall be for a full two-year term, concluding May 31, 2025.~~

PART TWO – MEMBERSHIP
Proposed amendments to Article III

At the request of the Committee on Membership, the Bylaws Committee reviewed several provisions of Article III of the Bylaws on Members and Affiliates. These efforts were driven by a memo, dated September 30, 2021, from the Committee on Membership to the chair and vice-chair of our committee, and an inquiry made regarding the membership termination process resulting from questions initially raised by the Committee on Professional Discipline. The Committee on Membership's memo, articulating the rationale and scope of its request, is attached as "Exhibit D" to the report.

The Committee on Membership asked for our committee to address three topics within the membership articles of the Bylaws: (1) the transition of law student members into full paying members, (2) a further adjustment to the membership provisions for paralegals as non-attorney affiliate members, and (3) a clarification in the process for termination of membership for nonpayment of dues. Having studied the requests and the existing language closely, our committee has proposed language on the first and third items but declined to recommend any changes in connection with the second item.

With respect to the requested change relating to law student membership transitions, the Committee on Membership wrote:

> "Law students typically graduate in December/May and take the Bar Exam in July/February. As law students prepare for the Bar Exam, they require continued membership with NYSBA to access certain member benefits such as Kaplan Bar Prep and Casebriefs, which is an open platform of law school case briefs designed for law students to use to assist with their case analysis and briefing. If NYSBA drops law students as members upon graduation from law school, the Association is dropping them when they need membership the most. It is important for the law students to have continued membership for at least 12 to 18 months post-graduation to allow them to study, pass the Bar Exam, and become admitted to the practice of law." Memo to Bylaws Committee, September 30, 2021.

Our committee concurred with this rationale, but our examination of the existing Bylaws provision revealed that the Bylaws also contemplate other transitions that could benefit from the extension proposed by the Committee on Membership. Those include service in the armed forces. As such, our committee proposes a different approach to the amendment which addresses these other events, already contemplated by the Bylaws, in a similar manner.

The Membership Committee also proposed revisions to the bylaw provisions on non-attorney affiliates to loosen the definition of paralegals. Having extensively studied this issue in our September 2019 report, we viewed the Committee on Membership's proposed changes as inconsistent with our 2019 findings and recommendations, as well as the action of the House regarding paralegal membership in June 2019. As such, we have declined to recommend additional changes to these bylaw provisions.

Last, the Membership Committee asked us to review the Bylaws and consider new language relating to termination of membership upon the failure of a member to pay dues. The Committee observed:

> "The membership renewal season runs from early October through March. Throughout this period, NYSBA assesses renewal results and anticipates the number of additional invoices needed to achieve membership goals for the year. Typically, NYSBA sends 6 print invoices and 6 email invoices to members as part of the renewal membership campaign. Members who have not renewed are dropped from the membership rolls on or around April 1st. Bylaws III.6.A. specifies drops to occur "within one month after receipt of the second dues notice" should dues not be paid during that time. In light of the timeline of the membership campaign season, and the practical consideration of what is "notice" in an era of electronic communications and solicitations, the membership provisions of the Bylaws should be amended to offer flexibility with membership drops given activity in the marketplace." Memo to Bylaws Committee, September 30, 2021.

We concurred with the Committee on Membership's assessment of the issue with the current bylaw language and, as we studied the matter, concluded that there was an overall weakness in the provisions of the Bylaws relating to membership termination. Our work was also informed by questions raised by the Committee on Professional Discipline that, while not specifically referred to us, drew our attention to the fact that additional clarification of the subsections of Section 6 was needed.

The outcome of this more comprehensive review is a significant rewrite of many of the subsections in Article III, Section 6, which focuses on the various events upon which membership in the Association will be terminated, and how it can be restored.

In Section 6(A), we addressed the issue raised by the Committee on Membership by changing the termination event to one driven by a Notice from the Treasurer. It is no longer specifically a "second" notice, giving staff more flexibility in how they want to engage in dues collection activities before the Treasurer notifies the member that their membership is about to be terminated for non-payment. The new language now provides that membership terminates if

payment is not made within 30 days of the Treasurer's notice. An identical approach is incorporated into Section 6(B), which is the provision dealing with termination of membership for failing to pay an assessment.

Our committee's study of Section 6(C) led to the conclusion that it was addressing two different potential events and could benefit from edits treating those events separately. It was therefore split into subsections (C) and (D), the former dealing with removal of members by the House upon the recommendation of the Committee on Professional Discipline after a hearing held by that committee, and the latter dealing with termination of membership following disbarment or suspension by a disciplinary authority.[3] In both places, we further recommended the addition of language to clarify how a membership ended under the provision could be restored, either by a vote of the House (in the case of removals under subsection (C)) or by the end of a suspension/readmission (in the case of a removal under subsection (D)).

Our last revision was to Section E and merely adds that a termination of membership caused by the member's resignation is effective when delivered to the Executive Director or Secretary. This was implied by the existing language, but not expressly stated anywhere.

Based on the foregoing, the committee proposes the Bylaws amendments set forth below:

Article III, Section 1(D)(1):

III. MEMBERS AND AFFILIATES

* * *

D. Law Student Members.

1. Any law student in good standing, if not otherwise eligible for membership in this Association, may become a Law Student member by written application to the Executive Director, endorsed as to the applicant's good standing as above prescribed on behalf of the applicant's law school, and by payment of the annual dues of the current year, provided that the law school is an approved law school under the Rules of the Court of Appeals. A Law Student member shall cease to be such at ~~the end of any calendar year in which, for any reason other than graduation or service in the Armed Forces of the United States or in any statutory substitute for such service, the law student cases to be enrolled in good standing in an approved law school, provided that continuance of such membership because of service in the Armed Forces on the United States or in any statutory substitute for such service shall cease one year after the termination of such service if the Law Student member has not by that time again become a law student and met all qualifications for becoming a Law Student member~~: (a) the end of the eighteenth month after graduation; (b) the end of the eighteenth month after the end of service

[3] The Committee identified, but did not address, the circumstance of an attorney that is admitted in more than one jurisdiction, and, therefore, may be entitled to hold membership in another category under Article III even after their removal from Active Membership upon disciplinary action in New York. Under the Bylaws as written and proposed, an attorney suspended or disbarred in New York remains ineligible for Association membership until readmitted in New York.

in the Armed Forces of the United States or in any statutory substitute for such service, provided that the individual shall be eligible to continue as a Law Student Member if the individual again becomes a law student and meets all qualifications for becoming a Law Student Member; (c) such time as the individual becomes eligible for membership in the Association as an Active or Associate Member; or (d) such time as the law student ceases to be enrolled in good standing in an approved law school and does not continue to qualify as a Law Student member under (a) or (b) above. A Law Student member shall be exempt from dues while in service of the Armed Forces of the United States or in any statutory substitute for such service.

Article III, Section 6:

III. MEMBERS AND AFFILIATES

* * *

Section 6. Termination of Membership.

A. If any member fails to pay yearly dues within ~~one month after receipt of the second dues notice~~ the period designated by the Association for payment of dues, it shall be the duty of the Treasurer to send a ~~letter and~~ notice to the member stating that unless said dues are paid, ~~within one month thereafter~~ the member shall cease to be a member of the Association ~~and forfeit all rights in respect thereof~~. If the dues are not paid by the member within 30 days of the date of the Treasurer's notice, the member's membership shall thereupon terminate.

B. If any member fails to pay any assessment within ~~one month after receipt of the second notice~~ the period designated by the Association for payment of such assessment, it shall be the duty of the Treasurer to send a ~~letter and~~ notice to the member stating that unless said assessment is paid ~~within one month thereafter~~, the member shall cease to be a member of the Association ~~and shall forfeit all rights in respect thereof~~. If the assessment is not paid by the member within 30 days of the date of the Treasurer's notice, the member's membership shall thereupon terminate.

C. The House of Delegates may suspend or expel any member for misconduct in the member's relations to the Association, or to the profession, upon the recommendation of the Committee on Professional Discipline after a hearing held by that committee upon reasonable notice to such member to appear and present a defense. Any member suspended or expelled from membership under the terms of this paragraph may be reinstated as a member only by vote of the House of Delegates.

D. Any member shall automatically be removed from membership in the event of a final court order of disbarment or suspension of the member from the practice of law in New York State. ~~Any member suspended or expelled from~~

~~membership under terms of this paragraph may be reinstated as a member by vote of the House of Delegates, without any adjustment of dues.~~Any member suspended or expelled from membership under the terms of this paragraph may not be reinstated to any class of membership until the end of such suspension or upon their readmission to the practice of law in New York.

~~D~~**E.** Any member may resign from membership in the Association by submitting a resignation in writing to the Executive Director or Secretary of the Association, without any adjustment of dues. The resignation shall be effective upon receipt by the Executive Director or Secretary.

~~E~~**F.** All interest in the property of the Association of persons ceasing to be members by expulsion, resignation or otherwise shall thereupon vest absolutely in the Association.

PART THREE – ERRATA
Correction to Article IV, Section 7

An internal citation error was discovered by staff at Article IV, Section 7 in reference to the House of Delegates' role in the election of officers and vice-presidents should be there a vacancy in those positions. Specifically, Article IV, Section 7 currently references Article V, Section 3(K), which reads "Each member of the House of Delegates must be a member of the New York State Bar Association in good standing." A reading of the provision strongly suggests that the reference was intended to be to Article V, Section 3(L), which governs the filling of vacancies in the positions of elected delegates, the President-Elect, Vice-Presidents, Secretary, Treasurer, and the members-at-large of the Executive Committee.

To correct this internal citation error, a correction to Article IV, Section 7 of the Association's Bylaws is proposed as follows:

Article IV, Section 7:

IV. OFFICERS

* * *

Section 7. Death, Disability or Resignation. In the event of the death, resignation or total disability of the President, the President-Elect shall automatically succeed to the office of President for the unexpired term and the term next following. In the event of the death, resignation or total disability of the President-Elect, or in the event the President-Elect succeeds to the presidency as provided in this section, the President shall serve as Acting Chair of the House of Delegates until the vacancy in the office of President-Elect shall be filled by election of the House of Delegates following nomination of a candidate by the Nominating Committee. In advance of making such nomination, the Nominating Committee shall give appropriate notice of the vacancy and of the House of Delegates meeting at which the election is to be

held. The Nominating Committee shall file its report of a nominee with the Secretary at least 30 days in advance of the House of Delegates meeting at which the election is to be held, and the report shall be open to inspection by any member of the Association. Any 50 members of the Association may also nominate candidates for President-Elect by filing a petition signed by such members with the Secretary not later than ten days before the meeting at which the election is to take place. Nominations not made by the Nominating Committee or the membership in the manner prescribed shall not be considered or voted upon. The determination of total disability of the President or President-Elect shall be made by the House of Delegates and its decision thereon shall be final. Except as provided in Article V, ~~Section 3(K)~~ Article V, Section 3(L), a vacancy in any other office shall be filled by appointment of the House of Delegates.

CONCLUSION

Our committee proposes the foregoing amendments to the Association to implement the changes previously requested by the House of Delegates and the Committee on Diversity, Equity, and Inclusion, and to address other matters identified by the Membership Committee and this committee. We commend them to you for your consideration and subscription at the November 5, 2022, meeting of the House of Delegates. If subscribed, the above amendments will be presented for discussion and adoption at the 2023 Annual Meeting of the Association.

Respectfully submitted,

COMMITTEE ON BYLAWS
Robert T. Schofield, IV, Chair
Anita L. Pelletier, Vice Chair
Eileen E. Buholtz
David A. Goldstein
LaMarr J. Jackson
Steven G. Leventhal
A. Thomas Levin*
Joshua Charles Nathan
David M. Schraver
Justin S. Teff
Dena J. Wurman
Oliver C. Young
Executive Committee liaison: Richard C. Lewis
Staff liaison: Thomas J. Richards

*A. Thomas Levin dissented from that portion of the report implementing removal of the sunset clauses from the diversity seat provisions.

Exhibit A - Resolution and Report of the Committee on Diversity, Equity, and Inclusion - Adopted by the House of Delegates on June 18, 2022

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

COMMITTEE ON DIVERSITY, EQUITY & INCLUSION

Mirna M. Santiago
Co-Chair, Committee on Diversity, Equity & Inclusion

Violet E. Samuels
Co-Chair, Committee on Diversity, Equity & Inclusion

May 19, 2022

T. Andrew Brown, Esq., President
New York State Bar Association
1 Elk Street
Albany, NY 12207

Dear President Brown and members of the Executive Committee:

Committee on Diversity, Equity and Inclusion

Bylaws Resolution and Report

Bylaws V. House of Delegates. Section 3. Composition. H. Twelve delegates to be appointed by the President then in office from a range of racial and ethnic minority groups identified by the National Association for Law Placement. At least two and no more than four of such delegates shall be appointed from each Judicial Department, and all appointments shall be subject to confirmation by the Executive Committee. This subsection shall expire ten years from the date of amendment (January 31, 2014) and shall be removed from these Bylaws without further action of the Association. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, 2025.

Bylaws VII. Executive Committee. Section 1. Composition. F. 1. Eight members-at-large who shall be Active members of the Association. Not less than two of the members-at-large shall be selected from the First Judicial District. Two of the members-at-large shall be selected to further ethnic and racial diversity and may not be drawn from the same Judicial District. Ten years from the date of amendment (January 31, 2014), the provision for the two members-at-large selected to further ethnic and racial diversity shall expire and be removed from these Bylaws without further action of the Association, and the number of these members-at-large on the Executive Committee shall revert to six. Notwithstanding such expiration, the final term authorized under this provision shall be for a full two-year term, concluding May 31, 2025.

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association reaffirms its unwavering and longstanding commitment to increase racial and ethnic diversity within its leadership ranks based upon its firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large.

FURTHER RESOLVED, that the mission of the New York State Bar Association's Committee on Diversity, Equity and Inclusion is to promote the full and equal participation of attorneys of color and other diverse attorneys in the Association and in all sectors and at every level of the legal profession.

FURTHER RESOLVED, that the Association is made stronger and more capable of implementing change through the law when its membership reflects the diversity of the individuals and communities served by the legal profession.

FURTHER RESOLVED, that the subject bylaws provisions institutes a deliberate and thoughtful process to identify and recruit diverse members whose perspectives help inform and strengthen the Association's decisions and policies.

FURTHER RESOLVED, that the increased participation of attorneys of color in leadership positions also helps foster a welcoming environment for and serves as an incentive to diverse lawyers considering membership within the Association.

FURTHER RESOLVED, that the subject bylaws provisions promote the objectives approved by the Association in its adoption of the 2020 Diversity Plan which commits the Association to require diversity as an emphasis in all leadership nomination processes, including diversity among the decision-makers on the Nominating Committee.

RESOLVED, that consistent with these stated principles and commitments, the Association hereby approves the continuation of the bylaws provisions, without any sunset clause, to ensure that at least 12 members of the Association will be appointed by the President from underrepresented racial and ethnic groups to serve in the House of Delegates and that two

members-at-large of the Executive Committee of the Association shall be selected to further ethnic and racial diversity.

The mission of the New York State Bar Association's Committee on Diversity, Equity and Inclusion is to promote the full and equal participation of attorneys of color and other diverse attorneys in the Association and in all sectors and at every level of the legal profession. This resolution presented is consistent with the New York State Bar Association's unwavering and longstanding commitment to increase diversity within its membership and leadership ranks. Specifically, as stated in this Association's Diversity Plan adopted by the House of Delegates in January 2020, the NYSBA aims to "promote and advance the full and equal participation of attorneys of color and other diverse attorneys (including diversity based on gender, race, color, ethnic origin, national origin, religion, sexual orientation, gender identity and expression, age, and disability) in NYSBA."

The Diversity Plan specifically commits this Association to promote diversity within its leadership positions and its leadership development processes. Our Association made the commitment to require diversity as an emphasis in all leadership nomination processes, including diversity among the decision-makers on the Nominating Committee. The Association also committed to following the Mansfield Rule to ensure that at least 30% of leadership roles be filled by women and people of color.

The Association is made stronger and more capable of implementing change through law when its membership reflects the diversity of the individuals and communities served by the legal profession. The subject bylaws provisions have enabled the Association to successfully create pathways to increase the number of members from underrepresented racial and ethnic groups serving in leadership positions, which is consistent with this Association's firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large.

The bylaws provisions promote a deliberate and thoughtful process to identify and recruit diverse members whose perspectives help inform and strengthen the Association's decisions and policies. Permanently ensuring the increased participation of attorneys of color in leadership positions also helps foster a welcoming environment for and serves as an incentive to diverse lawyers considering membership within the Association.

The New York State Bar Association's commitment and hard work in the area of increasing diversity within its leadership ranks has strengthened our Association's decision-making processes and is responsive to the needs of our membership and the clients we serve. We have miles to go to truly embody the diversity principles that the Association stands for and to honor our commitment to ensure an equitable legal system. The continuation and permanency of these bylaws provisions is a necessary step to meet these objectives and to promote the future viability of our Association.

Respectfully Submitted,

Mirna M. Santiago & Violet E. Samuels

Mirna M. Santiago and Violet E. Samuels

Co-Chairs, Committee on Diversity, Equity,

and Inclusion

On behalf of the Committee

cc: Lillian M. Moy, Committee on Diversity, Equity and Inclusion
Hon. Helena Heath, Committee on Diversity, Equity and Inclusion
Duane G. Frankson, Committee on Diversity, Equity and Inclusion
Richard J. Washington, Committee on Diversity, Equity and Inclusion
Randye Bernfeld, Committee on Diversity, Equity and Inclusion
Peter John Herne, Committee on Diversity, Equity and Inclusion
Ernesto Guerrero, NYSBA Staff Liaison

Exhibit B - Committee on Bylaws - Comments on Resolution Proposed by the Committee on Diversity, Equity, and Inclusion - June 14, 2022

NEW YORK STATE BAR ASSOCIATION
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COMMITTEE ON BYLAWS

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June 14, 2022

Richard Lewis, Esq., Chair
House of Delegates
Hinman, Howard & Kattell, LLP
80 Exchange Street, PO Box 5250
Binghamton, New York 13902-5250

Re: Comments on Resolution Proposed by the Committee on Diversity, Equity, and Inclusion

Dear Dick:

On behalf of the Committee on Bylaws, I commend the efforts of the Committee on Diversity, Equity, and Inclusion in preparing a comprehensive report on this issue of paramount importance to the Association.

In reviewing the proposed resolution of being recommended to the House, our committee wishes to confirm the process that will be followed should the Resolution proposed by the Committee on Diversity, Equity and Inclusion be adopted. In the ordinary course, if the House of Delegates approves the final resolved paragraph of the resolution as presented by the Committee, our committee would undertake efforts to prepare the language of a proposed bylaws amendment to be presented to the House for subscription at its November meeting. Should that amendment be subscribed by a majority of the members of the House, the proposed amendment would be presented to the Membership of the Association at the Annual Meeting in January. We offer this summary to confirm that: (1) action on the resolution before the House in June does not, in and of itself, constitute an amendment of the bylaws, and (2) our committee may suggest other and/or additional language in consideration of this effort as part of its process.

For example, our committee previously shared its view, with the Special Committee on Association Structure and Operations, that a review of the Association's Diversity Plan and the history of the Association's efforts to grow and sustain diversity within all aspects of its existence shows that, while the Association has adopted and later restated a strong policy in favor of diversity, that policy is not adequately reflected in the bylaws. We feel that amending the bylaws to do so is an important recognition of the Association's focus on this critical goal. An amendment

to accomplish this would be relatively simple[1] and could be included as part of or in tandem with any revisions to the bylaws that the House recommends.

In conclusion, our committee stands ready to perform its role to study and propose amendments to the Bylaws should the proposed Resolution of the Committee on Diversity, Equity and Inclusion be adopted by the House. Our committee's work would then be presented to the House for the November meeting.

Very truly yours,

Robert Schofield

Robert T. Schofield
Chair

cc: Committee on Diversity, Equity, and Inclusion

[1] Although the Bylaws Committee has not yet fully studied the issue, the inclusion of a clearly stated commitment to diversity in Article II Purposes, perhaps as a second, standalone paragraph, would be one suggestion for a potential amendment.

Exhibit C - NYSBA Diversity Plan - Adopted by the House of Delegates on January 31, 2020

New York State Bar Association

Diversity Plan

Approved by the New York State Bar
Association House of Delegates on Jan 31, 2020

Commitment

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

History

The Association's House of Delegates adopted a diversity policy on November 8, 2003, which was amended by passage at the House of Delegates on January 31, 2020, to read:

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

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

The summary below provides a brief history of the Diversity Report Card's development and its expanding scope – it initially covered only Sections but now includes NYSBA executive voluntary leadership, including governance and its Nominating Committee. The report continues to highlight the need for raising the level of diversity awareness within the profession and increase opportunities for attorneys to serve in leadership positions.

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

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

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

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

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

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

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

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

Purpose and Goals

Purpose

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

Goals

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

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

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

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

6. Special emphasis on diversity among the Nominating Committee membership (see item "C" below).

C. Promote and track diversity in the NYSBA's leadership nominations and leadership development processes.
   1. Require diversity as an emphasis in all leadership nominations processes, including diversity among the decision-makers on the Nominating Committee.
   2. Require diversity as an emphasis in the Presidential appointments process, including diversity among the appointments committee members (such diversity to be measured, at least in part, by consideration of data that indicates the diversity of Association membership).
   3. Urge Sections to emphasize diversity in leadership training and development programs.
   4. Build diversity-related sessions into the annual Section Leaders Conference and all leadership training efforts.

D. Urge adoption by all entities within the NYSBA of entity-specific diversity plans that are consistent with the objectives of this Diversity Plan, or their review and appropriate modification of existing diversity plans.
   1. Strongly encourage periodic review and updating of entity diversity plans.
   2. Recommend designation of an officer or other entity leader with responsibility for ensuring implementation of diversity plans.
   3. Advocate wide dissemination of entity diversity plans, as with the NYSBA Diversity Plan.
   4. Urge the compiling of uniform statistics and information on diversity participation by each entity and member. Association leadership shall encourage each leader and member to update their demographics here: https://members.nysba.org/MyNYSBA/Profile/Profile.aspx?ProfileCCO=6#/ProfileCCO.

E. Promote diversity in NYSBA membership. Marketing and membership solicitation materials should be welcoming to diverse populations, including showing adequate representation of diverse populations in such materials

   1. The NYSBA should compile and disseminate uniform statistics and other information on lawyers and law students – both NYSBA members and non-members – for each of the major diversity categories and target non-NYSBA members for membership solicitations. The membership committee shall consider introductory joint memberships with diverse specialty associations.
   2. With assistance from the Association's Office of Bar Services, NYSBA entities are urged to engage in active marketing, recruitment and outreach efforts to affinity bars and other professional organizations, legal communities, and law schools to promote diversity.
   3. NYSBA entities shall have liaison relationships with the diversity-focused entities of the Association (such as the Standing Committee on Diversity and Inclusion) and appoint persons who will be active liaisons.

F. Promote diversity in CLE and other programming, both live and virtual.

1. Implement strategic actions to improve diversity among program chairs, speakers, moderators, and attendees.
2. Ensure program content appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
3. Urge NYSBA entities to explore partnering or co-sponsoring opportunities with affinity bars and other organizations that can contribute to diversity.
4. Ensure program venues and materials are accessible to participants with disabilities.
5. Urge NYSBA entities to use program locations and venues, as well as social media, to enhance opportunities for participation by diverse lawyers and law students (e.g., locations that may minimize cost barriers; venues that may increase diverse community participation, like law schools with a diverse student body, affinity bar association locations; and social networking sites that may increase marketing efforts to diverse communities).

G. Promote diversity in NYSBA publications (hard copy and electronic).
1. Implement strategic actions to increase diversity in NYSBA members responsible for editorial policy and content of publications.
2. Ensure content of publications appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
3. Ensure content of publications is accessible to persons with disabilities.

H. Promote diversity in NYSBA entities' "marquee" events (e.g., annual awards dinners, luncheons, receptions), including diversity of:
1. Speakers,
2. Award recipients,
3. Planning and award nominations committees.
4. Report in Section and Committee success in diversity of speakers annually to the Executive Committee.

I. Enhance the current tracking and reporting of progress in diversity efforts, including:
1. Enhanced and accurate reporting of NYSBA diversity members in leadership roles in the biennial Diversity Report Card, which will urge more robust participation and tracking by NYSBA entities; encourage greater promotion of the reporting process by NYSBA leadership and accountability for entities that require significant improvement in their diversity efforts.
2. Ensure widespread dissemination of the biennial Diversity Report Card among NYSBA leadership and throughout NYSBA entities, providing accessible formats for persons with disabilities and through posting on the NYSBA website.

J. Urge NYSBA entities to develop or enhance mentoring programs that target young lawyers and law students and are designed to advance diversity within the Association.

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

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

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

N. Follow the Mansfield Rule (see https://www.diversitylab.com/pilot-projects/mansfield-rule/) with respect to leadership positions in all NYSBA entities, e.g. consider at least 50% diversity candidates for all positions, with the goal of ultimately reaching 30% diversity in leadership across the board.

Recommendations

Implementation Recommendation 1: *That the Association designate a principal staff person to provide oversight of the implementation of this Diversity Plan. Each year, that person will develop and secure approval of specific annual implementation steps with a corresponding timeline, budget and assessment procedure.*

The Association should also consider a presidentially appointed member on its Executive Committee as a diversity liaison on behalf of the Committee.

The Association shall take action as discussed above to improve submission of all demographic information by 10% more members and 25% more Association leaders at every level (section, committee, HOD, Executive committee) by January 31, 2021.

Implementation Recommendation 2*: That the NYSBA review the composition of the House of Delegates and its Nominating Committee, including the number of positions reserved for women, minorities, lesbian, gay, bisexual and transgender individuals, and persons with disabilities, and the manner of selecting the individuals for those positions, to ensure that the purpose of this Diversity Plan is being served in the nominations process.*

Implementation Recommendation 3: *That the NYSBA consider creating an event, award or other form of recognition to honor on an annual basis the NYSBA entity that has shown outstanding leadership in diversity-related membership initiatives and other diversity efforts.*

Implementation Recommendation 4*: That the NYSBA present at least one Presidential Showcase CLE program focused on diversity at each Annual Meeting.*

Implementation Recommendation 5: *That the NYSBA prepare a Diversity Impact Statement as recommended in the 2010 ABA Presidential "Next Steps" Report (recommendation E.2. for Bar Associations) for every Executive Committee action item.*

Implementation Recommendation 6: *That the NYSBA coordinate a centralized and accessible data collection and reporting center for diversity information that can be readily used to assess diversity data with stated goals. See above re: our goals for improved data collection.*

Implementation Recommendation 7: *That NYSBA leadership and Sections Caucus leadership express to Sections the necessity of incepting Diversity Committees for all sections and appointing liaisons to the standing NYSBA Committee on Diversity and Inclusion.*

Implementation Recommendation 8: *That all NYSBA entities create and submit personalized diversity plans by January 31, 2021.*

Exhibit D - Letter from Committee on Membership to Committee on Bylaws - September 30, 2021

FROM: The Membership Committee
TO: Robert T. Schofield, IV, Esq., Chair
Anita L. Pelletier, Esq., Vice Chair
CC: Kathy Baxter
RE: Membership Bylaws Updates
DATE: September 30, 2021

The Committee on Membership met on July 15, 2021, to review and discuss the membership provisions of the Bylaws. With a unanimous vote, the Committee identified certain provisions of the Bylaws which warrant review and amendment given current Association operating practices. The reviewed provisions and recommendations are as follows:

III. Members and Affiliates - Section 1.D. - Law Student Members (page 2)
Law students typically graduate in December/May and take the Bar Exam in July/February. As law students prepare for the Bar Exam, they require continued membership with NYSBA to access certain member benefits such as Kaplan Bar Prep and Casebriefs, which is an open platform of law school case briefs designed for law students to use to assist with their case analysis and briefing. If NYSBA drops law students as members upon graduation from law school, the Association is dropping them when they need membership the most. It is important for the law students to have continued membership for at least 12 to 18 months post-graduation to allow them to study, pass the Bar Exam, and become admitted to the practice of law. The Membership Committee proposes the following change in Bylaws text:

> *Any law student in good standing, if not otherwise eligible for membership in this Association, may become a Law Student member by written application to the Executive Director, endorsed as to the applicant's good standing as above prescribed on behalf of the applicant's law school, and by payment of the annual dues of the current year, provided that the law school is an approved law school under the Rules of the Court of Appeals. A Law Student member shall cease to be such <u>at the end of the eighteenth month</u> after graduation or service in the Armed Forces of the United States or in any statutory substitute for such service, the law student ceases to be enrolled in good standing in an approved law school, provided that continuance of such membership because of service in the Armed Forces of the United States or in any statutory substitute for such service shall cease one year after the termination of such service if the Law Student member has not by that time again become a law student and met all qualifications for becoming a Law Student member. A Law Student member shall be exempt from dues while in service of the Armed Forces of the United States or in any statutory substitute for such service.*

Section 2. A. 2. - Non-attorney Affiliates (page 3)
Beginning in 2022, NYSBA will recruit paralegal members. Amendment of the Bylaws is necessary to allow NYSBA to recruit paralegal members with ease and efficiency. Additionally, NYSBA will assess paralegal membership dues, which fall under the Affiliate dues category, to ensure we are pricing membership appropriately to increase NYSBA's membership numbers and overall dues revenue. The Membership Committee proposes the following amendment to better clarify the parameters of paralegal membership:

A. Any person:

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

2. who is a legal assistant or paralegal, qualified by education, training or work experience, and who performs specifically delegated substantive legal work for which an attorney is responsible,

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

Section 6. A. and B. - Termination of Membership (page 4)

The membership renewal season runs from early October through March. Throughout this period, NYSBA assesses renewal results and anticipates the number of additional invoices needed to achieve membership goals for the year. Typically, NYSBA sends 6 print invoices and 6 email invoices to members as part of the renewal membership campaign. Members who have not renewed are dropped from the membership rolls on or around April 1st. Bylaws III.6.A. specifies drops to occur "within one month after receipt of the second dues notice" should dues not be paid during that time. In light of the timeline of the membership campaign season, and the practical consideration of what is "notice" in an era of electronic communications and solicitations, the membership provisions of the Bylaws should be amended to offer flexibility with membership drops given activity in the marketplace. The Membership Committee proposes the following amendment in Bylaws text:

Section 6. Termination of Membership.

A. If any member fails to pay yearly dues by the end of the designated renewal period, they will receive notice that their membership has been terminated, and they will forfeit all rights in respect thereof.

B. If any member fails to pay any assessment within the designated renewal period, they will receive notice that their membership has been terminated, and they will forfeit all rights in respect thereof.

The Committee on Membership requests that the Committee on Bylaws review and amend the provisions of the Bylaws identified above to better reflect current Association operating practices.

***

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #3

REQUESTED ACTION: Approval of the proposed amendments to the Rules of the House of Delegates.

In 1973, when the House of Delegates was formed, it adopted Rules to govern the conduct of meetings. The rules were last amended in 1991. Given the length of time since the last review and changes in how meetings are conducted, including the development of remote and hybrid meetings, a review of the Rules was undertaken for potential changes.

The report briefly outlines the proposed amendments to the Rules and justification for the proposed amendments. A redlined draft of the proposed amended Rules is attached as Exhibit "A." A clean, non-redlined draft of the proposed amended Rules is attached as Exhibit "B." The current version of the Rules, as amended in 1991, is attached as Exhibit "C."

The report will be presented by Justin S. Teff, a member of the Committee on Bylaws subcommittee which was tasked with reviewing the Rules.

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

MEMORANDUM

To: Members of the House of Delegates
Date: October 7, 2022
Re: Proposed Amendments to the Rules of the House of Delegates

The Rules of the House of Delegates were last amended in 1991. These amendments to the Rules are proposed to better reflect current practices at meetings of the House and ensure that the Rules continue to align with the Bylaws, specifically those provisions relating to remote meetings and remote notice of meetings.

The following memo briefly outlines the proposed amendments to the Rules and justification for the proposed amendments.

A redlined draft of the proposed amended Rules is attached as Exhibit "A." A clean, non-redlined draft of the proposed amended Rules is attached as Exhibit "B." The current version of the Rules, as amended in 1991, is attached as Exhibit "C."

Section 1(a) and General Changes Throughout

The existing version of the Rules utilizes varying terminology to refer to the presiding officer of the House (e.g., "chair," "President-Elect") at times resulting in a lack of clarity. The proposed revision attempts in a general sense to employ more consistent language throughout the document and utilize the same in setting forth the line of succession as to presiding officer (President-Elect, President, senior Vice-President, etc.) in Section 1(a).

Section 1(b) and (c)

The existing section 1(b) assigns two mandatory obligations to the presiding officer: (1) ensure "meetings are conducted in an orderly manner," and (2) "[d]ecide questions of order and procedure." The proposed revision leaves intact these mandatory responsibilities but refines them with four discretionary capabilities in an effort to ensure that the House at its meetings may efficiently work through the business at hand in a reasonably unimpeded manner, yet with due regard for the participation rights of the delegates. These include the ability to change the order of business, limit the time for debate, and call for a vote, as well as a catch-all provision permitting "reasonable steps" to advance the meeting.

Section 2(b) and (c)

The existing version permits for the calling of a "special meeting" of the House with relaxed notice requirements if the calling officer determines that there is an "emergency." The proposed version is meant to eliminate the above distinction and simply denote that a meeting of the House other than the four mandated by section 2(a) may be called at any time by the listed officers with a standardized notice procedure that has no emergency exception. In cases of genuine emergency, it was deemed sufficient for the officers and Executive Committee to possess authority to take various necessary actions on behalf of the organization.

The proposal also renumbers existing subsection (c) as paragraph four of subsection (b) and expands the reconsideration limitation on the Secretary's mandate to call a meeting at the request of 25 percent of the delegates from "the last previous meeting" to the "previous twelve meetings" (approximately three years). This expands the existing limitation but falls short of the ABA Rules' more stringent requirement. The revision is meant to afford a reasonable balance between the House's obligation to consider what its delegates deem important business and avoiding repetitious and/or fruitless consideration of matters previously raised and rejected by the House.

The new proposed subsection (c) is also updated to accord with modern technology and practices and reflect that notice of a meeting may be transmitted by the Secretary via regular mail, e-mail, or other form of electronic communication.

Section 3

This section has been generally updated to utilize consistent language in referring to the presiding officer as well as provide for modern communication methods relative to notice requirements. Revised subsection (h) is updated to reflect that the newly revised version of Robert's Rules (12th ed.) shall govern procedure, unless in conflict with a provision of the Rules or Bylaws, in which case the latter control.

The proposed revision also contains several substantive elements that seek to promote efficiency and order within the context of House meetings as well as robust yet judicious debate. New subsection (c) inserts a requirement that delegates provide certain notice to the presiding officer should they intend to introduce a matter of wholly new business or make a motion to table a report or resolution scheduled for consideration. Here the intent is to give all parties a fair opportunity for due consideration prior to the meeting, decreasing the likelihood of haphazard handling at the meeting itself. The subsection does permit the presiding officer discretion to waive this requirement.

New subsection (d) gives the presiding officer the authority to limit debate/comment on a pending matter to no more than three speakers if no opposition to the pending matter is voiced amongst the delegates. This will hopefully preserve valuable meeting time when no true disagreement exists in the House.

Revised subsection (e) reduces the time a delegate may speak on a matter from ten minutes to three minutes, again meant to preserve time at meetings and efficiently advance the agenda to its conclusion prior to the adjournment of the meeting. This requirement may be waived upon the consent of the presiding officer, or a majority vote of the delegates present at the meeting.

Revised subsection (g) updates the voting rules to reflect modern technology and practices and the advent of remote participation via videoconference software. The subsection provides that voting on matters of House business is permitted electronically through the relevant software, and for those delegates present on the floor, the presiding officer may call for the remainder of the vote *viva voce*, by division of the House, or anonymous written ballot.

Existing Section 4 is eliminated as unnecessary given that membership in the House is determined pursuant to the Bylaws.

Exhibit A - Redlined Draft of Proposed Amendments to the Rules of the House of Delegates

NEW YORK STATE BAR ASSOCIATION
RULES OF THE HOUSE OF DELEGATES
ADOPTED JANUARY 24, 1973; AMENDED APRIL 13, 1991; PROPOSED AMENDMENTS SEPTEMBER 2022

1. Presiding Officer

(a) The ~~Chair~~ President-Elect shall ~~preside~~ be the Presiding Officer ~~at all meetings~~ of the House. In the absence of the ~~Chair~~President-Elect, the President shall preside, and in the absence of the President and President-Elect, the Vice-President with seniority of membership shall preside. In the absence of the President, the President-Elect, and all Vice-Presidents, the senior member of the House ~~of Delegates~~ shall preside.

(b) The ~~presiding~~ Presiding ~~officer~~ Officer shall:
(1) ~~Insure~~ Ensure that meetings are conducted in an orderly manner.
(2) Decide questions of order and procedure.

(c) The Presiding Officer may:
(1) Change the order of business at any meeting.
(2) Limit the time of debate or discussion on any matter of business.
(3) Call for a vote on any matter before the House.
(4) Take other reasonable steps to advance the efficiency of the meeting.

2. Meetings of the House of Delegates

(a) Unless otherwise ordered by the House, regular meetings shall be held at the time and place designated by the ~~Chair~~Presiding Officer, but in no event less than four times in each year including one meeting to be held in conjunction with the Annual Meeting of the Association.

(b) ~~A~~ Any ~~special~~ meeting of the House of Delegates may be called at any time, subject to the notice requirements of the Bylaws and subsection c below, by:
(1) The ~~Chair of the House~~President-Elect
(2) The President
(3) The Executive Committee
(4) The Secretary upon the written request of at least 25% of the delegates; provided, however, that the Secretary shall not be required to call such meeting to consider any matter which was considered and acted upon at a meeting of the House held within the previous twelve meetings.

~~(c) A special meeting of the House of Delegates shall be called by the Chair or the President upon the request in writing of at least 25% of the delegates; provided, however, that the Chair or President shall not be required to call a special meeting to consider any matter which was considered and acted upon at the last previous meeting of the House.~~

(~~d~~c) ~~Except in case of emergency, notification~~ Notice of any ~~regular or special~~ meeting of the House of Delegates shall be sent by the Secretary ~~of the Association~~ not less than 15 days prior to the time fixed for such meeting. Notice of any meeting shall be deemed ~~to be sufficiently given~~sufficient when written notice of the time and place thereof is ~~mailed~~ given by mail, email, or other electronic transmission by the Secretary to each member of the House of Delegates on or before the 15th day prior to such meeting. ~~In case the Chair of the House, the President, or the Executive Committee determines there is an emergency, a special meeting of the House may be called upon six days prior notice given by mail, or four days prior notice given by telegraph or telephone to each member of the House of Delegates.~~

3. Order of Business

(a) The ~~Chair, or in the absence of the Chair, the presiding~~ Presiding ~~officer~~ Officer shall determine the order and priority of business at a meeting. ~~Except in case of emergency, a~~A written agenda shall be ~~mailed~~ sent by mail, email, or other electronic transmission by the Secretary ~~of the Association~~ to each delegate not less than 15 days prior to the time fixed for the meeting, but additions or deletions may be made ~~in~~ to the agenda by the ~~Chair of the House~~President-Elect, the President, or the Executive Committee.

(b) Unless permitted by the ~~presiding~~ Presiding ~~officer~~Officer, no resolution may be proposed by a delegate for action at a meeting unless such resolution has been submitted~~,~~ in writing to the ~~Chair~~ Presiding Officer and the delegates~~,~~ at least 15 days prior to such meeting.

(c) Delegates ~~are required to~~shall notify the Presiding Officer, in writing, by the end of the business ~~on~~day ~~the~~ Wednesday prior to the meeting should they intend to introduce a matter of new business or make a motion to table a report or resolution, unless ~~there is good cause in which case notice should be given as soon as practical, and~~ the Presiding Officer ~~may make a~~ determine~~sation as to whether~~ that the motion will be heard without such notice ~~or moved to a future meeting~~.

(d) If no member has risen in opposition or requested to speak in opposition to a report or resolution, then the Presiding Officer may invoke the rules of limited debate, limiting comments to no more than three speakers.

(~~c~~e) With the exceptions noted below, no delegate shall speak more than ~~ten~~ three minutes at one time or more than once at the same session upon the same question unless such member obtains the consent of the ~~presiding~~ Presiding ~~officer~~ Officer or ~~the~~ a majority of the delegates present at the meeting. The person presenting the matter under discussion shall have the right to close the debate on that matter. The ~~Chair~~ Presiding Officer may ~~impose further limitations upon~~ adjust the length of time for making oral presentations if in his or her judgment the conduct of the business of the House so requires, but such limitations may be removed by majority vote of the delegates present at the meeting.

(~~d~~f) Without limitation on the other powers of the House, the House may by majority vote refer any matter coming before it to the Executive Committee or ~~another~~ other committee, section, or ~~action unit~~task force of the Association for further consideration.

(~~e~~g) Voting shall be by voice vote, ~~or, if the delegate is participating remotely, by polling through the videoconference software,~~ unless the ~~presiding~~ Presiding ~~officer~~ Officer directs a ~~division~~division of the House or ~~a~~an anonymous written ballot or, if the delegate is participating remotely, by polling through the videoconference software.

(~~f~~h) Robert's Rules of Order, Newly Revised shall govern meetings of the House, except as otherwise provided in these Rules or the Bylaws.

~~4. Membership~~

~~(a) Delegates to the House of Delegates shall be determined in accordance with Article V, Sections 3 and 4 of the Bylaws.~~

~~(b) Section delegates, as set forth in Article V, Section 3, paragraph D of the Bylaws, shall be chosen according to procedures established by the sections and may, but need not be officers of their respective sections.~~

~~(c) Delegates from those judicial districts in which there are two or more county bar associations in counties having less than 100 members each of the New York State Bar Association, as set forth in Article V, Section 3, paragraph E, subparagraph 5 of the Bylaws, shall be chosen by the governing bodies of such county bar associations in a manner mutually agreed upon by such bar associations. In the absence of such mutual agreement, the House of Delegates shall determine the manner in which the delegates shall be chosen.~~

~~5~~4. Persons in attendance at meetings of the House of Delegates

Meetings of the House shall be open to attendance by members of the Association unless the Executive Committee or the delegates vote to exclude non-delegates from a specified meeting. The ~~presiding~~ Presiding ~~officer~~ Officer of the meeting in his or her discretion may permit attendance at meetings of the House of Delegates by members of the press or members of the public. No non-delegate shall be heard by the House unless requested to speak by the ~~presiding~~ Presiding ~~officer~~ Officer of the meeting or upon the vote of two-thirds of the delegates present at the meeting, provided that such non-delegate shall first disclose the representative nature of his or her appearance, including the name of any client or principal whose interests the non-delegate may represent.

~~6~~5. Amendments

The Rules of the House of Delegates may be amended at any meeting of the House by a vote of two-thirds of those present, provided that 15 days previous notice in writing of the proposed amendment shall have been given to the delegates.

Exhibit B - Clean, Non-Redlined Draft of Proposed Amendments to the Rules of the House of Delegates

NEW YORK STATE BAR ASSOCIATION
RULES OF THE HOUSE OF DELEGATES
ADOPTED JANUARY 24, 1973; AMENDED APRIL 13, 1991; PROPOSED AMENDMENTS SEPTEMBER 2022

1. Presiding Officer

(a) The President-Elect shall be the Presiding Officer of the House. In the absence of the President-Elect, the President shall preside, and in the absence of the President and President-Elect, the Vice-President with seniority of membership shall preside. In the absence of the President, the President-Elect, and all Vice-Presidents, the senior member of the House shall preside.

(b) The Presiding Officer shall:
(1) Ensure that meetings are conducted in an orderly manner.
(2) Decide questions of order and procedure.

(c) The Presiding Officer may:
(1) Change the order of business at any meeting.
(2) Limit the time of debate or discussion on any matter of business.
(3) Call for a vote on any matter before the House.
(4) Take other reasonable steps to advance the efficiency of the meeting.

2. Meetings of the House of Delegates

(a) Unless otherwise ordered by the House, regular meetings shall be held at the time and place designated by the Presiding Officer, but in no event less than four times in each year including one meeting to be held in conjunction with the Annual Meeting of the Association.

(b) Any meeting of the House of Delegates may be called at any time, subject to the notice requirements of the Bylaws and subsection c below, by:
(1) The President-Elect
(2) The President
(3) The Executive Committee
(4) The Secretary upon the written request of at least 25% of the delegates; provided, however, that the Secretary shall not be required to call such meeting to consider any matter which was considered and acted upon at a meeting of the House held within the previous twelve meetings.

(c) Notice of any meeting of the House of Delegates shall be sent by the Secretary not less than 15 days prior to the time fixed for such meeting. Notice of any meeting shall be deemed sufficient when written notice of the time and place thereof is given by mail, email, or other electronic transmission by the Secretary to each member of the House of Delegates on or before the 15th day prior to such meeting.

3. Order of Business

(a) The Presiding Officer shall determine the order and priority of business at a meeting. A written agenda shall be sent by mail, email, or other electronic transmission by the Secretary to each delegate not less than 15 days prior to the time fixed for the meeting, but additions or deletions may be made to the agenda by the President-Elect, the President, or the Executive Committee.

(b) Unless permitted by the Presiding Officer, no resolution may be proposed by a delegate for action at a meeting unless such resolution has been submitted in writing to the Presiding Officer and the delegates at least 15 days prior to such meeting.

(c) Delegates shall notify the Presiding Officer, in writing, by the end of the business day Wednesday prior to the meeting should they intend to introduce a matter of new business or make a motion to table a report or resolution, unless the Presiding Officer determines that the motion will be heard without such notice.

(d) If no member has risen in opposition or requested to speak in opposition to a report or resolution, then the Presiding Officer may invoke the rules of limited debate, limiting comments to no more than three speakers.

(e) With the exceptions noted below, no delegate shall speak more than three minutes at one time or more than once at the same session upon the same question unless such member obtains the consent of the Presiding Officer or a majority of the delegates present at the meeting. The person presenting the matter under discussion shall have the right to close the debate on that matter. The Presiding Officer may adjust the length of time for making oral presentations if in his or her judgment the conduct of the business of the House so requires, but such limitations may be removed by majority vote of the delegates present at the meeting.

(f) Without limitation on the other powers of the House, the House may by majority vote refer any matter coming before it to the Executive Committee or other committee, section, or task force of the Association for further consideration.

(g) Voting shall be by voice vote, unless the Presiding Officer directs a division of the House or an anonymous written ballot or, if the delegate is participating remotely, by polling through the videoconference software.

(h) Robert's Rules of Order, Newly Revised shall govern meetings of the House, except as otherwise provided in these Rules or the Bylaws.

4. Persons in attendance at meetings of the House of Delegates

Meetings of the House shall be open to attendance by members of the Association unless the Executive Committee or the delegates vote to exclude non-delegates from a specified meeting. The Presiding Officer of the meeting in his or her discretion may permit attendance at meetings of the House of Delegates by members of the press or members

of the public. No non-delegate shall be heard by the House unless requested to speak by the Presiding Officer of the meeting or upon the vote of two-thirds of the delegates present at the meeting, provided that such non-delegate shall first disclose the representative nature of his or her appearance, including the name of any client or principal whose interests the non-delegate may represent.

5. Amendments

The Rules of the House of Delegates may be amended at any meeting of the House by a vote of two-thirds of those present, provided that 15 days previous notice in writing of the proposed amendment shall have been given to the delegates.

Exhibit C - Rules of the House of Delegates as amended in 1991

NEW YORK STATE BAR ASSOCIATION
RULES OF THE HOUSE OF DELEGATES
ADOPTED JANUARY 24, 1973; AMENDED APRIL 13, 1991

1. Presiding Officer

(a) The Chair shall preside at all meetings of the House. In the absence of the Chair, the President shall preside, and in the absence of the President and President-Elect, the Vice-President with seniority of membership shall preside. In the absence of the President, the President-Elect and all Vice-Presidents, the senior member of the House of Delegates shall preside.

(b) The presiding officer shall:
  (1) Insure that meetings are conducted in an orderly manner.
  (2) Decide questions of order and procedure.

2. Meetings of the House of Delegates

(a) Unless otherwise ordered by the House, regular meetings shall be held at the time and place designated by the Chair, but in no event less than four times in each year including one meeting to be held in conjunction with the Annual Meeting of the Association.

(b) A special meeting of the House of Delegates may be called at any time by:
  (1) The Chair of the House
  (2) The President
  (3) The Executive Committee

(c) A special meeting of the House of Delegates shall be called by the Chair or the President upon the request in writing of at least 25% of the delegates; provided, however, that the Chair or President shall not be required to call a special meeting to consider any matter which was considered and acted upon at the last previous meeting of the House.

(d) Except in case of emergency, notification of any regular or special meeting of the House of Delegates shall be sent by the Secretary of the Association not less than 15 days prior to the time fixed for such meeting. Notice of any meeting shall be deemed to be sufficiently given when written notice of the time and place thereof is mailed by the Secretary to each member of the House of Delegates on or before the 15th day prior to such meeting. In case the Chair of the House, the President, or the Executive Committee determines there is an emergency, a special meeting of the House may be called upon six days prior notice given by mail, or four days prior notice given by telegraph or telephone to each member of the House of Delegates.

3. Order of Business

(a) The Chair, or in the absence of the Chair, the presiding officer shall determine the order and priority of business at a meeting. Except in case of emergency, a written agenda shall be mailed by the Secretary of the Association to each delegate not less than 15 days prior to the time fixed for the meeting, but additions or deletions may be made in the agenda by the Chair of the House, the President, or the Executive Committee.

(b) Unless permitted by the presiding officer, no resolution may be proposed by a delegate for action at a meeting unless such resolution has been submitted, in writing to the Chair and the delegates, at least 15 days prior to such meeting.

(c) With the exceptions noted below, no delegate shall speak more than ten minutes at one time or more than once at the same session upon the same question unless such member obtains the consent of the presiding officer or the majority of the delegates present at the meeting. The person presenting the matter under discussion shall have the right to close the debate on that matter. The Chair may impose further limitations upon the length of time for making oral presentations if in his or her judgment the conduct of the business of the House so requires, but such limitations may be removed by majority vote of the delegates present at the meeting.

(d) Without limitation on the other powers of the House, the House may by vote refer any matter coming before it to the Executive Committee or another committee, section or action unit of the Association for further consideration.

(e) Voting shall be by voice vote unless the presiding officer directs a division or a written ballot.

(f) Roberts Rules of Order Revised shall govern meetings of the House, except as otherwise provided in these Rules or the Bylaws.

4. Membership

(a) Delegates to the House of Delegates shall be determined in accordance with Article V, Sections 3 and 4 of the Bylaws.

(b) Section delegates, as set forth in Article V, Section 3, paragraph D of the Bylaws, shall be chosen according to procedures established by the sections and may, but need not be officers of their respective sections.

(c) Delegates from those judicial districts in which there are two or more county bar associations in counties having less than 100 members each of the New York State Bar Association, as set forth in Article V, Section 3, paragraph E, subparagraph 5 of the Bylaws, shall be chosen by the governing bodies of such county bar associations in a manner mutually agreed upon by such bar associations. In the absence of such

mutual agreement, the House of Delegates shall determine the manner in which the delegates shall be chosen.

5. Persons in attendance at meetings of the House of Delegates

Meetings of the House shall be open to attendance by members of the Association unless the Executive Committee or the delegates vote to exclude non-delegates from a specified meeting. The presiding officer of the meeting in his or her discretion may permit attendance at meetings of the House of Delegates by members of the press or members of the public. No non-delegate shall be heard by the House unless requested to speak by the presiding officer of the meeting or upon the vote of two-thirds of the delegates present at the meeting, provided that such non-delegate shall first disclose the representative nature of his or her appearance, including the name of any client or principal whose interests the non-delegate may represent.

6. Amendments

The Rules of the House of Delegates may be amended at any meeting of the House by a vote of two-thirds of those present, provided that 15 days previous notice in writing of the proposed amendment shall have been given to the delegates.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

Attached are the Operating Budget, Statement of Financial Position, Statements of Activities, Statements of Activities (continued) and Capital Items Approved and Purchased for the period ending September 30, 2022.

The report will be presented by Association treasurer Domenick Napoletano.

NEW YORK STATE BAR ASSOCIATION
2022 OPERATING BUDGET
NINE MONTHS OF CALENDAR YEAR 2022

REVENUE

	2022 BUDGET	UNAUDITED RECEIVED 9/30/2022	% RECEIVED 9/30/2022	2021 BUDGET	UNAUDITED RECEIVED 9/30/2021	% RECEIVED 9/30/2021
MEMBERSHIP DUES	9,372,690	8,957,575	95.57%	8,764,295	9,285,855	105.95%
SECTIONS:						
Dues	1,219,400	1,104,973	90.62%	1,200,000	1,164,969	97.08%
Programs	2,841,555	960,475	33.80%	1,733,315	466,531	26.92%
INVESTMENT INCOME	486,225	312,083	64.18%	494,420	275,660	55.75%
ADVERTISING	218,000	219,683	100.77%	183,000	201,078	109.88%
CONTINUING LEGAL EDUCATION	2,950,000	1,574,330	53.37%	2,950,000	1,954,386	66.25%
USI AFFINITY PAYMENT	1,912,000	1,500,000	78.45%	2,154,000	1,607,733	74.64%
ANNUAL MEETING	400,000	444,011	111.00%	276,225	489,977	177.38%
HOUSE OF DELEGATES & COMMITTEES	47,500	44,519	93.72%	27,000	6,902	25.56%
PUBLICATIONS, ROYALTIES AND OTHER	213,500	229,489	107.49%	210,700	160,170	76.02%
REFERENCE MATERIALS	1,247,000	704,301	56.48%	1,300,000	733,456	56.42%
TOTAL REVENUE	**20,907,870**	**16,051,439**	**76.77%**	**19,292,955**	**16,346,717**	**84.73%**

EXPENSE

	2022 BUDGET	UNAUDITED EXPENDED 9/30/2022	% EXPENDED 9/30/2022	2021 BUDGET	UNAUDITED EXPENDED 9/30/2021	% EXPENDED 9/30/2021
SALARIES & FRINGE	8,588,946	6,265,873	72.95%	8,334,264	5,779,676	69.35%
BAR CENTER:						
Rent	-	-	0.00%	284,000	208,066	73.26%
Building Services	342,000	259,208	75.79%	365,000	220,769	60.48%
Insurance	190,000	161,772	85.14%	164,000	142,986	87.19%
Taxes	167,250	133,204	79.64%	180,250	159,152	88.30%
Plant and Equipment	862,000	635,238	73.69%	893,500	630,150	70.53%
Administration	610,750	633,458	103.72%	526,100	354,333	67.35%
SECTIONS	4,039,155	1,722,882	42.65%	2,920,715	420,693	14.40%
PUBLICATIONS:						
Reference Materials	121,500	75,180	61.88%	248,800	71,723	28.83%
Journal	265,000	194,235	73.30%	245,700	189,211	77.01%
Law Digest	47,000	39,199	83.40%	75,000	35,820	47.76%
State Bar News	100,300	99,044	98.75%	85,500	67,947	79.47%
MEETINGS:						
Annual Meeting	360,100	37,535	10.42%	24,250	13,811	56.95%
House of Delegates, Officers and Executive Committee	561,550	500,035	89.05%	309,000	177,852	57.56%
COMMITTEES:						
Continuing Legal Education	370,400	110,062	29.71%	435,000	74,391	17.10%
LPM / Electronic Communication Committee	35,150	-	0.00%	1,400	-	0.00%
Marketing / Membership	909,450	498,514	54.81%	850,000	310,745	36.56%
Media Services	290,000	200,848	69.26%	269,450	160,049	59.40%
All Other Committees and Departments	2,925,875	2,185,210	74.69%	2,590,135	1,948,048	75.21%
TOTAL EXPENSE	**20,786,426**	**13,751,497**	**66.16%**	**18,802,064**	**10,965,422**	**58.32%**
BUDGETED SURPLUS	**121,444**	**2,299,942**		**490,891**	**5,381,295**	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF SEPTEMBER 30, 2022

ASSETS	UNAUDITED 9/30/2022	UNAUDITED 9/30/2021	UNAUDITED 12/31/2021
Current Assets:			
General Cash and Cash Equivalents	15,958,639	15,464,720	19,902,457
Accounts Receivable	-2,016	18,063	39,878
Prepaid expenses	984,856	772,065	680,393
Royalties and Admin. Fees receivable	500,000	478,219	748,640
Total Current Assets	17,441,479	16,733,067	21,371,368
Board Designated Accounts:			
Cromwell Fund:			
Cash and Investments at Market Value	2,635,060	3,206,838	3,366,406
Accrued interest receivable	0	0	0
	2,635,060	3,206,838	3,366,406
Replacement Reserve Account:			
Equipment replacement reserve	1,118,021	1,117,909	1,117,938
Repairs replacement reserve	794,689	794,609	794,629
Furniture replacement reserve	220,039	220,017	220,022
	2,132,749	2,132,535	2,132,589
Long-Term Reserve Account:			
Cash and Investments at Market Value	27,204,934	33,004,086	34,513,008
Accrued interest receivable	0	0	124,042
	27,204,934	33,004,086	34,637,050
Sections Accounts:			
Section Cash and Investments at Market Value	3,806,899	4,041,301	4,022,992
Cash	342,566	1,210,806	1,172,408
	4,149,465	5,252,107	5,195,400
Fixed Assets:			
Building - 1 Elk	3,850,000	0	0
Furniture and fixtures	1,473,566	1,463,037	1,463,037
Leasehold Improvements	871,624	1,470,688	1,470,688
Equipment	3,220,527	4,034,985	4,053,020
	9,415,717	6,968,710	6,986,745
Less accumulated depreciation	3,939,368	4,552,489	4,680,627
Net fixed assets	5,476,349	2,416,221	2,306,118
Total Assets	59,040,036	62,744,854	69,008,931
LIABILITIES AND FUND BALANCES			
Current liabilities:			
Accounts Payable & other accrued expenses	905,028	557,308	861,398
Deferred dues	0	0	6,095,477
Deferred income special	(1)	57,692	0
Deferred grant revenue	18,103	29,906	29,906
Other deferred revenue	390,330	258,522	369,627
PPP Loan Payable	0	1,482,957	0
Payable To TNYBF - Service Agreement	3,639,456	0	
Payable To The New York Bar Foundation	0	510	480
Total current liabilities & Deferred Revenue	4,952,916	2,386,895	7,356,888
Long Term Liabilities:			
Accrued Other Postretirement Benefit Costs	8,426,910	8,976,735	8,156,910
Accrued Defined Contribution Plan Costs	248,484	243,000	398,670
Total Liabilities & Deferred Revenue	13,628,310	11,606,630	15,912,468
Board designated for:			
Cromwell Account	2,635,060	3,206,838	3,366,406
Replacement Reserve Account	2,132,749	2,132,535	2,132,589
Long-Term Reserve Account	18,529,540	23,784,351	25,957,428
Section Accounts	4,149,465	5,252,107	5,195,400
Invested in Fixed Assets (Less capital lease)	5,476,349	2,416,221	2,306,118
Undesignated	12,488,563	14,346,172	14,138,522
Total Net Assets	45,411,726	51,138,224	53,096,463
Total Liabilities and Net Assets	59,040,036	62,744,854	69,008,931

New York State Bar Association
Statement of Activities
For the Nine Months Ending September 30, 2022

	September 2022	***September 2021***	***December 2021***
REVENUES AND OTHER SUPPORT			
Membership dues	8,957,575	9,285,855	9,335,487
Section revenues			
Dues	1,104,973	1,164,969	1,175,901
Programs	960,475	466,531	699,904
Continuing legal education program	1,574,330	1,954,386	2,715,526
Administrative fee and royalty revenue	1,724,260	1,774,420	2,408,451
Annual meeting	444,011	489,977	489,977
Investment income	747,369	629,435	1,386,890
Reference Books, Formbooks and Disk Products	704,301	733,456	1,262,049
Other revenue	391,908	225,120	314,123
Total revenue and other support	16,609,202	16,724,149	19,788,308
PROGRAM EXPENSES			
Continuing legal education program	750,618	568,494	796,840
Graphics	840,929	878,317	1,172,896
Government relations program	212,932	232,877	324,497
Lawyer assistance program	50,104	55,959	52,865
Lawyer referral and information services	-	427	(63)
Law practice management services	-	37,136	36,455
Media / public relations services	480,279	433,237	577,256
Business Operations	1,848,173	1,566,340	2,231,386
Marketing and Membership services	1,194,732	923,419	1,538,319
Pro bono program	56,591	121,082	145,000
House of delegates	438,386	177,795	266,997
Executive committee	61,649	57	13,666
Other committees	169,347	64,740	76,452
Sections	1,722,882	420,693	703,398
Section newsletters	193,030	181,837	245,723
Reference Books, Formbooks and Disk Products	442,264	491,215	692,853
Publications	332,478	292,978	342,384
Annual meeting expenses	37,535	13,811	13,811
Total program expenses	8,831,929	6,460,414	9,230,735
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	2,480,448	2,197,275	2,871,832
Pension plans and other employee benefit plan costs	511,552	494,101	(181,808)
Rent and equipment costs	647,010	818,807	1,187,626
Consultant and other fees	589,256	401,507	680,709
Depreciation and amortization	558,900	558,900	687,038
Other expenses	132,402	33,997	52,308
Total management and general expenses	4,919,568	4,504,587	5,297,705
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS	**2,857,705**	**5,759,148**	**5,259,868**
Realized and unrealized gain (loss) on investments	(10,406,303)	2,471,319	3,445,877
Realized gain (loss) on sale of equipment	(136,142)	-	1,482,957
CHANGES IN NET ASSETS	**(7,684,740)**	**8,230,467**	**10,188,702**
Net assets, beginning of year	53,096,463	42,907,761	42,907,761
Net assets, end of year	45,411,723	51,138,228	53,096,463

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

REQUESTED ACTION: None, as the report is informational.

Association president Sherry Levin Wallach will advise the House of Delegates with respect to her presidential initiatives, the governance of the Association, and other developments of interest to the House.

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #6

REQUESTED ACTION: Approval of the 2023 Association income and expense budget.

Attached is the 2023 proposed Association operating budget. The budget has projected revenue of $20,521,643, and projected expense of $20,472,563, leaving a projected surplus of $49,080.

The budget will be presented by Michael J. McNamara, chair of the Finance Committee.

2023 PROPOSED BUDGET

THE ASSOCIATION HAS PROJECTED REVENUE OF $20,521,643,
AND PROJECTED EXPENSE OF $20,472,563 LEAVING A PROJECTED SURPLUS OF $49,080.

Prepared by staff

2023 NYSBA PROPOSED BUDGET

2023 PROPOSED INCOME BUDGET

ITEM	2022 BUDGET	RECEIVED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
Membership Dues	*9,372,690*	*8,957,575*	*9,000,000*	*9,000,000*	*9,335,487*	*9,339,925*	*9,673,873*
Continuing Legal Education	*2,950,000*	*1,574,330*	*2,095,000*	*2,390,000*	*2,715,526*	*3,043,386*	*3,153,234*
Investment Income	*486,225*	*312,083*	*494,215*	*494,215*	*503,868*	*489,631*	*564,518*
Advertising	*218,000*	*219,683*	*319,500*	*319,500*	*306,637*	*259,859*	*265,085*
Reference Materials	*1,247,000*	*704,301*	*1,273,200*	*1,309,350*	*1,262,049*	*1,032,335*	*1,097,626*
Publications and Miscellaneous	*213,500*	*215,108*	*299,000*	*308,000*	*233,545*	*168,907*	*273,698*
Insurance Program	*1,912,000*	*1,500,000*	*2,000,000*	*2,000,000*	*2,143,644*	*2,389,144*	*2,184,419*
Annual Meeting	*400,000*	*444,011*	*444,011*	*895,000*	*489,977*	*1,582,326*	*938,792*
House of Delegates	*33,500*	*44,519*	*45,000*	*16,200*	*7,360*	*(250)*	*32,617*
Committees	*14,000*	*14,381*	*70,500*	*20,500*	*19,931*	*24,344*	*44,479*
Sections	*4,060,955*	*2,065,448*	*2,209,950*	*3,768,878*	*1,875,805*	*1,986,214*	*3,771,251*
TOTAL	**20,907,870**	**16,051,440**	**18,250,376**	**20,521,643**	**18,893,829**	**20,315,820**	**21,999,592**

Prepared by staff

2023 PROPOSED EXPENSE BUDGET

ITEM	2022 BUDGET	EXPENDED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
Salaries and Fringe Benefits	*8,588,947*	*6,265,873*	*8,432,792*	*8,759,290*	*6,917,249*	*8,166,428*	*8,716,606*
Less: Allocations	*(8,588,947)*	*(6,265,873)*	*(8,432,792)*	*(8,759,290)*	*(6,917,249)*	*(8,166,428)*	*(8,716,606)*
Bar Center Operations & Administration	*2,172,000*	*1,822,880*	*2,267,950*	*1,963,150*	*2,474,161*	*2,424,373*	*1,789,566*
Publications and Meetings	*1,333,950*	*870,048*	*1,006,460*	*1,295,225*	*636,858*	*1,633,681*	*1,440,800*
Committees and Departments	*13,241,321*	*9,335,686*	*12,674,057*	*13,474,360*	*10,714,026*	*13,019,002*	*14,357,171*
Sections	*4,039,155*	*1,722,882*	*1,981,207*	*3,739,828*	*703,358*	*1,756,616*	*3,841,513*
TOTAL	**20,786,426**	**13,751,496**	**17,929,674**	**20,472,563**	**14,528,402**	**18,833,672**	**21,429,050**

2023 MEMBERSHIP DUES

CLASS	DUES	MEMBERS PAID	AMOUNT
Affiliate	*185*	*31*	*5,735*
Attorney - Admitted 1-2 Years	*95*	*3,183*	*302,385*
Attorney - Admitted 3-6 Years	*175*	*3,077*	*538,475*
Attorney - Admitted 7+ Years	*275*	*29,350*	*8,071,250*
Newly Admitted	-	*9,322*	-
Law students	-	*6,396*	-
Retired	*100*	*858*	*85,800*
		52,217	***9,003,645***

CLE INCOME BUDGET

	ITEM	2022 BUDGET	RECEIVED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
560-4700	**Programs**	*75,000*	*53,630*	*75,000*	*75,000*	*9,699*	*190,991*	*1,560,495*
572-4700	**Webcast Program Income**	*1,500,000*	*592,797*	*850,000*	*1,000,000*	*1,440,678*	*1,409,251*	*1,254,689*
572-4025	**CLE Webcast - Sponsorship**	-	-	-	-	-	-	-
568-4780	**On-Line**	*1,000,000*	*668,481*	*800,000*	*900,000*	*803,855*	*1,093,991*	-
569-4790	**Audio Compact Disk (CD)**	-	-	-	-	-	*48,747*	*69,947*
561-4710	**Course Book**	-	-	-	-	-	*3,194*	*26,240*
574-4780	**All Access Pass**	*350,000*	*247,747*	*350,000*	*400,000*	*429,349*	*206,737*	*134,972*
571-4715	**DVD/CD**	*25,000*	*11,675*	*20,000*	*15,000*	*31,945*	*90,475*	*106,891*
	TOTAL	**2,950,000**	**1,574,330**	**2,095,000**	**2,390,000**	**2,715,526**	**3,043,386**	**3,153,234**

SECTION DUES INCOME

ITEM	2022 BUDGET	RECEIVED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
Antitrust	*12,600*	*9,510*	*9,700*	*10,000*	*10,065*	*11,100*	*12,095*
Business Law	*69,000*	*55,034*	*58,000*	*58,000*	*60,495*	*65,186*	*70,758*
Cannabis Law	*-*	*8,645*	*9,500*	*10,500*	*-*	*-*	*-*
Commercial & Federal Litigation	*65,000*	*56,140*	*56,200*	*63,000*	*62,855*	*65,872*	*68,935*
Corporate Counsel	*28,000*	*25,685*	*25,700*	*24,000*	*25,275*	*31,598*	*34,630*
Criminal Justice	*31,000*	*28,910*	*30,000*	*31,000*	*32,130*	*33,088*	*36,307*
Dispute Resolution	*42,500*	*46,785*	*46,800*	*58,000*	*56,272*	*42,026*	*42,348*
Elder Law and Special Needs	*73,000*	*65,810*	*66,000*	*65,000*	*71,265*	*69,668*	*71,690*
Entertainment Law	*29,000*	*26,326*	*26,500*	*27,000*	*28,968*	*29,921*	*33,238*
Environmental Law	*27,000*	*26,420*	*26,500*	*28,000*	*26,758*	*26,705*	*27,933*
Family Law	*68,000*	*62,488*	*62,500*	*65,000*	*66,723*	*67,329*	*71,989*
Food, Drug	*6,300*	*4,373*	*4,400*	*5,000*	*4,898*	*5,488*	*5,088*
General Practice	*45,000*	*24,749*	*25,000*	*23,800*	*27,615*	*30,065*	*32,970*
Health Law	*36,000*	*30,056*	*30,100*	*31,000*	*32,340*	*35,451*	*37,380*
Intellectual Property Law	*30,000*	*22,115*	*23,000*	*23,000*	*26,125*	*30,276*	*33,932*
International Law	*44,000*	*33,040*	*33,100*	*33,000*	*37,735*	*41,737*	*44,024*
Judicial	*9,000*	*7,625*	*7,700*	*8,500*	*8,625*	*9,229*	*9,427*
Labor & Employment	*55,000*	*50,638*	*51,000*	*52,000*	*54,870*	*58,891*	*61,287*
LGBTQ	*9,000*	*7,620*	*7,800*	*9,000*	*270*	*-*	*-*
Local State Government	*26,000*	*23,910*	*24,000*	*24,000*	*25,365*	*27,010*	*28,280*
Real Property	*130,000*	*122,737*	*125,000*	*127,800*	*128,675*	*135,363*	*140,516*
50+	*48,000*	*39,860*	*40,000*	*42,000*	*45,679*	*37,727*	*42,054*
Tax	*42,000*	*39,705*	*40,000*	*52,000*	*40,725*	*46,803*	*48,963*
Torts, Insurance and Compensation	*52,000*	*53,980*	*55,000*	*70,750*	*59,820*	*65,569*	*71,303*
Trial Lawyers	*52,000*	*47,800*	*48,000*	*50,000*	*52,670*	*56,347*	*60,212*
Trusts and Estates	*150,000*	*148,867*	*150,325*	*150,000*	*154,785*	*154,616*	*160,789*
Women in Law	*20,000*	*19,070*	*19,100*	*20,000*	*17,760*	*16,678*	*14,741*
Young Lawyers	*20,000*	*17,075*	*17,500*	*20,000*	*17,140*	*22,865*	*27,162*
TOTAL	**1,219,400**	**1,104,973**	**1,118,425**	**1,181,350**	**1,175,901**	**1,216,608**	**1,288,049**

SECTION OTHER INCOME

ITEM	2022 BUDGET	RECEIVED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
Antitrust	*201,000*	*40,100*	*55,000*	*195,950*	*116,550*	*172,770*	*200,765*
Business Law	*12,135*	*1,421*	*1,500*	*28,000*	*1,949*	*6,662*	*16,070*
Cannabis Law	-	-	-	*14,000*	-	-	-
Commercial & Federal Litigation	*153,820*	*61,570*	*65,000*	*182,878*	*15,241*	*63,955*	*148,935*
Corporate Counsel	*40,650*	*1,000*	*1,000*	*29,800*	*7,850*	*(225)*	*1,198*
Criminal Justice	*24,200*	-	-	*21,200*	*(1,570)*	*10,390*	*8,895*
Dispute Resolution	*167,650*	*16,819*	*40,000*	*96,500*	*44,627*	*2,378*	*72,589*
Elder Law and Special Needs	*261,500*	*66,325*	*67,000*	*110,000*	*148,638*	*31,710*	*165,538*
Entertainment Law	*67,550*	*789*	*800*	*53,200*	*23,821*	*9,596*	*62,570*
Environmental Law	*69,500*	*24,655*	*25,000*	*69,450*	*29,242*	*39,395*	*79,955*
Family Law	*350,000*	*339,460*	*340,000*	*391,950*	*70,523*	*79,650*	*405,819*
Food, Drug	*1,000*	-	-	*1,650*	-	*180*	*780*
General Practice	*10,400*	-	-	*2,600*	*330*	*270*	-
Health Law	*50,600*	*240*	*250*	*23,200*	*2,973*	*11,165*	*38,223*
Intellectual Property Law	*41,800*	*750*	*750*	*25,500*	*4,798*	*14,035*	*27,250*
International Law	*307,000*	*142,689*	*201,000*	*220,000*	*28,916*	*9,705*	*321,610*
Judicial	*14,550*	-	-	*15,550*	-	*16,215*	*26,795*
Labor & Employment	*124,850*	*28,330*	*28,500*	*124,100*	*41,880*	*26,925*	*76,933*
LGBTQ	*16,500*	-	-	*7,500*	*10,000*	-	-
Local State Government	*70,800*	*50*	*15,000*	*35,100*	*13,592*	*160*	*18,140*
Real Property	*129,700*	*32,825*	*33,000*	*129,200*	*6,285*	*18,335*	*70,642*
50+	*6,500*	*125*	*125*	-	*125*	*350*	*230*
Tax	*199,000*	*43,504*	*46,000*	*164,000*	-	*106,145*	*177,975*
Torts, Insurance and Compensation	*34,200*	*2,368*	*3,000*	*114,600*	*(1,480)*	*4,535*	*58,280*
Trial Lawyers	*34,200*	*3,500*	*10,000*	*38,500*	*16,138*	*135*	*33,560*
Trusts and Estates	*359,450*	*140,168*	*142,000*	*395,100*	*84,326*	*60,120*	*310,875*
Women in Law	*55,000*	*7,177*	*8,000*	*57,500*	*27,503*	*40,050*	*55,890*
Young Lawyers	*38,000*	*6,610*	*8,600*	*40,500*	*7,650*	*45,000*	*103,686*
TOTAL	**2,841,555**	**960,475**	**1,091,525**	**2,587,528**	**699,904**	**769,606**	**2,483,202**

SECTIONS EXPENSE

ITEM	2022 BUDGET	EXPENDED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL	
Antitrust	*213,600*	*67,889*	*77,000*	*205,950*	*57,665*	*157,921*	*207,234*	620
Business Law	*81,135*	*27,050*	*28,100*	*86,000*	*52,849*	*77,299*	*97,343*	621
Cannabis	-	-	-	*24,500*	-	-	-	648
Commercial & Federal Litigation	*218,820*	*69,252*	*74,050*	*245,878*	*16,848*	*123,821*	*249,777*	631
Corporate Counsel	*68,650*	*26,185*	*26,200*	*53,800*	*25,987*	*29,749*	*43,331*	622
Criminal Justice	*55,200*	*8,005*	*8,400*	*52,200*	*8,281*	*30,064*	*33,326*	623
Dispute Resolution	*210,150*	*75,648*	*76,000*	*154,500*	*36,038*	*58,183*	*135,078*	644
Elder Law and Special Needs	*334,500*	*176,117*	*185,700*	*175,000*	*141,796*	*134,483*	*286,491*	632
Entertainment Law	*96,550*	*31,817*	*33,395*	*80,200*	*28,717*	*58,486*	*84,712*	630
Environmental & Energy Law	*96,500*	*17,232*	*17,950*	*97,450*	*29,092*	*70,577*	*155,476*	624
Family Law	*418,000*	*408,152*	*410,000*	*456,950*	*52,797*	*159,267*	*385,641*	625
Food, Drug	*7,300*	*106*	*150*	*6,650*	-	*5,773*	*6,547*	626
General Practice	*55,400*	*9,572*	*12,500*	*26,400*	*12,455*	*23,201*	*44,277*	627
Health Law	*86,600*	*19,528*	*24,100*	*54,200*	*13,858*	*49,434*	*61,303*	633
Intellectual Property Law	*71,800*	*6,216*	*8,650*	*48,500*	*6,466*	*40,228*	*51,660*	634
International Law	*343,250*	*296,815*	*401,162*	*253,000*	*25,713*	*50,087*	*420,051*	629
Judicial	*23,550*	*784*	*800*	*24,050*	*1,265*	*25,033*	*38,623*	635
Labor & Employment	*179,850*	*49,735*	*60,650*	*176,100*	*50,799*	*64,557*	*117,436*	636
LGBTQ	*25,500*	*264*	*2,500*	*16,100*	*2,156*	*381*	*2,661*	647
Local State Government	*96,800*	*2,281*	*37,000*	*59,100*	*28,694*	*11,649*	*45,167*	637
Real Property	*259,700*	*142,228*	*162,825*	*257,000*	*24,571*	*111,269*	*230,797*	638
50+	*40,450*	*925*	*1,800*	*22,000*	*(53)*	*19,051*	*51,105*	645
Tax	*241,000*	*40,850*	*52,800*	*207,450*	*67*	*166,208*	*237,110*	639
Torts, Insurance and Compensation	*86,200*	*18,991*	*21,350*	*185,350*	*11,314*	*22,216*	*114,987*	628
Trial Lawyers	*86,200*	*9,403*	*11,150*	*88,500*	*10,726*	*25,796*	*70,792*	640
Trusts and Estates	*509,450*	*202,466*	*230,000*	*545,000*	*54,029*	*168,276*	*469,515*	641
Women in Law	*75,000*	*4,440*	*5,125*	*77,500*	*3,049*	*40,922*	*50,334*	646
Young Lawyers	*58,000*	*10,931*	*11,850*	*60,500*	*8,178*	*32,685*	*150,737*	642
TOTAL	**4,039,155**	**1,722,882**	**1,981,207**	**3,739,828**	**703,358**	**1,756,616**	**3,841,513**	

BAR CENTER OPERATIONS AND ADMINISTRATIVE EXPENSE

ITEM	2022 BUDGET	EXPENDED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
Rent	-	-	-	-	*283,623*	*283,624*	*284,367*
Building Services	*342,000*	*259,208*	*323,500*	*325,500*	*417,725*	*474,322*	*423,113*
Insurance	*190,000*	*161,772*	*201,000*	*206,000*	*197,354*	*177,692*	*159,734*
Taxes	*167,250*	*133,204*	*153,750*	*93,750*	*186,645*	*221,880*	*113,231*
Plant and Equipment	*862,000*	*635,238*	*810,000*	*791,000*	*780,373*	*763,702*	*471,657*
Office Administration	*78,000*	*268,622*	*280,000*	*41,200*	*162,264*	*32,745*	*(67,506)*
Other	*532,750*	*364,836*	*499,700*	*505,700*	*446,177*	*470,409*	*404,970*
TOTAL	**2,172,000**	**1,822,880**	**2,267,950**	**1,963,150**	**2,474,161**	**2,424,373**	**1,789,566**

PUBLICATIONS AND MEETINGS

PUBLICATIONS

ITEM	2022 BUDGET	EXPENDED TO 9/30/22	PROJECTED YEAR END	2023 PROPOSED BUDGET	2021 ACTUAL	2020 ACTUAL	2019 ACTUAL
New York State Bar Journal	*265,000*	*194,235*	*240,600*	*250,300*	*228,021*	*298,433*	*365,979*
New York State Law Digest	*47,000*	*39,199*	*47,000*	*52,350*	*46,416*	*83,846*	*154,153*
State Bar News	*100,300*	*99,044*	*110,300*	*122,300*	*67,947*	*80,471*	*101,163*
TOTAL PUBLICATIONS	***412,300***	***332,478***	***397,900***	***424,950***	***342,384***	***462,750***	***621,295***

MEETINGS

Annual Meeting	*360,100*	*37,535*	*37,535*	*383,100*	*13,811*	*958,195*	*380,226*
Executive Committee	*55,800*	*61,648*	*67,650*	*44,550*	*13,666*	*14,020*	*50,818*
House of Delegates and Officer's Expense	*505,750*	*438,387*	*503,375*	*442,625*	*266,997*	*198,716*	*388,462*
TOTAL MEETINGS	***921,650***	***537,570***	***608,560***	***870,275***	***294,474***	***1,170,931***	***819,505***
TOTAL	**1,333,950**	**870,048**	**1,006,460**	**1,295,225**	**636,858**	**1,633,681**	**1,440,800**

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: None, as the report is informational.

Hon. Richard Duncan Simons, former associate judge of the Court of Appeals from 1983 to 1997 and acting chief judge in late 1992 and early 1993, passed away in July at the age of 95.

Hon. Howard A. Levine, former associate judge of the Court of Appeals, will present a memorial in honor of Judge Simons.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: None, as the report is informational.

The Nominating Committee submits nominations of candidates for all offices required by Article XI of the Bylaws to be filled by election at each Annual Meeting or at the meeting of the House of Delegates immediately following each Annual Meeting.

The individuals nominated for the following offices for the 2023-2024 Association year will be announced at this meeting: President-Elect, Secretary, Treasurer, Vice Presidents, Members-at-Large of the Executive Committee, Section Member-at-Large, and Young Lawyer Member-at-Large.

The individuals nominated as delegates to the American Bar Association House of Delegates for the 2023-2025 term will also be announced.

The report will be presented by Henry M. Greenberg, chair of the Nominating Committee.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Procedures for Judicial Discipline.

Attached is a report from the Committee on Procedures for Judicial Discipline concerning suspension as a mode of judicial discipline. The report is co-sponsored by the Committee on the New York State Constitution.

In 1978, the New York State Constitution was amended to remove authority from the Commission on Judicial Conduct and the Court of Appeals to suspend judges as a final disciplinary remedy.[1]

The report examines considerations surrounding potential amendment of the New York State Constitution to reinstate suspension as a mode of judicial discipline, providing a state-by-state comparison of modes of judicial discipline, a review of the Commission on Judicial Conduct's position on this matter, and a survey of organizational support for reinstatement of suspension as a mode of judicial discipline.

The report also reviews the ABA Model Rules for Judicial Disciplinary Enforcement, which permit a state's highest court to suspend a judge on an interim basis if the judge is charged with a "serious crime" or if there is sufficient evidence to demonstrate that a judge poses a substantial threat of serious harm to the public or to the administration of justice.[2]

The report ultimately recommends a proposed amendment to the New York State Constitution to restore the Commission's authority to suspend a judge for up to six months without pay as a final mode of discipline.

The report also recommends a proposed amendment to expand the circumstances under which the Court of Appeals may suspend a judge on an interim basis, similar to the standards set forth in the ABA Model Rules for Judicial Disciplinary Enforcement.

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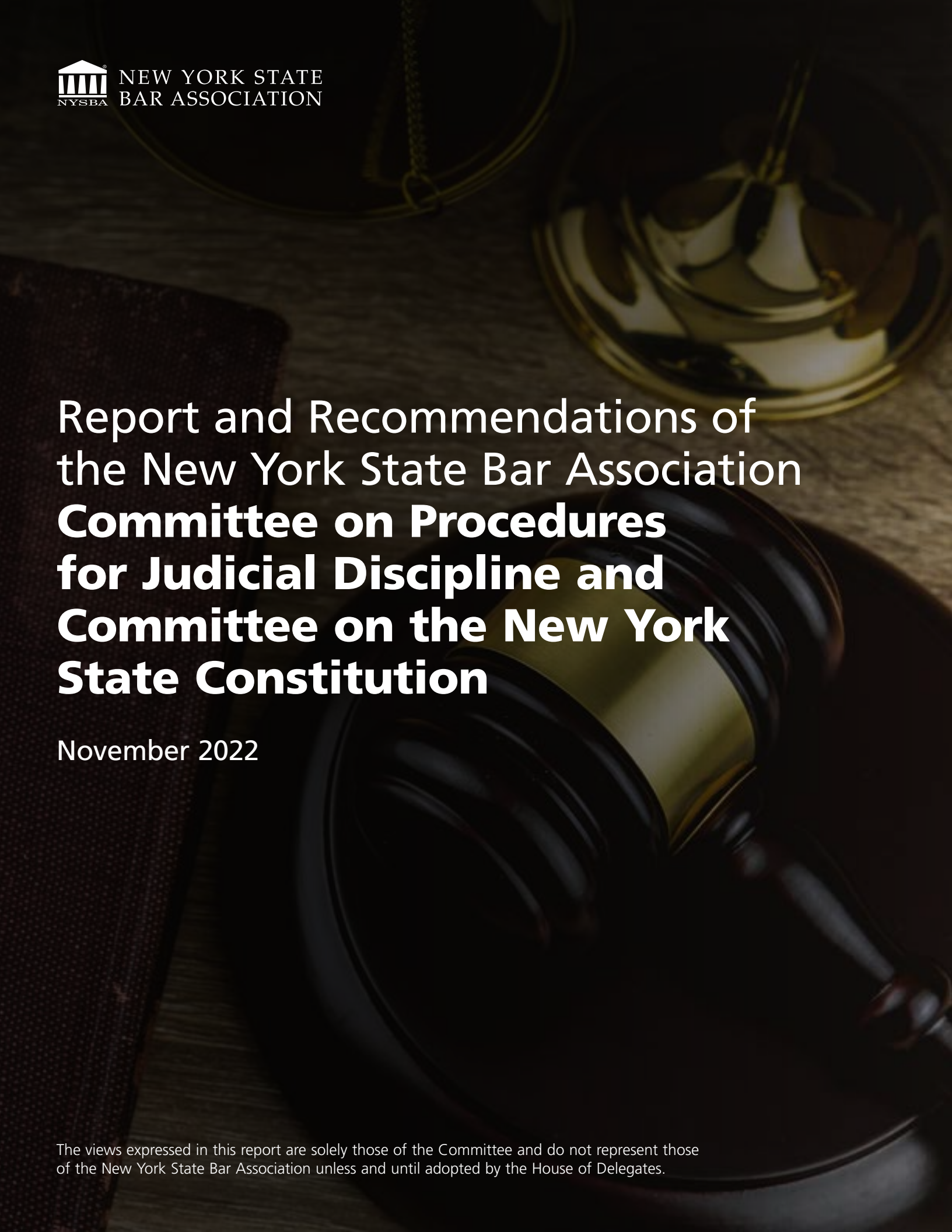
[1] The Constitution presently permits the Court to suspend a judge on an interim basis under limited circumstances. *See* N.Y. Const. art. VI § 22€

[2] *See* https://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/contents/.

The proposed constitutional amendments to Article VI § 22 of the New York State Constitution are outlined at Appendix A to the report.

This report was submitted to the Reports Group in June 2022. The Judicial Section has submitted comments concerning the report.

The report will be presented to the House of Delegates by Justin S. Teff, chair of the Committee on Procedures for Judicial Discipline.



NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Committee on Procedures for Judicial Discipline and Committee on the New York State Constitution**

November 2022

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

New York State Bar Association
Committee on Procedures for Judicial Discipline
Report Regarding Suspension as a Mode of Judicial Discipline

The New York State Commission on Judicial Conduct has been the agency primarily responsible for the investigation and discipline of New York's judges since its establishment in 1974.[1] Prior to 1978, the Commission possessed the authority, in addition to other leviable sanctions, to suspend a judge from office for up to six months as a mode of final discipline.[2] As a result of a 1978 amendment to New York's Constitution, neither the Commission nor the Court of Appeals may suspend a judge as a final remedy, though the Court is permitted to suspend a judge on an interim basis under limited circumstances.

While the precise rationale for the elimination of the suspension power was not perfectly recorded, the move is thought to have been grounded in concerns over efficient court administration, as well as the sentiment that if misconduct was egregious enough to warrant suspension, "public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal."[3] Yet in the ensuing decades, the Commission and other organizations have suggested reinstatement of the suspension option, owing particularly to its utility in ensuring proportional punishment. Indeed, New York is now among the minority of states that do not allow for suspension of a judge as a final sanction,[4] and the Commission has several times noted that it felt constrained by this lack of authority, which it would otherwise have employed.[5]

At its January 14, 2019 meeting, the New York State Bar Association Committee on Procedures for Judicial Discipline resolved to undertake a study of the judicial suspension issue for future consideration. The Committee adopted a preliminary version of this report and proposed amendment at its January 2020 meeting. At a subsequent meeting held May 6, 2022, following consultation with the NYSBA Committee on the New York State Constitution, the Judicial Discipline Committee adopted the annexed revised proposal. The Committee on the State Constitution approved of the revised proposal at its meeting on May 13, 2022.

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[1] In 1974 a temporary commission was created by the Legislature, followed by the establishment in 1976 of a permanent Commission on Judicial Conduct via state constitutional amendment. See, Gerald Stern, *New York's Approach to Judicial Discipline: The Development of a Commission System*, 54 Chicago-Kent Law Review 137 (1977).

[2] See id.; also New York State Commission on Judicial Conduct (SCJC) 1981 Annual Report, at 64; New York State Commission on Judicial Conduct, Policy Statement June 21, 2017: *Suspension*, available at: http://www.cjc.ny.gov/Policy.Statements/suspension.htm (last visited December 21, 2019). The suspension power was utilized five times between 1976 and 1978.

[3] SCJC June 21, 2017 Policy Statement, *supra* note 2.

[4] Cynthia Gray, *A Study of State Judicial Discipline Sanctions* 24 (2002).

[5] SCJC 2017 Annual Report, at 22.

For reasons set forth, the report recommends a proposed amendment to article VI, section 22 of New York's Constitution that would restore the Commission's suspension capability, as well as expand the Court of Appeals' authority viz. interim suspension.

State-by-State Comparison

New York is presently among the minority of states that do not permit suspension as a mode of final judicial discipline.[6] It has been observed that New York has had a comparatively high number of judges removed from office, relative to its sister states, and suggested that the absence of the suspension authority may be one reason for this phenomenon.[7] Gray's *Study of State Judicial Discipline Sanctions* notes that between 1990 and 2001, 41 judges were removed in New York, and comments, "[p]articularly considering the possibility of judges agreeing to suspension to avoid removal, it is likely that some of the 41 removals in New York would have been suspensions had that option been available."[8]

The Commission's Position

It was not long after the 1978 revision that the effects were realized on an institutional level. As early as its 1981 Annual Report, the SCJC recommended that the Legislature "reconsider the merits of a constitutional amendment providing suspension as an alternative sanction available to the Commission."[9] The Commission's report explains (as do subsequent reports) that in several recent decisions, the Commission would have chosen this as the appropriate sanction had it been available.[10] The Commission on Judicial Conduct repeated this recommendation in its annual reports filed in 1995 (p. 72), 1997 (p. 36), 2002 (p. 28-9), 2005 (p. 29), 2006 (p. 25-6), 2007 (p. 21-2), 2009 (p. 18), 2010 (p. 19), 2011 (p. 19), and 2017 (p. 21-2).

The SCJC also recommended in its 2000 (p. 26-8), 2006 (p. 24-5), 2007 (p. 20-1), 2009 (p. 16-8), 2010 (p. 17-9), 2011 (p. 17-9), and 2017 (p. 20-1) annual reports that the authority of the Court of Appeals to suspend a judge on an interim basis be expanded beyond its present limitations. Under article VI, section 22, the Court of Appeals may suspend a judge with or without pay on an interim basis only if: (a) there is a pending determination by the commission on judicial conduct for his or her retirement or removal; (b) the judge or justice has been charged with a felony by indictment or information; or (c) the judge or justice has been charged with "any other crime which involves moral turpitude."[11] As explained by the Commission, "there are any number of misdemeanor charges that may not be defined as involving 'moral turpitude' but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary."[12]

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[6] Gray, *supra* note 4, at 24. As of 2002, it was one of only 14 states in which suspension was not among the disciplinary options.
[7] See id., at 1, 7, 24.
[8] See id., at 24.
[9] SCJC 1981 Annual Report, *supra* note 2, at 64.
[10] See id.
[11] N.Y. Const., Article VI, Section 22 (e), (f), (g); N.Y. Jud. Law § 44(8).
[12] SCJC 2000 Annual Report, at 26.

ABA Model Rules for Judicial Disciplinary Enforcement

The American Bar Association Model Rules for Judicial Disciplinary Enforcement address both of the situations under consideration. Pursuant to section II, rule 6 of the Model Rules – which also sets forth the grounds for discipline – suspension is available as a final sanction, but may only be imposed by the state's highest court.[13] The Model Rules also permit the state's highest court to suspend a judge on an interim basis if the judge is charged with: (a) a "serious crime," separately defined as "any felony or lesser crime that reflects adversely on the judge's honesty, trustworthiness or fitness as a judge in other respects" or "any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or at attempt, conspiracy or solicitation of another to commit a 'serious crime'"; or (b) any other misconduct for which there is "sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice…"[14]

The commentary to the later section explains, "The integrity of the judicial system demands prompt action whenever a judge has been formally charged with a serious crime."[15] The commentary further notes:

> Certain misconduct poses such an immediate threat to the public or the administration of justice that the judge should be suspended from the bench immediately, pending a final determination of the ultimate discipline to be imposed. Interim suspension is also appropriate when the judge's continuing conduct is causing or is likely to cause serious harm to the administration of justice. In such cases, it may be necessary for the highest court to impose an interim suspension or transfer to incapacity status to maintain public confidence in the judiciary.

Organizational Support

Beyond the SCJC itself, other legal organizations have made similar recommendations. In 2018, the Institute for the Advancement of the American Legal System published a report entitled, "Recommendations for Judicial Discipline Systems," based in part upon the work of a 21-person committee of judicial conduct commissioners, commission staff, judges, lawyers, and scholars.[16] The report concluded, relative to the issue of appropriate sanctions, that each "state should consider adopting a full array of sanctions and remedies seeking an optimal fit between conduct and remedy."[17] The IAALS report added: "Suspension without pay is a useful alternative,

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[13] ABA Model Rules for Judicial Disciplinary Enforcement, section II, rule 6.
[14] ABA Model Rules for Judicial Disciplinary Enforcement, section II, rule 15.
[15] See id.
[16] Available at: https://iaals.du.edu/sites/default/files/documents/publications/recommendations_for_judicial_discipline_systems.pdf (last visited December 21, 2019).
[17] See id., at 9

particularly in cases of serious misconduct in which there are significant mitigating factors such as the judge's lack of a disciplinary record, and thus we recommend that states ensure that commissions and supreme courts have suspension without pay as an available sanction in appropriate cases."[18]

The topic of judicial suspension was also addressed as part of a 2009 New York County Lawyers' Association Task Force on Judicial Independence report on the Judicial Conduct Commission.[19] The NYCLA report recommended expansion of the range of sanctions for judicial misconduct to include a final determination of suspension.[20] It explained: "The Subcommittee received many comments, including some from persons formerly affiliated with the Commission, suggesting that the absence of additional, intermediate sanctions between censure and removal unfairly limited the Commission's choice of punishments, resulting in some dispositions that were disproportionately harsh or lenient for the misconduct in question."[21]

Recommendations

This report recommends that the Committee on Judicial Discipline and New York State Bar Association support a proposed constitutional amendment (see Appendix A) which would restore the authority of the SCJC to impose suspension without pay for up to six months as a final mode of discipline, as well as expand the power of the Court of Appeals to suspend judges on an interim basis when necessary to safeguard the integrity of the judiciary. While valid concerns may have existed in 1978, it is probable that the exponential advances in technology over the past four decades will diminish the potential burden on colleagues and court administration resulting from a judge's absence. Moreover, absent the prospect of a world without judicial discipline, it seems that a judge restored to office following a period of suspension poses no greater threat to the public's confidence in its judiciary than news of one altogether removed from the bench.

The report recommends that as a final mode of discipline, suspension be without pay and limited to a maximum duration of six months. As noted by Gray, "[o]ne of the advantages of suspension as a sanction is that the possibility of suspension for days, weeks, months, or even years gives commissions and courts flexibility to create sanctions that reflect proportionality."[22] However, it has also been fairly observed that suspension of a judge can place increased strain on fellow judges as well as court administration, and as such, the report does not recommend that the SCJC be empowered to impose suspension greater than six months as a final discipline.

The report also recommends expansion of the Court of Appeals' power to suspend a judge on an interim basis to include circumstances beyond those presently permissible. The report recommends that this power be delineated in a manner similar to that set forth in the ABA Model

[18] See id., at 10.
[19] Available at: https://www.nycla.org/siteFiles/News/News115_0.pdf (last visited December 21, 2019).
[20] See id., at 8, 31.
[21] See id., at 30-31.
[22] Gray, *supra* note 4, at 30.

Rules for Judicial Disciplinary Enforcement. It concurs with the sentiments of the SCJC and other legal organizations that many offenses beyond those set forth in New York's constitution have the potential to seriously erode the public's confidence in the judiciary and/or pose significant risk to the continuing administration of justice and thus warrant provisional cessation of duties.

APPENDIX A
Proposed Amendment to Article VI, § 22

[Commission on judicial conduct; composition; organization and procedure; review by court of appeals; discipline of judges or justices]

§22. a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured, <u>suspended without pay for up to six months,</u> or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his or her duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his or her judicial duties. The commission shall transmit an[y] such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (l) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as the governor shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as the governor shall designate. The person first appointed by the temporary president of the senate shall have a one-

year term. The person first appointed by the minority leader of the senate shall have a two-year term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him or her for such appointment. Membership shall also terminate if a member attains a position which would have rendered him or her ineligible for appointment at the time of appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, suspend without pay for up to six months, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his or her office while there is pending a determination by the commission on judicial conduct for his or her removal, suspension, or retirement, or upon receipt of sufficient evidence demonstrating that a judge or justice poses a substantial threat of serious harm to the public or to the administration of justice, or while the judge or justice is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, the judge or justice shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, suspended, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any ~~other crime which involves moral turpitude~~ serious crime. A serious crime is any crime that reflects adversely on the judge's or justice's honesty, trustworthiness or fitness as a judge or justice in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit a serious crime. The suspension shall continue upon conviction and, if the

conviction becomes final, the judge or justice shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, suspended, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeals pursuant to paragraphs E or F shall receive his or her judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that the judge or justice shall be paid his or her salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an appellate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law.

NEW YORK STATE BAR ASSOCIATION
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October 3, 2022

Sherry Levin Wallach, Esq.
President, NYSBA
One Elk Street
Albany, New York 12207

Dear President Wallach:

The Judicial Section has received and considered the Report Regarding Suspension as a Mode of Judicial Discipline drafted by the Committee on Procedures for Judicial Discipline (Committee). The Committee adopted a proposal to support an amendment to Article VI, section 22 of the New York State Constitution that will authorize the New York Court of Appeals to suspend a judge without pay on an interim basis for an indeterminate period of time. The proposed constitutional amendment also authorizes the New York State Commission on Judicial Conduct (CJC) to impose a suspension, without pay, as a final disposition in a judicial disciplinary action.

The Judicial Section **opposes** the proposed constitutional amendment in its entirety.

A. The Judicial Section of NYSBA opposes the proposed constitutional amendment that expands the power of the Court of Appeals to suspend a judge without pay for ill-defined conduct and for an indeterminate period of time.

First, the constitution already authorizes the Court of Appeals to suspend a judge without pay when the judge is charged with a crime punishable as a felony. Art. VI, § 22 (f) and (g).

Second, the language in the proposed expansion of power is vague and ambiguous:

(i) It authorizes the Court of Appeals to suspend a judge without pay "***pending a determination***" by the CJC for the removal, suspension or retirement of a judge. When is a determination by the CJC pending? Does it begin the moment a complaint is filed? If

so, as historically demonstrated, a judge under investigation could be denied pay for months, if not years, before any allegations are proven, let alone explored.

(ii) It authorizes the Court of Appeals to suspend a judge without pay "***upon receipt*** of ***sufficient evidence*** demonstrating that a judge or justice poses a **substantial threat** of **serious harm** to the public or to the ***administration of justice***." "Receipt" of evidence by whom? The CJC? The judge? What is "evidence?" What constitutes "sufficient evidence?" What constitutes a "substantial threat?" What is meant by "serious harm?" What is a substantial "threat to the administration of justice?"

Third, the proposed constitutional amendment affords no due process protections to a judge against whom any disciplinary allegation has been lodged prior to suspension without pay. Thus, a judge merely accused of wrongdoing could be deprived of all compensation without first having an opportunity to be heard, an opportunity to challenge any evidence presented against the judge, or indeed without any of the other procedural safeguards afforded private citizens or other public servants.

Fourth, the proposed constitutional amendment contains no provision protecting the privacy of judges under investigation. Where suspension is imposed, allegations against a judge necessarily will become public, causing great embarrassment and irreparable harm to the judge and his or her reputation, based on untested and unproven allegations.

Fifth, the proposed constitutional amendment does not provide a mechanism for expungement of any suspension in the event the judge is cleared of any allegations of misconduct, dereliction of duties or a threat to the administration of justice.

Sixth, the proposed constitutional amendment does not provide for the judge to receive back pay for the period of suspension upon a determination clearing the judge of any wrongdoing or upon imposition of a lesser sanction like admonishment or censure.

Seventh, the proposed constitutional amendment contains no provision for the employment security of the judge's chambers staff during any interim suspension.

Eighth, the proposed constitutional amendment provides insufficient justification for suspension, without pay, as opposed to a temporary administrative reassignment. If the goal of suspension pending a CJC determination is to remove a judge from performing his or her regular duties, the proposed constitutional amendment is unnecessary. The Administrative Judge in each judicial district has existing authority to "reassign" a sitting judge or justice who is the subject of potential disciplinary action. The Administrative Judge also may prohibit the judge under investigation from presiding over some or all pending matters and from entering all court facilities, including the judge's own chambers.

Ninth, the proposed constitutional amendment grants the Court of Appeals, the ultimate arbiter, power to deprive a judge of any compensation, for an *indefinite* period of time, before any allegation of misconduct is proven, let alone explored. Investigations by the Judicial Conduct Commission are lengthy, at times taking years to complete.

Thus, under the proposed constitutional amendment, a suspended judge could be deprived of compensation for many months or years. An indefinite suspension of pay without any proof of wrongdoing would have a devasting financial impact on a judge and his or her family, and the judge might have no choice but to resign.

B. The Judicial Section also opposes that portion of the proposed constitutional amendment that seeks to authorize suspension without pay for up to six months as a final remedy.

The amendment, as proposed, contains no guidelines or parameters for when that punishment would be appropriate. The CJC has authority to admonish or censure judges for "lesser" offenses, and it is hard to imagine a circumstance where suspension for six months would ever be an appropriate remedy. If a judge has engaged in conduct that warrants suspension without pay for up to six months, most certainly the judge would no longer be able to serve with the requisite honor and respect.

For all these reasons, we urge the NYSBA House of Delegates to vote against the proposed constitutional amendment.

Very Truly Yours,

Hon. Joanne D. Quiñones
Presiding Member
NYSBA Judicial Section

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #10

REQUESTED ACTION: None, as the report is informational.

Jackie Drohan and Dana Syracuse, co-chairs of the Task Force on Emerging Digital Finance and Currency, will present on the mission, composition, and goals of the Task Force.

The Task Force was formed by President Sherry Levin Wallach in June 2022 to study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State, including technological innovations with the Metaverse.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #11

REQUESTED ACTION: None, as the report is informational.

The Root/Stimson Award honors a lawyer who has demonstrated outstanding commitment to community and volunteer service and to the improvement of the justice system. Named for Elihu Root and Henry L. Stimson to honor their commitment to public service, this award is presented to a lawyer admitted to practice in New York state who is actively involved in volunteer community service work. The award recognizes members of the legal profession who have given unstintingly of their time through community service activities.

The 2022 Root/Stimson Award recipient is Samantha I.V. White.

Association president Sherry Levin Wallach will present the Root/Stimson Award to Samantha I.V. White.

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #12

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Legal Aid and President's Committee on Access to Justice.

In November 2021, the President's Committee on Access to Justice ("PCAJ") and the Committee on Legal Aid ("COLA") held two remote hearings at which members of the public were invited to discuss access to justice issues since the onset of the COVID-19 pandemic.

Representatives of approximately thirty organizations either testified at these hearings or submitted written testimony, including staff of statewide legal services providers, law schools, the OCA Office for Justice Initiatives, bar associations, community-based access to justice organizations, and individual attorneys.

Topics covered at the hearings included family court proceedings, immigration proceedings, housing court/landlord-tenant proceedings, criminal justice, social security proceedings, state benefit proceedings, the efficacy and equitability of remote proceedings, and the factor that race plays throughout these considerations, with focus on the interrelationship and impact of high-volume courts' hybrid virtual/in person court proceedings and operations, and the effect of the digital divide on low-income community members, court users, and providers of free legal assistance to these communities..

After the hearings, the PCAJ and COLA established a joint Working Group on Access to Justice During the COVID-19 Pandemic to review and distill the information gathered at the hearings into an extensive report.

The report at pages 3 to 5 offers several recommendations based upon the hearing testimonies. The recommendations include that a joint NYSBA-OCA task force of court personnel and legal services practitioners should be convened to develop recommendations to improve the administration of the justice system for all court users, including access to and information on court proceedings and procedures; that NYSBA should increase its commitment to non-litigation ways in which clients' needs could be more quickly addressed than via court processes; and that stakeholders should develop preparedness plans for access to legal services should there be a future event similar to COVID-19 that affects court operations. The report also calls for an increase in assigned

counsel rates in New York[1] and for New York State to invest in increased broadband internet access across the state for low-income and under-resourced communities.[2]

This report was submitted to the Reports Group in August 2022. No comments have been submitted as of October 18, 2022.

The report will be presented to the House of Delegates by Hon. Edwina F. Martin, immediate past co-chair of the President's Committee on Access to Justice.

[1] In June 2018, the House of Delegates approved a report of the Criminal Justice Section and the Committee on Mandated Representation on the need to increase assigned counsel rates in New York. *See* https://nysba.org/app/uploads/2021/09/NYSBA-Access-to-Assigned-Counsel-Report.pdf.

[2] The House of Delegates adopted a resolution on broadband access in June 2020. *See* https://nysba.org/app/uploads/2022/06/adopted-resolution-on-broadband-access-June-2020.pdf.

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Committee on Legal Aid and President's Committee on Access to Justice – Joint Report on Access to Justice During the COVID-19 Pandemic**

November 2022

THE NEW YORK STATE BAR ASSOCIATION'S PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE AND COMMITTEE ON LEGAL AID JOINT REPORT ON ACCESS TO JUSTICE DURING THE COVID-19 PANDEMIC

August 17, 2022

Andrew F. Emborsky, Esq.
Ilan Fuchs, Esq.
Rezwanul Islam, Esq.
Elizabeth Jois, Esq.
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I. Introduction

On March 20, 2020, then New York State Governor Andrew Cuomo signed the "New York State on PAUSE" Executive Order (PAUSE), which called for 100% closure of non-essential businesses statewide with exceptions for services such as groceries and healthcare, and included moratoriums on foreclosures, evictions, and other legal proceedings.[1] The impact of PAUSE on the New York State court system – the Office of Court Administration – and the greater legal community, and the continuing impact of COVID-19 on the courts and the practice of law, has been profound; increased reliance on technology and virtual court proceedings appears permanent.

On November 16 and 18, 2021, the NYSBA's President's Committee on Access to Justice (PCAJ) and Committee on Legal Aid (COLA) held public hearings regarding access to justice in New York State in the post-COVID legal landscape. The primary purpose of these hearings was to assess and determine recommendations for the New York State Bar Association (NYSBA) on how to address these impacts in the long term, in accordance with NYSBA's mission to "facilitate the administration of justice."[2]

Legal Services programs, *pro bono* practitioners, court personnel, and 18-B attorneys from across the state were invited to attend to opine on developments since the onset of the COVID-19 pandemic regarding access to justice in relation to: family court; immigration proceedings; housing court/landlord-tenant proceedings, criminal justice, social security proceedings, state benefit proceedings, the efficacy and equitability of virtual proceedings, and how the factor of race may have impacted these areas.

Hearing attendees were also asked to speak on the interrelationship and impact of high-volume courts' hybrid virtual/in person court proceedings and operations as well as the effect of

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[1] "*Governor Cuomo Signs the 'New York State on PAUSE' Executive Order,"* (available at https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order); (March 20, 2020).

[2] *Laws of New York – 1877; Chapter 210, "An Act to Incorporate the New York State Bar Association."* (Section 1 of the Enabling Act; and The Bylaws of the New York State Bar Association, Section II: "Purposes"). Reflecting that the NYSBA's mission and objectives, as outlined in its 1877 founding constitution, are "to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards of integrity, honor, professional skill and courtesy in the legal profession." (full text available at https://nysba.org/app/uploads/2022/02/Bylaws-January-2022.pdf)

the digital divide on low-income community members, court users and providers of free legal assistance to these communities.

II. Recommendations

Recommendations for the NYSBA based upon the hearing testimonies includes:

I. Convening a NYSBA-OCA Task Force of court personnel and legal services practitioners to develop recommendations for a plan that can address issues such as:
   a. Significant gaps in the ability to obtain Orders of Protection[3][4], within a Court system that had diminished capacity[5];
   b. Increasing and improving user-friendly online information and instructions for those proceeding without counsel[6];
   c. Addressing language access and literacy issues;
   d. Delineating proceedings appropriate for virtual court and those that must be conducted in a courtroom (such as witness examination and hearing testimony);
   e. Whether litigants should be provided a choice between in-person and virtual court appearances;
   f. Addressing the digital divide;
   g. Ensuring that technology limitations are not held against the parties in a proceeding;
   h. Developing an equitable e-filing system for *pro se* litigants.
   i. Providing basic information in multiple languages in a written format on the courts' websites and providing court notices in commonly spoken languages.

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[3] Judith Olin, Esq.; Clinical Professor and Director, *University at Buffalo Law School Family Violence and Women's Rights Clinic*; Virtual Public Hearing Testimony, (November 18, 2021), (at approximately 39:20; video link below). (Discussing the problems with pre-screening Family Court matters, and specifically screening Family Offense Petitions as "essential" or "non-essential," the substantial delays in docketing and hearing such applications, the frequency of domestic violence homicides in Erie County relative to other larger counties, and the inability of *pro se* litigants to utilize Law Help and similar online applications). (https://nysba.org/committees/presidents-committee-on-access-to-justice); *See also*: written testimony submitted.

[4] Andrew F. Emborsky, Esq.; Supervising Attorney, Family Unit; *Neighborhood Legal Services, Inc*., (written testimony submitted, November 23, 2021, pages 1-2).

[5] Anna Ognibene, Esq.; Supervising Attorney, *Her Justice*; (written testimony submitted, November 18, 2021, pages 3-9).

[6] *Id*., at page 6.

j. Offering live proceedings with full simultaneous interpretation and, where that is not possible, offering video proceedings with sequential interpretation of the entire proceedings.

k. Prioritizing language access during telephonic hearings by allotting more time to the allow for proper translations.

l. Increasing hourly rates for 18B lawyers to provide incentives to bring more attorneys into the various programs available to the thousands of *pro se* clients coming to court.

II. That NYSBA should increase its commitment to non-litigation ways in which clients' needs could be more quickly addressed than via court process by:

a. Supporting community legal education; [7]

b. Increasing training on pre-litigation and non-litigation advocacy; [8]

c. Exploring ways to help clients navigate the initial application and investigation process required to secure clearances and licenses to perform regulated work;

d. Exploring ways to help New Yorkers navigate various types of situations where they are asked to provide information regarding conviction history and addressing RAP sheet errors; [9]

e. Supporting legislation granting public defenders' direct access to client RAP sheets. [10]

III. General Recommendations:

a. Future planning for preparedness needs to incorporate and facilitate access to services.

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[7] Estee Konor, Esq.; Senior Staff Attorney; *Community Service Society of New York*, (written testimony submitted, November 24, 2021) (page 2).

[8] *Id*.

[9] *Id*., at pages 3-4.

[10] *Id*., at page 3.; "For court-involved New Yorkers, it is almost impossible to successfully navigate the many barriers to full participation in their community if they do not understand their own RAP sheet and how to talk about their conviction records. … Accessing their information…requires court-involved legal services clients in New York to undergo physical fingerprinting as part of the process of requesting their RAP sheet. This fingerprinting takes place in person at a legal services provider's office. The process, cumbersome even before COVID hit New York, has been especially hard to navigate during the pandemic. Because legal services providers do not have direct electronic access to client RAP sheets, the pandemic has exacerbated existing challenges associated with educating, advising, and representing them when their legal rights are violated. Most were cut off from essential information about their conviction records [during] the pandemic, a time when many were desperately looking for work to support themselves and needed information about their records to navigate the job-search process."

b. New York State should invest in increasing access to broadband internet service in low-income and under-resourced communities across the state.

The following sections are a summary of the hearing testimony in the following areas: the amount of people who could not access courts (Family Court, Criminal Court, and limited virtual access in rural courts); the amount of people who could not access services; how COVID highlighted race concerns; virtual hearings; the digital divide; language access; and 18B attorney concerns.

III. Number of People Who Could Not Access Courts

The results of the COVID-19 pandemic were varied and overarching. The effects were felt in different government systems, surfacing inherent problems embedded in their framework. Our systems of justice were no exception, highlighting the limits it put on peoples' accessibility to the courts and other legal services. Ultimately, it will take years to be fully understood but lessons can be taken from the experiences of those serving low income and vulnerable New Yorkers during the initial turbulent months.

Family Court Access

LIFT estimated no less than 8,000 individuals in 2020 could not receive help from the court system.[11] Legal Services of Hudson Valley reported a twenty-five percent (25%) decline in the number of clients.[12] Bronx Defenders, Brooklyn Defenders, Neighborhood Defenders and Center for Family Representation submitted joint testimony reflecting that they collectively represent thousands of New Yorkers as the "the primary providers of mandated legal representation for low-income parents and children in Article 10 cases filed by the New York City Administration for Children's Services ("ACS")"[13]. They reported the rates of reunification for families decreased by

[11] Cathy Cramer, Esq., CEO; *Legal Information for Families Today (LIFT);* (written testimony submitted, November 24, 2021, page 2).
[12] Lucy Turner, Esq.; Staff Attorney, Housing Unit; *Legal Services of Hudson Valley*; (virtual hearing testimony; November 18, 2021; at approximately 2:14:43)
[13] Emma S. Ketteringham, Esq.; Managing Director - Family Defense Practice; The Bronx Defenders; Lauren Shapiro, Esq.; Managing Director - Family Defense Practice Brooklyn Defender Services; Michele Cortese, Esq; Executive Director - Center for Family Representation; Zainab Akbar, Esq.; Managing Attorney - Family Defense Practice; Neighborhood Defender Service of Harlem; (written testimony jointly submitted, November 18, 2021; page 2).

over twenty percent (20%) during the pandemic.[14] The backlog will most likely persist for over several years.

During their testimony, many legal aid/services organizations pointed to the effects of the pandemic in the family law courts. In New York City, only "essential" cases were heard without detailing what falls under the definition of "essential" resulting in grave miscarriages of justice. Specifically, child support cases were not heard leaving parents of children without a source of income. Additionally, many custody and visitation cases were deemed non-emergency.[15] Parents were separated from their children for months.[16]

The discrepancy was made apparent when NYC Family Courts prioritized creating a system that allowed the Administration for Children's Services (ACS) to seek the removal of children from their families, and then failed to set up an adequate process by which families could contest those separations.[17]

New York City Family Court also failed to distinguish between cases which had hearings that could be conducted virtually and those that involved complex litigation and were better suited for in-person proceedings. Brooklyn Defenders Services found that "the court proceeded to allocate long periods of virtual court time for trials in termination of parental rights matters, without regard for the importance of in-person proceedings for these sensitive trials. The court has stated that there is access to in-person courtrooms but then has routinely denied our requests to use those courtrooms for these trials and other complex litigation."[18]

These challenges were not limited to the New York City family courts. The Family Violence and Women's Rights Clinic at the University of Buffalo described systemic problems

[14] Emma S. Ketteringham, Esq.; Managing Director - Family Defense Practice; *The Bronx Defenders*; Lauren Shapiro, Esq.; Managing Director - Family Defense Practice *Brooklyn Defender Services*; Michele Cortese, Esq; Executive Director - *Center for Family Representation*; Zainab Akbar, Esq.; Managing Attorney - Family Defense Practice; *Neighborhood Defender Service of Harlem*; (written testimony jointly submitted, November 18, 2021; page 2).
[15] Ognibene, *Her Justice*, (written testimony, pages 3-4).
[16] Lisa Schreibersdorf, Esq., Executive Director, *Brooklyn Defender Services;* (written testimony submitted, November 18, 2021; pages 5-8).
[17] *Id*., at page 7.
[18] *Id.*

with dealing with urgent cases in both Erie and Niagara County Family courts even though the rate of family-related homicide in Erie County is higher than Kings County.[19]

These limitations on accessibility were potentially life threatening, as discussed in the testimony of Neighborhood Legal Services, that pointed to the difficulty in obtaining Orders of Protection (OOP) in cases of domestic violence.[20]

The efficacy of the family court system was reduced significantly by the pandemic and the limited access caused infringement of rights and privileges of mainly the unrepresented and indigent.

Criminal Court Access

Without a doubt the most sensitive area in the context of the pandemic and the violation of freedoms and privileges is the criminal court system. The potential for the infringement of rights in this specific field of law is self-evident and indeed there have been concerning reports of significant breakdown in the system when it came to indigent clients. Access was severely limited in our criminal courts system, and because of fingerprinting requirements and processes, those of limited means accused of committing a crime were disproportionately impacted by the lack of access to physical resources. This point was explained in the Community Service Society testimony:

"[B]ecause we must obtain in-person fingerprints to get rap sheets, our new client intake all but ceased. We attempted to work around the lack of rap sheets by ordering—and paying $95 per report for—NYS Office of Court Administration `CHRS Reports.' But these documents are provided on the basis of name and date of birth, and they proved all but useless where aliased and even small variations in name spelling permeated clients' experiences with the criminal court system."[21]

[19] Olin; *University at Buffalo Law School Family Violence and Women's Rights Clinic; (*virtual hearing testimony of November 18, 2021, and written testimony submitted, page 1).
[20] Emborsky, *Neighborhood Legal Services, Inc.*; (written testimony, page 2).
[21] Konor; *Community Service Society of New York*, (written testimony submitted, November 24, 2021) (page 2).

Eventually they began fingerprinting operations by appointment, but this limited the number of clients they could work with.

Limited Virtual Access in Rural Courts

The COVID-19 pandemic also made apparent how lack of access to justice manifested itself in different ways depending on location. In the Capital Region and North Country, Courts that turned to virtual hearings were not as accessible since many clients do not necessarily have access to unlimited data, wireless services, or digital devices needed to access remote courts. Even when clients have smartphones, their plans are often basic pay per month plans which do not include streaming. Additionally, some clients—particularly elderly clients—simply do not have or know how to use smartphones or computers.[22]

In the context of Social Security hearings, the testimony of the Legal Aid Society of Northeastern New York, reports that some attorneys have expressed concern that a hearing judge will not grasp the full extent of a client's disability without an in-person hearing. (This is particularly true in telephone hearings, although it also holds true for video hearings.)[23]

The New York State Justice Courts, where many rural eviction cases are litigated,[24] were particularly unprepared for the COVID-19 pandemic.[25] These courts do not have the infrastructure, staff, or technology to allow for remote hearings.[26] In some cases, the Justices or court staff did not appear to be interested in learning how to use technology.[27]

The most difficult scenario occurred when justices, the majority of whom are not attorneys, ordered appearances regardless of any stay or moratorium; did not observe social distancing and

[22] Victoria Esposito, Esq.; Advocacy Director; *Legal Aid Society of North Eastern New York* (undated written testimony submitted, page 2).
[23] *Id*., at page 2.
[24] See: https://www.nycourts.gov/courts/townandvillage/ (Date Accessed, August 6, 2022)
[25] Lucy E. Turner, Esq.; Staff Attorney – Housing Unit; *Legal Services of Hudson Valley* (virtual hearing testimony; (November 18, 2021; at approximately 2:17)
[26] Id., virtual hearing testimony, November 18, 2021, at approximately 2:19
[27] Victoria Esposito, Esq.; Advocacy Director; Legal Aid Society of North Eastern New York (undated written testimony submitted, page 2).

mask guidelines; and made inappropriate political or personal remarks to staff who were attempting to observe those guidelines.[28]

It should be noted that organizations such as the Legal Aid Society of Northeastern NY, the Legal Aid Society, Legal Services of the Hudson Valley and others did not object to virtual hearings at its core but simply stated that many times the options were not utilized correctly and that some hearings should only be conducted in a courtroom; particularly those hearings that require testimony and examining witnesses.[29]

IV. Number of People Who Could Not Access Services

In addition to affecting the ability of the public to directly access the Court themselves, the COVID-19 health crisis also greatly changed the way in which residents of New York State were able to access ancillary and related services, which are essential components to enforcement and implementation of the relief sought in the Courts.

For example, multiple agencies in the 8th Judicial District reported massive backlogs of unserved Orders of Protection (OOP), perhaps as many as two hundred (200) from time to time.[30] This issue was reported by no fewer than four (4) legal services agencies and partners at ad hoc meetings held to discuss and coordinate COVID-19 responses.[31]

Despite a clearly identified issue affecting the communities served during the pandemic, there was an overarching desire not to alienate law enforcement during such a sensitive time, which resulted in a "wait-and-see" approach. Going forward there cannot be a significant gap in the ability to obtain *and then serve* OOPs, as in many cases these were the only tool available to enact immediate relief within a Court system that was operating at diminished capacity.

Since the most effective and heavily utilized tool during the pandemic was virtual and on-line access to the legal system and related services, this needs to be addressed. It appears that a

[28] *Id.,* at page 2.
[29] *Id.,* at page 2; *and* Clare J. Degnan, Esq.; Executive Director; *Legal Aid Society of Westchester County*; (written testimony submitted; December 2021, page 6; *and* Lucy Turner, Esq; Staff Attorney; *Legal Services of Hudson Valley*; (virtual hearing testimony 2:17:45 through 2:20:45).
[30] Emborsky, *Neighborhood Legal Services, Inc.*; (written testimony, page 2).
[31] *Id.*

significant effort needs to be made to increase the amount of information available online, as well as to simplify it and provide instructions that are friendly to those proceeding without counsel.

The Permanent Commission on Access to Justice (The Permanent Commission) surveyed more than 600 litigants this year about their experience navigating the judicial system. Seventy-nine percent (79%) of unrepresented litigants reported using websites to find information about their legal rights or to try and find help with their case, yet two out of every five users (40%) said they were unable to find what they were looking for.[32]

But even with greater online and virtual access to the Courts, gaps in accessibility have been observed in *pro se* matters. For example, seventy-five percent (75%) of unrepresented litigants said that they needed help in completing court forms. One out of every four (25%) pro se litigants reported not understanding which forms to use. Significant percentages of those polled by The Permanent Commission could not understand the words or could not speak the language used in forms (15%); or could not find the information or document required to complete the forms (15%). It became clear that in addition to language barriers, there were people who lack digital literacy to participate in online services, and those who encountered other barriers such as scanning, printing, and signing documents.[33]

Court-involved New Yorkers reported not being able to access conviction records during the pandemic. This was critical at a time when layoffs and furloughs were commonplace, and many looking for work needed access to their criminal and conviction records to navigate the job-search process. Limited access to "rap sheets" during COVID, because of in-person fingerprinting requirements caused similar issues, and needs to be addressed going forward.[34]

Limitations to access to services were observed outside of the family and criminal courts as well, as detailed in the testimony of the Nassau Suffolk Law Services Committee Inc. They reflected upon difficulties stemming from the lack of in-person options for assisting clients. This

[32] Veronica Dunlap, Esq.; Director of New York Programs; *probono.net;* (virtual hearing testimony, November 18, 2021, at approximately 12:25; and undated written testimony submitted, at page 2).
[33] *Id.,* at page 5.
[34] Konor; *Community Service Society of New York*, (written testimony submitted, November 24, 2021) (page 2).

resulted in problems for disabled clients, specifically in accessing the SSA and the related issues with that government agency's offices being fully remote.[35]

The Legal Aid Society of NYC (LAS) testimony confirmed the language access issues and availability of information to non-English speaking litigants, as disabled litigants, as areas to address. LAS also highlighted the importance of developing an equitable e-filing system for *pro se* litigants as the basis for long-term justice.[36]

Access to services outside of the legal system, yet directly related to the well-being of the persons served by the agencies operating within the legal system, were identified as practical problems that need to be addressed in connection with any review of the bar's COVID-19 pandemic response. For example, "many grantees reported significant efforts to facilitate client access to non-legal services including cash assistance, food pantries, and other essential resources."[37]

The Brooklyn Defender Service (BDS) noted certain, inherent, impacts that a virtual law practice has on providing legal advice and services to clients. Specifically stating:

> "the first meeting between a parent and their attorney is pivotal–it sets the tone for a robust and trusting attorney-client relationship. Moreover, as crucial decisions about a family–including whether they will be separated–are made at the first court appearance, it is vital for a parent to have the time and space to share facts and guide representation prior to that appearance. In this virtual world, ACS is tasked with supplying parents' phone numbers to defense counsel prior to intake. This is often done so at the last possible minute and frequently the numbers provided are incorrect."[38]

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[35]Rezwanul Islam, Esq, Deputy Executive Director; *Nassau Suffolk Law Services Committee Inc.*; (virtual hearing testimony, November 16, 2021; at approximately 39:30) (In discussing the effect of not having more options for providing services for clients seeking disability representation, the testimony indicated that unfortunately "More likely than finding assistance, they will give up and go without the services they need." (emphasis added, virtual hearing testimony at 43:40).

[36] Adriene Holder, Esq.; Chief Attorney of the Civil Practice; *Legal Aid Society* (written testimony submitted, November 17, 2021; at page 15-16). "If approached carefully, a uniform, user-friendly, accessible, and multilingual remote filing system has the potential to create massive benefits for pro se litigants, and would facilitate efficiency and transparency in the court system…The pro se e-filing system should also include regularly updated resources for pro se litigants including, but not limited to, an appropriately staffed helpline, FAQs, contact information for city marshals, sheriffs, legal services providers, clerks in each courtroom, Family Justice Centers, and a directory of the New York State courts."

[37]Christine M. Fecko, Esq; General Counsel; *Interest on Lawyer Account Fund of the State of New York (IOLA);* (written testimony submitted, November 23, 2021) (page 3).

[38] Schreibersdorf; *Brooklyn Defender Services;* (written testimony submitted, November 18, 2021; page 7).

Further, the testimony of BDS observed that only a small portion of attorneys have access to the Universal Case Management System (UCMS), the only way for counsel to access court orders (including orders of protection) and other critical information severely limiting advocates' ability to zealously represent parents whose children may have been subject to removal.[39] They went on to state that although "this lack of access preceded the onset of the COVID-19 pandemic, … given the disproportionate impact of the family regulation system on families of color, full access to this needed information is a matter of equity."

Finally, it appears that legal service agencies and service providers reflected a marked increase in administrative burden with increased virtual services, which can limit their ability to serve clients. There was significant difficulty in finding volunteers willing to meet in-person with clients, and there was a perceived difficulty providing services to clients with mental and physical health issues, as well as those with transportation and childcare complications.[40]

V. How COVID-19 Highlighted Concerns of Race and Racial Inequality

The COVID-19 pandemic has been unprecedented in scope. Its impact on our most vulnerable neighbors cannot be understated. The pandemic's negative consequences have been felt disproportionately by people of color.

The Legal Aid Society spoke at length about the disparate impact the pandemic has had on marginalized communities in New York City.[41] Acknowledging and identifying these issues are the first step in addressing them so that we may learn from these experiences, or as LAS stated "…It is through this lens of disparate impact that we must view our path forward.[42]

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[39] *Id*., at pages 7-9.

[40] Sally Curran, Esq.; Executive Director, *Volunteer Lawyers Project of CNY, Inc*. (virtual hearing testimony; November 16, 2021; at approximately 1:50:40).

[41] Adriene Holder, Esq.; Chief Attorney of the Civil Practice; *Legal Aid Society* (written testimony submitted, November 17, 2021; at page 7). "For example, approximately one-third of Black and Latino households do not have access to a computer and more than one-third of low-income New Yorkers do not have access to broadband of any kind."

[42] *Id.,* at page 4. "At the beginning of this pandemic, three of the top four counties suffering death rates from COVID-19 across the Nation were within New York City: Queens, Kings and Bronx. For example, South Bronx has one of the highest infection rates in the country, proving once again the disparate impact our Black and Brown communities continue to endure due to the lack of healthcare and resources needed to protect against a highly contagious and deadly pandemic that ravages the nation. It is through this lens of disparate impact that we must view our path forward."

There were disproportionately high rates of COVID-19 in communities of color.[43] Additionally, these same communities had issues accessing the internet, services and programs people need to survive. The pandemic has illustrated that issues of poverty manifest themselves differently depending on where you might live.

Organizations reported a number of issues that impacted people of color including limited access to Individual Taxpayer Identification Number (ITIN) and the family justice centers, such as family court.[44] [45] Similarly, some groups testified that due to issues of systemic racism, many ethnic groups resided in the poorer rural and urban areas of their regions with limited access to the internet.[46] [47] [48] As more and more venues moved online, the inability to access these services were also disproportionately felt by people of color.

Brooklyn Defenders Services testified that the disparities in healthcare, employment, and housing that put communities of color at greater risk of being targeted by the legal and court systems have also put them at greater risk of illness and death during this pandemic. The COVID-19 pandemic hit New York just as the State began implementing groundbreaking criminal justice reforms. These historic reforms were designed to address a system that continually and disproportionately impacted Black and Latinx/Hispanic/Latino/a/é communities, especially pretrial mass incarceration. When the pandemic struck, many procedural protections enshrined in

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[43] Curran; *Volunteer Lawyers Project of CNY, Inc*.; (hearing testimony; November 16, 2021, at approximately 1:49:00) (Comments include discussion of the overwhelmingly disproportionately effects of COVID in communities of color).

[44] Terry Lawson, Esq.; Executive Director; *UnLocal;* (written testimony submitted, November 18, 2021, pages 3-4) *(*Discussing difficulties resulting from limited access to get ITIN numbers as well as Family Courts.)

[45] Cramer; *Legal Information for Families Today (LIFT);* (written testimony submitted, November 24, 2021, page 1-2). "The unrepresented litigants who come to Family Court in New York City are disproportionately low-income, from communities of color, often undocumented immigrants, or speak monolingual Spanish or some other language. And, as the family courts are under-resourced and understaffed, there is a justice gap for many of the litigants."

[46] Turner; *Legal Services of Hudson Valley* (virtual hearing testimony; (November 18, 2021; at approximately 2:17); Comments briefly mentioned in the beginning of the testimony, due to the systemic racism in our country, many ethnic groups reside in the poorer rural areas with limited internet access.

[47] Leah Goodridge, Esq.; Managing Attorney for Housing Policy; *Mobilization for Justice, Inc*. (written testimony, November 18, 2021, page 3). Comments cited are studies showing that indigent, black, Latino and senior NYC residents have a greater percentage of homes without internet access, thus resulting in a greater percentage of evictions for these litigants than for white or Asian American households. In addition, digital access in public facilities is hampered due to "rampant police reporting of black residents" engaging in normal everyday activities such as sitting in a coffee shop or in a public park.

[48] Dunlap; *probono.net;* (undated written testimony submitted, at page 5). "Prior to the pandemic, the digital divide was often thought of as an infrastructure issue, for example "last mile" connectivity gaps in rural areas. While broadband access and affordability remains an issue for too many New Yorkers - particularly low-income, Black, Latinx, and rural communities."

the Criminal Procedure Law (CPL), including the newest reforms, were suspended through a series of overly broad executive orders.

Courts acceded to former Governor Cuomo's unnecessary suspension of key procedural safeguards. The results have been disastrous: New York City's jail population was, at the time of the testimony, higher than it was before the pandemic. Bail was set in many more cases and in higher amounts despite legislation designed to decrease these amounts. Our cases were allowed to be repeatedly adjourned while our clients were allowed to languish in jail at heightened risk of exposure. It should be, noted that some providers saw a positive impact from bail reform finding it reduced COVID-19 transmission, and allowed communicating with the clients to be more proactive. (Nassau County Legal Aid Society; Day 1, 15:30)

At the hearing, Brooklyn Defenders Services testified that over the past year, fourteen people have died while incarcerated at Rikers Island due to the inhumane conditions that were exacerbated by the pandemic.

Brooklyn Defender Services also shared that clients faced increased scrutiny and disrespect at an alarming rate, oftentimes being ejected from virtual courtrooms. The same disrespect clients faced was also felt by Brooklyn Defender Services attorneys practicing in these virtual forums. [49]

During this time, the United States also experienced social unrest due to the murder of George Floyd. In response, the Office of Court Administration appointed Secretary Johnson on June 9, 2020 to be the Special Advisor on Equal Justice in the Courts. He was tasked with reviewing equal justice and racial bias in the New York State court system, the largest and most complex in the country. The OCA Office of Justice Initiatives testified regarding their new task of implementing the thirteen recommendations from the report on race and justice stated in the

[49] Schreibersdorf; *Brooklyn Defender Services;* (written testimony submitted, November 18, 2021; page 6). "Our office saw an increase in the disrespectful and dehumanizing language used to speak to both families in the court system and our staff. The disrespectful treatment of families has included judges ejecting parents from virtual courtrooms when they did not want the parent to speak and using abusive language towards parents who were unable to appear by video. Our staff–particularly our staff of color–have also experienced being denigrated by judges in the presence of their clients, which is not only unacceptable, but compromises the attorney-client relationship and undermines the goal of objectivity in the court system."

report.[50] One of their first tasks was drafting a new mission statement that would emphasize the courts commitment to zero tolerance for racial bias.[51]

VI. Virtual Hearings

The impact of the COVID-19 pandemic on the New York State Court system, its litigants, and especially its most vulnerable litigants, cannot be overstated. As access to justice and access to the courthouse was severely limited, the New York State Court system's response in pivoting to virtual hearings became a critical tool to continue that access, with both successes and failures.

The testimony adduced by the various agencies and providers often showed similar concerns with the virtual hearing model. In criminal proceedings, representation and hearings by telephone or video raised substantial concerns over fundamental due process rights. The Legal Aid Society of Westchester County cited a law review article from 2010, well before the pandemic, that studied the outcomes of criminal defendants whose hearings were conducted over video. The findings confirmed substantially higher bond amounts for virtual defendants than their in-person counterparts, with increases "ranging from 54 to 90 percent, depending on the offense."[52] This situation was only exacerbated by the pandemic's use of telephone arraignments resulting in these worsening outcomes. The use of remote video proceedings made attorney-client communications more difficult and sometimes impossible.

Lack of access to technology, computers, digital devices, remote access, smart cell phones, technological illiteracy, lack of privacy, connectivity, and adequate broadband service was a consistent theme throughout. These difficulties impact predominantly on the more vulnerable

[50] *See* New York State Unified Court System, "Report from the Special Adviser on Equal Justice in the New York State Courts" (October 1, 2020), https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf
[51] Hon. Edwina G. Mendelson; Deputy Chief Administrative Judge for Justice Initiatives; and Director, New York State Courts Access to Justice Program; *New York State Unified Court System's Office for Justice Initiatives (OJI);* (virtual hearing testimony, November 16, 2021; written transcript submitted, page 5) "The mission of the Unified Court System (UCS) is to deliver equal justice under the law and to achieve the just, fair and timely resolution of all matters that come before our courts. In the service of our mission, the UCS is committed to operating with integrity and transparency, and to ensuring that all who enter or serve in our courts are treated with respect, dignity and professionalism. We affirm our responsibility to promote a court system free from any and all forms of bias and discrimination and to promote a judiciary and workforce that reflect the rich diversity of New York State."
[52] Degnan; *Legal Aid Society of Westchester County*; (written testimony; page 4).

litigants, including the poor, elderly, mentally challenged and disabled, thwarting their access to equal justice under the law.

There were advantages cited for litigants, including the lack of necessity to take off an entire day of work, seek childcare, rely on intermittent public transportation to appear in the courthouse (and especially in rural areas where public transportation is limited or non-existent), or the necessity to travel long distances, especially in rural or remote areas.

Volunteers of Legal Service ("VOLS") cited as problematic Department of Labor ("DOL") telephonic hearings, without a video option, which created confusion for the claimant seeking unemployment benefits.[53] Serious challenges included the inability for litigants to access the telephone hearing because they were unable to pay their phone bill, or missing the Administrative Law Judge's call, or the call coming up as "Anonymous" or "Unknown", and then the claimant not picking up the phone. Some claimants who do not speak English received notices in English only, advising that the hearing is by telephone. The lack of ability to read English then caused the claimant to misunderstand the directive, instead appear at the DOL office only to find it closed, causing them to miss the hearing and default on their administrative appeal. Conversely, there were claimants who do speak English, have adequate phone service, and who preferred the telephonic hearings rather than having to travel to the DOL office.

Similarly, the Social Security Administration offered disability hearings initially by telephone only, then recently, by video. Clients who did not want a virtual hearing were afforded the right to wait for an in-person hearing. Clients who did not want to wait an indefinite amount of time for an in-person hearing could opt for a virtual hearing. Litigants choosing a telephone hearing were often much more comfortable with this option, greatly reducing their anxiety levels.

The Legal Aid Society of Northeastern New York found that virtual hearings, in the 3rd Judicial District (Capital District) and 4th Judicial Districts (mostly rural counties), were most successful where kiosks were installed in some courts and community centers such as libraries or

[53] Stephanie Taylor, Esq.; Project Director, Unemployed Workers Project; *Volunteers of Legal Service (VOLS);* (written testimony submitted, November 18, 2021, pages 1-2)

churches. These kiosks afforded litigants, who did not otherwise have sufficient digital access, to appear virtually in the courthouse but still be protected from exposure to COVID-19.

Family Court Article 10 proceedings seemed to have proved to be most problematic when held virtually. New York City, in particular, found its family court remained essentially closed throughout the pandemic, and have only recently been opened for in-person hearings. Requests for in-person emergency hearings to terminate placement of children removed from their homes and parents were often denied, without explanation. Testimony presented jointly by the Bronx Defenders, Brooklyn Defender Services, Center for Family Representation and the Neighborhood Defender Service of Harlem (collectively, the "family defense providers"), lamented that the reunification rates of families separated by the Agency for Children Services ("ACS") in New York City decreased dramatically, from 2,309 reunifications in 2019 to 1,830 reunifications in 2020, finding that the failure to prioritize family reunification and the preservation of family bonds thwarts the very purpose of the family court and demonstrates a low regard for the human bonds of the family who rely on the court for justice.[54]

Virtual hearings in family court proved to be especially difficult and challenging for litigants without proper access to digital devices, lack of technology to join court appearances, judges who refused to recall a case so that a parent may re-charge their phone or judges admonishing parents for appearing from a noisy, crowded public location where they can access free Wi-Fi.

There were successful programs implemented during the pandemic to enhance virtual hearings. The Westchester County Association (an economic development organization) partnered with WestHab (an affordable housing non-profit) in "Project OVERCOME", based in Yonkers. This program is part of US Ignite, a national non-profit organization, to expedite delivery of broadband services to underserved communities across the United States. [55]

[54] Ketteringham; *The Bronx Defenders*; Shapiro; *Brooklyn Defender Services*; Cortese; *Center for Family Representation*; Akbar; *Neighborhood Defender Service of Harlem*; (written testimony jointly submitted, November 18, 2021; page 2).
[55] Degnan; *Legal Aid Society of Westchester County*; (written testimony; page 5)

Legal Information for Families Today ("LIFT") established a Tech Hub pilot, with private funding, whereby they opened their administrative offices, located in Brooklyn, near the courthouse, for people to conduct their virtual hearings in a safe, private space.

Some of the recommendations or guidelines, from these joint defender organizations for utilization, or not, of virtual appearances in Article 10 proceedings include resuming in-person proceedings for Article 10 intake, emergency hearings pursuant to FCA 1027 and 1028 and all contested hearings when a parent chooses to appear in person; hold conferences with court attorneys and uncontested appearances virtually; provide technology and technical assistance to ensure that parties have access to family court in any proceedings conducted virtually; expand in-person family court hours to accommodate emergency hearings; and ensure equal access to the court by requiring that judges schedule all Orders to Show Cause and motions filed by defense counsel.[56]

VII. How the Digital Divide Impacted Indigent Populations

Similar to issues with virtual hearings, legal services providers across the state consistently highlighted how the digital divide impeded the ability of low-income and under-resourced communities to access justice as courts transitioned to virtual proceedings and legal services providers pivoted to remote service delivery models during the pandemic.

Low-income communities across the state do not have reliable and consistent access to computers, tablets, or internet connections necessary to participate in virtual proceedings and online community education programs, or access online legal forms.

In Westchester County, thirty-two percent (32%) of households do not have a laptop or tablet.[57] One-third of black and Latino NYC residents do not have access to a computer.[58] Forty-two percent (42%) of NYC seniors lack internet access and thirty percent (30%) of Black and

[56] Ketteringham; *The Bronx Defenders*; Shapiro; *Brooklyn Defender Services*; Cortese; *Center for Family Representation*; Akbar; *Neighborhood Defender Service of Harlem*; (written testimony jointly submitted, November 18, 2021; pages 4-5).
[57] Degnan; *Legal Aid Society of Westchester County*; (written testimony; page 5).
[58] Adriene Holder, Esq.; Chief Attorney of the Civil Practice; Legal Aid Society (virtual hearing testimony, November 18th, 2021, at approximately 2:38:31).

Latinx NYC residents lack broadband access.[59] In rural communities, access to broadband is limited.[60]

In many instances, when there is a computer or tablet in the household, multiple members may need to share it for work and/or school. The quality of internet access also varies, with some families lacking access to broadband service, resulting in slow or inadequate internet speeds.

Clients who rely on their cell phones for internet access may only be able to afford limited data plans. Those with a tablet or phone, but no computer, are hindered in their ability to complete online court forms or petitions.[61] Cell phone access may also be limited, with clients needing to buy minutes and/or not having good cell phone coverage based on their location.[62]

Some clients have been able to access the internet in public spaces, such as libraries. However, internet connections in public spaces are not necessarily secure. It is inappropriate to utilize these spaces for completing legal documents that require social security numbers and personal health information.[63] Limits on the amount of time one can use computers at libraries and other public spaces have also impeded the ability to navigate and complete lengthy forms.[64] Given the rampant policing of black communities, the ability to access the internet in public places such as a coffee shop or parks is hampered.[65]

[59] Leah Goodridge, Esq.; Managing Attorney for Housing Policy; *Mobilization for Justice, Inc.* (virtual hearing testimony, November 18th, 2021, at approximately 2:24:40).
[60] Esposito; *Legal Aid Society of North Eastern New York*; (virtual hearing testimony, November 18, 2021, at approximately at approximately 1:11:52).
[61] Cramer; *Legal Information for Families Today (LIFT);* (virtual hearing testimony, November 18, 2021, at approximately at approximately 51:10).
[62] Degnan; *Legal Aid Society of Westchester County*; (virtual hearing testimony, November 18, 2021, at approximately 2:10:01); Goodridge; *Mobilization for Justice, Inc.* (virtual hearing testimony, November 18, 2021, at approximately 2:25:52).
[63] Michael Conors, Legal Services of NYC (virtual hearing testimony, November 18th, 2021, at approximately 1:43:58).
[64] Conors, Legal Services of NYC (virtual hearing testimony, November 18th, 2021, at approximately 1:44:06).
[65] Goodridge; *Mobilization for Justice, Inc.* (virtual hearing testimony, November 18th, 2021, at approximately 2:26:44).

Clients with inadequate internet access have found virtual hearings challenging. For example, Family Court judges in New York City were insisting that parties appear by video without regard to a family's access to technology.[66]

Family Court litigants who appear late for virtual hearings because of connectivity issues have found their hearings adjourned or even dismissed. As a result, attorneys representing clients in family court have had to spend time filing to re-calendar cases for clients who had a technology problem.[67]

Even when hearings are telephonic, such as unemployment insurance hearings, clients may need to file documents electronically over the internet. Those without the means to do so are unfairly disadvantaged.[68]

As courts were almost exclusively virtual for an extended period, the onus was placed on legal services providers to ensure their clients were able to participate in virtual proceedings. Some legal services organizations were able to access private funding to help address the digital divide. For example, as mentioned earlier, LIFT was able to access private funding to launch a Tech Hub for client use. Additionally, Brooklyn Defender Services was able to identify funding to provide a limited number of clients with tablets with data plans. However, the responsibility should not be solely on a client and their attorney to overcome obstacles to accessing technology to participate in proceedings.[69]

Despite the availability of devices and the internet, some clients may lack digital literacy skills needed to access justice. Limited digital literacy has impacted clients across practice areas, including housing, elder law, and public benefits. Older adult clients have been particularly limited

[66] Anya Mukarji-Connolly, Esq.; Associate Director of Policy & Advocacy; *Brooklyn Defender Service*; (virtual hearing testimony, November 18, 2021, at approximately 1:33:20).
[67] Cramer; *Legal Information for Families Today (LIFT);* (virtual hearing testimony, November 18th, 2021, at approximately 49:48).
[68] Stephanie Taylor, Esq.; Project Director, Unemployed Workers Project; *Volunteers of Legal Service (VOLS*); (virtual hearing testimony, November 18, 2021, at approximately 1:13:40).
[69] Lisa Schreibersdorf, Executive Director,. Brooklyn Defender Service; (written testimony submitted November 18, 2021, , page 8); and Cramer; Legal Information for Families Today (LIFT); (virtual hearing testimony, November 18, 2021, at approximately 50:34 and 53:24).

by such digital literacy from effectively engaging in life planning at a particular time of vulnerability.

Lack of digital literacy also impeded the ability of litigants to complete online forms and participate in virtual court proceedings. Judges were not necessarily patient with clients struggling with technology during hearings.

A recent study by the Permanent Commission found that seventy-five percent (75%) of respondents needed help filling out online legal forms. In the public benefits context, barriers encountered included: the need for an email address to create an online account; multi-factor authentication; and requiring multiple accounts or apps to access benefits.

As legal services providers shifted from in-person to virtual intakes over the course of the pandemic, some providers noted a decrease in overall intakes, which may be related to digital access.[70] In addition, while community legal education doubled via virtual means,[71] clients' lack of access to technology and limited digital literacy may have limited their ability to benefit from these types of services.

In the criminal justice context, clients' lack of access to technology limited the ability of public defenders to provide high quality representation as private face-to-face interaction was limited.

OCA Office of Justice Initiatives[72] (OJI) offered testimony detailing how it helped bridge the digital divide. OJI has a collaborative approach to problem-solving and has created strategic partnerships with bar associations, law schools, law firms, and legal services programs to help fulfill its core mission of advancing access to New York's Justice system.

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[70] Fecko; Interest on Lawyer Account Fund of the State of New York (IOLA); (written testimony submitted, November 23, 2021, page 2).

[71] Fecko; *Interest on Lawyer Account Fund of the State of New York (IOLA);* (written testimony submitted, November 23, 2021) (page 2).

[72] Hon Edwina G. Mendelson; *New York State Unified Court System's Office for Justice Initiatives (OJI)* "Our core mission to ensure meaningful access to justice for all New Yorkers in all courts is more important than ever." Comments go on to detail efforts to promote access via the Policy and Planning Division, Child Welfare and Family Justice Division, Youth and Emerging Adult Division, Judiciary Legal Services Program, and the Access to Justice Division. (written transcript of virtual hearing testimony, pages 1-2).

During the pandemic, most of its programs shifted to a virtual format. They provided free legal consultations, prepared uncontested divorce papers, and extended outreach to vulnerable communities through "Know Your Rights" presentations in partnership with the Brooklyn Public Library.

Legal services providers offered several recommendations for eliminating the digital divide for indigent clients and reducing the unfair burden placed on legal services providers to facilitate client access to technology. Specifically, New York State should invest in increasing access to broadband internet service in low-income and under-resourced communities across the state. In addition, the New York State Court system should be responsible for ensuring access to justice by:

- Providing litigants with a choice between in-person and virtual court appearances.
- Providing litigants access to computers through the following mechanisms:
    - Offering designated private computer stations in courthouses and government agency buildings.
    - Coordinating with local shelters and libraries to provide a secure digital system that enables litigants to upload court documents and other paperwork relating to their proceeding.
    - Collaborating with community-based organizations to set up hubs where residents can borrow computers or tablets if they do not have one.
- Simplifying websites and online forms to make them more accessible for those with limited digital literacy skills and for those who rely on phones and tablets to access the internet.
- Developing a written policy that technology limitations will not be held against the parties in a proceeding.

VIII. Language Access

The COVID-19 pandemic has both exposed pre-existing failures of language access for limited English proficiency ("LEP") individuals in New York Courts and created a new need for better language interpretation in written materials and during court proceedings.

More than two million New Yorkers are not fluent in English, while another three million do not speak English as their primary language.[73] In total, New Yorkers speak more than 150 languages.[74] The courts are required to provide adequate interpretation so that LEP litigants can meaningfully participate in proceedings.[75]

Practitioners emphasized that meaningful language access must occur at all stages of litigation – from court websites explaining how to file and/or respond to a case, to initial meetings with assigned counsel and at hearings and trials in front of a judge.

As an initial matter, practitioners raise grave concerns that the courts do not provide written instructions for filing and answering litigation in the most spoken languages in New York.[76]

Prior to the pandemic, would-be litigants could walk into the courthouse to seek advice on filing or answering. Court staff would either find an interpreter to assist or attempt to communicate using flyers or court forms. This was sub-optimal, but at least allowed many LEP litigants some access to justice.

With fewer in-person services available, it is now vital that this basic information be provided in multiple languages in a written format on the courts' websites. Court notices must also be offered in commonly spoken languages.

The failure to provide this simple accommodation has real-world effects; for instance, LEP appellants in hearings administered by the Department of Labor have accidentally defaulted on their hearings because the notice telling them to appear via video conference rather than in-person was sent only in English.[77] For all these documents, there must be access to a language line service that will be able to provide translation into less commonly spoken languages in New York.

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[73] *See* New York State Unified Court System, "Ensuring Language Access: A Strategic Plan for the New York Courts" 1 (March 2017), http://ww2.nycourts.gov/sites/default/ files/document/files/2018-06/language-access-report2017.pdf (citing U.S. Census Bureau, Language Statistics (2013), www.census.gov/data/tables/2013/demo/2009- 2013-lang-tables.html).
[74] *Id*.
[75] 22 N.Y.C.R.R. § 217.1(a).
[76] Adriene Holder, Esq.; Chief Attorney of the Civil Practice; *The Legal Aid Society* (written testimony submitted, November 17, 2021; at page 13).
[77] Stephanie Taylor, Esq.; Project Director, Unemployed Workers Project; *Volunteers of Legal Service (VOLS);* (written testimony submitted, November 18, 2021, page 1).

Similarly, it is vital that written instructions for joining and participating in virtual court appearances be posted in multiple languages. These instructions should include explanations of the procedure for calendar calls – often a moment for significant confusion – in relevant court systems. The New Jersey Court website features an instructional video on how to prepare for remote court hearings in Spanish, Haitian Creole, Korean, Polish, Portuguese, and Arabic. New York should similarly make this information available in a variety of languages.[78]

Even more pressing is the need for improved interpretation during court proceedings. LEP litigants have found telephonic proceedings particularly difficult to understand, as it is not always clear who is speaking, and time is not generally allotted for interpretation of the full proceeding. Instead, interpreters often translate only when the LEP individual is speaking or being addressed directly. By contrast, during live proceedings the interpreter is generally seated near the LEP individual and can offer simultaneous interpretation of the entire proceeding. Proceedings via video conference are somewhat better than telephonic proceedings, as litigants can more easily identify the speaker. However, the problem remains that there is no way for functional simultaneous interpretation of the entirety of the proceedings.

As a result of these difficulties, live proceedings with full simultaneous interpretation should be the gold standard for cases involving LEP individuals. If live proceedings are not possible, every effort should be made to offer video proceedings with sequential interpretation of the entire proceedings. This is undoubtedly more time-consuming, as each statement must be followed by an interpretation of that statement. However, it is the only way to ensure that LEP litigants can meaningfully participate. Courts must therefore be aware that they should allot additional time for virtual proceedings involving LEP individuals. In the event of a telephonic hearing with an LEP participant, even more time must be allotted so that each speaker can identify themselves each time they speak.

LEP litigants who are assigned counsel must be provided an adequate opportunity to communicate with counsel through a language access line. Otherwise, the right to counsel in these cases is severely undermined by the inability of client and attorney to communicate regarding even

[78] Adriene Holder, Esq.; Chief Attorney of the Civil Practice; The Legal Aid Society (written testimony submitted, November 17, 2021; at page 14).

the basic facts of the case.[79] In some limited circumstances, New York City has funded a language line for assigned counsel, and the outcomes in those cases have been significantly better-[80] Assigned counsel throughout the state should be provided access to a language line to ensure that the right to counsel is not meaningless.

IX. 18B Attorney Concerns

Additional funding for legal services during the post-COVID period is essential to providing direct representation and would allow for Court operations to normalize more from occurring in the future. Increased funding must also be directed to the Family Courts themselves, to obtain additional staff, referees, and magistrates, to handle the initial surge of cases in a future health crisis, and the corresponding overload of docketed cases.[81]

There is a general shortage of 18B attorneys, which further prolongs cases. Hourly rates for 18B lawyers should be increased to provide incentives to bring more attorneys into the various programs available to the thousands of pro se clients coming to court.

X. Conclusion

The delivery of legal services to low income, disabled and elderly communities around New York State will continue to be a challenge as we build back from the pandemic. By gathering testimony and developing this report, we hope that we can all learn from the collective experience of the legal services community. In that way, the entire state is better prepared for the next emergency and can avoid the needless suffering of our most vulnerable neighbors.

[79] Sarah Tirgary, President of the Assigned Counsel Association-NYS (written testimony submitted, November 17, 2021; at page 1-3).
[80] Sarah Tirgary, President of the Assigned Counsel Association-NYS (written testimony submitted, November 17, 2021; at page 1-3).
[81] Ognibene; *Her Justice*; (written testimony submitted, November 18, 2021, pages 7-8).

XI. Appendices - Organization Testimony

A. ACA-NYS, Inc.
B. Brooklyn Defender Services
C. Her Justice
D. Hon. Edwina G. Mendelson
E. Interest on Lawyer Account Fund (IOLA)
F. Legal Aid Society of Northeastern New York
G. Legal Aid Society of Westchester County
H. Legal Information for Families Today (LIFT)
I. Nassau Suffolk Law Services Committee Inc.
J. Neighborhood Legal Services, Inc.
K. Pro Bono Net
L. The Bronx Defenders, Brooklyn Defender Services, Center for Family Representation, and Neighborhood Defender Service of Harlem
M. The Legal Aid Society
N. University at Buffalo School of Law Family Violence and Women's Rights Clinic
O. UnLocal
P. Volunteers of Legal Service (VOLS)

APPENDIX A

Testimony of Sarah Tirgary, President of the Assigned Counsel Association – NYS before the commission on November 16, 2021.

Good Afternoon;

My name is Sarah Tirgary and I am President of the Assigned Counsel Association of NYS, an organization that is approximately 5 years old, whose mission is to bring about improved access to resources for the assigned counsel panel attorneys and their clients, as well as to facilitate better communications between the courts, and our attorneys. Our goal in a nutshell is to advocate for improvements in the quality of legal representation of indigent clients and children.

Our members represent almost every county in NYS – each having their own unique demographics and bureaucratic structure.

Most if not all attorneys on the Assigned counsel panels (family, criminal and appellate panels alike) maintain their own private practices, yet are each bound together by one common factor – they represent some of the most vulnerable members of our communities within NYS- including indigent adults and children.

Our attorneys are some of the most qualified and talented attorneys in their field of practice, yet during COVID, these attorneys have been limited in what they CAN accomplish for their clients due to their lack of access to resources.

Our association recognizes the unique needs of each individual county. Having worked primarily in NYC in the county of Queens, I am intimately familiar with NYC issues, but have recently learned of many issues concerning upstate counties.

In the midst of this pandemic, most if not all courts at one point or another reverted to a 100% virtual court system. One thing that stands out in a virtual practice for counties with a diverse cultural make up is the inability for our attorneys to communicate with our non-English speaking clients. Although our panels are made up of the most racially and ethnically diverse group of attorneys, we cannot guarantee at any given time of day that we have available an attorney with language skills to match the language needs of a client. These clients are exposed and vulnerable, experiencing a trauma that often times is considered unspeakable. We have been in situations on almost a daily basis where we cannot speak with our clients with the aid of an interpreter. This is unforgiving, especially since the solution to this problem is so simple.

The need for our access to a telephonic interpreter services was made known to the NYC MOCJ on numerous occasions. We were repeatedly told ‘we will have to get back to you’. Months would go by when we would not hear a word so we would have to email again the ACP administrator to ask for a status update, only to be told ‘I will get back to you but completely understand the dilemma’.

The constitutional right to effective assistance of counsel is undermined when an attorney cannot speak with their client using the same language skills. Access to justice is completely undermined when we don’t’ have access to a telephonic interpreter services in a virtual world. This is having a disproportionate impact on people of color, denying them access to justice at a time when their families are potentially being torn apart. Please note that when courts were in person, on the first day that we are assigned to represent a client, we could ask an interpreter in the courthouse to help interpret for us right before the case was about to be called. This situation was not ideal as it rushed us, not allowing clients to tell their story. This problem became magnified as we are now unable to speak at all with our clients unless we use google translate or a comparable translation app. We all know these translation apps are ineffective.

To demonstrate how access to resources such as a telephonic interpreter service can improve the outcome of a case, I give you another example. In Queens County, the assigned counsel attorneys recognized the growing surge in domestic violence and child abuse due to people sheltering in due to the pandemic. Children no longer had their teachers or guidance counselors to report abuse or neglect, survivors of DV were not missed at work or school when they didn’t’ show up, or if they showed up with bruises. Our attorneys in Queens formed what is now known as the O Squad. WE formed an alliance with the Family Justice Center a Mayoral agency who makes sure that survivors are put in touch with appropriate resources. IN this example, the FJC would connect survivors with agencies who are mandated to assist them in accessing services, including legal assistance.

Our attorneys, upon receiving a referral, would meet with the clients on the phone, draft a petition, file it, and appear on behalf of the client. For these cases, the NYC Mayor’e office, FJC DID give us access to a telephonic interpreter service for the life of the case. However, the Mayor’s office refuses to provide us with access to the same service for representation of all other types of adult.

In cases where we represent survivors of DV through the O Squad program, our attorneys have been able to successfully represent hundreds if not over a thousands of survivors, particularly non-English speaking clients. Our petitions

were thorough, succinct, and told a story that interwove the specific body of law that was violated. Sworn pleadings must be complete, dependable and reliable. Without an interpreter, a client could not swear to the contents of a petition.

This program was so successful that we formed another alliance with the District Attorney's office in filing family offense petitions for survivors who had their criminal case jeopardized due to a technicality, not on the merits of the case. Again we were given access to a telephonic interpreter service by the NYC Mayor's office. However we were not given access to such a service for our other cases.

The reason why these two scenarios are so important is so that we can demonstrate how access to basic resources enable us to successfully and robustly represent a client in court. Effective communication with our clients ensures that pleadings are reliable and accurate. Our panels have seen first-hand how access to resources have made a profound difference in the quality of our advocacy. In the case of NYC not paying for us to have access to a telephonic interpreter for our regular intake days, we cannot adequately or robustly represent a client without being able to speak with them in their native tongue.

It must be noted that NYS who is responsible for managing the AFC panel, does provide their attorneys with immediate access to a telephonic interpreter service. Why should adults not have similar access?

Whether a client is represented by an assigned counsel attorney or an IP, and whether a client is a child or an adult, all clients should be given access to the same resources so that attorneys can represent them with the same robust advocacy. Regardless of who pays us, clients of NYS should benefit from being able to access through their attorneys the same services.

We are ultimately failing families by not being provided them with the same access to basic services. The pandemic has magnified this disparity, making it obvious to us how such denial of basic resources is disproportionately impacting people of color.

Changing the subject to something unrelated, I would briefly like to move on to one more issue– and that is the elephant in the room which is the heavy caseloads that our attorneys are now carrying due to the failure of NYS to raise the rate of pay of assigned counsel attorneys in about 18 years.

While the ACANYS, along with all NYC bar associations, the Macon B Allan Black Lawyers Association, Metropolitan black lawyers association, Asian American lawyers association and Latino Lawyers Association have filed a lawsuit against NYC and NYS alleging ineffective assistance of counsel due to the lack of increase in statutory rate of pay of assigned counsel attorneys, we do not stop there. Our mandate is to improve services for our clients. If our attorneys are carrying high caseloads due to our inability to retain qualified attorneys, then each client cannot possibly get the amount of attention that they need and deserve. Instead of hiring institutional providers to do this work at an enhanced rate of pay, it is incumbent upon the state to restore the assigned counsel panel, provide us with access to sufficient pay and access to necessary resources. *

We cannot wait any longer to address these issues. We are in the midst of a crisis – a crisis that is impacting primarily people of color -both clients and attorneys. This is a pandemic that has been going on for years before COVID. We are asking for access to the same services regardless of what language our client speak or their age. Without equal access to services, people of color and children will remain vulnerable, disenfranchised and impoverished.
I thank you for this opportunity and appreciate the effort that this commission is making to help improve the quality of representation of the indigent and children.

*Highlighted portion was not mentioned at the hearing as I didn't think it applied to the discussion.

APPENDIX B

Written Testimony of Lisa Schreibersdorf, Executive Director, Brooklyn Defender Services

Presented Before The New York State Bar Association President's Committee on Access to Justice and Committee on Legal Aid

Joint Public Hearing on Access to Justice in a Post-COVID Legal Landscape

November 18, 2021

On behalf of Brooklyn Defender Services, I offer this written testimony to the New York State Bar Association's President's Committee on Access to Justice and Committee on Legal Aid to accompany the oral testimony our organization gave on November 18, 2021. Thank you to the Committees' co-chairs for holding today's joint hearing on access to justice in a post-COVID legal landscape.

Brooklyn Defender Services (BDS) provides multi-disciplinary and people-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy to nearly 30,000 people and their families in Brooklyn every year. In addition to zealous legal defense, we provide a wide range of legal services and advocacy to meet our clients' unique needs. Our expertise lies in the intersection of the criminal legal, immigration, and family regulation systems that disproportionately target low-income communities of color. In many cases, our advocacy is of a preventive nature, helping people maintain or access housing, immigration status, public benefits, education and employment.

In March 2020, when the COVID-19 pandemic first emerged in New York City, our office—like many others—immediately pivoted online to protect our clients and staff while continuing to represent and support our clients in the midst of the growing crisis. The COVID-19 pandemic has disproportionately impacted the communities our office serves. The disparities in healthcare, employment, and housing that put communities of color at greater risk of being targeted by the legal and court systems have also put them at greater risk of illness and death during this pandemic. Our clients lost loved ones, jobs, housing, access to their children in the foster system, and delays in accessing relief in their court cases. As the pandemic grew in New York City, hundreds of people we represented were being held in unsafe conditions inside City jails and

immigration detention. We filed unique legal proceedings in criminal and immigration courts and ultimately secured the release of dozens of people. In the early months of the pandemic, we fought to reunite or ensure in-person contact for families separated by the foster system. We provided families with the technology they needed to maintain contact until it was safe to visit each other in person. We conducted virtual Know Your Rights trainings so that the communities we serve knew about the housing moratorium, changes to how to access court and how to access emergency assistance.

Once the courts closed their doors in March 2020 and moved to virtual appearances, we worked diligently to protect our clients' due process rights and to ensure they had access to counsel and the technology needed to participate in their virtual court appearances. In the nearly two years since the pandemic began, we have advocated for continued access to court without compromising the health and safety of staff and those we serve. Once criminal court resumed limited in-person court appearances, we advocated for stronger protective measures inside court and for non-dispositive proceedings to be held virtually.

We have entered a new stage of the pandemic in New York which gives us an opportunity to reflect on many of the systems that have long needed reform and new solutions to address these longstanding issues. More than ever, this crisis has forced us to consider the intersecting institutions and legal systems that surveil, control, and oppress people in low-income communities of color. The pandemic and the swelling national movement for racial justice provide a unique opportunity to consider the ways that our legal systems operate and the impact on the communities it targets. With increased access to COVID vaccines and the anticipated re-opening of courts this is a crucial moment to reconsider the status quo in this harsh and often degrading and dehumanizing court system.

BDS represents people in criminal, family, immigration, and housing court. While there are many similarities in how the COVID pandemic has impacted these four court systems, the solutions needed to ensure greater equity in these court systems will vary from court to court. Below, I address how the pandemic has impacted the court systems in which we work, in most cases exacerbating an already flawed system, and our recommendations for immediate steps needed to right some of the most pressing wrongs to ensure greater access to justice and to protect the due process rights of litigants.

Criminal Court

The COVID-19 pandemic hit New York just as the State began implementing groundbreaking criminal justice reforms. These historic reforms were designed to address a system that continually and disproportionately impacted Black and Latinx/Hispanic/Latino/a/é communities, especially pretrial mass incarceration. When the pandemic struck, many procedural protections

enshrined in the Criminal Procedure Law (CPL), including the newest reforms, were suspended through a series of overly broad executive orders. Courts acceded to former Governor Cuomo's unnecessary suspension of key procedural safeguards. The results have been disastrous: New York City's jail population is now higher than it was before the pandemic.[1]

At the emergence and height of the COVID pandemic, as infection rates were surging across the State, some emergency measures—such as the suspension of grand juries and in-person arraignments—were necessary. All cases were administratively adjourned as the courts began to adopt remote technology to conduct virtual court proceedings. Virtual arraignments began immediately. Despite the new bail laws, courts flouted the spirit and goals of these reforms. Bail was set in many more cases and in higher amounts.[2] At the same time, procedural deadlines designed to protect the rights of persons held in pretrial detention were suspended and many of our clients faced weeks, if not months, in jail without due process hearings. Prosecutors needed to say nothing more than "COVID-19" to justify continuing to hold our clients behind bars. The courts went along with this systematic abridgment of due process and agreed that CPL §§180.80 and 190.80 were indefinitely suspended. Cases were adjourned repeatedly while our clients languished in jail at heightened risk of exposure to the virus.

In May 2020, courts began to schedule virtual preliminary hearings to satisfy the time requirements in CPL §180.80. Meanwhile, pretrial incarceration rates continued to climb. Prosecutors were given license to choose which cases were deemed worthy of preliminary hearings. In many Article 130 cases, prosecutors simply refused to conduct preliminary hearings citing the alleged sensitive nature of the allegations and courts went along, allowing indefinite detention of the accused. In other cases, judges rubber-stamped the allegations after perfunctory virtual preliminary hearings and found probable cause that a felony had been committed.

In all cases, speedy trial under CPL §30.30 was deemed suspended even after prosecutors could obtain supporting depositions in misdemeanor cases, and some grand juries were convened. Throughout much of this time period, prosecutors were more than capable of turning over discovery and meeting their deadlines under CPL Article 245. To this day, prosecutors have not offered any plausible explanation of their claimed inability to turn over discovery, and simply assert they were not legally required to do so under the executive orders. Without access to

[1] In the first quarter of 2020, when bail reforms took effect, the pretrial jail population reached a record low of under 4,000 people. (See https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf)

[2] Comparing the pre-pandemic period (January 1-March 16, 2020) to the final quarter of 2020, bail-setting rose from 10% of cases to 18% among nonviolent felony charges, and from 44% to 56% among violent felony charges. See "Closing Rikers Island: A Roadmap for Reducing Jail in New York City," by the Independent Commission on New York City Criminal Justice and Incarceration Reform and the Center for Court Innovation (July 2021). (https://thecrimereport.org/2021/07/21/rikers-closure-called-model-for-shrinking-jail-populations/)

discovery, plea dispositions stalled because defense lawyers did not have critical information to assess the evidence and advise their clients[3].

Given this background, remote technology is just one factor in any analysis involving access to justice. Constitutional and statutory protections limit the utility of virtual court appearances.[4] More than a year and a half later, as criminal justice system stakeholders ponder access to justice and what it means, those ensnared in the system remain marginalized. Hearings and trials may have resumed. Virtual appearances for case conferences are still occurring. But access to justice is still being denied, especially to those who remain behind bars.

The New York City Police Department (NYPD) has continued to vilify bail reform with false and misleading fear mongering. Despite data that show otherwise, the Mayor and NYPD continue to cite a rise in violent crime when, in fact, violent crime has gone down. Prosecutors persist in asking for bail in higher amounts and in more cases and judges continue to routinely accede to their requests.

Over the past year, fourteen people have died while incarcerated at Rikers Island, an unprecedented number. The inhumane conditions at Rikers Island have made national news to the disgrace of the City and the entire criminal justice system.[5] Weak responses to the Rikers crisis and the backlog of cases have failed to address the underlying problems or causes that led to this crisis in the first place. Transferring sentenced people and all women to State prison facilities is merely a temporary and inadequate band-aid on the real problem of mass incarceration. And the transfers have resulted in other kinds of injustice. With persons locked away far from their communities, there are serious concerns about visits with attorneys and family members. It remains to be seen how the New York State Department of Corrections and Community Supervision (DOCCS) will provide for early morning transportation from upstate facilities to New York City courts for in-person appearances, an indispensable right for those who are incarcerated and have little opportunity to speak with their attorneys in person. Despite all these problems, judges continue to agree to prosecutors' requests for bail in amounts that are unreachable. In fact, in its report, *Closing Rikers Island: A Roadmap for Reducing Jail in New York City*, the Independent Commission on New York City Criminal Justice and Incarceration Reform and the Center for Court Innovation, estimates that the pretrial jail population could be reduced by 750 to 1100 people if affordable bail were set, or pretrial services properly utilized.

The experience of virtual court proceedings over the course of the pandemic has revealed that these proceedings often provide the appearance–but not the reality–of fairness. Virtual court proceedings should have no place in criminal justice when important rights are under

[3] C.P.L. §245.25 requires the prosecution to turn over discovery 3 (for unindicted felonies) or 7 days (for indicted felonies and misdemeanors) prior to the expiration of a plea offer.
[4] N.Y. Const., art. I, § 6. C.P.L. §182.30.
[5] https://www.nytimes.com/2021/09/15/nyregion/rikers-island-jail.html

consideration by the court. And virtual proceedings are especially inappropriate when the defendant is incarcerated. Throughout the pandemic, our incarcerated clients have had to struggle to follow–and be heard–in virtual court proceedings conducted using broken or malfunctioning equipment and in the loud environment of a jail. BDS clients were often torn away from court proceedings because their pre-arranged timeslot had expired and another defendant's case was scheduled to begin. Confidential attorney-client communication has been hampered by software that did not readily allow for private conversations. Virtual court proceedings can promote efficiency, eliminating transportation costs and the waiting time and inconvenience that precede routine court appearances in situations where "nothing of substance will be determined.[6]"

<u>Recommendations for Criminal Court</u>:

- The statute authorizing virtual court proceedings should be expanded to cover all counties in New York (it currently applies in only 27 of New York's 62 counties).
- The existing limitations on the use of virtual proceedings should largely be maintained. Virtual proceedings should never be allowed–even with purported consent of the defendant–for initial criminal court arraignments or any pretrial hearing or trial. The stakes are simply too high at these proceedings to permit the use of anything other than a traditional in-person appearance.
- Prosecutors and judges have broad authority to reduce the pretrial population by ceasing to seek and to set bail. Prosecutors should consent to the release of people on their own recognizance or supervised release rather than sending them to Rikers.

Family Court

Like the criminal legal system, race and poverty are defining characteristics of the family regulation system.[7] Poor communities and communities of color are disproportionately impacted by the state's family regulation system. In New York, Black children make up 40% of the children in foster care yet make up only 15% of the children in the state, whereas white children make up 25% of the children in foster care and 48% of the children across the state.[8] Black children also fare far worse in the foster system and have much longer stays within the system.[9] Moreover, investigations and involvement in this system are pervasive in New York City's communities of color–recent research has shown that 44% of Black children in New York City are investigated and approximately 6% are placed into the foster system, and that 43% of

[6] Preiser, Practice Commentary McKinney's Cons. Law of New York, CPL Article 182

[7] Many, including scholar Professor Dorothy Roberts, have come to refer to the "child welfare" system as the family regulation system, given the historical and current harms perpetuated by the system. *See e.g.*, Dorothy Roberts, "Abolishing Policing Also Means Abolishing Family Regulation", The Imprint (June 16, 2020), found at: https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480.

[8] https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20State.pdf, page 7.

[9] https://www.gao.gov/new.items/d07816.pdf, page 4.

Latinx/Hispanic/Latino/a/é children in New York City experience an investigation.[10] Over 90 percent of our family defense clients are people of color living in poverty, often raising their children in homeless shelters or public housing, and in neighborhoods that are subject to extensive police surveillance.

Even prior to the onset of the COVID-19 pandemic, our staff routinely bore witness to the ways in which court personnel, including judges and court officers, dehumanized and disrespected the largely Black and Latinx/Hispanic/Latino/a/é families in the courthouse. Parents were often referred to by generic labels like "birthmother" or "subject-child" rather than by name; an expression of grief or anger was treated as dangerous or a sign of untreated mental illness and not approached with compassion; families were forced to wait for hours to go before a judge or only to find out that the matter had been adjourned; and families' knowledge of their own needs and bonds were routinely disregarded.

We witnessed the ways in which this disregard manifested in the practical functioning of the courthouse, including prioritizing court time for proceedings—such as termination of parental rights trials—that severed family bonds, rather than litigation that kept families together or reunited families; failing to hold counsel for the New York City Administration for Children's Services (ACS) accountable for causing court delays due to failure to provide timely discovery and settlement offers; limiting defense counsel's time and ability to present a robust defense; and disregarding the importance of giving counsel time to meet and interview a parent or caretaker prior to being first assigned for representation.

Many of these inequities were amplified as the family court transitioned to virtual proceedings early in the COVID-19 pandemic. Our office saw an increase in the disrespectful and dehumanizing language used to speak to both families in the court system and our staff. The disrespectful treatment of families has included judges ejecting parents from virtual courtrooms when they did not want the parent to speak and using abusive language towards parents who were unable to appear by video. Our staff–particularly our staff of color–have also experienced being denigrated by judges in the presence of their clients, which is not only unacceptable, but compromises the attorney-client relationship and undermines the goal of objectivity in the court system.

The transition to virtual courtrooms has also hampered families' ability to fully assert their due process rights, and attorneys' ability to fully advocate for their clients. The detrimental impact of virtual proceedings on the experience of parents in court–particularly during initial "intake"

[10] Kinya Franklin & Sara Werner, *'A Call to Action': New Research Finds Extremely High Rates of Investigations of Black, Brown and Native Families*, Rise Magazine (Nov. 3, 2021), https://www.risemagazine.org/2021/11/a-call-to-action-research (citing Frank Edwards, Sara Wakefield, Kieran Healy, Christopher Wildeman, "Contact with Child Protective Services is pervasive but unequally distributed by race and ethnicity in large US counties," Proceedings of the National Academy of Sciences 118 (Jul 2021)).

appearances and contested and complex litigation–as well as the ability to maintain a high-level of zealous representation cannot be overstated. Counsel must build a trusting attorney-client relationship in mere minutes over the phone prior to an initial appearance. During a court appearance, it is difficult–if not impossible–for attorneys and their clients to communicate privately, which not only prevents counsel from incorporating a parent's personal knowledge and opinions about their families into of-the-moment litigation decisions, but also prevents counsel from being able to answer a parent's questions and ensure that they understand what is happening in court. A parent and family's humanity can be lost in virtual proceedings: a parent cannot make eye contact with a judge or best-establish their credibility during emotional testimony. And when a court appearance is traumatic, counsel is not able to reassure and support a parent in a pivotal point in their attorney-client relationship. This is especially important in family court proceedings, which affect a parent's ability to keep their family together, are highly emotional, and during which the parent may feel as if all the other parties are against them.

Vitally, only a small portion of attorneys have access to the Universal Case Management System (UCMS), which is the only way for counsel to access court orders–including orders of protection–and other critical information about court matters, severely limiting advocates' ability to zealously represent parents. This lack of access preceded the onset of the COVID-19 pandemic and given the disproportionate impact of the family regulation system on families of color, full access to this needed information is a matter of equity.

At the onset of the COVID-19 pandemic, the court prioritized creating a system that allowed for ACS to seek the removal of children from their families, and then failed to set up an adequate process by which families could contest these separations. This failure led to long delays in the commencement and conclusion of emergency hearings that could reunite families[11]. The court proceeded to allocate long periods of virtual court time for trials in termination of parental rights matters, without regard for the importance of in-person proceedings for these sensitive trials. The court has stated that there is access to in-person courtrooms but then has routinely denied our requests to use those courtrooms for these trials and other complex litigation.

The transition to virtual court proceedings has also created the unique challenge of reaching and then communicating with a parent or caretaker at the filing of a new neglect or abuse petition ("intake"). The first meeting between a parent and their attorney is pivotal–it sets the tone for a robust and trusting attorney-client relationship. Moreover, as crucial decisions about a family–including whether they will be separated–are made at the first court appearance, it is vital for a parent to have the time and space to share facts and guide representation prior to that appearance. In this virtual world, ACS is tasked with supplying parents' phone numbers to defense counsel prior to intake. This is often done so at the last possible minute and frequently the numbers provided are incorrect. If the attorney can reach the parent at the number provided, they must

[11] Emergency hearings pursuant to Family Court Act Sections 1027 and 1028.

introduce themselves and the entire process of a court proceeding, create a trusting rapport, and confirm a legal strategy in mere minutes, usually without even having received a copy of the petition setting forth the allegations against the parent. Often at that point of first contact, parents are not fully aware that they are respondents in a legal matter, nor that the government will be asking to remove their children from their care. Currently, the court is scheduling these first appearances within minutes of when–and at times even before–the assigned attorney receives a copy of the petition, rather than when counsel and parties are truly ready to proceed. This prioritization of court efficiency overdue process for families has intensified the inequities that existed within our court systems prior to the onset of the pandemic.

Certainly, a key issue in the transition to virtual proceedings is families' lack of access to Wi-Fi or data plans, hardware, and safe and confidential spaces to participate in their court cases. The onus has been and continues to be on organizations like BDS to ensure parents have this needed access. Our experience is that judges insist parents and caretakers appear by video without regard to a family's lack of access and counsel's limited resources to assist. We have done our part by securing separate funding to provide a limited number of parents a tablet with a data plan and by creating confidential and equipped spaces in our offices for our clients to appear by video. However, as meeting these needs is a matter of ensuring a fair and accessible court system – the responsibility should not be solely on a parent and their attorney.

At the same time, the ability to access court by phone or video has made court proceedings – particularly those appearances that are routine or uncontested – much more accessible for some parents, including those who work, have young children at home, must take their children to or from school, or do not have the resources to travel to court. The families before the court are diverse, and as such, the Court should make a variety of efforts to increase accessibility and equity within the court system to meet all families' needs.

To that end, a hybrid model of both in-person and virtual proceedings, including by phone and video, are needed to increase equitable access to all court proceedings. Such a hybrid model should include access to in-person courtrooms for respondents in Article 10 cases for first appearances where crucial decisions regarding a family are made; access to all court appearances by phone and video; and access to video equipped spaces for litigants who do not otherwise have this technology. In the same vein, the implementation of the Electronic Document Delivery System (EDDS) has simplified court procedures and any plan to improve the court system should include a fully electronic filing system for family courts, in addition to full access to UCMS.

<u>Recommendations for Family Court</u>:

- Efforts should be made to get feedback and recommendations from those directly impacted/litigants in family court.

- Family courts should provide technologically equipped in-person facilities and ensure the parties' access to the court, as well as issue a written policy that technology limitations may not be held against the parties.
- Family courts should provide litigants and counsel timely and meaningful access to in-person courtrooms for complex litigation.
- All attorneys and attorney offices should be granted immediate access to the court's Universal Court Management System (UCMS) and work directly with impacted people and counsel to develop how the system will be used.
- The courts should prioritize enhanced and expanded interpretation services for additional languages beyond Spanish.
- Steps must be taken to end the daily acts of racism and discrimination by judges and court employees toward litigants and staff of color before the court and create clear reporting mechanisms for when they occur and institute measures of accountability.

Housing Court

Housing Court is the state's most voluminous civil court, and the vast majority of its cases are summary eviction proceedings, brought by landlords to quickly evict tenants. Tenants of color are disparately represented in these eviction proceedings. As of 2020, tenants of color were three to four times more likely than white tenants to report that they had fallen behind on their rent or deferred payment; they were also two to three times as likely as white tenants to have little to no confidence that they could pay next month's rent on time. Latinx/Hispanic/Latino/a/é tenants faced the highest rates of housing instability: more than a third are behind on their rent and nearly half had little to no confidence in their ability to make next month's rent on time. Compared to renters nationwide, Asian and Latinx/Hispanic/Latino/a/é tenants in the New York City metro area are at much greater risk for losing their housing.[12]

The COVID-19 pandemic has exacerbated New York City's existing housing crisis and compounded its disproportionate effect on tenants of color. The same communities and neighborhoods that have historically borne the most eviction filings have been disproportionately ravaged by the COVID-19 pandemic, have been slowest to recover, and will be at greatest risk of eviction when the moratorium expires in January.[13]

Housing court has been operating primarily virtually since the outset of the pandemic and expects to continue with a "remote-first" practice going forward.[14] While our client population tends to have inconsistent access to technology, remote-first practice was less of an issue in the earlier months of pandemic housing court practice as moratoria were in place and the court was not issuing default judgments. As a result, the impact of the pandemic on day-to-day operations

[12] https://www.cssny.org/news/entry/race-evictions-new-york-city
[13] https://www.brookings.edu/research/the-coming-eviction-crisis-will-hit-black-communities-the-hardest/
[14] https://www.law360.com/articles/1366647/takeaways-from-a-pandemic-year-in-nyc-housing-courts

of housing court has yet to be fully realized. As we prepare for the expiration of the last eviction moratorium, cases are moving forward with both virtual and in-person appearances after eighteen months of remote operation. As of September, housing court has resumed mandatory in-person appearances for all new eviction cases. Tenants are connected with potential counsel at a preliminary "intake" virtual appearance, and then are required to appear in-person in housing court at the next appearance, presumably by or with their newly acquired counsel.[15]

While there is access to justice concerns for *pro se* remote proceedings, requiring tenants and attorneys to appear at mandatory in person appearances *after* they have been connected with counsel is unsafe, unhealthy, and most importantly unnecessary, especially as the Delta variant persists. Brooklyn Housing Court is situated in a building that was repurposed and is not equipped for safe in-person appearances. The hallways are narrow, the facilities are old, not thoroughly cleaned, and not designed for crowd flow.[16]

Further, the very purpose of the in-person appearance, to further negotiation between the parties, necessitates close communication and discussion—in other words, the court is directing that parties not observe social distancing in court. These appearances are risky for all litigants and parties, and especially tenants, attorneys and staff with disabilities or pre-existing conditions. Advocates have attempted to draw attention to this issue for the past eighteen months, yet the Office of Court Administration has not promulgated alternatives or provided a clear process to request a reasonable accommodation.

Given the ordinary course of housing court proceedings there is no reason in-person appearances cannot be agreed upon, or even mandated by a particular judge, on a case-by-case basis.

Recommendations for Housing Court Post-Moratorium:

The statewide eviction moratorium is set to expire in January, at which point pending cases will move forward, courts will issue new warrants of eviction (including from default judgments), and marshals will be able to execute existing warrants. We expect that tens of thousands of tenants will be at risk of eviction.

The slower pace of housing and eviction proceedings over the past eighteen months should be a source of reflection and reexamination of housing court and its processes. We recommend that housing courts reframe themselves as a place that protects tenants' rights and promotes safe stable housing, as opposed to serving as a debt collection and eviction certification tool for landlords. While this suggestion seems radical given the current priorities of housing court, we recommend that the courts' reorientation can be framed as a return to the original purpose—a

[15] https://www.law360.com/pulse/articles/1423389/nyc-housing-court-mandates-some-in-person-appearances

[16] https://www.nydailynews.com/new-york/manhattan/ny-nyc-courthouses-crowdrx-report-unsafe-conditions-coronavirus-20201001-avpvzs435jd6xkxiuvq4z5cii4-story.html

forum for "the enforcement of housing standards …a necessity in the public interest".[17] In the current climate, enforcing not only housing standards but providing access to legal assistance and financial relief, mitigating the public health crisis of COVID-19 and ensuring equities should also be priorities for the housing court system. While the introduction and administration of the ERAP program was an important step towards linking eviction proceedings with positive tenant-based assistance, this funding has already been exhausted and we have not even reached a point where evictions can legally resume.

To this end, we recommend the following.

- Housing courts should ensure all tenants facing eviction are aware that they have the right to an attorney before courts issue any new judgments or warrants. While the "intake" part system is theoretically ensuring access to counsel, the process is confusing and chaotic. This court appearance should not be the only chance provided to tenants for accessing counsel. Tenants should receive notice simultaneously with predicate notices and their court notices that free lawyers are available and be encouraged to seek out such assistance before their court date, or even before a case is filed. Access to legal advice when a notice is received, before a court case has been filed, can often result in pre-litigation solutions that save time, money, and judicial resources. Once a case begins, Judges and court staff should be directed to connect litigants with counsel at every possible opportunity and provide such options to tenants well in advance of any discussion of the substance of their proceeding. To make the "Right to Counsel" a meaningful right, all parts of the court system must be active in ensuring that tenants are aware and advantage themselves of this right.
- Robust protections for any tenants who are not represented by counsel are needed. Given the disparities in access to technology, we recommend that such tenants are not subject to default judgments.
- Unrepresented tenants should be given clear communication about the option for virtual or in-person proceedings. While we are opposed to any one-size-fits-all mandate for in-person appearances, access to such appearances may be essential to litigants who are not comfortable with, or do not have the ability to use, internet court access. This option should be clearly communicated in every notice that tenants receive.
- Housing courts must implement a clear and visible process for tenants with disabilities to obtain reasonable accommodations related to their court appearances. Notice to tenants should include details on in-person and virtual appearances as well as accommodations to ensure that tenants who are hard-of-hearing, blind or low-vision and with mobility issues can still access the court process. The onus of providing this information should be on the court, and tenants with disabilities should not need to seek out assistance merely to ensure their due process rights.

[17] https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1457&context=ulj

- Ultimately, if we are to stem the tide of the eviction crisis that will occur once the moratorium expires in January 2022, tenants will need financial support and both tenants and landlords will need assistance. Without additional programs and funding for rental assistance the vast majority of tenants facing eviction will be unable to avoid losing their homes in the long term which will have ripple effects on children, employment, communities and ultimately, New York. Those that can avoid being evicted over unpaid rent may still face civil judgments for tens of thousands of dollars in unpaid rent. While the moratorium was an essential component in minimizing the public health impacts of the pandemic, especially for communities of color, it also resulted in unpaid rent reaching staggering amounts. Vouchers and programs that previously could have been accessed to encourage a landlord to sign a new lease will be unavailable where a tenant owes $60,000 in rental arrears. We should not lose sight of the continued increase in self-help evictions and illegal lockouts or of the necessity of continuing to push for programs that can help provide permanent housing stability and avoid evictions, not just delay them through additional due process procedures.

Immigration Court

Immigration courts fall under the jurisdiction of the Executive Office for Immigration Review (EOIR) which is an office of the Department of Justice (DOJ). The immigration court system is made up of various administrative immigration courts throughout the United States and the Board of Immigration Appeals (BIA), an administrative appellate body also known as the Court of Immigration Appeals. There are seven immigration courts in the state of New York, three of which are located in New York City. The immigration judge is responsible for conducting removal proceedings and has the authority to decide whether an immigrant respondent may remain in the United States.

The Varick Street Immigration Court in New York City remained open throughout the pandemic and cases involving detained immigrants continued to proceed via video teleconference as they had since 2018. Most attorneys appeared via telephone though some chose to appear in person. Then on March 27, 2020, the Varick Immigration Court transferred all of its hearings to appear before immigration judges in Fort Worth, Texas and Fort Snelling, Minnesota. New York City-based attorneys were given the option to appear virtually before these judges in-person from the Varick Immigration courthouse or to appear telephonically.[18] The respondents, who were in ICE detention, appeared via video teleconference from the county jail at which they were held.

The non-detained immigration courts in New York City, which are among the largest and busiest immigration courts in the country, were closed for over a year. After nearly sixteen months,

[18] Mazin Sidahmed, "The Varick St. Immigration Court Has Moved All of Its Hearings to Fort Worth" (March 27, 2020) *available at* https://documentedny.com/2020/03/27/the-varick-st-immigration-court-has-moved-all-of-its-hearings-to-fort-worth/

EOIR resumed virtual hearings on a limited basis in non-detained cases at the Broadway Immigration Court and the Federal Plaza Immigration Court on July 6, 2021.

During the COVID-19 pandemic, New York City's immigration courts handling the cases of detained respondents increased the use of remote telephone and video court appearances. In our experience, these remote appearances run counter to due process, exacerbate inequity, deprive respondents of access to counsel, prejudice *pro se* respondents and rob immigrants from an opportunity to fully access the courts and participate in their defense. Generally, hearings in removal proceedings can be conducted in person, telephonically or via video conference.[19] Prior to the pandemic, immigration removal proceedings had been predominantly in-person for both the detained docket at the Varick Immigration Court and the non-detained docket at the Broadway Immigration Court and the Federal Plaza Immigration Court. The use of video teleconferencing technology became more widespread in New York City in June 2018 when, without prior notice, ICE's New York Field Office began conducting removal proceedings at the Varick Immigration Court exclusively by video teleconferencing. Under this practice, immigrants detained by ICE appeared by video feed from the county jail at which they were held. This practice proved problematic and led to immigrants being unable to fully and fairly participate in their own hearings or fully and fairly present their defenses to removal.

Video teleconferencing is an unreliable and an ineffective tool for conducting immigration hearings in a manner consistent with due process both for immigrants who are detained in custody of the Department of Homeland Security (DHS) and those not detained, particularly considering the stakes involved. Video teleconferencing prevents litigants from being able to fully and fairly participate in their own court proceedings – hearings which decide their fates. Removal proceedings often hinge on judicial determinations of character, truthfulness, remorse, and an individual's recollection of personal history and personal accounts. In most cases, these determinations cannot be effectively or fairly made over video teleconference appearance. Instead, they require an in-person representation before an immigration judge with all parties including the government attorney, interpreter and in some cases, witnesses present. Video teleconferencing often does not allow respondents to properly hear the judge, speak to their attorneys, or fully see and understand what is happening during their hearings.

[19] INA § 240(b)(2)(B). INA § 235(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.25(c). The use of video teleconferencing to conduct hearings in immigration courts is contemplated in the Immigration and Nationality Act (INA) and have been historically used in other parts of the country, particularly in rural detention settings and at the border. Pursuant to current EOIR policies regarding the use of technology to conduct hearings, EOIR's use of video teleconferencing is usually "determined principally by operational need—e.g., to reach locations where no permanent immigration court is located; to increase convenience and accessibility for respondents; to reduce travel costs; to consolidate and manage dockets." See INA §§ 235(b)(1)(B)(iii)(III), 240(b)(2)(A)(iii); Maya P Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, Journal on Migration and Human Security (2021) *available at https://journals.sagepub.com/doi/pdf/10.1177/23315024211034740*

Exacerbating the challenges of remote court appearances, most respondents in immigration proceedings have limited English language proficiency.[20] Besides logistical hurdles on how interpretation is made available, existing issues with interpretation itself have been complicated by remote translation which impact the quality of the interpretation. There is no right to interpretation during a removal hearing. Oftentimes, interpretation is only provided when a respondent is speaking or being directly spoken to. This practice deprives respondents of the right to understand the entire proceedings – proceedings which are determining the fate of their lives. Moreover, there is no right to translation of court notices, there are no interpreters available at the court windows or at the main court number where respondents are often directed to call when trying to figure out what's going on with their case. The importance of language access cannot be overemphasized since immigration proceedings are often multilingual and because immigrants must be able to understand what is happening in their own proceedings and ensure their testimony is clearly conveyed on the record.

Prior to the COVID-19 pandemic, the US immigration court system was suffering from a significant backlog of cases, among other inefficiencies and a lack of fairness. Pending cases in immigration courts had an average wait time exceeding four years, including cases that require urgent attention, such as those seeking asylum and humanitarian relief.[21] COVID-19 exacerbated these delays and caused many disruptions to immigration court operations, including postponed proceedings, court closures, and led to an expanded use of video or telephone conferencing to conduct proceedings throughout the country. There are currently 1.4 million cases pending in the entire United States, with 161,562 cases in New York.[22]

Unlike with the criminal legal system, because removal proceedings are deemed civil matters, immigrants facing removal are not afforded the right to an attorney if they cannot afford one. This leads to a high percentage of *pro se* respondents in immigration courts. When removal proceedings moved to virtual courts, *pro se* respondents lost access to the EOIR Self-Help Legal Centers which provide general legal information, *pro se* legal forms and lists of pro bono legal service providers. Detained immigrants, with many in remote locations, face even greater obstacles. Where there are no universal representation models such as New York's Immigrant Family Unity Project or non-profit Legal Service Provider programs through VERA's SAFE Cities network, unrepresented individuals face insurmountable hurdles when it comes to retaining counsel due to the lack of in-person appearances.

Some immigration practitioners must also practice in state court as part of their representation of an immigrant client. Special Immigrant Juvenile Status (SIJS) provides a pathway to lawful

[20] Maya P Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, Journal on Migration and Human Security (2021) *available at* https://journals.sagepub.com/doi/pdf/10.1177/23315024211034740

[21] https://www.aila.org/advo-media/issues/all/featured-issue-immigration-court-backlog

[22] https://trac.syr.edu/phptools/immigration/court_backlog/

permanent residence and citizenship for children who have been deemed abused, abandoned, or neglected by one of their parents. An application for SIJS requires lawyers representing these children to first go to the state court systems before submitting an application with immigration. In New York, these matters fall under the jurisdiction of the state family courts.

In New York City, family courts closed their doors in March 2020 and began operating by video and telephone to adjudicate essential and emergency matters. As of November 2021, the court is now open for the initiation of new cases involving non-essential and non-emergency matters. However, there is a long backlog. For SIJS cases, this translates into a system that is accepting filings but is plagued with extreme delays in the adjudication of most petitions.

Recommendations for Immigration Court:

- EOIR should conduct hearings in person unless the immigrant provides a knowing and informed waiver of the right to appear in person.
- For any hearings conducted in a remote or hybrid manner, EOIR must coordinate different players who need to participate in the proceedings. Right now, the systems in place are not working and have placed the burden largely on legal services providers who lack adequate resources to tackle these issues affecting client representation.
- For video teleconference hearings in cases where the respondents are detained, EOIR should impose and enforce the burden on Immigration and Customs Enforcement ("ICE") (or its agents in local facilities) to certify that the area where the detained respondent is participating in the hearing via is indeed "closed"—without the presence of any ICE officers, corrections staff, or other detainees.
- EOIR should provide rooms in the courthouse for providers to speak privately and confidentially to unrepresented respondents—regardless of whether they appear in person or via video—prior to their appearance at an initial master calendar hearing.
- EOIR should provide dedicated, confidential spaces—along with sufficient technology, logistics, and IT support to maintain those spaces—in the courthouse where people in proceedings can meet with counsel either in person or by video before, during (i.e., via breaks) and after hearings.
- Regardless of whether proceedings are conducted in person or by video, EOIR should prioritize ensuring that families can attend court appearances and people can see their loved ones.
- EOIR should also facilitate access to the necessary technology for remote video teleconference appearances. One way is to provide internet portals and/or stand-alone kiosks at the court building to allow respondents who are unable to otherwise access remote proceedings to appear. EOIR must also prioritize providing real-time assistance from court personnel.

- Immigration judges should be encouraged to exercise their discretion to order in-person production in an individual case or for an individual appearance based on due process considerations. Factors that immigration judges should consider include:
    - Potential for sensitive testimony
    - Potential competency issues or other vulnerable characteristics (e.g., age, mental or physical health, disabilities) that would render testimony and participation via VTC problematic
    - Reliance on an interpreter for extensive or complicated proceedings or testimony
    - Repeated technological breakdowns, in an individual case or systemically at a facility (e.g., dropped or busy lines, interpretation problems) that require adjournment or rescheduling
    - Evidence filed late by the government, particularly related to criminal issues or impeachment, or
    - Any other issues that may impede a fair hearing.

Conclusion

Once again, I would like to thank the President's Committee on Access to Justice and the Committee on Legal Aid for holding today's important hearing on access to justice in a post-COVID legal landscape. Much of the current legal landscape has been dramatically altered by this terrible health crisis that has wreaked havoc on the lives of the most vulnerable. This tragedy has laid bare many of the inequities in the fabric of our society, including our legal and court systems. Amid this tragedy, we have an opportunity to change the legal landscape and to create a more equitable court system. We are encouraged by the joint two-day hearing held by your committees and the Bar's commitment to ensuring access to justice in a post-pandemic landscape. We look forward to continuing this conversation with your committees. If you have any questions or concerns, please do not hesitate to contact me at (917) 593-0078 or Lschreib@bds.org.

HER JUSTICE
Shift the Power

Testimony: Anna Ognibene, Supervising Attorney, Her Justice
Hearing: New York State Bar Association: Access to Justice Post-COVID
Hosts: President's Committee on Access to Justice and Committee on Legal Aid
Date: November 18, 2021

Thank you for the opportunity to submit testimony regarding access to justice in the "post-COVID landscape". I am a Supervising Attorney at Her Justice, a legal services organization dedicated to serving low-income women in New York City. My practice focuses on the Family Court in all five boroughs of New York City, which is the basis of my testimony before these Committees.

As will be discussed below, and as the Committees heard from many providers during these hearings, the COVID-19 pandemic exposed significant barriers to justice faced by the most vulnerable New Yorkers. Rather than being caused by the pandemic, though, these barriers existed well before this current crisis hit. Clearly, there have been some uniquely pandemic-related disruptions: closing the New York City Family Court for 14 months caused significant back-ups and delays that will be felt by Family Court litigants for a long time. However, the Family Court, like other underfunded pro-se courts, already suffered from access issues and long wait times, which the COVID-19 crisis only brought to the fore.

The disruption caused by the pandemic, ironically, gives us a unique opportunity now to build back better: we can make broad changes so that a "post-COVID landscape" can look significantly better than the pre-COVID one. As a "pro bono first" organization, Her Justice can offer insight into ways to make the Family Court more accessible—not only to the communities who rely on it for basic safety and financial protections, but also to pro bono attorneys who want to serve these communities. More engagement from the private bar in pro bono service will help to close the gap in services felt by low-income New Yorkers.

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Organization Background

At Her Justice, we serve women living in poverty in New York City by providing free legal help as they navigate the civil justice system for urgent legal needs in the areas of family, matrimonial and immigration law. While so many things in our lives were put on pause due to the COVID-19 pandemic, the legal needs of our clients—and the essential services we provide—were not. In 2020 alone, Her Justice provided a range of legal help to more than 6,900 women and their children. Our service delivery model makes us unique: our small legal department of 25 (who speak 10 languages other than English) recruits, trains and then serves as virtual mentors to volunteer attorneys from the best firms across the City. These volunteer lawyers then stand side-by-side with women who would otherwise have to navigate the complex legal system on their own. Our pro bono first model has enabled us to assist tens of thousands of women over the years, far more than we could have reached relying exclusively on direct service.

We believe that the client-centered services we provide must also be paired with policy work, to advance systemic reform while meeting individual need. In this way, we create a virtuous cycle of change, advancing systemic solutions that are informed by the lived experience of our clients. Through our pro bono model and policy reform work, we begin to break down systemic barriers that are built into our civil justice system, barriers that reinforce and exacerbate economic, gender and racial imbalances.

Her Justice clients come from all over New York City: 31% live in Queens, 28% in Brooklyn, 22% in the Bronx, and 15% in Manhattan. They also represent New York City: 54% are Latina, 25% are Black and 11% are Asian or from another minority group. We find clients through our live legal helpline and by partnering with community-based organizations. All our clients are in critical need of legal support; 80% are survivors of intimate partner violence; 71% are mothers; and 62% were born outside of the U.S.

Family Court closed for most cases for 14 months during the pandemic, creating harmful gaps in protection and case delays that will last for years.

Although those who practice in Family Court were familiar with the difficulties that came, even pre-COVID, from it being over-burdened and under-funded, the stress of the pandemic and the sudden closure of court buildings made an imperfect system essentially non-functional, resulting in harmful delays and backlogs that affected the most vulnerable populations and their ability to address basic safety and financial needs.

From the start of the pandemic, when courthouses abruptly closed, the Family Court distinguished between cases that were "essential" and those that were "non-essential." "Essential" cases were allowed to be filed and heard, and "non-essential" cases were turned away, with no indication of when they might be accepted again. The Court's definition of "essential matters" included child protective matters, orders of protection, and juvenile delinquency matters. Notably missing from this list of "essential" matters were custody, visitation, and child support matters.

What designation of custody/visitation matters as "non-essential" meant for our clients was that they were left entirely on their own to figure out complex and controversial parenting issues, often with co-parents who were uncooperative or abusive. Ever-evolving CDC and government guidelines about lock-down, mask-wearing, socializing versus social distancing, in-person versus remote school, travel restrictions, and quarantining were difficult enough for parents to navigate for their children even when they had amicable relationships with each other. But for our clients in volatile relationships, pandemic parenting issues became ways that an abuser could assert power and control, with essentially no accountability. For example, our clients' abusers could insist they bring their children on long trips on public transportation in order to comply with visitation that had been ordered before the pandemic, because our clients had no way to go back to court and ask for an amended order based on the changed circumstances of the pandemic. Our clients were faced with the choice of having to accept untenable and unsafe demands from their abusers, or resort to

self-help, which could trigger a judge's ire or even police intervention if there was an existing order being violated.

It was also confounding that the Family Court deemed support cases to be "non-essential", and refused to schedule or hear them, given how clearly the pandemic wrought financial havoc on low-income communities. Many of our clients were employed in service positions, such as food service, cleaning, or home health aides, and lost their jobs. Many of our clients are undocumented immigrants, and thus did not qualify for public assistance, unemployment benefits, or the CARES Act relief. Without a court to mandate child support, our clients found themselves completely without means of support if their partners walked away and refused to support their families voluntarily. In this period, some of our clients reported that their ex-partners told them, "I'm not going to give you a penny, and there's nothing you can do about it."[1]

One Her Justice client grew so desperate after the Family Court declined to hear her support petition that she felt she had no choice than to leave the state with the children to stay with family, where at least they would have housing and childcare. After his refusal to pay child support drove the client to this decision, her abusive partner then filed an emergency writ of habeas corpus to force her to bring the children back to New York (at her own expense); *that* petition was accepted and heard. In other words, the Family Court was not available to our client to help her feed her children, but was available to her abuser to allow him to keep her trapped in a city she could not afford. Months after being ordered to leave her support network and come back to New York City, the client is still waiting for her first appearance on the child support petition and even a temporary order.

In May 2020, to address the lack of access to child support through the courts, Her Justice and other legal services providers submitted a letter to New York State court

[1] At the same time, over in Civil Court, debt collection filings by creditors against our clients were permitted to continue, even while our clients were cut off from child support to help pay those debts, and in fact may have been forced into debt to cover their expenses in the absence of this income.

administrators urging them to accept new petitions (both to establish support and to modify orders of support) for purposes of preserving filing dates for retroactivity of support. We also urged court administrators to allow support applications as "emergencies," an approach that Her Justice and our pro bono attorneys pursued in individual cases, submitting orders to show cause with evidence of parents' dire financial hardship. (These individual case requests were all denied.) The court administration responded by stating that the New York City Family Courts would accept petitions for downward modification from *payors* of child support, but not that *custodial parents* who so desperately needed child support would also be able to file petitions.[2]

Even now that Family Court has adopted virtual hearings and, since Spring 2021, re-opened for "non-essential" petitions, this change has not been well-communicated to the public. To date, the Family Court website still advertises that it is "currently accepting only emergency/essential applications"[3] and is "not yet open for the initiation of new cases involving non-essential and non-emergency matters."[4] In effect, this means that parents are most likely to know that their custody or child support petition can now be filed if they are lucky enough to have access to a lawyer with this inside information. Further, since this change has been seemingly communicated from the courts on an ad-hoc basis during meetings with advocate groups, even lawyers have not always been sure which Family Court in which county is accepting what type of cases.

Further, litigants who are able to learn that their petitions will now be accepted are then waiting months for any action on their petitions. Some of Her Justice's clients, who have needed child support since 2020 but are only just now able to file, are being given return dates—their first opportunity to ask for even a temporary order of support—in *2022*.

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[2] These letters are on file with Her Justice; *see also* the Family Court website at https://www.nycourts.gov/LegacyPDFS/COURTS/nyc/family/Notice%20on%20Child%20Support%207.pdf – giving instructions to litigants on how to file a request "to change your order of support because of a change of circumstances such as a loss of your job or funds."

[3] https://www.nycourts.gov/LegacyPDFS/COURTS/nyc/family/fact-sheet-for-FamCt-public-website.pdf

[4] https://ww2.nycourts.gov/coronavirus-and-new-york-city-family-court-29611

Our clients, who are single mothers trying to juggle closed schools with low-wage jobs that sometimes do not entitle them to paid sick leave, cannot wait two years for financial support.

A "post-COVID" Family Court should remove the existing barriers for litigants to participate in their own cases, which will also make it easier for the private bar to provide pro bono services to fill in the gaps.

The Family Court's challenges serving vulnerable populations were exacerbated by the pandemic and court closures described above, but this "pro se friendly" court has always been difficult to navigate without an attorney, even for the most basic cases. The website, as discussed above, has out-of-date information, is not translated into multiple languages, and is inaccessible to those people who cannot read or do not have reliable internet access. At the courthouses, there is a lack of staff or information posted giving directions about how, what, and where to file. As one Her Justice client said about information posted in the courthouse: "Even with the know your rights posters they have, I didn't know mine."[5] Language barriers compound the challenges for non- or limited English speakers, and the court administration's efforts to convey information in plain language do not go far enough.

The first step in creating the "post-COVID" Family Court should be simplification of court forms and processes, and enhancement in litigant education.[6] Simplified financial disclosure forms, for example, and clearer instructions for those forms, will help litigants participate more fully and with greater accountability in their support cases and will benefit the efficiency of the process overall. Attorneys should not be a necessity for simple cases, for example child support cases where both parties' incomes are fixed and on-the-books, or

[5] *See* Her Justice, *Towards Justice for Parents in Child Support Courts* (March 2021), available at: https://herjustice.org/childsupportpolicyreport/.

[6] *See* American Academy of Arts & Sciences, *Civil Justice for All*, at 21 (2020) (noting "Simplification should proceed on the assumption that most people pursuing matters in court are not lawyers and do not have lawyers representing them….), https://www.amacad.org/sites/default/files/publication/downloads/2020-Civil-Justice-for-All_0.pdf.

routine tasks, for example putting in an answer to a Civil Court consumer debt case to avoid default.

Ideally, simplification and education would allow many more people to successfully pursue and resolve their cases without an attorney, and ease the pressure on legal services organizations who can then focus their efforts on those complex cases that would most benefit from direct representation. Currently, legal services organizations in New York City are so stretched beyond their limits by the overwhelming demand, that clients report many places are not even picking up the phone. More legal services funding is necessary to address the alarming gap in services for some of the most life-altering cases.

Pro bono services complement traditional legal services. With Her Justice's experience as a "pro bono first" organization, we know very well the power of pro bono to make a difference to our clients: Her Justice serves women in a broad range of Family Court matters, but we put particular focus on cases for which there is no right to counsel and/or where traditional legal services may not have capacity. Given our pro bono attorneys' access to volunteer forensic accountants, our service delivery model can be particularly effective for child support cases, custody or order of protection matters when there are evidentiary issues and private counsel representing the opposing party, or other complex cases that benefit from additional resources. At the same time, we are keenly aware that Family Court operations pre-COVID made it challenging for pro bono attorneys to participate in many cases. We believe that improvements in the operations of and access to Family Court for the benefit of litigants will in turn encourage greater participation by private sector attorneys in critical pro bono representation.

Adjournments and Long Delays

Long delays between court appearances have become a way of life since COVID-19 closed courthouses. While courts were completely closed during the height of the pandemic, existing cases did not move forward, and new filings were not accepted. Now court

personnel are trying to work through a more-than-a-year backlog of already filed cases, while managing the surge of new petitions that could not be filed during the closure.

As described above, custody and child support cases address some of our clients' most critical safety and security needs. A Family Court litigant should not have to wait two or more years for resolution on where their children will live or how they will support them. Additionally, pro bono attorneys at private law firms are often unable or unwilling to commit that length of time to one pro bono case. High associate turnover and the unpredictability of billable workflow means that many would-be volunteers do not feel comfortable taking on a Family Court case that might require them to appear in court multiple times over multiple years.

More funding *must* be directed to the Family Court to hire additional staff, Special Referees, and Support Magistrates and start tackling this critical backlog of the Family Court dockets. The caseload is simply not manageable at the current staffing level, and will only result in cascading delays as more and more people learn that their petitions can now be filed again.

On the other hand, sometimes adjournments are necessary to the litigants and attorneys, because of scheduling conflicts, or the hope that a case will settle. While other courts allow adjournment requests by email or phone, Family Court has the Catch-22 that the only sure way to request an adjournment is to appear in person at the date sought to be adjourned. In the "post-COVID landscape", where more business can be done electronically, the Court administration should create a platform on the Family Court website through which adjournments could be requested and approved in advance of an appearance.

<u>Virtual Appearances and Times Certain</u>

Pre-COVID, there were almost no times-certain given in Family Court appearances. This meant that a litigant had to take an entire day off work, risk losing a day's wages, and secure childcare to move their case along. Sometimes, the litigant might wait in Family Court

all day, only to be called shortly before the end of the day and given an adjourn date with no actual discussion of the substance of the case. In some cases, the long wait and adjournment might be because the other party or attorney did not show up, or came late, often with no accountability. As a Petitioner seeking child support, one failure to appear meant the case was dismissed altogether and had to be started over from scratch. But for Respondent-payors, not showing up, or showing up unprepared, simply meant that the case would be adjourned to another date, and it would take several rounds of this before there were any meaningful consequences. Frustrated with the amount of time spent in Family Court with no perceived progress, many of our clients abandoned their cases. Because they were not getting child support in the first place, they could not afford to take so much time off work to *seek* child support.

This inefficient scheduling of cases also created a high barrier for pro bono volunteers to take on direct representation. Unlike dedicated Family Court practitioners or 18B court appointed attorneys, who might appear on multiple cases in Family Court in one day, pro bono attorneys would generally be in Family Court for one case only. We often heard from these volunteers that they simply do not have the flexibility to be away from the firm and sit in Family Court for an entire day only to be in front of the referee or magistrate for five or ten minutes.

The advent of virtual appearances during the pandemic has eased some of this burden, as appearing virtually means that litigants do not have to take an entire day off work or seek childcare, and pro bono attorneys do not have to miss an entire day of billable work.[7] Of course, virtual appearances have their own set of challenges which must be considered—not all litigants can participate easily. Some do not have reliable internet access, or do not have a safe or private place to conduct sensitive court proceedings from home. Virtual

[7] Virtual appearances can also be safer and more comfortable for victims of intimate partner violence, who no longer have to spend the day sitting in a court waiting-room with their abuser, or risk being followed home and having their confidential location compromised.

courtrooms make it difficult for attorneys to have private conversations with their clients, and technical difficulties and glitches by the court have resulted in some cases being unfairly dismissed, when the litigant tried to appear but was unable to log on.

These challenges can be worked through with proper investment in technology infrastructure and training, and should not be a reason to discontinue virtual appearances in a "post-COVID" landscape. Virtual appearances will not be appropriate for all instances or all people, but they can be a powerful way to streamline the process and cut down the amount of time litigants and attorneys spend on cases.

Further, for virtual appearances as well, but *especially* for appearances that resume in-person, the court should offer times-certain to reduce the amount of inefficient wait time that is currently keeping both the litigants and potential pro bono volunteers from being able to participate meaningfully.

E-filing and electronic access to files

Family Court has always had a paper-filing system. Only the most basic case information is available on the "eCourts" website, and even then only when a case has a pending court date. Pre-COVID, filings of new petitions had to be done in person with the petitions clerk, and anyone needing to access their own files had to appear in person in the records room. When the courthouses closed, the Family Court cobbled together a hybrid email/mail system of filing and requesting records, but, especially at the beginning of the closures, with confusion about the procedure by attorneys and court personnel alike, many petitions were simply getting lost: sent to email addresses that no one was checking, or mailed in envelopes that no one was opening.

As difficult as this can be for our clients, our pro bono attorneys, many of whom are used to practicing in well-funded federal courts (which were able to remain open and run largely without interruption through the pandemic), are always surprised that there is no way for them to log in and get access to their client's court file when taking representation

of a new case. With no way for attorneys to access a case's docket history electronically, they must rely on their client's reports of what happened in previous appearances—oftentimes when the client herself was confused and did not understand much of what happened. In addition to case files, individual court's rules of practice are not readily available online, which puts pro bono attorneys who do not regularly practice in Family Court at a disadvantage as compared to "insiders" who are familiar with the various particularized rules from regular practice in the Family Court.

Since the pandemic started, the Family Court has started accepting electronic documents through EDDS, which allows for the uploading of court documents, but is not an "e-filing" system in that it does not automatically deem such documents "filed" or "served". The argument against using an electronic court docket in Family Court has typically been concern around protecting the sensitive and confidential nature of personal matters. That said, matrimonial cases in Supreme Court, dealing with many of the same issues, can now be electronically filed, served, and accessed using the more robust and feature-rich NYSCEF system. If Family Court adopted the NYSCEF online docket system, it would allow both litigants and their pro bono attorneys much greater access and flexibility than requiring them to travel to the courthouse in person to file court documents or access records.

Conclusion

The Family Court must prioritize speeding up cases, working through its backlog, and respecting litigants' and attorneys' time and competing needs. Simple cases could be streamlined by giving litigants accessible information in their language to empower them to go forward without a lawyer. By hiring a sufficient number of court personnel and fact-finders, these simple cases could likely be resolved in only a couple of appearances, allowing the litigants to focus on their employment and their families' needs with minimal disruption.

For more complex or contentious cases that benefit from attorney representation and need judicial attention, changes to Family Court forms and procedures could reduce delays,

and allow Her Justice and our pro bono partners, along with legal services attorneys, the ability to handle more cases efficiently, thus better serving the most vulnerable populations. At the same time, these changes would create a more equitable and empowering experience in court for litigants.

We commend the Association and the Committees on their dedication to addressing the impact of the COVID-19 pandemic on access to justice in New York, and we hope that this testimony has served to render more visible the hardships many of our clients face in this challenging time and the opportunity for the courts to build back better for those they serve.

APPENDIX D

Hon. Edwina G. Mendelson
NYS Deputy Chief Administrative Judge For Justice Initiatives
Remarks - NYSBA Access to Justice Hearing—November 16, 2021

Thank you for the opportunity to present remarks today at this very important hearing. I thank the NYSBA President's Committee on Access to Justice and the Committee on Legal Aid for gathering us to listen and learn from each other about the impact of Covid-19 on low-income New Yorkers in the court system and on legal services and pro bono providers of legal services.

I provide comments today in my capacity as statewide Deputy Chief Administrative Judge for Justice Initiatives, a position I have held over 4 years now.

I hope my remarks provide information about our court efforts to promote access to justice during the lengthy ongoing COVID-19 pandemic season—I find hard to believe and to say this, but we are entering the 20th month of pandemic life.

I hope to also highlight our plans to promote justice in its aftermath, which will be our new, and perhaps in some ways better, normal.

I am also here today to listen and to learn. Know that my team and I serving in the Office for Justice Initiatives promise to take in all that is presented to us at these hearings with open ears, minds, and hearts, as we consider ways to enhance and promote meaningful access to justice for all New Yorkers today and going forward.

The portfolio of our office has grown over these years and now operates in five divisions—all with Access to Justice as their mission.

- Our **Policy and Planning Division** is where we address foreclosure policy endeavors, as well as provide oversight and support for our more than 300 problem-solving accountability and intervention courts. These include our groundbreaking opioid courts, drug courts, family treatment courts, veterans' treatment courts, mental health courts, human trafficking intervention courts, domestic violence and integrated domestic violence courts, young adult and juvenile treatment courts, community courts, and impaired driving courts.

- Our **Child Welfare and Family Justice Division** includes the work of the Child Welfare Court Improvement Project where we promote safety, stability and permanent homes for children and families involved with the child welfare system.

- Our **Youth and Emerging Adult Division** is where we provide training, guidance and support to our courts in the ongoing implementation of the recent laws Raising the Age of criminal responsibility. Here we have added a newer policy focus on the 18-25 year old emerging adult criminal justice population. Those working in the Access to Justice field know that criminal justice system involvement leads to a host of collateral consequences impacting the essentials

of life legal needs, so our focus on promoting access to justice extends to this area.

- Our core mission to ensure meaningful access to justice for all New Yorkers in all courts is more important now than ever. Connected to our Access to Justice work is our programmatic oversight of the **Judiciary Civil Legal Services** Program, which provides 100 million dollars yearly to enable so many New Yorkers to have their life essential legal needs met. JCLS funding ensures that low-income New Yorkers have meaningful access to the courts and the legal assistance in the following areas: (i) housing matters (including evictions, foreclosures, and homeless prevention); (ii) family matters (including domestic violence and family stability); (iii) access to health care and education; and (iv) subsistence income (including wages, disability and other benefit entitlements, and consumer debts).

- Our **Access to Justice Division** manages a variety of court and community-based self-help service programs, including pro bono volunteer attorney and other volunteer programs, establish and support Help Centers throughout the state, launch technological initiatives to enhance justice for New Yorkers and provide many other resources designed to serve unrepresented court users, including those developed specifically to help court users navigate our virtual court operations ushered in by the Covid-19 public health crisis.

Partnerships with local bar associations, law schools, legal services providers, law firms, and community organizations remain key to many of our access to justice endeavors, and throughout this extremely long pandemic season, we have continued to work closely with all our justice partners—many of whom have or will provide testimony at this hearing.

Our goal is to re-imagine and strengthen our existing programs, as well as create new ones to address emerging needs.

To meet our goals and the public need, we have successfully shifted many of our programs and initiatives to virtual formats so that we may continue to provide program services, while reducing our physical footprint in our courthouses as necessary for public health reasons.

I will highlight some of our programs:

We have created virtual pro bono assistance programs connected with New York City's Family Court, Civil Court and Supreme Court.

- Our NYC Family Court Volunteer Attorney Program creatively transitioned from an in-person model to a virtual model by partnering with the private bar and using technology to provide free legal consultations to clients with limited resources. Using both low and high-tech methods, the program has expanded its reach, enabling diverse clients with limited resources to access legal help without having to travel, lose work time or find childcare. This model also significantly expands the pool of volunteer attorneys and facilitates their participation.

- In Civil Court my office works with the City Bar Justice Center to offer free online and phone consultations to unrepresented litigants in New York City Civil Court. Volunteer attorneys provide legal advice and guidance on a variety of Civil Court matters including Small Claims, Name Change, Security Deposit Issues, Warranty of Habitability, Consumer Debt, Judgment Collection/Payment, and Service of Papers.

- In the Supreme Court we operate the Virtual Uncontested Divorce Volunteer Attorney Program that assists unrepresented litigants with the preparation of uncontested divorce papers.

We have established a partnership with the Brooklyn Public Library co-hosting virtual "Know Your Rights" presentations. A new series will begin early next year and will run quarterly. We will begin with the topic of Eviction Prevention and Housing Court matters.

Statewide, we worked with the NYS Unified Court System/New York State Bar Association's COVID -19 Recovery Task Force to provide pro bono legal assistance in child support and child guardianship matters. That was done with great support from LIFT and private bar leaders in coordination with court managers throughout the state.

My office piloted transition of our popular Court Navigator volunteer program from an in-person, in-courthouse program to a virtual platform last summer which expanded its reach to courts throughout the state. Court Navigators were also assigned to assist in-person at the 9th JD Help Center and at houses of worship that are part of the 9th Judicial District Faith Based Court Access Initiative. We are now developing plans to expand the Virtual Court Navigator Pilot Program to additional locations.

The work we have done to continue to support those in our community who are especially vulnerable and at risk is especially important.

Our office has long overseen the Guardian Ad Litem Program in the NYC Civil Court Housing Court for quite some time. The program recruits, trains, and provides Housing Court Judges with a pool of GALs whose goal is to safeguard the rights and prevent the eviction of some of New York City's most vulnerable people. The work continued throughout the pandemic. OJI is supporting current efforts to expand this popular program to Westchester County.

Still on the topic of supporting vulnerable communities: we have recently received a grant from the US Department of Health and Human Services Administration for Community Living that will enable us to implement a uniform, modern data tracking system to give court officials, particularly judges and court examiners, a continuous and complete overview of the services being provided to incapacitated individuals needing court assistance, as well as engage in other system improvement endeavors in that arena.

We are user testing, and soon preparing to launch, an Elder Abuse Self-Assessment Tool developed in collaboration with the Center for Elder Law and Justice, the Weinberg

Center and the NYS Unified Court System's Division of Technology. It is designed to provide older adults with community-based resources tailored to the needs that are identified by their response to a brief series of questions.

And, as part of the statewide Rural Justice Working Group, we are working to identify and reduce rural justice challenges and facilitate remote access to courts by creating additional Community Court Access Programs (CCAP)—access stations linking litigants to virtual court proceedings in community-based settings like libraries, community centers or houses of worship. This past year we have supported CCAP sites in the 3rd, 5th, and 9th JDs.

Working with the Brownsville Community Justice Center, we have piloted a court community access hub in NYC with more to follow.

I will spend a few final moments discussing our court system's efforts to promote racial equity.

Access to justice and racial equity are inextricably intertwined.

Earlier this year at her annual Hearing on Civil Legal Services, Chief Judge DiFiore expressed this sentiment this way, and I quote: "The access to justice crisis is, in so many vital respects, a racial and equal justice crisis affecting the legitimacy of our system".

To understand the context for our court system's recent work in this area, I bring us back to the painful time of late May 2020 and the horrific circumstances of the death of George Floyd that we all witnessed together on our screens and devices. That is what has brought us to this moment where we are experiencing our most recent racial reckoning in our society and in our institutions, including our courts.

During this same time—some refer to it as the pandemic within the pandemic—and closer to home for those who work in the courts, our equal justice work was desperately needed to respond to disturbing racist social media depictions made by our very own court employees.

We needed to act decisively, and we did.

The unique response of Chief Judge Janet DiFiore, who like other court leaders throughout the country was asked to respond to what was happening in our society, was to appoint a highly respected former Presidential Cabinet member—Secretary Jeh Johnson—to conduct a searching review of our entire court system as it regards racism, discrimination, bias and fairness. What followed was Secretary Johnson issuing a deeply painful to read 100-page report that I commend to your attention and my subsequent appointment to the assignment of a lifetime—to implement the recommendations made in that report.

Joining me in our equal justice in the courts work are a remarkable number of deeply invested and hard-working judicial leaders, staff and interested stakeholders of every type and in every region of our state.

They and we have been acting nonstop to address the recommendations made by Secretary Johnson. Later this week, Chief Judge DiFiore will present a report to the public highlighting our efforts to promote racial equity in our courts. Please look out for it.

At this time, I will only discuss with you the first recommendation of the 13 we are implementing, and the one considered most important to Chief Judge DiFiore, which is that we make a firm commitment from the top to embrace zero tolerance for racial bias. To further the goals of our commitment, we drafted and issued a new mission statement that I wish to recite to you. I'm quite proud of it:

> *The mission of the Unified Court System (UCS) is to deliver equal justice under the law and to achieve the just, fair and timely resolution of all matters that come before our courts.*
> (traditional and important and likely found in most judiciary mission statements in our country)
>
> (Here is the new part—the part that excites me and I hope inspires you, as it does me)
> *In the service of our mission, the UCS is committed to operating with integrity and transparency, and to ensuring that all who enter or serve in our courts are treated with respect, dignity and professionalism. We affirm our responsibility to promote a court system free from any and all forms of bias and discrimination and to promote a judiciary and workforce that reflect the rich diversity of New York State.*

Our courts' new mission statement—aspirational at this time, but a work in deep progress—is access to justice in action. That is our commitment and our calling as a court.

I end with thanks for the opportunity to greet you and learn from you all at today's hearing and the session to follow later this week.

I leave you with full acknowledgment and recognition that we remain in a season of immense legal and health challenges for so many in the communities in which we live and those in which we are privileged to serve.

I express my sincere hope and desire that you and all your loved ones remain very healthy and stay well!

APPENDIX E

Interest on Lawyer Account Fund of the State of New York

Funding civil legal assistance for low-income New Yorkers since 1984

MEMORANDUM FROM:

CHRISTINE M. FECKO ESQ.
General Counsel

DATE: November 23, 2021

TO: New York State Bar Association's President's Committee on Access to Justice and Committee on Legal Aid

RE: Access to Justice in the post-COVID Legal Landscape

I offer the following statement in support of the effort by the New York State Bar Association's President's Committee on Access to Justice and Committee on Legal Aid to collect information regarding access to justice in the post-COVID legal landscape.

IOLA Fund

The IOLA Fund ("IOLA") supports non-profit organizations in New York State that provide legal assistance to low-income people and improve the administration of justice for communities underserved by legal services.

IOLA was established as a public body by the State of New York in 1983, with the strong support of the New York State Bar Association. It is governed by an independent Board of Trustees appointed by the governor, legislative leaders, and the Chief Judge of the State of New York. A former President of the New York State Bar Association currently sits on the IOLA Board.

IOLA's revenue is derived from interest on attorney IOLA escrow accounts that hold pools of client money that individually are too small or expected to be held too briefly to generate sufficient income to justify the expense of administering a segregated account for the client's benefit. Today, every state, along with the District of Columbia, Puerto Rico, and the Virgin Islands, operates a similar program.

In New York, approximately 45,000 IOLA accounts are currently open at 185 banking institutions. The interest from these accounts, together with an annual grant of $15 million from the Office of Court Administration, allowed IOLA to provide $70 million in grants to 74 non-profit organizations for the two-year grant cycle ending March 31, 2021.

IOLA

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IOLA Grantee Reporting

IOLA collects extensive reports from its Grantees to track progress towards contract goals and to aid IOLA's understanding of the civil legal aid community in New York State. IOLA Grantees submit annual reports with detailed narrative descriptions and statistical and financial data regarding their programs. These Grantee reports are not limited to the work funded by IOLA, but rather include data on all civil legal services delivered.

Overview of Legal Services by IOLA Grantees during the Pandemic

After comparing the narrative and statistical reports from IOLA Grantees for fiscal years 2021 and 2020, I offer the following overview of legal services provided by IOLA Grantees during the pandemic:

- Overall client intakes were down by 22% due to a dramatic fall in in-person intake. Telephone and online intake, however, doubled.
    - Many Grantees reported creating new hotlines and new online intake tools to meet community demand.
    - Several Grantees conducted systemized outreach to check on the well-being of current and former clients.
- Approximately 25% fewer cases were closed.
    - Cases closed after litigation (including due to settlement, administrative decision, and court decision) were down 51%, likely due to court closures. In contrast, non-litigated resolutions (including non-litigation advocacy and settlement) were down 19% and brief services were down 16%.
    - Housing matters, which account for the largest number of cases, were down almost 30% and may reflect a reduction in client need due to the eviction moratorium.
    - It seems unlikely that other categories of cases such as Family Law, Income Maintenance and Employment experienced a reduction in need. Rather, given news reports of family tensions, job losses and increased food insecurity during the shutdown, these case closure reductions may reflect unmet legal need.
- Community Legal Education doubled. Unsurprisingly, this was driven by presentations via Teams, Google, FaceBook, and Zoom. The people served online in this manner increased from about 90,000 in 2020 to over 2.6 million in 2021.
- Pro Se assistance, which is largely comprised of helping individuals to prepare their own court filings, was down by about 30%, likely a reflection of court closures.
- Pro Bono volunteers slipped only 5%, but the total hours donated dropped 20%.
- Overall, IOLA Grantee staffing remained steady, with a small increase

in legal staff that was offset by a small decrease in administrative staff. Many Grantees reported significant delays with government contracts that caused cash flow problems, but the receipt of PPP loans appears to have staved off staff reductions.

- Many Grantees reported significant efforts to facilitate client access to non-legal services including cash assistance, food pantries, and other essential resources.

Statewide Data

The above Overview is supported by the following statewide data, taken from IOLA Grantee reports for the fiscal years ending March 31, 2020 and March 31, 2021. Brief explanations of reporting metrics are included.

1. **Intakes** counts completed intakes (aka, "screenings," "initial interviews," etc.), defined as the collection of a potential client's information used to determine client and case eligibility.

Intakes by Type			
	2020	**2021**	**% change**
Online	6,386	9,716	52%
Telephone	138,853	200,940	45%
In-Person	173,959	37,457	-78%
Total Intakes	**319,198**	**248,113**	**-22%**

2. **Cases Closed** counts all matters where the legal work has concluded, including the rendering of individualized legal advice ("brief services"), finalizing a settlement (with or without litigation), and obtaining a judgment (after an administrative proceeding or court trial).

Cases Closed by Level of Service			
	2020	**2021**	**% change**
Brief Services	207,442	173,664	-16%
Closed without Litigation (non-litigation advocacy and settlement)	36,640	29,748	-19%
Closed after Litigation (settlement, administrative decision, and court decision)	82,756	40,570	-51%
Other	374	73	-80%
Total Cases Closed	**327,212**	**244,055**	**-25%**

A closed case is classified into one of 11 broad case types (e.g., Housing), each of which is further broken down into a specific case benefit (e.g., "Prevented eviction from public housing," "Avoided or delayed foreclosure or other loss of home," etc.).

Cases Closed by Case Type			
	2020	2021	% change
Housing	84,508	59,473	-30%
Family Law	47,337	37,816	-20%
Immigration	57,807	37,014	-36%
Income Maintenance	37,900	33,183	-12%
Education	20,953	18,217	-13%
Consumer	19,374	8,982	-54%
Health	16,020	13,637	-15%
Employment	10,788	8,709	-19%
Individual Rights	5,527	4,317	-22%
Juvenile*	735	1,158	58%
Miscellaneous[1]	26,263	21,549	-18%
TOTAL	**327,212**	**244,055**	**-25%**

[1] Miscellaneous cases include advanced planning, taxes, reentry, etc.

**Result of improved data reporting.*

3. **Community Legal Education** counts individuals receiving legal education via in-person presentations to community groups, distribution of brochures, and other (online forums such as Facebook, YouTube, and Instagram Live and via email or text distribution of legal information).

Community Legal Education			
	2020	2021	% change
Presentations to Community Groups	304,733	708,255	132%
Legal Education Brochures	1,209,702	1,425,071	18%
Other	90,633	2,661,044	2836%
TOTAL	**1,605,068**	**4,794,370**	**199%**

4. **Pro Se** counts the number of self-represented individuals assisted with individualized documents to aid with their legal disputes via workshops or clinics, court help centers, self-help materials, and other (primarily, online forms).

Pro Se Assistance			
	2020	2021	% change
Workshops or clinics	24,696	28,556	16%
Help Center at Court	24,024	2,004	-92%
Self-Help Printed Materials	117,511	69,356	-41%
Other	41,093	47,830	16%
TOTAL	**207,324**	**147,746**	**-29%**

5. **Pro Bono Involvement** counts attorneys (including AEP volunteers), law students, and others who are enrolled with Grantee programs. "Enrolled" means, at a minimum, that the volunteer has committed to do work, usually evidenced by registering and receiving training from the Grantee. Volunteer hours counts the time worked on pro bono matters as reported by the volunteers or, in some cases, estimated by the Grantees.

Pro Bono Involvement			
	2020	**2021**	**% change**
Total Volunteers	**40,602**	**38,687**	**-5%**
Total Volunteer Hours	**1,022,308**	**832,382**	**-19%**

6. **Grantee Staffing** counts the total number of full-time equivalent paid staff persons and compensated fellows (e.g. AmeriCorps members, Equal Justice Works fellows, Immigrant Justice Corps or deferred associates) who were directly involved with Grantee programs throughout the full fiscal year.

Grantee Staffing			
	2020	**2021**	**% change**
Lawyers	2,389	2,467	3%
Paralegals	988	1,014	3%
Other	1,038	992	-4%
Total Staff	**4,415**	**4,472**	**1%**

APPENDIX F

Good morning. My name is Victoria Esposito; I am the Advocacy Director for the Legal Aid Society of Northeastern New York, which provides civil legal services to low-income individuals in sixteen counties throughout the region. Our practice covers Supreme Court, justice courts, and everything in between. We work in our region's most urban areas, and also in some of its most rural areas. I would like to talk about how our practice has changed throughout the pandemic to reach clients and the ways in which we had to change our models; I would also like to cover the experiences of our attorneys and staff with virtual and remote court during the COVID-19 pandemic: the good, the bad, and the ugly.

In March 2020, like so many other agencies, we closed our doors and very suddenly transitioned to remote work. In some ways our large service area made the transition relatively easy; with some of our offices two hundred miles away from each other, even before COVID we relied on remote meeting tools and programs, such as GoToMeeting and Skype for Business. That meant that our staff was familiar with these tools and did not have to learn completely new technology while working from home—although during the pandemic the specific platforms switched to Zoom and Teams. However, reaching and working with clients presented a particularly large barrier.

As the courts' availability and protocols changed, and as new policies and moratoria came down almost daily, we had to find a way to let clients know what rights they had. We relied heavily on our website and on social media posts, using Facebook Live appearances for particularly time-sensitive pieces of information; we also began holding virtual Town Halls, sometimes in conjunction with partner agencies, to discuss the rights and procedures available to tenants, Social Security recipients, public benefits recipients, unemployment applicants, and others. We worked through our files to find clients who had particular problems and needs, such as SSI recipients who had a very short timeline to fill out forms for the first stimulus check, and did our best to contact every one of them.

The advent of remote notarization allowed us to hold Zoom clinics for clients who needed help with pro se divorces or name change petitions, and remote will signing allowed us to assist many of our clients with their advance planning needs; in light of the pandemic, we were particularly happy to be able to help out with health care proxies in addition to the other planning documents. While these processes are cumbersome and time-consuming in a remote setting, the option of not assisting clients at all was unacceptable to us.

Even before the pandemic, we had regular contact with the state's other legal services organizations, and that became invaluable during the worst of COVID. We were able to identify problems which were common throughout the state and to hear what solutions and strategies had worked for other organizations. In the wake of the Supreme Court's decision in Chrysafis v. Marks, striking down the state's eviction moratorium, these existing relationships made it easy for LASNNY coordinate these organizations to jointly produce a pattern pleading, intended to combat the flood of evictions which we expected to follow.

With courts moving to remote operations only, we anticipated that the barriers that made it difficult to contact our clients would also make it difficult for them to attend court when necessary. While that was true in some cases, there have also been some unanticipated benefits for clients and attorneys alike.

The Good: Clients were happy to be able to save money on gas and to be able to appear in court despite being under quarantine. Our attorneys tell us that remote foreclosure settlement conferences have been particularly successful. While there have been occasional problems with the courts' video links, our attorneys have found that they and their clients can meaningfully participate in the conferences by telephone. (As our foreclosure grant allows us to serve individuals with slightly higher incomes than most of our funding, our attorneys have speculated that our foreclosure clients might also have better access to wireless, data, computers and/or smartphones.)

Throughout most of the pandemic the Social Security Administration has been offering disability hearings by telephone only, although they have recently begun offering video hearing options. Those clients who did not want a telephone hearing could wait until in-person hearings were resumed; as the pandemic continues, however, many of these clients have opted for remote hearings rather than wait for an indefinite period of time. Some of our attorneys have found that their clients were much more comfortable with telephone hearings than they would have been with in-person hearings, since it greatly reduced their anxiety.

Our attorneys also gave high marks to those courts which installed kiosks for our clients to use for virtual hearings. This recognized that our client base does not necessarily have access to computer access, smartphones, unlimited minutes, or wireless, and it allowed them to safely and meaningfully participate in these important proceedings. (We also particularly appreciated the court systems' understanding of this and their work to install more kiosks in courts and community centers alike. In our service area, the 4th Judicial District, which covers most of our rural counties, installed self-help kiosks in many court buildings so that people without access to technology could still appear virtually and safely. The 3rd Judicial District, which covers the Capital District, installed kiosks in some courts and also in community centers such as libraries or churches. Some kiosks are set up to allow individuals to transmit documents directly to and from court staff, so that they can receive, fill out, and scan back a Petition or other paperwork.)

The Bad: As you might expect, our clients do not necessarily have access to unlimited data, to wireless services, or to the devices they need to access remote courts. Even when clients have smartphones, their plans are often basic pay per month plans which do not include streaming. Additionally, some clients—particularly elderly clients—simply do not have or know how to use smartphones or computers. In some cases they do not have a camera on their device or are unable to use them, which was unacceptable to the judges as they were then unable to assess the client's credibility. In administrative hearings, witnesses do not receive a link to the proceeding until just before the judge intends to swear them in. However, this means that if the witnesses do not happen to be on email at that moment or have difficulty connecting for whatever reason the entire proceeding gets held up and the judge can get quite annoyed. One of our attorneys requested an accommodation for a hearing impaired client in a telephone hearing for an unemployment case; the only available accommodation was TTY, which our client does not use. (Unemployment cases have been telephone-only throughout the pandemic, so our client had no viable option.)

Our rural clients in particular lack consistent wireless service, and accordingly they have had to appear from parking lots, cars, and libraries. This means that it is particularly difficult for clients to review the documents that the judge or opposing party is relying on. Our own COVID protocols prevent us from allowing clients into our offices unless they do not have access to digital technology or there is some other barrier preventing them from appearing virtually. One client who had received permission to appear from our office was actually under quarantine on the day of her court appearance. This meant that she had to appear from our parking lot while her attorney was inside. Finally, our clients sometimes have great difficulty finding a quiet and private place in their home, particularly if they also have children.

Some agencies sent out instructions which were confusing, particularly to litigants who we did not yet represent. At least one housing authority sent out notices that tenants facing eviction should come to their office to use their video capabilities. The tenants did not understand that they could appear remotely from their homes or other places; accordingly, they felt they had no choice but to go to a public place during an ongoing pandemic. Other clients did not understand that they had the right to appear remotely, and still others were never notified by the court or by the housing authority that their hearings had been canceled. This led to our clients going to court during the height of the pandemic, only to be told that their hearings or appearances had been canceled.

In the context of Social Security hearings, some of our attorneys have expressed concern that a hearing judge will not grasp the full extent of a client's disability without an in-person hearing. (This is particularly true in telephone hearings, although it also holds true for video hearings. One attorney expressed concern that she could not adequately read the judge's facial expressions or reactions in a video hearing.) Similarly, some of our disability attorneys have expressed concerns about holding telephone hearings for clients who need interpreters, as this would require a six-way conference call. They have also pointed out that telephone hearings require our clients to use their minutes, which is a great burden on the population we serve, and that Social Security will not reimburse the clients for their minutes. It is of note here that Social Security will reimburse clients for mileage to and from in-person hearings and will sometimes advance money to extremely needy clients; the policies and regulations do not seem to have caught up with our current reality. One other problem that our disability attorneys encountered was that if the parties could not connect immediately the judge would reschedule the hearing, regardless of the reason for the difficulty. By contrast, judges generally wait 15-20 minutes before rescheduling in-person hearings or calling the next hearing. Many of these concerns carry across all our practice areas, of course.

<u>THE UGLY:</u> Our justice court system, which is where most of our rural eviction cases are litigated, was particularly unprepared for the COVID pandemic. These courts do not have the infrastructure, staff, or technology to allow for remote hearings, and in some cases the justices or court staff did not appear to be interested in learning how to use technology. The most difficult scenario occurred when justices, the majority of whom are not attorneys, ordered appearances regardless of any stay or moratorium; did not observe social

distancing and mask guidelines; and made inappropriate political or personal remarks to our staff who were attempting to observe those guidelines.

As all of us know, the pandemic completely upended and continues to affect our professional as well as our personal lives. LASNNY was able to weather this relatively well as an institution, although not without some acute growing pains. While there have been unexpected benefits to our clients, both their and our experiences have reminded us of the urgent need to consider technology and connectivity as a crucial part of our nation's infrastructure, rather than a luxury for those who can afford it.

CLARE J. DEGNAN
EXECUTIVE DIRECTOR

SHERRY LEVIN WALLACH
DEPUTY EXECUTIVE DIRECTOR

Testimony from the Legal Aid Society of Westchester County for the joint hearings of the New York Bar Association's Committee on Legal Aid and The President's Commission on Access to Justice in the Post Covid Landscape.

December 2021

"ACCESS TO JUSTICE**"**

"Access to Justice means different things to different people. In its narrowest sense, it represents only the formal ability to appear in court. Broadly speaking, it engages the wider social context of our court system and the systemic barriers faced by different members of the community."[i]

At the highest levels of our government an understanding that there are barriers preventing equal access to our courts and quasi-judicial proceedings. President Biden issued a Presidential Memorandum on May 18, 2021. In it, he distilled the challenges before us in these terms:

"The coronavirus disease 2019 (COVID-19) pandemic has further exposed and exacerbated inequities in our justice system, as courts and legal service providers have been forced to curtail in-person operations, often without the resources or technology to offer remote-access or other safe alternatives. These access limitations have compounded the effects of other harms wrought by the pandemic. These problems have touched the lives of many persons in this country, particularly low-income people and people of color."[ii]

The President's comments apply even to a "wealthy" county such as Westchester County, New York.

What does access to justice mean for the Legal Aid Society of Westchester County (LASW) and the population we serve, especially in a post- Covid world?

Barriers to accessing the court system and all the trappings of the criminal, family, landlord/tenant courts are significant. The barriers include the existing barriers of poverty, education, language, sufficient legal representation, lack of public support and transportation all of which are highlighted and exacerbated by technology. The "digital divide" is real; LASW clients are further marginalized every day. The Covid-19 pandemic response by the courts has served to emphasize existing barriers and created new barriers for our clients to appear in court.

TRADITIONAL BARRIERS:

Geography:

Westchester County is a microcosm for all New York State. It has rural areas, densely populated urban areas, poverty, and extraordinary wealth. Westchester County has some areas with a robust public transportation systems and other areas with minimal services with little or no direct access to courts. It can take over four hours on public transportation[iii] what it would take 40 minutes to drive; couple limited transportation options with forty (40) local court jurisdictions, six (6) of which are cities[iv] and 34 are towns and village municipal courts. Some of the town and village courts meet at night, at time when public transportation may not run. The county seat is in White Plains where you can find the County and Supreme Courts and one of the three Family Courts, there are two additional locations for Family Court, Yonkers, and New Rochelle. The local court jurisdictions are not under Office of Court Administration jurisdiction, they meet both day and night.

Every jurisdiction has its own housing court (referred to as Landlord/tenant), and each have vehicle and traffic court, criminal court, small claims court and local code violation court. At the best of times these courts were difficult to navigate, and post Covid, almost impossible.

Each town and village court has its own court rules. Some courts have never opened after being closed in March 2020. For example, as of today, the Town of Harrison is still only operating virtually with no in-person access at all.

Indeed, while the housing courts in the local jurisdictions have been mostly shut down, the eviction moratorium[v] is due to expire on January 15, 2022, and advocates are expecting a massive uptick housing petitions for evictions. It is not clear if these proceedings will be conducted virtually or in-person.

Public Transportation:

Public bus transportation is very limited in the northwestern part of the county and non-existent in the northeastern portion of the county,[vi] and while there are train lines (Harlem to the east and Hudson to the west) it is difficult to get to those train lines from many areas. For example, if you live in the town of Yorktown and you need to take public transportation to get to Family Court in White Plains, there are a few bus lines available. You could take the weekday express bus to White Plains. The trip will take one hour ten minutes but there are only 3 scheduled express buses on any morning. If you missed the express bus, it takes over two hours to make this same trip[vii]. If you have a court date, you will need to take off the entire day for court. Missing work not only causes economic hardship for the litigant by reduced work hours but may also result in job loss.

Housing:

Westchester County has little affordable housing for low-income residents. The County was sued for their failures to provide sufficient affordable housing in 2009 with an agreed settlement in 2017.[viii] The National Low Income Housing Coalition (NLIHC) surveyed the Congressional Districts of each state, including the three Congressional Districts which incorporate parts of Westchester County, Congressional Districts 16, 17 and 18. There are 135,818 renters in the Westchester County Statutory Exemption Area and of those renters approximately 102,000 families are spending more than 50% of their annual income on housing.[ix] Housing insecurity and high costs prevent the vast majority of renters from having additional disposable income to have the technology to appear in virtual court, to afford to take off time to come to court, pay for fines, access their attorneys by telephone, in-person or via electronic meeting.

Shelters and short-term housing are issues for our clients. There are no long-term housing options for client who are being released from jail, there overnight "drop in shelters" where the "residents" come to the shelter in the evening and must leave during the day.[1] Many LASW clients who are accepted into a "problem solving court" such as the Diversion Court do not have stable housing. Those discharged from the County Jail often have a time lag where they are without housing and services before going into treatment. Lack of housing and services places our clients at a risk of relapsing.

[1] In the city of Peekskill there is an amazing non-profit, Caring for the Hungry and Homeless of Peekskill (CHHOP). It serves approximately 1,300 clients each week.

COVID -19 BARRIERS:

Digital Divide:

March 2020, the country shut down. Businesses shuttered, courts and other public institution closed. Everyone scrambled to propose plans to continue with work and school while working to keep everyone separate and reduce the spread of the Covid-19 virus. Inside a month, our courts pivoted to a virtual court for only the most pressing matters. Criminal and civil trials stopped, and New York Pause stopped all the grand jury proceedings. Schools scrambled and developed online learning strategies. Initially, all that was needed was telephone, cell phone preferred but a non-smart telephone or landline was sufficient. However, in a few short months (like the schools), a telephone was not sufficient, and a tablet, computer or laptop was necessary for the appearance. The public health crisis required everyone to pivot and compromise on procedures – which in non-crisis times are a violation of due process rights. Everyone did what was needed to keep the system moving, even if difficult and cumbersome. Now, it is commonplace for the local courts to push remote proceedings for after hour arraignments and appearances for incarcerated clients, unfortunately, many of the attorneys are capitulating to the courts' requests.

Criminal representation of a client cannot be accomplished over the telephone – or the equivalent of a telephone, video on a computer. Telephonic arraignments violate fundamental due process of the client often resulting in worse outcomes for the clients. A law review article from 2010 studied the outcomes of criminal defendants whose hearings were conducted over video. Their study reported substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense.[x]

The Brennan Center for Justice published research supporting what is intuitive for defense attorneys; "the use of remote video proceedings can make attorney-client communications more difficult. For example, a 2010 survey by the National Center for State Courts found that 37 percent of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations."[xi]

At the beginning of the pandemic, the digital divide between rich and poor became even more apparent with schools going virtual. According to the Pew Research Center nationally, there are still gaps in high-speed internet access. Only 49% of African Americans and 51% of Hispanics have high-speed internet at home, as compared with 66% of Caucasians. Internet speed has important effects on media access, especially when it comes to streaming video, so this gap is significant.[xii] The studies are similar to the realities faced by Westchester County residents. For example, Scarsdale[xiii] a very wealthy area of the county, only 2.4% of the population lacks in-home high-speed internet, by comparison, Mount Vernon, 29.4% of the households do not have internet access[xiv] and it was estimated that in Yonkers 25% of the population did not have a laptop or computer in the home.[xv]

Community organizations are trying to help the students/families who need the broad band conductivity. For example, there is a public/private pilot in Yonkers. The Westchester County Association (economic development organization) partnered with WestHab (an affordable housing non-profit) in project OVERCOME. The Westchester County Association (WCA) is one of seven lead organizations to have been selected by US Ignite, a national non-profit accelerating the smart city movement, to participate in Project OVERCOME. Project OVERCOME is a $2.7 million effort is designed to expedite the delivery of broadband services to underserved communities across the United States[xvi]. However, this is just one community in one city (out of six) within the county.

Studies show that 32% of the households in Westchester County do not have a laptop or tablet[xvii], and this is a statistic in comparison to Scarsdale which has only 3% of its population without broad band access. Clearly there is a divide between the richly resourced and those who have less; two communities next to each other have divergent capacities to appear in virtual proceedings.

All LASW clients are working poor or indigent. They are from the families who may be housing and food insecure without access to broadband and many of them do not have unfettered access to a computer to appear in remote court. Many clients have cellphones but according to the Pew Research Center full 30% of the people surveyed are worried about being able to pay the cell phone bill.[xviii] LASW also represents clients who fall into the vulnerable categories: non-citizens; non-English speakers; homeless; addicted; mentally ill or otherwise marginalized. Despite the increase in the ubiquitous smart cell phones, marginalized populations still do not have the same access to digital devices.[xix]

Vaccine Hesitancy:

Westchester County identified three major population centers, Peekskill, Yonkers, and Mount Vernon as areas where there was vaccine hesitancy.[xx] The response was to provide more pop-up clinics in those areas to provide greater access for the populations. The majority of LASW assignments come from Yonkers and Mount Vernon and the three are densely populated cities with significant lower income populations.

It is more difficult to access courts and services when you are fearful of contracting Covid and unable to receive a vaccination against the virus.

Conclusion:

The expansion of technology in our legal systems (to coin a phrase) is "a blessing and a curse." The use of the technology is extraordinarily attractive. When technology is used mindfully and appropriately, it can be of tremendous value in allowing for access to courts. For example, it is a good use of time and resources to schedule remote court calendars for conferences and status updates. However, we need to avoid the pitfalls of allowing the convenience of sitting before our computers to replace human interactions.

In every case, access to justice means that the person has an opportunity to be heard; the in-person court and interactions with attorneys cannot be replaced by an electronic appearance. Criminal defense attorneys must not allow convenience to interfere with representation of a client. During court appearances the attorney must have constant and easy communication with the client. The attorney must be able to read the body language of the client, shifting feet, glancing around, fidgeting – the non-verbal cues that the client does not understand what is happening. It is difficult if not impossible to see these signs of a client's distress over video. There is no way to whisper to a client, "you, okay?" over Zoom. The clients must have an unfettered opportunity to speak with and be heard by their attorneys, anything less is not acceptable.

If the use of technology is expanded, there must be steps taken to make sure our most marginalized clients have both access to technology (allowing alternative methods of accessing the courts) and in-person access.

It is important to note, the traditional barrier in access to justice are still part of the problem. For our less resourced clients, their access to technology is limited (not everyone has a computer, or a smart phone). Education, reach out, collaboration with community stakeholders must continue with the overarching goals of making it easier to access necessary legal services. Technology will allow the legal systems to better serve the justice system, but we cannot allow technology to replace the "human touch."

Clare J. Degnan, Esq.
Executive Director

END NOTES:

[i] https://www.aclrc.com/what-is-access-to-justice

[ii] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/18/memorandum-on-restoring-the-department-of-justices-access-to-justice-function-and-reinvigorating-the-white-house-legal-aid-interagency-roundtable/

[iii] https://transportation.westchestergov.com/images/stories/Schedules/sysmapeng052020.pdfvillage

[iv] In descending order of population: Yonkers, New Rochelle, Mount Vernon, White Plains, Peekskill, Rye.

[v] https://www.nytimes.com/2021/09/01/nyregion/eviction-moratorium-new-york.html

[vi] https://transportation.westchestergov.com/images/stories/Schedules/sysmapeng052020.pdf

[vii] https://transportation.westchestergov.com/images/stories/Schedules/rte1417fall21r10082021.pdf

[viii] https://nlihc.org/resource/new-developments-westchester-county-affh-court-settlement

[ix] https://nlihc.org/sites/default/files/Housing-Profiles/Congressional-District-Housing-Profile-NY.pdf

[x] https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article

[xi] https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court#footnote10_bzl4w47 quoting Eric Bellone, "Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom," Journal of International Commercial Law and Technology 8 (2013): 44-45.

[xii] https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/

[xiii] Bloomberg's' annual 2020 rankings of riches places, Scarsdale is the 'richest town" on the East Coast of the United States.

[xiv] https://wca4kids.org/infographics/westchesters-digital-divide-for-kids/

[xv] https://www.lohud.com/story/news/education/2020/04/01/new-york-schools-online-classes-struggle/2920746001/

[xvi] https://www.westhab.org; https://www.westchester.org/initiative/digital/

[xvii] https://www.nysl.nysed.gov/libdev/documents/HorriganReportNY.pdf

[xviii] https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/

[xix] https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/

[xx] https://dailyvoice.com/new-york/poundridge/news/covid-19-westchester-works-to-ease-vax-hesitancy-in-some-areas-schedules-new-pop-up-clinics/812935/

APPENDIX H

The New York State Bar Association's President's Committee on Access to Justice and Committee on Legal Aid

November 24, 2021

Thank you to the New York State Bar Association for the opportunity to submit testimony on the impact the COVID-19 pandemic has had on access to justice in the courts.

My name is Cathy Cramer, and I am the CEO of Legal Information for Families Today (LIFT). We provide limited scope legal representation to unrepresented litigants in New York State Family Court. For over 25 years we have worked closely with the Family Court to serve families having issues with child support, custody and visitation, and domestic violence. LIFT provides support through our Helpline, our legal consultations, our community outreach efforts and through our remote pro bono program. We work with 25,000 families every year and with litigants from across New York City and State. We have no income eligibility requirements and work with men, women, grandparents and other caretakers.

Even before the pandemic, the New York City Family Courts were already overburdened and under-resourced, hearing over 200,000 cases per year. 80% of litigants come to Family Court without a lawyer. The onset of the pandemic only exacerbated the existing problems. The Court has been working very hard throughout this period, but it has been very difficult for our clients in particular. The unrepresented litigants who come to Family Court in New York City are disproportionately low-income, from communities of color, often undocumented immigrants, or speak monolingual Spanish or some other language. And, as the family courts are under-resourced and understaffed, there is a justice gap for many of the litigants. Organizations like LIFT and others have worked closely with the Court to fill this justice gap.

None of us were prepared for the pandemic. In March 2020, the New York City Family Courts' initial response was to strictly limit the services they could provide. They went all virtual and only heard "essential cases." However, it was unclear what "essential" meant and there was little communication about what was deemed essential or even what emergency cases were.

In New York City, the Family Court stopped hearing cases related to child support altogether. These were not considered emergencies. Meanwhile, people were losing jobs and they could not pay their child support orders. But they could not seek any relief from the family courts, so child support debt continued to accumulate. And administrative enforcements were still in effect. On the other side, parents who needed child support to put food on the table weren't receiving it. And people hoping to resolve "non-emergency" custody and visitation issues in the family courts were often left without visiting or seeing their children for months.

In the early days of the pandemic, calls and emails to the Court went unanswered. People turned to the Court's website for information, but that website is confusing and not user-friendly. There were no help centers open, very few court clerks available, and no way to pick up or drop off petitions for pro se

litigants. LIFT created a PPE team that stood outside the courthouse for months to distribute masks and information about our Helpline and other free legal resources, to make sure people were getting some of the help they needed. We documented that in the fall of 2020 alone, 8,000 people came to the Courts for help and did not know that the Courts were physically closed. People continued to come throughout the next year.

People were desperate for information and help, so they called LIFT, often at the Court's suggestion.

Throughout the pandemic, LIFT had record-breaking numbers of requests for help on our Helplines – over 24,000 people called LIFT in FY21, an increase of 51%, and our legal advice consultations grew by 56% to nearly 3,000 consultations. Our pro bono program, Family Legal Connection, which takes place over video and is available on a client's mobile device, facilitated over 300 consultations. Over 144,000 people viewed our digital library of Legal Resource Guides. Despite growing and relentless client demand and increasingly complex cases, LIFT staff rose to the challenge. Yet it has been taxing, and we have prioritized increasing staffing and providing needed support to our team to manage the demand.

Now, the Courts have begun hearing more virtual or hybrid cases, but there are still many issues for unrepresented litigants. There are frequent problems with connectivity. In a few cases, people are getting notices of hearings the morning of their virtual hearing, leaving them no time to prepare. If people are even 5 minutes late, possibly due to connectivity issues, hearings are adjourned, or worse, dismissed. Our attorneys spend much of their time now filing to re-calendar cases for clients who had technology problems.

Although non-emergency matters are now being calendared and heard, the delays are extensive: some cases filed in early 2021 won't be heard until March and April 2022. It will likely take **many months** to catch up to the backlog. Families must continue to wait to get help they have needed since 2020. And new cases are being filed every day.

The New York City Family Courts continue to remain almost exclusively virtual and only have limited physical access available to litigants which intensifies challenges for clients who don't have access to computers, printers or Wi-Fi.

LIFT is attempting to bridge the digital divide with our Tech Hub pilot. We have opened our administrative offices, located in Brooklyn near the courthouse, for people to conduct their virtual hearings in a safe, private space, and can also download and upload Court documents, supported by our trained staff. We had to get private foundation funding to afford this effort and it is only a pilot.

Nearly 60% of the people who have come to our Tech Hub only have access to a phone or tablet at home, so they cannot fill out any petitions or court forms they need. 45% of Tech Hub visitors have Broadband Internet at their home, with 41% relying on a data plan for their smartphone. 16% of Tech Hub visitors have no internet connection at all and 5% have no access to any technology.

Here are some examples of how LIFT's clients have been impacted by the pandemic:

An Urdu-speaking mother of two children and came to LIFT needing assistance filing for both paternity and child support. Her children's father had been living with the family up until recently, when he had been drinking and got physically aggressive. When he abruptly stopped paying any child support, she lost a vital source of income to support her children. Her only source of income at the time was unemployment benefits and she was terrified that she and her children would be evicted if she could not pay the rent. She did not know where they would go. The LIFT attorney drafted all of the petitions to start her paternity and child support cases. At the time, however, the Court still was not yet hearing new child support cases unless they were considered "emergencies." The LIFT attorney submitted an emergency petition in the hopes that the Court would hear her case more quickly. Child support cases, though, are rarely considered emergencies.

Another one of our clients is a Spanish-speaking mother of three young children. She and the father had separated four years ago due to domestic violence. He never provided any financial support for the children. The client attempted to start a child support case a few years ago, but the father evaded service and the Court dismissed the case. A LIFT staff attorney assisted her with drafting the forms to start a new case. However, the client had a difficult time figuring out how to download and save the forms as PDF files. Fortunately, the client lives in Brooklyn, so the attorney scheduled an appointment with LIFT's Tech Hub for assistance with printing out, signing, and uploading the forms. The forms were then submitted to the Court.

We're proud that the Tech Hub is available to provide in-person support to people who need help. However, there are still parents who cannot benefit from the Tech Hub, like the currently incarcerated.

A currently incarcerated client needed help to modify his child support order because one of his two children had died. Prior to incarceration, he informed the Office of Child Support Services of his pending incarceration and believed they modified the order. But months later he realized the order was still in place and he had $7,000 in debt.

He could not file anything, as the Courts were closed to child support cases, so he reached out to LIFT. Our attorney reviewed the petition over the phone with the client and mailed it to the Courts. We are hopeful the Courts will accept it, but the arrears are still mounting.

LIFT has many recommendations for how the Courts should move forward from the pandemic. We believe that the virtual courts should be here to stay – when they work, they are much easier for litigants. They cut down on wait time and remove many barriers unrepresented litigants face like the need to travel to court, to take full days off work, find childcare, etc. **But the digital divide remains real and needs to be addressed.**

- We need more places like our Tech Hub, in each borough.
- The Courts need comprehensive IT back up and support staff.
- The Court's website and forms need to be made much more user friendly, and accessible, especially to those for whom English is not their first language.

- Communications between the Court and the public need to be improved and made accessible in many languages. For example, right now, petition rooms in many courts are open, but the public has no way of knowing this – LIFT staff is telling them about this, not the Court.
- The Court needs more jurists and Court staff to handle the ever increasing caseloads due to backlog and pent up demand.
- There is a shortage of 18b lawyers and this prolongs cases. Their fees should be increased in order to get more lawyers into the profession and available to the thousands of pro se clients coming to court.
- There should also be greater access to UCMS. LIFT spends so much time trying to get background information from the clients on their cases, clients often do not understand what is happening in their cases or can accurately share their case history. This information is crucial for our attorney to provide accurate advice and relief for clients.

Our hope is that we have all learned a lot from the past year and a half. LIFT has provided hope and support to many litigants who had nowhere to turn. We look forward to continuing to work with the Family Court to improve access to justice for New York families. As we all believe, all New York families and children deserve EQUAL ACCESS to justice.

Thank you very much for this opportunity, and we look forward to working with the New York State Bar in the future.

APPENDIX I

NASSAU SUFFOLK LAW SERVICES COMMITTEE INC.

TESTIMONY FOR PUBLIC HEARING REGARDING THE IMPACT OF COVID19 ON OUR CLIENTS.

Rezwanul Islam

November 16, 2021 at 1 PM

My name is Rezwanul Islam, I am the Deputy Executive Director of Nassau Suffolk Law Services Committee Inc. We are the largest provider of free civil legal services on Long Island. We serve indigent clients in Nassau and Suffolk County and appear in a number of venues at the local, state and federal level. We represent them in a full range of civil legal services, including social security hearings, fair hearings before OTDA, and in landlord/tenant court. Our attorneys also appear in family court and help guide clients through other civil legal issues they might be dealing with.

I would like to thank the New York State Bar Association, the Committee on Legal Aid and the President's Committee on Access to Justice for the opportunity to testify about the impact the COVID-19 Pandemic has had on indigent populations throughout New York State.

The pandemic has had a serious impact on the way our clients access services that are vital to their well-being. As the world shut down, so did many of the agencies and organizations our clients rely on.

While some aspects of these shutdowns have improved delivery of services to more capable clients, it has had a devastating impact on the more vulnerable which includes the poor, elderly, and disabled.

In our experience, new innovations such as remote hearings provided a safe and accessible way for our attorneys to provide representation and appear in court. However, our clients have had great difficulty accessing these same tools. For instance, some clients do not have sufficient technological literacy in the programs that are required for court appearances or hearings. In other instances, if they have the sufficient knowhow to access these tools, they typically lack other resources in the form of safe/secure housing or access to the required hardware or internet. Clients that live in emergency housing do not have the ability join a hearing alone, as typically required. So that means they needed to go to other venues to be ale to appear at their hearings. In one instance early in the pandemic, before we could accommodate some clients to come use our facilities, we asked a client go to a park or other open area where they could access the hearing.

These experiences illustrate how important it is for clients with very little means to be able to access in person services. Agencies and organizations whose primary function is to serve the poor, elderly and disabled must always have a presence in the communities they serve.

One of the primary examples of this need can be seen in the operations of the Social security Administration. At the beginning of the pandemic, the Social Security Administration began full remote operations, at the same time as many services our clients rely on. To their credit, they built a remote hearing infrastructure as the need arose. However, as the world has begun to reopen, the Social Security Administration has remained closed. Notably, their field/district offices where much of the day-to-day operations of the Administration is conducted have not returned to their offices. Meanwhile, they continue to process and deny applications and make other decisions that impact our client's benefits.

What most advocates and clients find when they are dealing with the Social Security Administration, is that calls go unanswered, mail goes unopened, faxes go undelivered and most importantly our clients have almost no way to access emergency services.

In the past, the district and field offices would be able to handle simple requests such as filing a request for a hearing, completing an application, or accepting documents that prove eligibility for benefits. Individuals that are blind or illiterate and who have no one in the world to assist them have been left to their own devices to “figure out” how to request a reconsideration when an application is denied. More likely than finding assistance, they will give up and go without the services they need to survive.

The Social Security Administration’s continued closure to the public can in some ways be seen as a case study of how the pandemic has impacted the lives of our clients who are the most underserved and vulnerable. Many of the issues these individuals have faced in accessing the Social Security Administration’s services are the same ones our clients face when trying to access our services when we are working in a purely remote environment.

While I believe remote hearings and services can increase access to our clients who are otherwise able but live-in secluded areas, it is detrimental to the elderly, disabled and mentally ill who rely on in person services to meet their needs. In order to properly serve these populations, the agencies and organizations that serve them must be able to provide in person services effectively.

NEIGHBORHOOD LEGAL SERVICES, INC.
EQUAL JUSTICE FOR ALL

November 23, 2021

New York State Bar Association
1 Elk Street
Albany, New York 12207

Re: Written Testimony on access to Justice in the post-COVID legal landscape
Hearings of November 16th and November 19th

Dear Co-Chairs:

I am the supervising attorney of the Family Law Unit at Neighborhood Legal Services, in Buffalo NY, and I am a committee member of the NYSBA Committee on Legal Aid. I submit this to be considered as written testimony to supplement the wonderful speakers who testified at the hearings held last week.

First, let me congratulate the co-chairs and the committees as a whole, as well as those who testified, on having the courage and dedication to the practice to be willing to discuss some of the important issues facing our clients. These are difficult times, and they have exposed some weaknesses in the procedures and systems that were in place prior to the pandemic. It is also clear from our hearings that the greatest strength of the profession is the human element, and those who took the time and invested the effort to testify showed a true commitment to bettering the lives of the attorneys, organizations, and clients we serve. I am proud to count myself among you.

Second, I work closely with Judith Olin, Esq., Director of the Family Violence and Women's Rights Clinic, and Clinical Professor at the University at Buffalo School of Law. We have formed an ad hoc committee of legal service providers, meeting regularly to discuss issues we see in the Family and Supreme Courts during COVID. On November 18th, Professor Olin quite eloquently testified to the issues that we have in Erie County Family Court with timely hearing of family offense petitions in domestic and intimate partner violence cases in accordance with FCA §153-c(a).

Closely connected to these cases is a separate but extremely important issue: that of prompt processing and service of Orders of Protection (OOPs) during this pandemic. As all practitioners in this area are aware, the protections afforded and enhanced civil and criminal sanctions for violation of OOPs are only enforceable once the Respondent has been served

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with the OOP. No less than four (4) agencies connected to our ad hoc committee in Erie County have reported that certain law enforcement agencies tasked with service of these vital documents, have simply stopped serving them at times.

It has been reported that some OOPs take weeks to even have service attempted, and that there are up to 200 unserved OOPs at the local special victims unit from time to time. This seemed to happen at the worst possible time—when violence victims were stuck inside quarantining or fleeing the virus, and while there was a sense of antagonism between the City, its legal services agencies, and a law enforcement community alarmed by possible defunding efforts. Further, no single agency wanted to be seen as the face of any action adverse to law enforcement, at a time when domestic violence was peaking in this area. Attorneys relied on reaching out to personal connections within law enforcement to push service in urgent matters, and prioritized matters accordingly.

We mainly serve victims of violence and low income populations whom cannot pay for private process service themselves. The assistance of law enforcement as a partner in this fight is vital to keeping our clients safe, including removing weapons from situations that may become inflamed. The potential ramifications of alienating them during COVID has kept efforts to address this issue to a minimum to the detriment of the vulnerable populations we serve. The hesitance is understandable, and there have been many other systemic issues to tackle as we pursue access to justice during these times.

Yet, if a victim of violence cannot count on the Courts in our district to timely hear a petition, and cannot count on law enforcement to timely serve a potentially violent offender with an order, it is difficult to see how justice is being made accessible. Ultimately, my hope is that rather than being viewed as an attack, this submission will be regarded as a starting point for an important discussion as we move toward a post-COVID legal landscape.

Very truly yours,

Andrew F. Emborsky, Esq. /s/

Andrew F. Emborsky, Esq.

Member – Committee on Legal Aid

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NEW YORK STATE BAR ASSOCIATION
PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE AND COMMITTEE ON LEGAL AID
CIVIL LEGAL SERVICES HEARINGS

Access to Justice in the post-COVID Legal Landscape

INTRODUCTION

Pro Bono Net is a national nonprofit dedicated to increasing access to justice for low-to-moderate income individuals, families, and communities. For over 20 years, we have provided innovative technology solutions and expertise in building and mobilizing justice networks to transform the way legal help reaches those in need. Pro Bono Net's New York programs - including LawHelp New York, TenantHelp New York, the New York Crime Victims Legal Help, LawHelp Interactive, Closing the Gap, Family Legal Connection, and Citizenshipworks - enable legal service providers to maximize their impact, increase pro bono involvement, and empower the public by providing legal assistance and information, including resources for unrepresented litigants. At Pro Bono Net, we believe that everyone navigating the civil justice system should understand their legal rights, responsibilities, and what to expect from the legal procedures that they are a part of, even when they can't access or afford an attorney.

MAKING LEGAL HELP INFORMATION ACCESSIBLE TO NEW YORKERS

We are all familiar with the impact of the pandemic — there have been over 2 million cases of COVID-19 in New York alone, and over 50,000 people have lost their lives in the state because of the virus. Although we cannot yet know the full and long-term impact on individuals and families, we have learned through experience that legal needs have increased as a direct consequence of COVID-19. Last year, the Legal Services Corporation, the largest funder of civil legal aid for low-income Americans in the United States, reported that over 95% of its grantees anticipated a "sharp increase in legal needs arising from COVID-19 in the areas of eviction, foreclosures, unemployment assistance and appeals, consumer debt, and income maintenance." We know from LSC's reports that an overwhelming majority of the civil legal problems reported by low-income Americans receive inadequate or no legal

assistance and that self-represented litigants rely on legal information and low cost aid that is accessible to them. A report published in September of this year shows that the internet is the primary source of legal information, nationally, for people with legal needs, and most people rely on one source for legal information.[1]

Here in New York, the Permanent Commission on Access to Justice surveyed more than 600 litigants this year about their experience navigating the judicial system. Seventy-nine percent of unrepresented litigants reported using websites to find information about their legal rights or to try and find help with their case; 40% said they were unable to find what they were looking for. Even when legal resources can be found, it does not guarantee they will be used successfully, as reflected in the fact that 75% of unrepresented litigants said that they needed help in completing court forms, including those who did not know which forms to use (25%); could not understand the words, or could not speak the language, used in forms (15%); or could not find the information or document required to complete the forms (15%).

Since March 2020, both LawHelpNY.org and LiveHelp have seen an exponential increase in user requests for information related to the pandemic. LiveHelp, LawHelpNY's bilingual chat program, is one of the most accessed legal resources in New York State and helps more than 10,000 people each year access direct services, legal information, and court forms, as well as enables people to identify, prevent or mitigate legal problems. LiveHelp provides assistance in English and Spanish Monday through Friday from 9am to 9pm. With the onset of COVID-19, LiveHelp experienced unprecedented surges as New Yorkers struggled with an array of legal problems. To respond to the demand, LawHelpNY recruited hundreds of law student volunteers.

LiveHelp is a critical tool and reliable resource to assist low-income pro se litigants with finding information about court procedures, accessing court forms, and understanding their rights when representing themselves. The services that LiveHelp provides, complemented by partnerships with legal service providers, makes it an essential part of the access to justice ecosystem. In 2020 during the height of the COVID-19 pandemic, LawHelpNY's trained volunteer operators provided information and referral-finding assistance to an average of 1,100 individuals a month from all over the state, 32% of which were CourtHelp-related.

[1] Justice Needs and Satisfaction in the United States of America 2021 Legal problems in daily life, Institute for the Advancement of the American Legal System (IAALS) and the Hague Institute for Innovation of Law (HIIL), 2021.
https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf

Moreover, 119 LiveHelp volunteers from 20 law schools contributed over 4,685 hours of pro bono assistance through LiveHelp. Among the feedback we have received from LiveHelp users:

- "So grateful to have the help by live chat! I tried calling the court house number but no answer! Your service was needed!"
- "The operator who helped me was very helpful with the information provided to me. Thank you so very much."
- "Thank you so much for being here [and] being free! You are greatly appreciated!"
- "[The] Rep was caring, looked up lots of information for me and shared useful resources. I am really grateful for the service."

Since we launched TenantHelpNY.org, thousands of New Yorkers outside of New York City have visited the online resource looking to understand their rights around COVID-19 housing protections and eviction prevention. We anticipate increased usage of the site's resources and tools when the eviction moratorium expires in January 2022.

Moreover, when the remnants of Hurricane Ida hit New York in early September, we saw an increase in LawHelpNY visits by people seeking legal resources and information about how to obtain assistance from the Federal Emergency Management Agency, commonly known as FEMA. We know from Superstorm Sandy and other recent disasters around the country that recovering from the impact of a climate disaster can span over several months, and in some cases, years. The legal needs arising out of Hurricane Ida include assistance with appealing FEMA and Small Business Administration determinations, landlord and tenant problems, replacing lost or damaged documents, insurance scams, and contractor fraud. These needs may exacerbate existing legal issues connected to COVID-19.

CREATING LEGAL SUPPORT NETWORKS FOR SELF-REPRESENTED LITIGANTS

In addition to accessible online legal help content, our tools have enabled thousands of community advocates and pro bono attorneys to assist New Yorkers in navigating their legal cases. For example, the Family Offense Petition Program, a program made available by the New York State Unified Court System in partnership with Pro Bono Net, was first piloted in the Bronx in 2013 and has expanded to all New York counties. The program enables trained advocates to help domestic violence survivors create and remotely file a temporary order of protection petition with the courts. During

the pandemic, more than 14,000 petitions were filed remotely using this program, a 20% increase over the prior year.

The Family Offense Petition program is powered by Pro Bono Net's LawHelp Interactive program (LHI), which allows self-represented litigants across the state to use plain language, often bilingual interactive DIY (Do-it-Yourself) Interviews to guide them through the process of completing court forms and other legal documents, and to make complex court processes more accessible and human-centered. In the face of widespread court and legal aid agency closures, New Yorkers used LHI to assemble more than 154,000 court forms in 2020 in areas such as consumer debt, child custody and support, landlord tenant issues and wills and estates. (And, through the first three quarters of 2021, usage is up by almost 20%.) When asked in a survey, "What did it mean to you to have this program available to help deal with the COVID crisis?" one user responded, "[E]verything, I am emotionally and economically impacted by the pandemic and this service was indispensable." Another stated, "I am a senior who is not computer savvy, so this website has been my lifesaver in this time of crisis in my life." These are just two of hundreds of testimonials we received in 2020 about how LawHelp Interactive provided a legal and safety lifeline for people trying to resolve legal problems amidst the great hardship of the pandemic.

Another of our programs, Remote Legal Connect, was developed before the pandemic and has expanded since March of 2020 due to the increased need for remote legal services. The program enables legal service providers and pro bono initiatives to set up remote legal support projects. These projects allow pro bono attorneys and other advocates to virtually meet with clients, in most cases self-represented litigants, while simultaneously reviewing and completing forms and other documentation. In New York, we learned that despite delays in several cases because of the pandemic, our partners continued to use the platform uninterrupted, including assisting pro se litigants with COVID-19 related matters. For example, last year, a woman who had lost her job because of the pandemic needed help with a custody dispute involving her three children. With an upcoming virtual hearing in Family Court, the woman was able to meet with a pro bono attorney through Family Legal Connection, one of the Remote Legal Connect projects in New York, to learn about her rights and prepare for court.

DIGITAL DIVIDE CONSIDERATIONS

While Pro Bono Net saw record-high usage of many of our online legal help systems during the pandemic, we also know that the digital divide had a profound impact on low income and under-resourced communities that lack the Internet access, mobile devices or support to access essential online legal resources and services.

Prior to the pandemic, the digital divide was often thought of as an infrastructure issue, for example "last mile" connectivity gaps in rural areas. While broadband access and affordability remains an issue for too many New Yorkers - particularly low-income, Black, Latinx, and rural communities - the pandemic spotlighted new dimensions of this divide, highlighting who is able to access basic legal services and participate equitably in our legal system. These new dimensions include barriers that low income New Yorkers face when seeking information in languages other than English, or in plain language (understandable to anyone unfamiliar with the legal system); barriers encountered by people who lack digital literacy to participate in online services; and barriers to scanning, printing and signing documents.

To reach underserved New Yorkers, especially communities that are disproportionately impacted by systemic barriers, Pro Bono Net's programs work to advance digital equity. We advocate for a "no wrong door" approach, with online options increasing and complementing phone, in-person, and other traditional service delivery models. We work with direct service providers and trusted intermediaries to design wraparound services that help people successfully navigate complex processes and participate in remote services. Our programs provide language access, plain language information, and plain language privacy policies so users understand their data rights and options. And we train our LiveHelp operators on empathy-centered support to help people in crisis learn about their legal options and feel more confident taking the next step.

CONCLUSION

As illustrated by the data included in our testimony, hundreds of thousands of New Yorkers are already seeking out and successfully using online legal resources and services. We anticipate that this demand will only grow in the aftermath of the pandemic, which supercharged our collective reliance on digital tools. We are encouraged by new state and federal investments to reduce the digital divide and ensure widely affordable and accessible broadband access for historically marginalized and excluded communities. However, access to the Internet and access

to the civil justice system is not enough. To ensure that all New Yorkers are able to take advantage of investments made to increase access to justice, robust legal information and services must be made widely available to the public through a multitude of easily accessible digital channels. Moreover, true empathy for the most vulnerable must ensure that they are prepared and supported when they enter the legal or court system. We, as a community, have a responsibility to do all that we can to eliminate systemic barriers to justice, to center human well-being in the design of court proceedings, and to help ensure that people can successfully participate in civil justice processes.

APPENDIX L

New York State Bar Association

President's Committee on Access to Justice and Committee on Legal Aid

Access to Justice in the Post-COVID Legal Landscape

November 18, 2021

The following written testimony is submitted jointly by the Bronx Defenders (BxD), Brooklyn Defender Services (BDS), Center for Family Representation (CFR) and the Neighborhood Defender Service of Harlem (NDS) (collectively the "family defense providers"). Our four offices are the primary providers of mandated legal representation for low-income parents and children in Article 10 cases filed by the New York City Administration for Children's Services ("ACS").

Our clients are low-income parents and children, the vast majority of whom are from racially and ethnically marginalized communities and who are living under the constant threat of family separation and surveillance by the family regulation system[1] in New York City. The families appearing in family court Article 10 proceedings have been disproportionately policed by ACS and the extent to which their race makes them vulnerable to the negative consequences of contact with the family regulation system is profound. Our clients rely on New York City Family Courts to ensure that their families are not wrongfully separated and to ensure that, in cases where children are placed in the foster system, ACS makes the efforts required by law to send them safely home as quickly as possible.

When the family court is not operating efficiently or fairly, families are deprived of the most elemental of human bonds and fundamental rights. As it operates today, the family court does not serve as a check on the discriminatory policing of low-income Black and Brown families by ACS or as a vigilant protector of fundamental rights and family bonds. Rather, it too often operates as an extension of the surveillance experienced by communities of color at the hands of ACS and itself causes lasting trauma for the most marginalized families. This reality has been exacerbated by the pandemic and the resulting shut down of in-person Article 10 proceedings.

As an initial matter, we must qualify our experience and recommendations. As attorneys representing parents in Article 10 court proceedings, we are on the spectrum of power within a court system that does great harm to the families that rely upon the court for justice. We ask that you center any inquiry on the families directly impacted, looking specifically at whether families

[1] Together, ACS and its attendant systems, including the foster system, so-called preventive services, and the family court are most accurately described, in our view, as the family regulation, rather than the "child welfare" or "child protective" system.

have access to justice and whether and how the courts are functioning to prioritize the needs of impacted families. It is their experiences and recommendations that matter most. **Our recommendations should not preclude or be deemed a substitution for recommendations from the community and families who are directly impacted by the court system**. We urge your committees to create meaningful opportunities for those most directly harmed to communicate their experience of accessing justice in the post-COVID era and make recommendations for change.

***

How a court prioritizes its proceedings, often with limited resources, and how it operates daily demonstrates who and what it values. During the pandemic, the family court has failed, in its everyday operations and priorities, to value the families appearing before it. Particularly problematic has been the family court's low regard for due process protections for parents and children and its overall prioritization of expediency and proceedings that curtail or end family bonds over proceedings that protect them and prevent family separation. Perhaps this failure was in part because of a lack of resources, rather than a lack of commitment to justice by the court itself. The failure of our courts to prioritize family integrity, however, is not unique to the pandemic. The family court has long demonstrated a fixed and embedded disregard for the families it purports to serve and is in large part why families appearing before the family court believe, with considerable supporting evidence, that their lives and family bonds do not matter to the court.

Our recommendations below are aimed at addressing this structural failure. While some of the following recommendations include "quick fixes," others require a deep commitment by the court to the reunification of families, humility, anti-racism, and to a re-orientation of priorities for the judiciary.

The Impact of the Pandemic on Article 10 Proceedings and Family Separation

The family court has been all but shuttered to in-person Article 10 proceedings since March of 2020. While the city's criminal courts, often situated just next door or in the same building, have resumed in-person arraignments and gradually opened to other proceedings, including grand jury proceedings and jury trials, all but a handful of Article 10 appearances have been conducted remotely. Even while the Office of Court Administration announced the re-opening of courts and family courts across the state resumed in-person proceedings, New York City's family courts have remained essentially closed to in-person proceedings. Although a few cases involving multiple interpreters have been conducted with a hybrid model (some attorneys and parties on screens and some appearing in person), most singular requests to conduct in-person emergency hearings to end family separation have been denied, without explanation. Not surprisingly during this time, the reunification rates of families separated by ACS in New York City have gone down: there were only 1,830 reunifications in 2020, as compared to 2,309 in 2019—a decrease of over 20%. In addition, emergency hearings which are required by law to commence pursuant to statutory time frames are regularly adjourned beyond what is required by law, and often take weeks to months to complete.

During the pandemic, the court's remote operations were limited to "essential proceedings," defined for Article 10 cases as those that involve ACS applications to remove children and separate families. ACS could no longer file to surveil families through "court-ordered supervision," for much of the first year of the pandemic. While "court-ordered supervision" cases include several different sets of circumstances, ACS can normally seek ongoing court oversight of a family instead of family separation. Notably, the decrease in reports, investigations, and court cases has not resulted in children being less safe. This is true even despite the economic stress and challenging circumstances for families during the pandemic. Indeed, when asked at a City Council hearing in June, 2021 whether the shutdown affected child safety, ACS Commissioner David Hansell answered, "I'm happy to say, and very relieved to say, that we haven't seen any indication, at least in New York City, that that's the case."[2]

During the almost two-year shut down of the New York City Family Court, emergency hearings under Family Court Act §§ 1027 and 1028 to prevent the unnecessary removal of children or to return children unnecessarily removed, respectively, have not been prioritized by the courts and in many cases, even over objection, have been delayed. The Family Court Act requires that 1027 hearings commence within 24 hours of the removal of a child and 1028 hearings must commence within 3 days of a parent's demand to have their child returned to their care. The court must return children home to their parents unless ACS proves that a child is at imminent risk of serious harm in their parent's care. While needless delay in emergency hearings has always been a problem in New York City Family Courts, this delay has been exacerbated by remote operations. When family courts first shut down, they remained open only for emergency applications by ACS which sought the removal of children from their homes. Only after advocacy from our offices and from those organizations representing children in these proceedings did the court agree to conduct emergency hearings at the request of parents and children.

In addition, several family court judges have insisted on hearing emergency applications through motion practice and that parents seeking the return of their children provide written affidavits, despite no statutory requirement to do so. This practice shifts the burden from ACS to parents, depriving parents of the due process required under the law and delaying justice for families who are predominantly Black and Brown. While emergency hearings to end family separation have not been prioritized, the court has ensured that termination of parental rights cases (TPRs) move forward. Very few parents' rights were terminated in the first months of the pandemic, but the filing of TPRs increased in the fall of 2020 and dramatically increased in 2021.[3] The failure to prioritize family reunification and the preservation of family bonds thwarts the very purpose of

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[2] See, Testimony of Commissioner David Hansell, Committee on General Welfare hearing June 14, 2021, video at 52:00 minutes; Kendra Hurley, "How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System," New Republic August 18, 2021 (https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system); Anna Arons, "An Unintended Abolition: Family Regulation During the COVID-9 Crisis," Columbia Journal of Race and Law, March 31, 2021 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3815217).

[3] ACS July 2021 Flash Indicator Report, at 18. https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/07.pdf.

the family court and demonstrates a low regard for the human bonds of the family who rely on the court for justice.

In addition, the family court has also failed to ensure that the parties have access to the court throughout the pandemic. Throughout the court's shut down, it has prioritized calling new cases over parents having time to speak to their assigned attorneys about the allegations against them which are sometimes provided while attorneys are making an appearance. The court routinely schedules new cases only moments after attorneys have received the petitions and contact information for their clients. Many litigants struggle to access remote court proceedings due to a lack of the technology needed to join a court appearance, and the court relies on defense counsel to ensure their clients can access the court. We have observed numerous instances where judges refuse to recall a case so that a parent may re-charge their phone or where judges admonish parents for appearing from a noisy, crowded public location where they can access free Wi-Fi. Our clients often cannot afford basic communications technology such as phones, ample data plans, laptop computers and Wi-Fi, and they often must share the devices they have across family members. When parents do not have technology or Wi-Fi, the court orders parents' counsel to facilitate the appearance of parents in court. The court's approach to our clients' lack of access to the resources and technology needed to meaningfully engage in court reflects both its misunderstanding of its role – to be accessible to all who need assistance, regardless of means.

The following are suggestions for court operations that will better ensure access to justice:

- Resume in-person proceedings for Article 10 intake, emergency hearings pursuant to FCA 1027 and 1028 and all contested hearings when a parent chooses to appear in person.
- Prioritize the scheduling of emergency hearings to prevent and end family separation and ensure that such hearings are held according to statutory and constitutional time frames.
- Abolish standards and goals for family court judges and end the prioritization of termination of parental rights proceedings over hearings to prevent or end family separation.
- Continue to hold conferences with court attorneys and uncontested appearances virtually, and
- Provide technology and technical assistance to ensure that parties have access to the family court in any proceedings conducted virtually.
- Require the Family Court to issue a written policy that the lack of technology cannot be held against the parents and require ACS case planners to appear from a private and quiet location.
- Expand in-person family court hours to accommodate emergency hearings.
- Require trial orders of readiness and complete discovery before scheduling Article 10 cases for fact finding or disposition.
- Adopt the Best Practices for Virtual Article 10 Proceedings dated December 2020, drafted by the institutional parent defense organizations, attorneys for children, and FCLS.
- Provide mandatory and ongoing bias training for all judges and court personnel.

- Provide all attorneys access to the court's Universal Court Management System (UCMS).
- Enhance and expand interpretation services for additional languages beyond Spanish.
- Center the schedules and responsibilities of the parents in scheduling court appearances and hearings over those of the attorneys, ACS and foster care agency case planners.
- Ensure equal access to the court by requiring that judges schedule all Orders to Show Cause and Motions filed by defense counsel.

We appreciate the opportunity to provide you with information about how the pandemic and the veritable shut-down of the family court to in-person proceedings have impacted access to justice by parents and children in Article 10 proceedings and share our recommendations for change. We are available to answer any questions or provide additional explanation or information for why these changes are necessary and you can reach us at the contact information provided below.

Sincerely,

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THE LEGAL AID SOCIETY

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November 17, 2021

Re: HEARING: ACCESS TO JUSTICE IN THE POST-COVID LEGAL LANDSCAPE

TESTIMONY OF THE LEGAL AID SOCIETY

I. Introduction

Thank you to the New York State Bar Association's President's Committee on Access to Justice and the Committee on Legal Aid for holding this timely and important hearing. We welcome the opportunity to testify on the critical issues around access to justice as our city, state, and country move forward from the Covid-19 pandemic. We advocate for a new framework for "virtual justice," which means a top-to-bottom rethinking of how the courts work through the lenses of technology and access to justice. Such a framework includes studying the opportunities and challenges posed by remote hearings, addressing the digital divide, and reworking electronic filing as the gateway to a functional virtual justice system.

II. Background

The Legal Aid Society ("the Society"), the nation's oldest and largest legal services and social justice organization, is an indispensable component of the legal, social and economic fabric of New York City – passionately advocating for low-income individuals and families across a variety of criminal, civil and juvenile rights matters, while also fighting for legal

reform. The Society has performed this role in City, State and federal courts since 1876. With its annual caseload of more than 300,000 legal matters, the Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Society's law reform and social justice advocacy also benefits some two million low-income families and individuals in New York City, and the landmark rulings in many of these cases have a national impact. The Society accomplishes this with a full-time staff of nearly 2,100, including more than 1,200 lawyers working with over 800 social workers, investigators, paralegals and support and administrative staff through a network of borough, neighborhood, and courthouse offices in New York City. The Society operates three major practices – Criminal, Civil and Juvenile Rights – and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program.

The Society's Criminal Practice is the citywide public defender in the City of New York. Prior to the COVID-19 pandemic and its impact on our criminal legal system, our Criminal Practice represented approximately 180,000 low-income New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice, the Society represents people accused of crimes from their initial arrest through the post-conviction process, and represents prisoners' safety and health issues in New York City jails and state prisons.

The Society's Civil Practice provides comprehensive legal assistance in legal matters involving housing, foreclosure and homelessness; family law and domestic violence; income

and economic security assistance (such as unemployment insurance benefits, federal disability benefits, food stamps, and public assistance); health law; immigration; HIV/AIDS and chronic diseases; elder law for senior citizens; low-wage worker employment law problems; tax law; consumer law; education law; community development opportunities to help clients move out of poverty; and reentry and reintegration matters for clients returning to the community from correctional facilities.

The Society's Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Court in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our staff represented some 34,000 children, including approximately 4,000 who were arrested by the NYPD and charged in Family Court with juvenile delinquency.

In addition to representing many thousands of children, youth, and adults each year in trial and appellate courts, the Society also pursues impact litigation and other law reform initiatives on behalf of our clients.

In March 2020, COVID-19 swept across our nation with great speed, impacting our community and bringing death, illness, and a rapidly changing environment of rules and protocols to address the deadly pandemic. At the beginning of this pandemic, three of the top four counties suffering death rates from COVID-19 across the Nation were within New York City: Queens, Kings and Bronx. For example, South Bronx has one of the highest infection rates in the country, proving once again the disparate impact our Black and Brown communities continue to endure due to the lack of healthcare and resources needed to protect

against a highly contagious and deadly pandemic that ravages the nation. It is through this lens of disparate impact that we must view our path forward. The communities impacted the most by COVID-19 are the same communities that are disparately pulled into our criminal and juvenile legal systems, as well as our child welfare system. They are the communities often most in need of assistance from our courts. As we examine access to justice in a post-COVID-19 environment, we must maintain this perspective to truly accomplish change.

Over the next 18 months, our legal community would see courts close and reopen with restrictions as transmission rates cycled over time. Our legal system would be pushed to make rapid adjustments, including an explosive expansion of technology and remote practice, unprecedented for our courts. As restrictions and capacity would grow and wane, we experienced and learned many lessons that can only assist us now as we plan for a future post-COVID-19.

III. Inequities in Virtual Proceedings

In March 2020, with the COVID-19 pandemic spreading rapidly, our courts, along with schools, businesses and communities, closed to all but the most essential of functions to slow the transmission rates and save lives. Courts quickly implemented new technologies to provide access, albeit remotely, to the courts until transmission rates and safety protocols permitted in-person appearances. These necessary steps directly impacted people with matters before our courts, placing barriers to access both courts and counsel. As a result of this rapid transition, the courts are now positioned to use technology and allocate resources to provide greater access and legal services in a new post-COVID-19

environment. The pandemic exacerbated a humanitarian crisis for all those incarcerated, particularly at Rikers Island, isolating people from courts, counsel and their loved ones. Correctional facilities closed to visitors and courts ceased or greatly restricted transportation for court appearances. In response, our courts and correctional facilities turned to new technologies to reestablish connections. Courts implemented video conferencing platforms, which quickly became overburdened.

Courts did not adequately allocate time and resources for needed capacity for the new format for court appearances, preliminary hearings, bail reviews or other matters. Counsel was not given enough time to discuss matters with their clients, including preparing for upcoming critical bail review, writs and hearings. Such conversations may require review of discovery materials including material in video formats for body worn cameras, surveillance and cell phone videos. Probation departments, diversion court staff and program services also required more time for assessments and addressing possible treatment programs or other needed services. Due to the lack of capacity and resources, people held in correctional facilities suffered delays as scheduled videoconferences and/or in-person appearances were cancelled and rescheduled.

If the Court is to rely on virtual hearings and continue to expand its digital operations as we think it should, it must also acknowledge and work to improve its capacity to deliver justice in virtual proceedings. For example, in local correctional facilities, videoconferencing capacity must increase to allow for timely attorney-client communications. Clients also need an opportunity to confidentially and privately access critical documents and files, many in

video format, to understand the nature and content of the charges. By reviewing the relevant evidence, clients can make knowing decisions as to whether a certain plea or trial will expedite a resolution of the matter. Court appearances, in-person and virtual, cannot be delayed to the detriment of those held in custody. Moreover, services and programs need to have timely access to help clients re-enter the community with the necessary support, services and supervision. We must continue to devote resources to increase capacity and permit clients held in correctional facilities to access courts without delays.

Courts must expand virtual appearances in order to provide greater capacity for matters best suited for in-court proceedings. For example, with current restricted capacity in criminal courts, our courts must ensure access for incarcerated clients to conference cases, dispose of cases, reassess bail determinations, or move the matter to hearing and trial. Similarly, court capacity should be used at this time to conduct hearings and trials, especially for incarcerated clients or for the oldest pending matters. Across the State, we have created and used capacity to conduct critical hearings and jury trials while attempting to maintain a safe environment during the COVID-19 pandemic. Many people have waited months and years, some in correctional facilities, to have their day in court. We must maintain our focus to provide that access as our capacity continues to expand.

We must also look to provide more legal services within correctional facilities, local and State, to provide greater access to the courts and legal services for people incarcerated. For example, The Legal Aid Society's Incarcerated Client Services located within New York City's correctional facilities were critical during this crisis to reconnect and

serve incarcerated clients. Defender services on site could quickly determine a client's health and location, communicate critical information, assist in telephone or video conferences with counsel, get essential documents signed for releases, plea and sentence, or other needed forms for reentry. As part of the defense team, defender services can operate and assist within the protections of right to counsel. Through the assistance of defender services, delays were addressed and people reconnected with courts and counsel.

In State correctional facilities, these same issues present themselves for people held post-conviction. People sought advice of counsel to seek motions to vacate or resentence in light of the conditions driven by the pandemic or seek information on appeals. However, timely access to counsel, and the ability to communicate with counsel in a secure and confidential way, was limited for clients post-conviction. More needs to be done to assess and address access to courts, counsel and reentry services in our State correctional facilities.

IV. Addressing the Digital Divide

Access to digital technology is unequal in New York State. Communities of color and low-income people, in particular, are especially disadvantaged. For example, approximately one-third of Black and Latino households do not have access to a computer and more than one-third of low-income New Yorkers do not have access to broadband of any kind. In an effort to bridge this digital divide, New York City's Department of Education provided more than 300,000 internet-enabled iPads to students to enable remote learning in 2020. Similar

innovation is required to address access to courts. Lacking a device or internet service when trying to access virtual courts is like being denied entry to a physical courthouse building.

There are a number of actions that the courts should take to address digital inequity, beginning with a technology lending program. The courts should work with community leaders to designate a series of "hubs" at trusted locations throughout New York communities, at which people could borrow hardware such as laptops and tablets. These hubs could include the offices of elected officials, branches of public libraries, and community centers and places of worship. The courts should then provide the hubs with internet-enabled tablets, smartphones, laptops, scanners, cameras, and printers, and work with these facilities to establish lending programs, where community members can utilize these resources. The courts should develop ongoing communication channels with litigants and organizers to collect data and feedback on any access issues that continue to arise.

The Society created a pilot "Justice Tablet" initiative in collaboration with Columbia Law School's "Lawyering in the Digital Age Clinic." Through this program, students identified hardware and software and built prototypes to test with the Society's clients in Queens. We identified a low cost Samsung tablet, purchased two of them, and loaded each with Zoom, Microsoft Teams, an email account, and a scanning app, and delivered it to clients who were facing eviction. We also activated the SIM card on the tablet so that it could access the internet anywhere, including in clients' homes where there is no connectivity. Using the Justice Tablet, one client, an elderly Bangladeshi immigrant in Flushing, was able to obtain rental arrears through the Emergency Rent Assistance Program ("ERAP") and prevent his

eviction. A second client, a grandmother in Astoria, is in the midst of suing her landlord for harassment and to get lead paint removed from her apartment so that her granddaughter can visit without facing exposure to lead paint. So far, we have learned that for many of our clients, the hardware and software are both completely new and out of reach. Our team spent many hours orienting these clients about what the hardware is and how it works. And yet, the results — significant improvements in communication with the advocates, including transmission of documents and photos, and greater access to virtual proceedings — have been promising.

The court system and all of its stakeholders should also actively advocate for increased access to broadband internet service at no or low cost to users. Expansion of the existing access points like LinkNYC and reduction of the cost of private internet service through subsidies and credits should be prioritized. Improving access to virtual courts must include greater access to legal information and resources for litigants. Such services can be provided online through virtual trainings and platforms hosted by law schools, legal services providers, and nonprofits.

V. Remote Appearances: Opportunities and Limitations

During the pandemic, as physical places ceased to operate, virtual spaces became the default. We learned that courts are a set of services, not a collection of buildings. This has offered many opportunities to improve the delivery of services to our clients, but has also posed serious threats to our clients' rights and interests. At times, remote hearings have

served as crucial tools to promote the dual goals of public safety and access to justice during the Covid-19 pandemic. Under the right circumstances, remote hearings can provide meaningful due process, allowing courts to work with litigants to bridge the digital divide and enforce procedural protections. For example, for our teenage clients at the heart of child welfare cases, the ability to participate remotely in their own court appearances, give testimony, and engage with the decision-making process around their own lives without sacrificing an entire day of school has been a tremendous bonus. We recommend the court continue to provide virtual hearings moving forward to accommodate litigants who opt-in to such hearings for any number of reasons, including as accommodations to disabilities and caretaking responsibilities, to address transportation challenges, and to avoid missing work or school.

If the court requires litigants to attend a hearing in person, it must allow litigants to call the court and obtain an adjournment if they cannot come to court due to childcare or work obligations, disability, illness, or an inability to afford the train or bus fare. In order to reduce the possibility that litigants are not able to attend hearings due to childcare concerns, every court should operate its own childcare center. Housing Court should follow the model of New York's Family Court system, which has ten court-based childcare centers running in the five boroughs, Monday through Friday from 9:00AM to 5:00PM, all of which provide free childcare and educational services to the children of adults who are obligated to make an in-person court appearance.

Litigants must be able to opt-in to virtual proceedings without coercion. If they don't, in-person proceedings should serve as the default type. In criminal cases, it is the accused who has a right to be present at all critical phases of the proceedings. A waiver of those rights to elect to appear in virtual court must be a knowing and voluntary one by the accused. Similar protections exist in juvenile delinquency proceedings. A person who wishes to appear in person must be afforded that opportunity and not compelled otherwise.

We also must also be mindful that for some people and in some cases, a virtual appearance is not the equivalent of an in-person court proceeding. There are critical phases within a criminal and juvenile legal matter that, with the greater public health demands abated, may only be fulfilled in-person. For example, no other appearance carries more significance than a determination of one's freedom. Bail or remand determinations at first appearance and/or arraignments have an immense impact on an accused's ability to fight the accusations and on the outcome of the proceeding. One study found using a virtual appearance for bail review led to a substantial increase in the amount of bail set during bail hearings. Virtual bail hearings led to a 50 percent increase in bail set on average over an in-person hearing. The lack of a shared physical encounter and recognition of the humanity of the accused person, in these scenarios, may have led to a barrier to attorney-client communication and an adverse perception of the accused.

We saw how a remote arraignment process can also negatively impact attorney-client communication and related services. The quality and connectivity of the platform greatly

impacted counsel's opportunity to assess a client for critical physical and mental health issues and to establish an attorney-client relationship. A remote practice placed barriers to obtaining needed HIPAAs and other releases, to coordinating with escorts and services for post-arraignment housing or programs, and to reuniting our clients immediately with their families. Moreover, many video conference platforms did not provide a private "break out" space to afford a confidential attorney-client discussion during the proceeding. This barrier hampered the ability to consult with counsel during the proceeding. Absent an overriding public health need, arraignments should remain in-person to afford people accused of a crime full access to counsel and services and to remove any possible bias or prejudice imposed by a virtual appearance.

Similarly, in criminal legal matters, the exercise of critical constitutional and legal rights at pretrial evidentiary hearings and trial may only be fulfilled in an in-person proceeding. Every aspect of a jury trial can be conducted more fairly when in-person, whether it is selecting a jury, confronting witnesses, presenting a defense, providing the right to counsel, or delivering summations. The opportunity to observe the demeanor of people in jury selection or in cross-examination is substantially impaired in a virtual hearing. Moreover, a virtual appearance will create barriers to live, immediate consultations between counsel and client. For all these reasons, our laws and our courts continue to refrain from virtual evidentiary hearings and trials in criminal legal matters. Juvenile delinquency matters, while lacking a jury, offer similarly strong protections of the need for in-person hearings and trial.

In civil proceedings, allowing litigants to opt-in for virtual appearances will greatly improve access for many. However, the court must work proactively to ensure that virtual hearings are truly accessible to all individuals, and take particular care to ensure that people with disabilities, people with limited English proficiency, and people without access to or knowledge of technology are afforded meaningful accommodations. This is particularly important because people with disabilities and people who speak languages other than English make up a disproportionate percentage of our clients, as they are twice as likely to live in poverty as others. In child welfare proceedings in Family Court, we serve as attorneys for the child. As a result, our clients are not required to be present. However, they are entitled to participate for certain critical proceedings and must be provided access to the proceeding, and confidential access to counsel, should a proceeding take place remotely.

The Court should provide comprehensive resources on its website that explain to all litigants how to utilize the platform that virtual hearings will be held on, such as Microsoft Teams. The Court can follow the models of the Connecticut Judicial Branch or the New Jersey Courts in designing these resources. The Connecticut Judicial Branch's website features both written guides and videos that instruct litigants on how to join a Google Teams meeting with a PC or mobile device, how to make a test call, and how to join a Google Teams call as a guest. Similarly, the website for the New Jersey Courts also features written guides that discuss how to join a Zoom virtual courtroom, how to join a Google Teams meeting, and what software requirements are necessary to operate Zoom. The website also features an instructional video on how to prepare for a remote court hearing.

Critically, the Court must provide resources in multiple languages to ensure that individuals who speak languages other than English can fully access the virtual court system. The New Jersey Court website features an instructional video on how to prepare for remote court hearings in Spanish, Haitian Creole, Korean, Polish, Portuguese, and Arabic. However, the remainder of the information and reference guides on the New Jersey Court website are only in English; this Court must strive to provide all resources in multiple languages. The Court must also provide interpreters in any virtual hearing where the litigant opts for one. Court personnel should proactively reach out to parties to inquire about language needs prior to a given hearing.

Furthermore, the Court should provide sign language interpreters for all litigants who are deaf or hard-of-hearing. The Court should consider following the model of the New Jersey Courts' website and feature resources that provide tips for interpreters assisting litigants with Zoom calls as well as the relevant procedures that must be followed by interpreters. Additionally, the Court should work with litigants to provide them with access to alternative text formats such as Braille and audio with Assistive Listening Devices. Finally, the Court should: a) establish multiple methods of communication that individuals can utilize to request accommodations, b) create a centralized process to review and adjudicate accommodation requests, and c) design an appeals process that litigants can utilize if their accommodations requests were not addressed in an adequate fashion.

By providing greater access to courts remotely, we can allocate resources for necessary capacity for in-person appearances, especially for hearings and trials. For people accused of

crimes held in jails, their criminal legal matters must take priority in criminal courts. Unfortunately, we have seen courts use critical limited capacity during this pandemic to order people at liberty to appear in-person on low level appearance tickets and summons. Other people at liberty were ordered back to court merely to receive new adjournment dates based on political winds to focus on certain charges or other administrative decisions. Courts must use capacity to conference cases for incarcerated clients looking to resolve the case, reassess bail determinations, or move the matter to hearing and trial. Similarly, court capacity should be used at this time to conduct hearings and trials, especially for incarcerated clients or for the oldest pending matters. Many people have waited months and years, some in correctional facilities, to have their day in court. We must maintain our focus to provide that access.

VI. Improving and Expanding the E-Filing System

If approached carefully, a uniform, user-friendly, accessible, and multilingual remote filing system has the potential to create massive benefits for *pro se* litigants, and would facilitate efficiency and transparency in the court system. However, vulnerable litigants' differential access to the technology which would allow them to utilize such a system is a source of inequity, creating yet another shortfall in the justice system. Additionally, procedural hurdles present an additional challenge to developing an equitable e-filing system for *pro se* litigants. New York must not only maintain an e-filing system *pro se* litigants can use at their choice, keeping remote filing as an option if the *pro se* litigant so chooses, but

must also assume the responsibility of ensuring that litigants have access to technology assistance and information explaining, in plain language, the system that is in place.

Lacking access to computers, tablets, and/or smartphones, and not understanding how to maneuver e-filing systems should not bar litigants from participating in proceedings in ways that are more convenient, and less disruptive to them. The *pro se* e-filing system should also include regularly updated resources for *pro se* litigants including, but not limited to, an appropriately staffed helpline, FAQs, contact information for city marshals, sheriffs, legal services providers, clerks in each courtroom, Family Justice Centers, and a directory of the New York State courts. Any notices or instructions provided to *pro se* litigants should use plain language and should be timely provided to litigants in a manner most effective for them. The court should also consider developing a continuous, and well-monitored, means by which litigants and organizers can provide feedback on the system's effectiveness, so that the necessary adjustments can be made, ensuring that the court is achieving equity in this domain to its highest potential.

A system such as this, with the reinforcements we recommend, would minimize the stress and expenses of litigation, not only including transportation to and from the courts, administrative costs, employment and/or childcare burdens, but also the stress and inequity that can arise from unrepresented party's unfamiliarity with the legal system. A uniform e-filing system would also potentially decrease bias that *pro se* litigants experience when their work product has imperfections, and would greatly reduce the wait time that results from court staff being responsible for all in-person filings. Rules for participating in e-filing should

be communicated publicly, in multiple languages, and in accessible ways. The system should be password protected, and include fillable documents such as pleadings, affidavits, orders to show cause, motions, and subpoenas. Adopting a model like this will make it much easier for both attorneys and litigants – *pro se* or represented – to navigate the legal system, and minimize the need for in-person appearances and travel.

Moreover, e-filing systems must be expanded to our criminal legal practice. During this pandemic, we saw courts adopt emergency, temporary procedures to allow parties to file and serve legal documents via new electronic portals or email. These necessary systems allowed filing and service without hardcopies delivered in-person in our courts increasing access and efficiency while addressing health and safety needs within our courthouses. But, as the courts expand in-court functions, we have seen the return of hardcopy filing and service in our criminal courts. E-filing has established itself as providing greater access and efficiency in our civil courts, including writs of habeas corpus. It has also enhanced our practice in Family Court, although some improvements remain to be made. For instance, attorneys in Family Court are required to upload documents directly to the court, robbing opposing counsel of the opportunity to object in advance, before the documents are put in the record. The process of subsequently removing those documents from the permanent file are arduous. It is time to bring its full benefits to criminal legal practice.

VII. Conclusion

As we continue to progress through the various stages of the Covid-19 crisis, we must focus on the objective of ensuring that New York's marginalized and vulnerable community members have their legal needs met, and will continue to push for fairness and equity. The Legal Aid Society is already partnering with other stakeholders, such as law schools and other legal services organizations, to promote basic principles for access to justice in the post-Covid era. We hope that all stakeholders will join in this important endeavor in order to build the bridge to the future of service delivery within the justice system. On behalf of our approximately 300,000 clients, the Society thanks you for the opportunity to provide testimony on access to justice in a post-COVID-19 legal landscape.

University at Buffalo
Family Violence and Women's Rights Clinic
School of Law

Good morning. My name is Judith Olin and I am a Clinical Professor of Law at the University at Buffalo School of Law where I direct the Family Violence and Women's Rights Clinic. We will celebrate our 30th anniversary in 2022, and I am proud to say that we are the longest continuously running domestic violence law clinic in New York State.

I am here to talk about how citizens filing family offense petitions in Erie and Niagara County Family courts are routinely denied immediate access to the court as required by New York State law. Family Court Act section 153-c (a) states that

Any person appearing at family court when the court is open requesting a temporary order of protection under any article of this act shall be entitled to file a petition without delay on the same day such person first appears at the family court, and a hearing on that request shall be held on the same day or the next day that the family court is open following the filing of such petition.

This statute is clear and unambiguous. One would think that nearly 45 years after the seminal case of *Bruno v Codd*, we would no longer be experiencing this problem. According to statistics published by the New York State Division of Criminal Justice Services, in 2019, Erie County recorded 15 domestic violence homicides, of which 13 involved intimate partners, a larger number than Kings County which has 2 ½ times the population of Erie County.

I represent a work group of domestic violence advocates and attorneys who are deeply concerned about this ongoing injustice. We have learned from neighboring counties such as Monroe, that petitioners get access to family court the same day or the next day as required by the statute. This situation has been going on since before the Covid pandemic, and it is time to put an end to it and give citizens in Erie and Niagara counties access to an immediate hearing on their family offense petitions as required by New York State law.

Please do not hesitate to contact me at 716-645-3076 or by email at judyolin@buffalo.edu if you have any questions. Thank you for your attention.

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UnLocal
Community Immigration
Legal Services & Education

Testimony submitted to the New York State Bar Association's President's Committee on Access to Justice and Committee on Legal Aid

Thursday, November 18, 2021, 10:00am

Good morning. Thank you for holding this hearing and for the opportunity to testify today. My name is Terry Lawson and I am the Executive Director of UnLocal, a community-centered non-profit organization that provides direct community education, outreach, and legal representation to New York City's undocumented immigrant communities. I am a member of the Advisory Council on Immigration Issues in Family Court and am also the co-founder of the Bronx Immigration Partnership, a coordinated safety net of legal and social services providers assisting Bronx residents with their immigration-related needs. I am here today to discuss the challenges our clients and community members are facing in the current legal landscape.

UnLocal provides free high-quality legal services for New York's most vulnerable immigrants, many of whom are essential workers, who are seeking employment authorization, asylum, DACA, SIJS, lawful permanent residency, relief from removal, and much more. Over

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the last year, our Legal team has handled over 1200 cases for people across New York City and in parts of Long Island and upstate. Our Queer Immigrant Justice Project works with LGBTQ+ immigrants who are seeking asylum, and UnLocal is part of the Rapid Response Legal Collaborative, along with Make the Road New York and NYLAG, which has fought tirelessly during this pandemic to stop deportations and get people out of detention. Over the past year, our Education and Outreach team has conducted 70 virtual community events and informed community members about the Fund for Excluded Workers, DACA, the NYS Dream Act, unemployment, taxes, the census, and more.

Many of the challenges our clients and community members face today are the same ones that have plagued us from the beginning of the pandemic and before: lack of access to affordable housing, technology, and free high quality legal services. In the current landscape, with many previously walk-in services now virtual, our clients facing eviction struggle to find legal representation to stop their displacement. With the depletion of the Excluded Workers Fund and the Emergency Rental Assistance Program and the ending of the eviction moratorium, we fear that many more of our clients will lose their homes unless New York takes meaningful steps to

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address New York's housing crisis. The rapid closing of the Excluded Worker Fund underscored how the help that exists is not for everyone. Those who were able to quickly provide the required documentation of their lost wages during COVID had their claims approved while those forced to go to shelters, who worked for employers who paid them cash, who had to juggle children in remote school, or were blocked access to their documents by abusive partners, were left out. Those seeking assistance from the Excluded Workers Fund had to show the existence of an Individual Taxpayer Identification Number, or ITIN, or that they had applied for one. Yet, the process of applying for and receiving ITINs is arduous, particularly at a time when the system is being flooded and community offices remain closed.

Over the past eighteen months, our clients experiencing intimate partner violence have faced countless barriers from being stuck at home, with no access to resources, no ability to pay rent, and no way to buy food. We have families in New York who are literally starving, people who have already experienced multiple traumas. Spending so much time at home, with no money, with bills coming in, with mental trauma: this is how people get killed. We learned this fall that the U.S. murder rate increased 30% last year, the highest in six decades. A staggering

percentage of those involved domestic and gender-based violence. Immigrant survivors and victims of gender-based violence have the added stress of fearing that they could be reported to ICE at any time and separated from their children, also as a form of abuse, and that any information provided to government agencies or any public benefits sought for themselves and their families could get them deported. For those who are transgender or nonbinary, immigrant survivors and victims also face myriad stereotypes, minimal resources, and increased rates of violence. Institutional barriers obstruct immigrant victims and survivors from accessing the help they need during the pandemic. The lack of language access for immigrant survivors and victims continues to pervade interactions with government. It is often those who are most at risk who fear accessing the institutions set up to address their physical, emotional, and financial wellbeing, oftentimes for good reason. Without easy access to the Family Justice Centers and the services previously available there, our clients struggle to file for family court orders of protection and to navigate the court system without counsel. Further, by limiting the New York City Family Courts to only accepting emergency and essential filings, many of our clients are unable to file custody

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and guardianship petitions for their children, who are eligible for Special Immigrant Juvenile Status, unless their child is turning 18 or 21.

The electronic filing systems developed by the courts are a welcome change and one that we hope will continue to be supported with the requisite resources. Being able to file electronically has been critical to ensuring the efficient filing of court documents, both in the New York state court system and immigration court. As my colleagues have testified, however, the backlogs and delays mean that our clients are waiting years for their day in court, making true access to justice impossible.

The ability to appear in court proceedings via video conference has made it much easier for our attorneys and our clients to access the courts. I join my colleagues who have explained the importance of permanently adopting a hybrid model, given how much time and money is saved for both litigants and counsel. A side note however is that the suspension of the ability to remotely notarize documents in New York was premature, as remote notarization remains an ongoing need.

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Community Immigration
Legal Services & Education

We believe that further investment in the technology, to ensure that the courts, litigants, and counsel are able to communicate via video conferencing, is paramount. Such efforts made must be keenly attuned to the needs of unrepresented litigants, who struggled to engage with and understand court systems prior to the pandemic. While increased reliance on technology is a welcomed advancement for legal representatives, unrepresented litigants could be left even farther behind.

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VOLS
VOLUNTEERS of LEGAL SERVICE

NYSBA Virtual Hearings on Access to Justice
November 18, 2021
Presented by: Stephanie Taylor, Unemployed Workers Project

My name is Stephanie Taylor and I'm the Project Director of the Unemployed Workers Project at Volunteers of Legal Service (VOLS). VOLS was established in 1984 and our purpose is to leverage private attorneys to provide free legal services to low-income New Yorkers to help fill the justice gap. In addition to the Unemployed Workers Project, VOLS' projects provide end-of-life and incapacity planning program for seniors and older veterans; uniquely holistic and full-service legal services for small businesses; school- and health-based legal service partnerships with pro bono law firms to serve children and their families; and an immigration law practice that reaches many young clients who might not otherwise access assistance. Last year, our services directly benefited 6,215 clients and their household members.

VOLS Unemployed Workers Project hears from dozens of New Yorkers every day asking for help with their unemployment insurance (UI) cases. Many of these claimants lost their jobs in the wake of the COVID-19 pandemic and successfully applied for unemployment insurance benefits (UIB)--providing them with a lifeline. Over one year later, many of these same claimants are now being charged with initial ineligibility and related overpayments. These claimants are facing thousands of dollars in alleged overpayments and require a hearing to fight these charges.

Prior to the pandemic, the default for UI administrative hearings was in-person at one of the New York State Department of Labor's (DOL) hearing sites. Telephonic hearings were available exclusively for claimants residing further than 90 minutes from the hearing site or if they had a substantial hardship (like a documented health reason that prevents them from appearing in-person, or if an unforeseen emergency arises). At the beginning of the Covid-19 pandemic, the DOL pivoted to exclusively offering telephonic (audio-only) hearings. To date, all hearings are over the telephone and do not provide a video option.

The major concern with telephonic-only hearings is that some claimants do not have the funds to pay their phone bill and are therefore not able to receive the Administrative Law Judge's (ALJ) call and participate in their hearing. Other areas of concern include (1) claimants' inability to electronically submit evidence and (2) some claimants miss the ALJ's call. We hear from many claimants who say that they were waiting with their phone, at the right day and time, but that they never received the call. Other claimants report that calls from the ALJ's offices come up as "Anonymous" or "Unknown," which confuses claimants; they believe it to be a spam call and don't want to tie up their line for when the ALJ calls, inadvertently refusing the call and missing their hearings. In such cases, in order to obtain access to justice, claimants must file a timely request to reopen their case, alleging the reasons for missing the call. While this is burdensome even for English-speaking claimants working with attorneys, it often is an insurmountable barrier for individuals with limited English proficiency (LEP) and no access to legal counsel. These claimants are frequently summarily shut out of the process.

Unchanged from pre-pandemic standards, the DOL does not provide important notices in languages other than English. When an LEP claimant receives their English-language hearing notice containing language informing them that the hearing will be over the phone, they sometimes mistakenly go to the physical DOL office for their hearing. Once they arrive, they find a closed DOL office and no one to assist them. Consequently, these claimants often miss their hearings and default on their administrative appeals.

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Although telephone hearings present an impediment to accessing benefits for some, there are claimants who prefer telephonic hearings, especially those who are proficient in English and who have consistent reliable telephone access. These claimants don't have to go to the DOL's hearing office, which alleviates travel expenses, the burden of taking time off from work or dealing with childcare issues. Claimants might be more open to participating in a hearing and fighting for their benefits when they can do that from their own home or job.

Aside from hearings, the DOL has been extremely difficult to access throughout the pandemic. Back in early Spring 2020, the DOL hired hundreds of staff who gave out bad information or who erroneously granted applications. This incompetence led to many claimants to being charged with overpayments they can ill afford to pay back and are therefore forced to participate in administrative hearings to fight the claims of overpayments or seek a waiver.

In addition, while claimants, pre-pandemic, had the option of visiting a physical DOL office to fill out an application or ask for help, those offices are now closed. It's extremely difficult for claimants to get the DOL's to answer calls or emails so claimants are oftentimes unable to get information on their cases.

Our suggestions are to open the DOL's physical offices to increase access to services, to allow for in-person submission of requests and evidence, and to offer in-person hearings. At the same time, telephonic hearings should remain an option for all claimants. Finally, in order to ensure access to justice for all New Yorkers regardless of English-language ability, the DOL must greatly improve their translation and interpretation policies and practices. Without these modifications, the DOL is not affording due process to each and every New Yorker needing this critical assistance.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #13

REQUESTED ACTION: None, as the report is informational.

Catherine Christian and Andy Kossover, co-chairs of the Task Force on Modernization of Criminal Practice, will present on the mission, composition, and goals of the Task Force.

The Task Force was formed by President Sherry Levin Wallach in June 2022 to suggest new laws and policies to modernize criminal law practice in the State of New State, with focus on improvements to safety, fairness, access to justice, and efficiency in the administration of criminal justice.

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #14

REQUESTED ACTION: Approval of the resolution offered by the Task Force on the U.S. Territories.

The Task Force on the U.S. Territories was formed by President Sherry Levin Wallach in June 2022 to study and evaluate laws, policies, and judicial decisions affecting the individual rights and liberties of the peoples of the U.S. territories.

On July 19, 2022, the Executive Committee approved a resolution offered by the Task Force declaring support for efforts to overrule the *Insular Cases*, including through the filing of amicus curiae briefs in appropriate litigation.[1]

The resolution also authorized the Association to file a joint resolution with the Virgin Islands Bar Association at the American Bar Association's meeting in August 2022 calling for the *Insular Cases* and the "territorial incorporation doctrine"[2] to be overturned. This joint resolution was duly filed and adopted by the ABA House of Delegates as Resolution 404 at is August 9, 2022, meeting.

The approval of the House of Delegates is now sought to adopt the July 19, 2022, resolution, as revised to reference the Executive Committee's original passage of the resolution in July 2022, and the ABA House of Delegates' passage of the ABA resolution in August 2022. House approval of the resolution will formalize the recommendations contained therein as standing policy of the Association.

The resolved clauses of the resolution are listed below for ease of reference.

NOW, THEREFORE,

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[1] The *Insular Cases* are a series of Supreme Court rulings from the early 20th century concerning the rights and liberties of residents of the U.S. territories – the U.S. Virgin Islands, American Samoa, Guam, the Northern Mariana Islands and Puerto Rico.

[2] The territorial incorporation doctrine posits that the Constitution fully applies only in "incorporated" territories, or those territories that Congress has deemed to be on the path to statehood (e.g., Alaska and Hawaii in the early 20th century), and does not fully apply in "unincorporated" territories which are not on the path to statehood.

> IT IS RESOLVED, that the New York State Bar Association supports efforts to overrule the Insular Cases and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of amicus curiae briefs in appropriate litigation; and it is further
>
> RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution.

Three items are attached as exhibits to the report: first, a copy of the original resolution as adopted by the NYSBA Executive Committee on July 19, 2022; second, a copy of resolution 404 as adopted by the ABA House of Delegates on August 9, 2022; and third, a listing of relevant NYSBA programming and articles on the *Insular Cases* and legal matters concerning the U.S. territories.

This report was submitted to the Reports Group in October 2022. The President's Committee on Access to Justice has submitted comments in support of the resolution.

The report will be presented to the House of Delegates by Task Force co-chairs Mirna Martinez Santiago and Natalie Gomez-Velez.

NEW YORK STATE BAR ASSOCIATION

Resolution and report of the New York State Bar Association **Task Force on the U.S. Territories - First Task Force Report**

November 2022

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.

New York State Bar Association

Task Force on the U.S. Territories

M E M O R A N D U M

The New York State Bar Association (NYSBA) Task Force on the U.S. Territories (Task Force) respectfully submits the attached proposed resolution and related materials for the consideration of the NYSBA House of Delegates.

Consistent with NYSBA's mission to promote adherence to the rule of law; diversity, equity, and inclusion; and equal access to justice for all both within the State of New York and throughout the United States, the Task Force is working to address the separate and unequal status of residents of the inhabited U.S. Territories of Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

These territories and their residents have a close relationship to New York. For example, according to the Pew Research Center, 20% of the U.S. mainland Puerto Rican population of 5.6 million resides in New York State. New York and Puerto Rico have maintained close ties for a century. Those ties strengthened in the aftermath of Hurricane Maria in 2017 and in ensuing years. The U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa similarly have significant ties to New York given migration patterns and New York's position as a national and global capital.

New York's close ties with residents of the U.S. Territories and their diaspora impel a response to stark inequities facing the territories because of their legal status. Territorial residents do not have the right to vote for the U.S. President or Congress, they do not enjoy the full panoply of constitutional rights, and they are subject to starkly unequal treatment as was evidenced in the recent Supreme Court decision in *U.S. v. Vaello-Madero* denying an equal protection challenge to the rescission of SSI benefits based solely on Puerto Rico residency. These inequities stem directly from the *Insular Cases*, which established a separate and unequal status for "unincorporated" U.S. Territories that remains in law today. That must change.

NYSBA is a leader in ensuring equal justice for all and in upholding the rule of law. It therefore has a significant role to play in exposing and addressing the "colonies problem" presented by the U.S. treatment of the Territories based on the continued operation of the *Insular Cases*. NYSBA has embraced that work in earnest, holding a series of events such as those noted in Exhibit 3.

The proposed resolution seeks to continue that work. They support efforts to overrule the *Insular Cases* and the territorial incorporation doctrine and to dismantle the colonial framework they establish, including but not limited through the filing of amicus curiae briefs in appropriate litigation.

Resolution – Proposed for Adoption at the November 5, 2022,
Meeting of the NYSBA House of Delegates

WHEREAS, it is the mission of the New York State Bar Association to promote equal access to justice for all both within the State of New York and throughout the United States; and

WHEREAS, consistent with its mission, the New York State Bar Association established the Task Force on the U.S. Territories, and vested it with the mission, among other things, to evaluate and study judicial decisions, including the *Insular Cases*, affecting the individual rights and liberties of the people of the U.S. Territories; and

WHEREAS, the New York State Bar Association has established a chapter within the U.S. Virgin Islands, and executed a memorandum of understanding with the Virgin Islands Bar Association in which among other things the New York State Bar Association and the Virgin Islands Bar Association mutually recognized the need to develop and improve understanding of the law in both of their jurisdictions, including human rights laws; and

WHEREAS, the relationship between the federal government and the five inhabited United States territories—the U.S. Virgin Islands, Puerto Rico, Guam, the Northern Mariana Islands, and American Samoa—continues to be governed by the *Insular Cases*, a series of early 20th century decisions in which the Supreme Court of the United States held that the United States Constitution and its Bill of Rights did not extend *ex proprio vigore* to these territories because they were "inhabited by alien races, differing from us in religion, customs, … and modes of thought", making it impossible to govern "according to Anglo-Saxon principles;" and

WHEREAS, the *Insular Cases* and the doctrine of territorial incorporation that they established rest on racial views and stereotypes from the era of *Plessy v. Ferguson,*163 U.S. 537 (1896) that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession; and

WHEREAS, sitting justices of the Supreme Court of the United States, including Justices Neil Gorsuch and Sonia Sotomayor, have called for overruling the *Insular Cases* in an appropriate case, with Justice Gorsuch identifying the decision of the United States Court of Appeals for Tenth Circuit in *Fitisemanu v. United States,*1 F.4th 862 (2021) as an appropriate vehicle to consider that issue; and

WHEREAS, a petition for writ of certiorari was filed with the Supreme Court of the United States in the *Fitisemanu* matter on April 27, 2022, with the respondents' brief due on or before July 29, 2022; and

WHEREAS, if no further extensions of time are granted, it is likely that the Supreme Court of the United States will consider the *Fitisemanu* certiorari petition at an October 2022 conference and, if certiorari is granted, issue a briefing schedule in which the petitioner's brief and any *amicus curiae* briefs in support of the petitioner would be due in November or December 2022; and

WHEREAS, the Executive Committee met on July 9, 2022, and adopted a resolution of the Task Force on the U.S. Territories, attached as "Exhibit 1" to this resolution, holding that "the New York State Bar Association supports efforts to overrule the Insular Cases and the territorial

incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of amicus curiae briefs in appropriate litigation;" and

WHEREAS, the resolution adopted by the Executive Committee on July 9, 2022, authorized NYSBA to jointly submit with the Virgin Islands Bar Association a resolution for consideration at the August 8-9, 2022, meeting of the American Bar Association House of Delegates; and

WHEREAS, the American Bar Association House of Delegates met on August 8-9, 2022, and adopted Resolution 404, attached as "Exhibit 2" to this resolution, which reads:

> RESOLVED, That the American Bar Association supports the efforts to restore the rights, liberties, and protections provided by the United States Constitution to the people of the United States territories, so that they are afforded the same rights, liberties, and protections as the people of the states;
>
> FURTHER RESOLVED, That the American Bar Association opposes the "territorial incorporation doctrine" established by the Insular Cases, as contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence; and
>
> FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation that provides the people of the United States territories the same rights, liberties, and protections as those afforded to the people of the states.

WHEREAS, the approval of the House of Delegates is now sought to ratify as Association policy the recommendations contained in the resolution adopted by the Executive Committee on July 19, 2022;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association supports efforts to overrule the *Insular Cases* and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of *amicus curiae* briefs in appropriate litigation; and it is further

RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution.

Exhibit 1 – Task Force on the U.S. Territories Resolution on the *Insular Cases*
Adopted by the NYSBA Executive Committee on July 19, 2022

Resolution Adopted by the NYSBA Executive Committee
on July 19, 2022

WHEREAS, it is the mission of the New York State Bar Association to promote equal access to justice for all both within the State of New York and throughout the United States; and

WHEREAS, consistent with its mission, the New York State Bar Association established the Task Force on the U.S. Territories, and vested it with the mission, among other things, to evaluate and study judicial decisions, including the *Insular Cases*, affecting the individual rights and liberties of the people of the U.S. Territories; and

WHEREAS, the New York State Bar Association has established a chapter within the U.S. Virgin Islands, and executed a memorandum of understanding with the Virgin Islands Bar Association in which among other things the New York State Bar Association and the Virgin Islands Bar Association mutually recognized the need to develop and improve understanding of the law in both of their jurisdictions, including human rights laws; and

WHEREAS, the relationship between the federal government and the five inhabited United States territories—the U.S. Virgin Islands, Puerto Rico, Guam, the Northern Mariana Islands, and American Samoa—continues to be governed by the *Insular Cases*, a series of early 20th century decisions in which the Supreme Court of the United States held that the United States Constitution and its Bill of Rights did not extend *ex proprio vigore* to these territories because they were "inhabited by alien races, differing from us in religion, customs, … and modes of thought", making it impossible to govern "according to Anglo-Saxon principles;" and

WHEREAS, the *Insular Cases* and the doctrine of territorial incorporation that they established rest on racial views and stereotypes from the era of *Plessy v. Ferguson,*163 U.S. 537 (1896) that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession; and

WHEREAS, sitting justices of the Supreme Court of the United States, including Justices Neil Gorsuch and Sonia Sotomayor, have called for overruling the *Insular Cases* in an appropriate case, with Justice Gorsuch identifying the decision of the United States Court of Appeals for Tenth Circuit in *Fitisemanu v. United States,*1 F.4th 862 (2021) as an appropriate vehicle to consider that issue; and

WHEREAS, a petition for writ of certiorari was filed with the Supreme Court of the United States in the *Fitisemanu* matter on April 27, 2022, with the respondents' brief due on or before July 29, 2022; and

WHEREAS, if no further extensions of time are granted, it is likely that the Supreme Court of the United States will consider the *Fitisemanu* certiorari petition at an October 2022 conference and, if certiorari is granted, issue a briefing schedule in which the petitioner's brief and any *amicus curiae* briefs in support of the petitioner would be due in November or December 2022; and

WHEREAS, because the next meeting of the New York State Bar Association House of Delegates will not occur until November 5, 2022, approval of the Executive Committee is needed to permit

the New York State Bar Association to file an *amicus curiae* brief in support of the petitioner in the *Fitisemanu* matter;

WHEREAS, the American Bar Association House of Delegates will meet on August 8-9, 2022, and state and territorial bar associations may submit a resolution for consideration at that meeting on or before August 6, 2022; and

WHEREAS, the American Bar Association has filed *amicus curiae* briefs in support of equal rights for the people of the U.S. territories in other cases before the Supreme Court of the United States, such as *United States v. Vaello-Madero*, but has no policy directly urging that the *Insular Cases* be overruled; and

WHEREAS, the Virgin Islands Bar Association has asked that the New York State Bar Association co-sponsor a resolution for the August 8-9, 2022 meeting of the American Bar Association House of Delegates which, if adopted, would establish policy urging the overruling of the Insular Cases and permit the American Bar Association to file an *amicus curiae* brief in the *Fitisemanu* matter if certiorari is granted; and

WHERAS, if such a resolution is not submitted for and approved at the August 8-9, 2022, meeting, the American Bar Association will not be able to file an *amicus curiae* brief in the *Fitisemanu* matter, given that the next meeting of the American Bar Association House of Delegates would not be until February 6, 2023, well after briefing has concluded; and

WHEREAS, the New York State Bar Association Task Force on U.S. Territories has collaborated with the Virgin Islands Bar Association to draft such a resolution and report for consideration by the American Bar Association House of Delegates at its August 8-9, 2022, meeting, approved a draft resolution and report after its July 11, 2022, meeting; and

WHEREAS, because the next meeting of the New York State Bar Association House of Delegates will not occur until November 5, 2022, approval of the Executive Committee is needed to permit the New York State Bar Association to co-sponsor such a resolution with the Virgin Islands Bar Association for the August 8-9, 2022, meeting of the American Bar Association House of Delegates; and

WHEREAS, the Task Force on U.S. Territories has requested that the Executive Committee authorize the New York State Bar Association to support and work on efforts to overrule the *Insular Cases*, which may include, but are not necessarily limited to, the filing of an *amicus curiae* brief in the *Fitisemanu* matter and co-sponsor a resolution and report with the Virgin Islands Bar Association for consideration by the American Bar Association House of Delegates;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association supports efforts to overrule the *Insular Cases* and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of *amicus curiae* briefs in appropriate litigation; and it is further

RESOLVED, that the New York State Bar Association is authorized to co-sponsor with the Virgin Islands Bar Association the draft resolution and report attached as "Exhibit 1" to this resolution for consideration at the August 8-9, 2022 meeting of the American Bar Association House of Delegates; and it is further

RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution, including agreeing to any changes in language or form to the draft resolution and report suggested by the American Bar Association House of Delegates Committee on Rules and Calendar or other entities represented in the American Bar Association House of Delegates.

Exhibit 2 – ABA Resolution 404

Adopted by the American Bar Association House of Delegates on August 9, 2022

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2022

RESOLUTION

RESOLVED, That the American Bar Association supports the efforts to restore the rights, liberties, and protections provided by the United States Constitution to the people of the United States territories, so that they are afforded the same rights, liberties, and protections as the people of the states;

FURTHER RESOLVED, That the American Bar Association opposes the "territorial incorporation doctrine" established by the Insular Cases, as contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation that provides the people of the United States territories the same rights, liberties, and protections as those afforded to the people of the states.

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REPORT

> *A century ago in the* Insular Cases*, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The* Insular Cases *have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.*
>
> \- Justice Neil M. Gorsuch[1]

When one thinks of colonial powers, the United States may not immediately come to mind. After all, the United States only became a nation after it declared independence from Great Britain in 1776 – the first instance of a European colony successfully rebelling against its European colonizer in modern history.

But the United States has a colonies problem. Today, more than 3.5 million Americans—98% of whom are racial or ethnic minorities—reside in the territories of the U.S. Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, and Puerto Rico. They are treated differently from the approximately 330 million people that live in the 50 states and the District of Columbia. While those who live in the mainland United States know they enjoy the full protections of the Bill of Rights of the United States Constitution, the extension of those rights to the people of these five territories is not a guarantee, but a matter of legislative and judicial discretion.

This was not always the case. Prior to 1901, the people of America's territories possessed the full panoply of civil rights and liberties protected by the Bill of Rights. This changed in 1901 when the Supreme Court of the United States decided the first of the *Insular Cases*, a series of decisions which denied certain constitutional rights to residents of America's insular territories—who were described as "alien races," "savage," "half-civilized," and "ignorant or lawless"—based on conceptions of racial inferiority and the white man's burden.[2]

This resolution calls upon the American Bar Association to recognize what many already have: that the *Insular Cases* and the "territorial incorporation doctrine" they established are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes that have long been rejected and cannot be reconciled with basic

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[1] *United States v. Vaello-Madero*, 142 S.Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

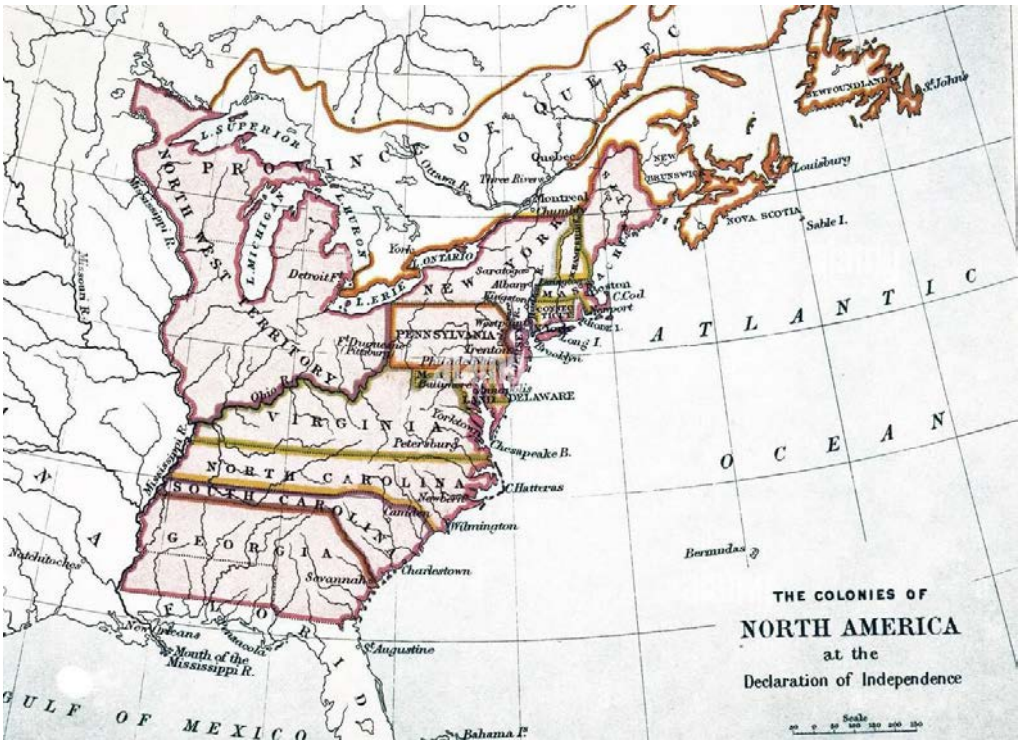
[2] The *Insular Cases* typically refers to a series of six opinions issued by the Supreme Court of the United States during its 1901 term, including *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). However, some jurists and scholars include additional cases within the *Insular Cases*, such as *Dooley v. United States*, 183 U.S. 151 (1901), *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901), *Kepner v. United States*, 195 U.S. 100 (1904), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Puerto Rico*, 442 U.S. 465 (1922). As used in this resolution, the term Insular Cases refers to all of these cases from *De Lima* to through *Balzac*.

constitutional and democratic principles or the values of the legal profession, which would include the filing of an *amicus curiae* brief in an appropriate case. It further calls upon Congress to enact legislation to overrule the *Insular Cases* and the "territorial incorporation doctrine."

I. HISTORICAL BACKGROUND

To understand the legal bankruptcy of the "territorial incorporation doctrine," one must consider the law as it existed prior to the *Insular Cases*. When we think of the original 13 colonies that would come together on July 4, 1776, and become the United States of America, we may envision a map such as this:

But while that is what those 13 states may look like today, the actual borders as they existed at the time of Independence were vastly different:



While the 13 states were united against British rule, from 1776 through 1781 they also competed against each other to acquire new lands for themselves to the West. Recognizing that this would eventually lead to a weak and internally divided country always on the verge of a potential civil war, the Founders, through the Articles of Confederation and later the United States Constitution, established a more stable framework in which the existing 13 states were essentially "locked in" to their borders while new lands to the West would be administered by the federal government until they achieved sufficient population and established appropriate institutions to allow for admission as a new state co-equal to the original 13 states.

In the 120 years from ratification of the Articles of Confederation in 1781 up until the Supreme Court decided the first of the *Insular Cases* in 1901, it was beyond dispute that the people of the territories were at an absolute minimum entitled to the same civil rights and liberties as the people of the states. In fact, the Northwest Ordinance of 1787 – the governing document of the first United States territory that would eventually become the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota – not only codified extended rights such as freedom of speech and freedom of religion but provided the people of the territory with even greater rights than the minimum conferred by the United States Constitution, such as a right to education. And throughout the 19th century, the Supreme Court repeatedly held, in an unbroken line of cases, that the Bill of Rights to the United States Constitution applies to the territories by its own terms and cannot be

infringed upon by either Congress or a territorial government.[3]

II. THE *INSULAR CASES*

At the end of the 19th Century and the start of the 20th century, the United States became a colonial power. In 1898, the United States acquired Guam, the Philippines, and Puerto Rico from Spain at the conclusion of the Spanish-American War. The following year, the islands comprising the Samoan archipelago were partitioned between Germany and the United States, resulting in the transfer of sovereignty over the islands of Tutuila and Aunu'u to the United States on April 17, 1900, which thereafter would collectively be known as American Samoa. Shortly thereafter, in 1903, the United States acquired the Panama Canal Zone from Panama through the Hay-Bunau-Varilla Treaty. And effective March 31, 1917, the United States purchased from Denmark the islands of St. Croix, St. John, and St. Thomas, as well as many surrounding minor islands, which collectively became the U.S. Virgin Islands.

Unlike other territories acquired by the United States in the late 18th and early-to-mid 19th Century, these new territories were not contiguous with the mainland United States and had overwhelmingly non-white populations. For reasons stemming from nothing more than naked racism, the most famous and influential attorneys and law professors of the time "sought to devise new theories by which Congress could permanently rule the country's new acquisitions as a European power might, unrestrained by domestic law."[4] These included Simeon Baldwin, widely recognized as the founder of the American Bar Association, as well as scholars such as Christopher Columbus Langdell and Abbott Lawrence Lowell whose influence over legal education continues to this day.[5]

Unfortunately, the views of Baldwin, Langdell, and Lowell would ultimately receive the imprimatur of law by the Supreme Court in the *Insular Cases*. In *Downes v. Bidwell* (182 U.S. 244 (1901)), the first and most prominent of the Insular Cases, Justice Henry Billings Brown, the author of *Plessy v. Ferguson*'s doctrine of "separate but equal", wrote the judgment of the Court that America's newly acquired overseas territories were "inhabited by alien races, differing from us in religion, customs, … and modes of thought", making it impossible to govern "according to Anglo-Saxon principles."[6] Writing for three justices, Justice Edward White developed the territorial incorporation doctrine, which he found necessary due to the "evils" of admitting "millions of inhabitants" of "unknown

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[3] *See, e.g., Webster v. Reid,* 52 U.S. (11 How) 437 (1850); *Reynolds v. United States*, 98 U.S. 145 (1879); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Springville v. Thomas*, 166 U.S. 707 (1897); *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897); *Thompson v. Utah*, 170 U.S. 343 (1898).

[4] *Vaello-Madero*, 142 S.Ct. at 1552 (Gorsuch, J., concurring).

[5] *See* Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Simeon E. Baldwin, The People of the United States, 8 YALE L.J. 159 (1899); Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899).

[6] 182 U.S. 244, 287 (1901).

islands, peopled with an uncivilized race," who he believed would be "absolutely unfit" for citizenship.[7] Under this territorial incorporation doctrine, the United States Constitution—let alone its Bill of Rights—did not extend *ex proprio vigore* to the so-called "unincorporated" territories; rather, the Constitution applied in full only to "incorporated" territories. Not surprisingly, each and every one of the "incorporated" territories were those with majority-white populations—such as Alaska—while all the "unincorporated" territories were those whose populations were overwhelmingly non-white. In doing so, the Supreme Court overturned 120 years of historical practice and judicial precedent.

III. THE LEGACY OF THE *INSULAR CASES*

Today, the reasoning of the *Insular Cases* has been emphatically repudiated by all corners of the legal community, to the point where the *Insular Cases* are said to have "nary a friend in the world." [8] In fact, as early as 65 years ago the United States Supreme Court repudiated their reasoning, directing that "[n]either the [*Insular Cases*] nor their reasoning should be given any further expansion." [9] The Supreme Court, however, stopped short of declaring the *Insular Cases* overruled. And within years of the last of the *Insular Cases* being decided, Congress provided some legislative relief from the rulings by extending by statute many provisions of the Bill of Rights to the remaining unincorporated territories.

The *Insular Cases*, however, are not a mere historic relic that, if overturned, would have nothing but a symbolic effect. The actions by the Supreme Court and Congress to minimize the effects of the *Insular Cases*, while commendable, have not undone the legacy of the *Insular Cases* and the harm they continue to inflict on the territories. While Congress extended most constitutional rights by statute, it did not extend every right to every territory. To give just two examples, Congress has not enacted legislation providing those born in American Samoa with birthright citizenship and has exempted the U.S. Virgin Islands from the requirement that prosecutions—even federal prosecutions—be by grand jury indictment. And even with rights that Congress extended by statute, there remains the ever-present concern that a future Congress could repeal those rights at any time.

Perhaps more significantly, the lower federal courts have not abided by the clear directive of the United States Supreme Court to not give the *Insular Cases* any further expansion. The United States Court of Appeals for the Third Circuit cited to the Insular Cases as legal authority for withholding from residents of the U.S. Virgin Islands rights which are plainly conferred by the Bill of Rights, and relied on the *Insular Cases* as the sole authority for setting aside the Fourth Amendment and authorizing the warrantless searches of all individuals traveling from the U.S. Virgin Islands to the mainland United States.[10] Like the Third Circuit, the Ninth Circuit has not only repeatedly cited favorably

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[7] *Id.* at 306.
[8] Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008).
[9] *Reid v. Covert*, 354 U.S. 1, 14 (1957).
[10] *See United States v. Ntreh*, 279 F.3d 255, 256-57 (3d Cir. 2002); *United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994).

to the *Insular Cases* and applied them as substantive law,[11] but extended them to other contexts, even using them as the basis to withhold the right to a jury trial in the Northern Mariana Islands as late as 1984.[12] And while the District of Columbia Circuit and the Tenth Circuit do not hear cases involving the territories with any regularity, they too have extended the result and reasoning of the *Insular Cases*.[13]

Perhaps most shockingly, in doing so the Tenth Circuit took the position that the *Insular Cases* "can be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories" since "the *Insular Cases*' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution." [14] This reasoning is extraordinarily reminiscent of legal arguments made to support retaining precedents such as *Plessy v. Ferguson* and *Dred Scott v. Sanford*, such as by contending that African-Americans benefited from slavery and Jim Crow laws. For instance, the lower court decision in *Brown v. Board of Education,* famously reversed by the United States Supreme Court, had upheld school segregation not on grounds that African-Americans were an inferior race, but because of the purported benefits that African-Americans received from segregation and the separate-but-equal regime that were not afforded to whites, such as how "the school district transports colored children to and from school free of charge" while "[n]o such service is furnished to white children."[15]

IV. THE ROLE OF THE AMERICAN BAR ASSOCIATION

It is the mission of the American Bar Association to increase public understanding and respect for the rule of law and the legal process, to hold governments accountable under the law, and to work for just laws, including human rights.[16] As the voice of the legal profession in the United States, the ABA is uniquely situated to recognize the "rotten foundation" of the *Insular Cases* and support efforts to overrule the *Insular Cases* and their "territorial incorporation doctrine."[17]

The ABA, however, possesses a special obligation to adopt this as ABA policy. One of the architects of the racist legal reasoning that formed the analytical foundation for the result of the *Insular Cases* was Simeon Baldwin, a former ABA President who is also widely credited as the primary founder and "Father" of the ABA. Baldwin is widely credited as having "fed the doctrine that encouraged these cases."[18] In an article

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[11] *See, e.g., Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999); *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1295 (9th Cir. 1985).
[12] *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).
[13] *See Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).
[14] *Fitisemanu*, 1 F.4th at 870.
[15] 98 F.Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955).
[16] *See* 2008A121.
[17] *Vaello-Madero*, 142 S.Ct. at 1556 (Gorsuch, J., concurring).
[18] Paola Marie Sepulveda-Miranda, *Second-Class Health in the Absence of Self-Determination and Governance: The Effect of Colonial Governance Over the Healthcare System of Puerto Rico in Comparison to Hawaii and Massachusetts*, 14 NE. U. L. REV. 491, 514 (2022).

published in the *Harvard Law Review,* Baldwin wrote:

> Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from the sharp and sudden justice — or injustice — which they have been hitherto accustomed to expect, would, of course, be a serious obstacle to the maintenance there of an efficient government.[19]

Baldwin would also advocate against the conferral of constitutional rights on the people of these territories in an article published in the Yale Law Journal, where he wrote:

> Our recent extension of territory by including Hawaii has probably made all the natives of that country citizens of the United States. They are not, however, and probably never will be, the people of a state. Would it be wise to invest them with a right to bear arms, which they never enjoyed by force of a similar guaranty, under their former government? We may incorporate Puerto Rico and the Philippines. Would it be safe to extend to all their population these immunities which Americans rightfully claim as their proper birthright?[20]

These views were wrong then, and certainly remain wrong now. The ABA has long since moved beyond the racism of Baldwin and its other early leaders, and now stands as a champion for human rights and diversity and inclusion both within the legal profession, the United States, and the world. By adopting this resolution, the ABA will not just further its mission, but help remedy and undo the harm caused by Baldwin and his racist ideology.

V. CONCLUSION

> As stated by Justice Neil M. Gorsuch "The flaws in the Insular Cases are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion."[21]

The *Insular Cases* and their lower court progeny are one of the last vestiges of both American colonialism and the *Plessy*-era Supreme Court. This resolution highlights the ABA's strong support for the rights of territorial and Indigenous peoples as well as its

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[19] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899);
[20] Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159, 164 (1899).
[21] *Vaello-Madero*, 142 S.Ct. at 1554 (2022) (Gorsuch, J., concurring).

continued unwavering commitment to and support for human rights, and urges Congress to enact legislation to overrule the *Insular Cases* and the "territorial incorporation doctrine".

Respectfully submitted,

Sherry Levin Wallach, Esq.
President, New York State Bar Association

Alisha Udhwani, Esq.
President, Virgin Islands Bar Association

August 2022

GENERAL INFORMATION FORM

1. Summary of Resolution

This resolution provides that the American Bar Association supports the overruling of the United States Supreme Court's decisions in the Insular Cases and the "territorial incorporation doctrine," which are contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence. It further provides that the American Bar Association supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine."

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution advances Goals III (Eliminate Bias and Enhance Diversity) and IV (Advance the Rule of Law), in that the *Insular Cases* withheld constitutional rights to the people of the so-called "unincorporated" territories—virtually all of whom are racial minorities—because those territories were "inhabited by alien races, differing from us in religion, customs, … and modes of thought", making it impossible to govern "according to Anglo-Saxon principles." The resolution accomplishes these goals by calling for the overruling of the *Insular Cases*, which would advance equality for the people of these territories.

3. Approval by Submitting Body

Approved by the New York State Bar Association on July 19, 2022.
Approved by the Virgin Islands Bar Association on July 5, 2022.

4. Has this or a similar Resolution been submitted to the House or Board previously?

No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

21M10D (supporting an interpretation of the Fourth Amendment which would preclude application of the border-search exception to travel to or from a United States territory);
20A10B (supporting an interpretation of the Equal Protection Clause guaranteeing federal benefits to persons residing in territories on the same basis as those who reside elsewhere in the United States);
20A10C (opposing as violative of the Equal Protection Clause provisions of federal absentee voting act treating territories in a discriminatory manner);
20M10C (supporting an interpretation of the Citizenship Clause of the Fourteenth

Amendment that recognizes all persons born in the territories as natural-born citizens of the United States);
14A10A (urging an amendment to 28 U.S.C. § 44(c) to grant each territory representation on its respective federal court of appeals);
99M107 (urging Congress to establish an Article III district court in the U.S. Virgin Islands).

6. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

7. Status of Legislation (if applicable).

N/A

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If adopted, this policy would support the filing of an *amicus curiae* brief in an appropriate case. The ABA would also support the passage of appropriate legislation consistent with the policy.

9. Cost to the Association (both indirect and direct costs).

None.

10. Disclosure of Interest.

None.

11. Referrals

ABA Coalition on Racial and Ethnic Justice
ABA Commission on Disability Rights
ABA Commission on Hispanic Legal Rights & Responsibilities
ABA Commission on Racial and Ethnic Diversity in the Profession
ABA Commission on Sexual Orientation and Gender Identity
ABA Commission on Women in the Profession
ABA Council for Diversity in the Educational Pipeline
ABA Diversity and Inclusion Advisory Council
ABA Government & Public Sector Lawyers Division
ABA Section of Business Law
ABA Section of Criminal Justice
ABA Section on Civil Rights & Social Justice
ABA Section on International Law

ABA Section on State & Local Government Law
ABA Young Lawyers Division

12. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Anthony M. Ciolli
Past President, Virgin Islands Bar
PO Box 590
St. Thomas, VI 00804
340-774-2237
aciolli@gmail.com

13. Contact Name and Address Information. (Who will present the Resolution with Report to the House?

Sherry Levin Wallach
President, New York State Bar Association
One Elk Street
Albany, NY 12207
917-286-3407
slwallach@nysba.org
(President Levin Wallach will make the motion and introduce Anthony M. Ciolli)

Anthony M. Ciolli
Past President, Virgin Islands Bar
PO Box 590
St. Thomas, VI 00804
340-774-2237
aciolli@gmail.com
(Anthony M. Ciolli will present the resolution to the House)

EXECUTIVE SUMMARY

1. **Summary of Resolution.**

This resolution provides that the American Bar Association supports the overruling of the United States Supreme Court's decisions in the Insular Cases and the "territorial incorporation doctrine," which are contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence. It further provides that the American Bar Association supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine."

2. **Summary of the Issue which the Resolution addresses.**

In the *Insular Cases*, the Supreme Court of the United States held the United States Constitution—let alone its Bill of Rights—did not extend *ex proprio vigore* to the so-called "unincorporated" territories due to the race of their inhabitants. As such, to this day which constitutional rights extend to the people of these "unincorporated" territories remains a matter of legislative and judicial discretion.

3. **An explanation of how the proposed policy position will address the issue.**

This resolution supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine," and dismantle the colonial framework they establish.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.

Exhibit 3 – Listing of Relevant Programming and Articles on the *Insular Cases* and the U.S. Territories

Links to recent programming produced by the Association on the *Insular Cases* and the U.S. territories.

These on-demand programs are accessible at the links below upon logging on to the NYSBA website. Materials are linked with the videos once accessed.

An Argument Against Second Class Citizenship in the U.S. Territories: A Movement for Equality and Overturning the Insular Cases
Presented Friday, April 1, 2022
https://nysba.ce21.com/ViewerUnAutheticatedLink?x=pTAJBuYUEII4ayREjLOL4A==&p=ikxj5w2ddq. (Please don't externally circulate this link – please use the following link for external circulation as the video is technically an on-demand CLE product: https://nysba.org/products/diversity-symposium-awards/).

America Has a Colonies Problem: Constitutional Rights and U.S. Territories (free)
Link to on-demand video (NYSBA login required): https://nysba.org/products/america-has-a-colonies-problem-constitutional-rights-and-u-s-territories/

2022 Constance Baker Motley Symposium - What do the Insular Cases, Voter Suppression Efforts and the Anti-CRT Movement Have in Common? (free)
Link to on-demand video (NYSBA login required): https://nysba.org/products/am2022-constance-baker-motley-symposium/
Link to agenda: https://nysba.org/am2022/annual-meeting-2022-constance-baker-motley-symposium/

NYSBA also produced a series of programming on "How You Can Lose Your Rights as an American Citizen."

Part 1 – https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-1/
Part 2 – https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-2/
Part 3 – https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-3/

Press Releases and Articles

"New York State Bar Association Disappointed by Department of Justice's Position on Equal Rights for Residents of the U.S. Territories" August 30, 2022 – https://nysba.org/new-york-state-bar-association-disappointed-by-department-of-justices-position-on-equal-rights-for-residents-of-u-s-territories/

"New York State Bar Association Urges Department of Justice to Support Equal Rights for Residents of U.S. Territories" August 24, 2022 – https://nysba.org/new-york-state-bar-association-urges-department-of-justice-to-support-equal-rights-for-residents-of-u-s-territories/

“American Bar Association Approves New York State Bar Association-Sponsored Resolutions on Guns, War Crimes, Legal Ethics and U.S. Territories” August 9, 2022— https://nysba.org/american-bar-association-approves-new-york-state-bar-association-sponsored-resolutions-on-guns-war-crimes-legal-ethics-and-u-s-territories/

“NYSBA Acts on Unjust Insular Cases Ahead of Possible Supreme Court Review” July 7, 2022 – https://nysba.org/nysba-acts-on-unjust-insular-cases-ahead-of-possible-supreme-court-review/

“NYSBA Signs Agreement With Virgin Islands Bar Association Following International Conference in NYC” June 24, 2022 – https://nysba.org/international-conference-in-new-york-city-to-begin-today-nysba-to-sign-agreement-with-virgin-islands-bar-association-on-friday/

“NYSBA President Sherry Levin Wallach Outlines Goals in Miranda Warnings Podcast” June 1, 2022 — https://nysba.org/nysba-president-sherry-levin-wallach-outlines-goals-in-miranda-warnings-podcast/

“What U.S. v. Vaello-Madero and the Insular Cases Can Teach About Anti-CRT Campaigns” February 14, 2022 — https://nysba.org/what-u-s-v-vaello-madero-and-the-insular-cases-can-teach-about-anti-crt-campaigns/

“Puerto Rico’s ‘Insular Cases’” January 21, 2022 — https://nysba.org/why-ny-court-of-appeals-judge-jenny-rivera-has-a-keen-interest-in-the-outcome-of-one-of-puerto-ricos-insular-cases/

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

October 14, 2022

TO: Task Force on the U.S. Territories

FROM: President's Committee on Access to Justice

RE: Support of the Resolution of the Task Force on the U.S. Territories

The President's Committee on Access to Justice has reviewed the resolution and report of the Task Force on the U.S. Territories concerning the *Insular Cases* and the territorial incorporation doctrine The Committee is in support of the resolution, as the recommendations contained therein, if implemented, would advance access to justice for the peoples of the U.S. territories.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #15

REQUESTED ACTION: Approval of the resolution offered by the Women in Law Section.

Attached is a resolution from the Women in Law Section entitled "Resolution Supporting Reproductive Health-Care Rights and Reproductive Autonomy and the New York State Equal Rights Amendment." The resolution calls on NYSBA to adopt as policy: (i) support for reproductive healthcare and abortion rights; (ii) support for existing NYS laws that protect reproductive healthcare rights; (iii) support for the Equal Rights Amendment to New York's Constitution that passed as a concurrent resolution of the state legislature this year (S51002); (iv) support for a federal law protecting reproductive healthcare rights; and (v) opposition to any federal law banning abortion.

The report presented in support of the resolution reviews the legal and constitutional effects of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* and the overruling of *Roe v. Wade*, including discussion on the legal history of reproductive rights in New York State, legislative developments in New York State, healthcare considerations surrounding reproductive rights and abortion, equitable access to reproductive services, and the interplay of abortion bans and religious freedoms.

By way of procedural background, in January 2022, the Executive Committee approved a legislative proposal from the Women in Law Section in support of S1268, an earlier version of the Equal Rights Amendment. This affirmative legislative proposal is attached as an exhibit to this report. S1268 did not advance in the legislature, and instead on July 1, 2022, the New York State Senate and Assembly passed concurrent resolution S51002.[1]

The House of Delegates' approval of the resolution offered by the Women in Law Section would formalize Association policy in support of the current version of the Equal Rights Amendment (i.e., concurrent resolution S51002), in addition to support for the other measures listed in the resolution.[2]

The resolved clauses of the resolution are listed below for ease of reference.

[1] The concurrent resolution must be passed by two sessions of the legislature before the proposed amendment can be put on the ballot at a general election.
[2] The report includes links to the various bills referenced in the resolution.

NOW, THEREFORE,

IT IS RESOLVED, that the New York State Bar Association supports the rights of individuals to choose legal reproductive health care, including abortion; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the amendments to New York State Public Health Law, Education Law, and Penal Law, as enacted in New York State by the signing of S.240/A.21 in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports N.Y. Public Health Law Article 25-A as enacted in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the June 13, 2022, Legislative Package, as enacted by New York State and supports the policies and intent of the legislative package enacted; and it is

FURTHER RESOLVED, that the New York State Bar Association supports S.51002 of 2022, as passed by the New York State Senate and Assembly, and as policy the proposal codified in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection; and it is

FURTHER RESOLVED, that the New York State Bar Association supports passage of the Women's Health Protection Act of 2022, and supports the policies and intent of this bill; and it is

FURTHER RESOLVED, that the New York State Bar Association opposes passage of laws that would ban abortion nationwide and/or diminish the current protections under New York law; and it is

FURTHER RESOLVED, that the New York State Bar Association approves the report and recommendations of the Women in the Law Section; and it is

FURTHER RESOLVED, that the officers of the Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

This report was originally submitted to the Reports Group in August 2022. An updated version of the resolution and report was submitted on October 24, 2022. The Young

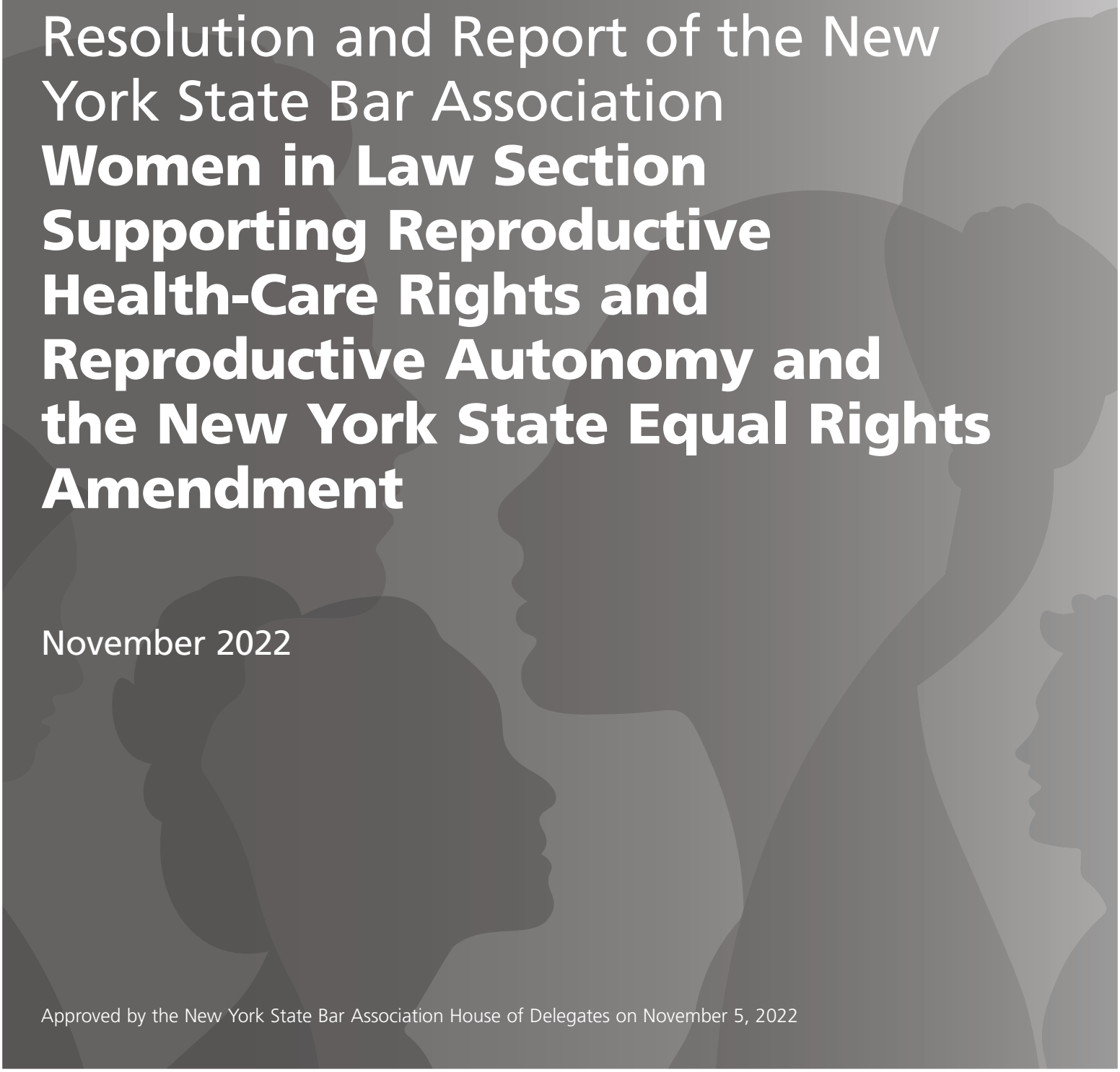
Lawyers Section, the Labor and Employment Law Section, the International Section, the Family Law Section, the Committee on Diversity, Equity, and Inclusion, and the President's Committee on Access to Justice have submitted comments in support of the resolution. Printed copies of any comments submitted after October 31, 2022, will be printed and distributed at the meeting.

The report will be presented to the House of Delegates by Terri Mazur and Susan Harper, past chairs of the Women in Law Section.

NEW YORK STATE BAR ASSOCIATION

Resolution and Report of the New York State Bar Association **Women in Law Section Supporting Reproductive Health-Care Rights and Reproductive Autonomy and the New York State Equal Rights Amendment**

November 2022



Approved by the New York State Bar Association House of Delegates on November 5, 2022

NEW YORK STATE BAR ASSOCIATION

Resolution Adopted by the House of Delegates on _____ _____

WHEREAS, the New York State Legislature has found that "comprehensive reproductive health care is a fundamental component of every individual's health, privacy and equality"[1] and that "New Yorkers deserve a constitution that recognizes that every person is entitled to equal rights and justice under the law regardless of who they are, whom they love, or what their families look like";[2] and

WHEREAS, effective January 22, 2019, New York State enacted S.240/A.21,[3] which amended the New York State Public Health Law, Education Law, and Penal Law, and added new Article 25-A, the Reproductive Health Act, to the New York State Public Health Law[4]; and

WHEREAS, on June 13, 2022, New York State enacted six laws (together, the "June 13, 2022, Legislative Package")[5] to protect patients and providers in anticipation of the U.S. Supreme Court's final decision in *Dobbs v. Jackson Women's Health Organization*, as follows: (i) S.9039A/A.10094A Establishes a Cause of Action for Unlawful Interference with Protected Rights; (ii) S.9077A/A.10372A Relates to Legal Protection for Abortion Service Providers; (iii) S.9079B/A.9687B Prohibits Misconduct Charges Against Healthcare Practitioners for Providing Reproductive Health Services to Patients Who Reside in States Where Such Services Are Illegal; (iv) S.9080B/A.9718B Prohibits Medical Malpractice Insurance Companies from Taking Adverse Action Against a Reproductive Healthcare Provider Who Provides Legal Care; (v) S.9384A/A.9818A Includes Abortion Providers and Patients in the Address Confidentiality Program; and (vi) S.470/A.5499 Authorizes a Study to Examine Unmet Health and Resource Needs and Impact of Limited Service Pregnancy Centers; and

WHEREAS, on June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (2022), overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, cases which had recognized a right to abortion under the U.S. Constitution; and

WHEREAS, on January 21, 2022, the Executive Committee of the New York State Bar Association adopted an affirmative legislative proposal in support of passage of New York State Senate Bill S.1268, which proposed an amendment to Article 1 of the New York State Constitution in relation to equality of rights and protection against discrimination,[6] and the New York State Bar

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[1] https://www.nysenate.gov/legislation/laws/PBH/2599-AA.
[2] https://www.nysenate.gov/legislation/bills/2021/s51002.
[3] https://www.nysenate.gov/legislation/bills/2019/s240.
[4] https://www.nysenate.gov/legislation/laws/PBH/A25-A.
[5] https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive.
[6] https://www.nysenate.gov/legislation/bills/2021/S1268.

Association had previously in 2019 adopted support for proposed equality amendments to the New York State Constitution and an Equal Rights Amendment to the U.S. Constitution; and

WHEREAS, on July 1, 2022, the New York State Senate and Assembly passed S.51002, a concurrent resolution of the Senate and Assembly proposing an amendment to Section 11 of Article 1 of the New York State Constitution in relation to equal protection,[7]

WHEREAS, federal legislation, titled the Women's Health Protection Act of 2022,[8] has been proposed in the U.S. Senate and House of Representatives, to prohibit governmental restrictions on the provision of, and access to, abortion services; and

WHEREAS, federal legislation has been proposed that would ban abortion nationwide and/or diminish the current protections under New York law;

NOW, THEREFORE,

IT IS RESOLVED, that the New York State Bar Association supports the rights of individuals to choose legal reproductive health care, including abortion; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the amendments to New York State Public Health Law, Education Law, and Penal Law, as enacted in New York State by the signing of S.240/A.21 in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports N.Y. Public Health Law Article 25-A as enacted in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the June 13, 2022, Legislative Package, as enacted by New York State and supports the policies and intent of the legislative package enacted; and it is

FURTHER RESOLVED, that the New York State Bar Association supports S.51002 of 2022, as passed by the New York State Senate and Assembly, and as policy the proposal codified in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection; and it is

FURTHER RESOLVED, that the New York State Bar Association supports passage of the Women's Health Protection Act of 2022, and supports the policies and intent of this bill; and it is

FURTHER RESOLVED, that the New York State Bar Association opposes passage of laws that would ban abortion nationwide and/or diminish the current protections under New York law; and it is

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[7] https://www.nysenate.gov/legislation/bills/2021/s51002.

[8] https://www.congress.gov/bill/117th-congress/senate-bill/4132.

FURTHER RESOLVED, that the New York State Bar Association approves the report and recommendations of the Women in the Law Section; and it is

FURTHER RESOLVED, that the officers of the Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

SECOND AMENDED REPORT OF THE NYSBA WOMEN IN LAW SECTION IN SUPPORT OF ITS PROPOSED RESOLUTION SUPPORTING REPRODUCTIVE HEALTH-CARE RIGHTS AND REPRODUCTIVE AUTONOMY AND THE NEW YORK STATE EQUAL RIGHTS AMENDMENT[1]

October 24, 2022

I. INTRODUCTION

On June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973). When the *Dobbs* decision was leaked and then issued, overturning millions of Americans' constitutional right to abortion, bar associations across New York and the country issued strong statements in opposition to *Dobbs* and the potential impacts on other rights at stake (*e.g.*, contraception access, same-sex relationships, and same-sex marriage). However, one prominent bar association – the New York State Bar Association (NYSBA or the Association) – could not speak as the Association on this important issue because it does not have a policy on reproductive health care.

The U.S. Supreme Court in *Dobbs* held that reproductive rights are a legislative issue.[2] NYSBA's mission statement makes clear:

> Our mission is to *shape the development of law*, educate and inform the public, and respond to the demands of our diverse and ever-changing legal profession. *NYSBA advocates for* ***state and federal*** *legislation and works tirelessly to promote equal access to justice for all.*[3]

Why Support this Proposal Now?

As a result of *Dobbs*, there are now, or soon will be, laws on the federal and New York State (NYS) level that need the immediate attention of the Association.

New York State has supported the right to reproductive health care, including abortion, for more than 50 years. NYS recently updated its laws with the Reproductive Health Act of 2019. NYS reaffirmed its commitment to reproductive health care and health-care providers in June 2022, when the New York Governor signed into law six pieces of legislation protecting reproductive and

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[1] This report amends the Report of the NYSBA Women in Law Section (WILS) in Support of its Proposed Resolution Supporting Abortion Rights and the New York State Equal Rights Amendment, dated August 22, 2022, and its amended report dated August 26, 2022.

[2] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (2022), slip op.at 69. In July 2022, in *Dobbs*, the U.S. Supreme Court held that "the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."

[3] *See* https://nysba.org/about/ (emphasis added).

abortion rights for all.[4] However, the *Dobbs* decision paves the way for federal and state legislation that would place existing NYS reproductive health care rights at risk.

On the state level, we ask NYSBA to advocate for the current version of the Equality Amendment (ERA) to the NYS Constitution, S.51002. Since 2019, NYSBA consistently has adopted as policy three prior versions of the NY ERA legislation.[5] In 2019, NYSBA also adopted the Federal ERA as a policy of the association. The New York State ERA currently pending, S.51002, is a concurrent resolution of the Senate and Assembly proposing an amendment to Section 11 of Article 1 of the New York State Constitution in relation to equal protection and includes protections for reproductive health care and autonomy.[6] On July 1, 2022, the New York Legislature passed this version of the ERA to the NYS Constitution. The process for amending the NYS Constitution requires the ERA amendment to pass two separate legislative sessions and then be approved by referendum. This means the ERA will be on the State legislative agenda again in 2023 and, assuming it is passed again, it must then be approved by the voters, presumably in 2024.

On the federal level, bills were proposed that would impose nationwide restrictions on reproductive health care rights including abortion. If a nationwide abortion law passes, it would severely restrict, if not eliminate, the rights we have held under New York state law for over 50 years.

As detailed more fully below, the threats to women's and girls' health care and family planning are real. A majority of Americans support the right to choose, including in states where abortion has been strictly curtailed.[7] NYSBA cannot advocate on this important issue if it does not have a

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[4] These laws are:S.9039A/A.10094A (Establishes a Cause of Action for Unlawful Interference with Protected Rights); S.9077A/A.10372A (Relates to Legal Protection for Abortion Service Providers); S.9079B/A.9687B (Prohibits Misconduct Charges Against Healthcare Practitioners for Providing Reproductive Health Services to Patients Who Reside in States Where Such Services Are Illegal); S.9080B/A.9718B (Prohibits Medical Malpractice Insurance Companies from Taking Adverse Action Against a Reproductive Healthcare Provider Who Provides Legal Care); S.9384A/A.9818A (Includes Abortion Providers and Patients in the Address Confidentiality Program); and S.470/A.5499 (Authorizes a Study to Examine Unmet Health and Resource Needs and Impact of Limited Service Pregnancy Centers). *See* https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive (attached as Exhibit A).

[5] *See* Exhibit B: https://nysba.org/app/uploads/2020/03/19-20NYSBA11.pdf (New York State Bar Association #11 Memorandum in Support of the 2019 ERA bill (prohibiting discrimination against a person based on "sex" and "pregnancy," among other protected categories, circulated to the NYSBA Legislature on Feb. 28, 2019)); Women in Law Section Updated Memorandum in Support of Equal Rights Amendment to the New York State Constitution, Bills A.271 and A.272/S.517 (Feb. 6, 2019) (prohibiting discrimination against a person based on "sex" and "pregnancy"); Resolution of the Women in Law Section Supporting the New York State Equal Rights Amendment (S.1268) (Sept. 24, 2021) (prohibiting discrimination against a person based on "sex" and "pregnancy and pregnancy outcomes", among other protected categories)).

[6] https://www.nysenate.gov/legislation/bills/2021/s51002.

[7] *See* New York State Bar Association's Women in Law Section Issues Statement on the Supreme Court's Decision in Dobbs Overturning Roe v. Wade, n.4, https://nysba.org/new-york-state-bar-associations-women-in-law-section-issues-statement-on-the-supreme-courts-decision-in-dobbs-overturning-roe-v-wade/.

policy. For this reason, it is critical that NYSBA adopt a policy supporting reproductive health care, including abortion, and reproductive autonomy.

As lawyers we are sworn to uphold the law. As leaders of the state bar, we are duty bound to raise our voices and advocate when individuals, including our members, are not treated equally under the law. Recently, the President of NYSBA, Sherry Levin Wallach, Esq., spoke of the importance of the need to act:

> It is more important than ever that we seize every opportunity to work together. In light of the *Dobbs* decision, I believe that we have an obligation to act. As a leader for women and for equal rights for all, this section has a vital role to play. We must see this as the opportunity it is, we are in the right place at the right time. Because it's not just reproductive rights, but all our rights that are in jeopardy.[8]

The Women in Law Section urges NYSBA to adopt WILS' Report and Resolution Supporting Reproductive Health-Care Rights and Reproductive Autonomy and the current New York State ERA, so that we can maintain these important existing NYS health-care laws and preserve our right to reproductive health care and reproductive autonomy. This includes:

(i) recognition of the rights of individuals to access legal reproductive health care, including abortion;

(ii) support for amendments to the NYS Public Health Law, Education Law, and Penal Law, as enacted in NYS by the signing of S.240/A.21 in 2019;[9]

(iii) support for N.Y. Public Health Law Article 25-A as enacted in 2019;[10]

(iv) support for the June 13, 2022, Legislative Package as enacted by New York State[11] and support for the policies and intent of the legislative package enacted (*see* Exhibit A for summaries of the June 13, 2022 Laws);

(v) support for S.51002[12] of 2022, the NYS Equal Rights Amendment (ERA), as passed by the New York State Senate and Assembly, and as policy the proposal codified

[8] https://nysba.org/dobbs-decision-presents-wide-ranging-ramifications-for-womens-rights/.

[9] https://www.nysenate.gov/legislation/bills/2019/s240.

[10] https://www.nysenate.gov/legislation/laws/PBH/A25-A.

[11] *See* n.4, *supra*.

[12] *See* https://www.nysenate.gov/legislation/bills/2021/s51002.

in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection;

(vi) support, as a federal legislative priority, for passage of the Women's Health Protection Act of 2022[13] and support for the policies and intent of this bill; and

(vii) opposition to laws that would ban abortion nationwide and/or diminish the current protections under New York law.

II. NYSBA SHOULD SUPPORT REPRODUCTIVE HEALTH CARE RIGHTS INCLUDING THE RIGHT TO CHOOSE ABORTION

When the Supreme Court issued its decision in *Dobbs,* WILS drafted a statement in opposition and, in doing so, learned that NYSBA does not have any policy regarding reproductive health-care rights, including abortion rights. As a result, WILS has prepared this report and the accompanying resolution asking NYSBA to adopt a policy supporting reproductive health-care rights.

A. Many Bar and Medical Associations Support Reproductive Health-Care Rights

Bar associations across the country, including the American Bar Association[14] (ABA), the National Association of Women Lawyers[15] (NAWL), the Women's Bar Association of the State of New York[16] (WBASNY), New York County Lawyers Association[17] (NYCLA) and the NY City Bar Association[18] expressed their opposition to the *Dobbs* decision and their support for reproductive health care and abortion rights. Associations of medical professionals, including the American Medical Association[19] (AMA), the American College of Obstetricians and Gynecologists (ACOG), the American Academy of Pediatrics, and the American Academy of

[13] *See* https://www.congress.gov/bill/117th-congress/house-bill/8296 (emphasis added).

[14] https://www.abajournal.com/web/article/aba-stands-up-for-abortion-same-sex-marriage-and-contraceptive-rights; *see also* https://www.americanbar.org/news/abanews/aba-news-archives/2022/08/aba-reaffirms-support-reproductive-rights/.

[15] https://www.nawl.org/page/reproductive-justice.

[16] https://rcwba.org/wbasny-supports-a-womans-right-to-make-her-own-reproductive-healthcare-decisions-and-strongly-opposes-the-leaked-united-states-supreme-courts-draft-decision-in-the-dobbs-v-jackson-w/.

[17] https://www.nycla.org/pdf/NYCLA%20Statement%20on%20SCOTUS%20Ruling%20re%20Dobbs%20(1).pdf.

[18] https://www.nycbar.org/media-listing/media/detail/supreme-courts-overruling-of-roe-and-casey.

[19] https://www.ama-assn.org/about/leadership/dobbs-ruling-assault-reproductive-health-safe-medical-practice.

Family Physicians, also issued statements opposing the *Dobbs* decision and supporting abortion rights.[20] As reported in the news,

> The American College of Obstetricians and Gynecologists' position on abortion is that it should be legal and available to patients with healthy pregnancies up to fetal viability (when the fetus has a chance of surviving outside of the uterus). While it's generally understood to occur around 23 weeks, fetal viability is ultimately a "medical determination," according to the ACOG, and it may vary pregnancy to pregnancy.[21]

The various positions of the ABA, NAWL, WBASNY, ACOG, AMA, American Academy of Pediatrics, and American Academy of Family Physicians include: (i) abortion is health care; (ii) abortion bans pose an existential threat to the health, safety, and well-being of women, children, all child-bearing persons, and their families; and (iii) abortion bans are inequitable and perpetuate inequities.[22]

As we said in our own WILS statement in reaction to the *Dobbs* ruling,

> The majority's decision . . . intentionally disregards the importance of women's autonomy over their lives, physical selves, and well-being. It takes away from women and all childbearing persons the right to make decisions about their own bodies, reproductive freedom, and healthcare. It subverts women's status as equal citizens under the law and the right to privacy and liberty under the 14th Amendment.[23]

B. NYS Has Supported Abortion Rights for Over 50 Years

In New York State, abortion has been legal since 1970. New York expanded abortion rights in 2019.[24] In June of this year, in response to the leaked draft decision in *Dobbs*, NYS enacted legislation, including the June 13, 2022 Legislative Package, to expand abortion access within the

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[20] *See, e.g.,* https://www.cnet.com/health/medical/the-medical-community-says-abortion-access-is-health-care-heres-why/; *see also* https://www.aap.org/en/news-room/news-releases/aap/2022/aap-statement-on-supreme-court-decision-in-dobbs-v.-jackson-womens-health-organization/.

[21] *Id*.

[22] *See* n. 14, 15, 16, 19 and 20.

[23] *See* https://nysba.org/new-york-state-bar-associations-women-in-law-section-issues-statement-on-the-supreme-courts-decision-in-dobbs-overturning-roe-v-wade/.

[24] *See* https://www.nysenate.gov/legislation/bills/2019/s240; https://www.nysenate.gov/legislation/laws/PBH/A25-A.

State of New York, to help protect persons who travel here for abortion services, and to protect health-care providers who provide abortion services in the State.

As set forth above, NYS has introduced several ERA proposals. Following *Dobbs*, the NYS ERA proposal was modified once more to explicitly include a person's "reproductive healthcare and autonomy" as a protected classification. To avoid any confusion, the bill's sponsors made clear what this means in their supporting memorandum:

> It is not possible to achieve sex equality while prosecutors and state agencies single out pregnant people for punishment because of their pregnancy, the outcomes of their pregnancies and their reproductive healthcare decision making. *And because the right to abortion is central to a pregnant person's equality, this amendment clarifies that any action that discriminates against a person based on their pregnancy, pregnancy outcome, reproductive healthcare, or reproductive autonomy is a sex-based classification.* This is critical given the Supreme Court's recission of the constitutional right to abortion care. As one protected pregnancy outcome, abortion care is a fundamental right that is integral to a person's reproductive autonomy. *Indeed, reproductive autonomy is the power to decide and control one's own contraceptive use, pregnancy, and childbearing. For example, people with reproductive autonomy can control whether and when to become pregnant, whether and when to use contraception, which method to use, whether and when to continue a pregnancy, and decisions in childbirth.* And this is consistent with our state's long history of protecting bodily autonomy long enshrined in our common law, as established in 1914 with Justice Cardozo's famous articulation of the doctrine in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130 (1914) that every human being of adult years and sound mind has a right to determine what shall be done with his own body. The State shall further not use its police power or power of the purse to burden, limit, or favor any type of reproductive decision making at the expense of other outcomes, and, as consistent with section 17 of this article, shall guarantee rights and access to reproductive healthcare services.[25]

On July 1, 2022, the New York Legislature passed this version of the ERA to the NYS Constitution, which would add "reproductive rights and autonomy" as a protected category.[26] As noted above, the ERA will be on the State legislative agenda again in 2023 and, assuming it is passed again, will go to a referendum, presumably in 2024.

Elsewhere in the United States, however, some states began to enact or trigger abortion bans. Within weeks, in some instances days, after the Court issued the *Dobbs* decision, ten states enacted laws banning almost all abortions, four states enacted laws banning abortion after six weeks, and

[25] Sponsor Memo, https://www.nysenate.gov/legislation/bills/2021/S51002 (emphasis added).

[26] https://www.nysenate.gov/legislation/bills/2021/S51002.

additional bans have been enacted or are about to be triggered.[27] Some states make no exceptions for victims of rape or incest.[28] The status of abortion in each state is constantly changing.[29]

WILS urges NYSBA to adopt as policy and legislative proposal Senate Bill S51002,[30] the ERA to the NYS Constitution that was passed by the State's Senate and Assembly on July 1, 2022, and as policy the proposal codified in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection.

C. Abortion Is Health Care

Abortion bans cannot stop tragic medical complications and violent criminal behavior. Soon after the first abortion bans went into effect, we began to read reports of their dreadful effects on women and children across the United States.

- In Ohio, a ten-year-old rape victim had to travel to Indiana for an abortion (before Indiana imposed its own abortion ban).[31]
- In Tennessee, doctors canceled an abortion while the patient was in the procedure room, despite acknowledging that the fetus was not viable, forcing her to travel to Georgia to terminate her pregnancy.[32]
- In Louisiana, a woman carrying a fetus that was missing part of its skull and would not survive, was denied an abortion in her home state.[33]
- In Texas and Wisconsin, women carrying non-viable fetuses were forced to wait until they showed signs of life-threatening infections before doctors would terminate the pregnancies.[34]

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[27] *See* https://www.cnn.com/2022/08/25/politics/abortion-access-trigger-laws-idaho-tennessee-texas/index.html (published Aug. 25, 2022).

[28] *See* https://www.chicagotribune.com/nation-world/ct-aud-nw-abortion-conservatives-supreme-court-20220506-zdfjswn4cveora32emjhu3m4x4-story.html (published May 6, 2022).

[29] *See* https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/.

[30] *See* https://www.nysenate.gov/legislation/bills/2021/s51002.

[31] *See* https://www.cnn.com/2022/07/14/us/indiana-ag-ohio-rape-victim/index.html (published July 15, 2022); *see also* https://www.cincinnati.com/story/news/2022/09/27/affidavits-2-more-raped-minors-were-denied-ohio-abortions/69520380007/.

[32] https://www.nytimes.com/2022/08/01/us/abortion-journey-crossing-states.html.

[33] https://news.yahoo.com/louisiana-mother-said-she-denied-003726187.html (published Aug. 16, 2022).

[34] https://www.nbcnews.com/health/health-news/abortion-laws-texas-wisconsin-forcing-pregnant-women-wait-care-rcna41678 (published Aug. 8, 2022).

- Patients of child-bearing age who are suffering from painful and often debilitating rheumatoid arthritis have been denied prescriptions for essential medications because they may cause abortions.[35]
- In states that prevent pregnant women from getting a divorce, pregnant women could not free themselves of abusive spouses.[36]

These types of patients were denied or are being denied basic health care. Before *Dobbs*, treating physicians could have recommended and performed abortions, if appropriate, for victims of incest and rape, or where the abortion was in the best interest of the physical and mental health of the patient.

But as states have been imposing abortion bans and restrictions, medical professionals and facilities are now refusing to perform abortions or are delaying them until later than otherwise medically advisable.

As health care is delayed, the dangers to a pregnant person increase.[37] A procedure that should be done as soon as the problem is diagnosed is postponed for days or weeks, as doctors are forced by law to wait for the worst outcomes. Care is often delayed even for persons with the financial means and ability to travel to other states for abortions, because it takes time to schedule appointments in other states, schedule time off from their jobs, arrange care for children or other family members at home, and, for some, raise funds needed for the costs of travel, hotel stays, and medical care.

Abortion bans are also causing medical professionals and facilities to refuse to perform necessary procedures to end ectopic pregnancies.[38] According to medical professionals, an ectopic pregnancy is not viable, and is a life-threatening condition that requires emergency treatment. An ectopic pregnancy is also a serious risk to the pregnant person. Yet, due to the repressive laws imposed by certain state abortion bans, doctors in those states are forced to wait until their patients

[35] https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/; https://www.reuters.com/world/us/state-abortion-bans-prevent-women-getting-essential-medication-2022-07-14/.

[36] https://www.austinchronicle.com/news/2022-08-05/texans-cant-divorce-while-pregnant-can-use-ivf-for-now/; https://www.msn.com/en-us/news/us/women-in-missouri-cant-get-a-divorce-while-pregnant-many-fear-what-this-means-post-roe/ar-AAZMpIB.

[37] *See, e.g.* n. 33.

[38] https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy (an ectopic pregnancy is "a pregnancy that happens outside of the uterus.… This is a life-threatening condition. *An ectopic pregnancy is not a pregnancy that can be carried to term* (till birth) and can be dangerous for the mother if not treated right away.") (emphasis added).

exhibit life-threatening symptoms before they can provide the care needed to end those pregnancies.[39]

Medical professionals in states with abortion bans are delaying or refusing to perform procedures that would be standard medical care for women and childbearing persons who have miscarriages.[40]

And medical professionals face grave concerns over what might be permissible in treating pregnant persons with cancer, when treatments can unintentionally end pregnancies.[41]

Forcing minors to carry a pregnancy to term is especially cruel and is profoundly unacceptable in cases of rape and incest. A forced pregnancy effectively means ending the minor's childhood. For example, in August 2022, "a Florida court of appeal upheld a decision stating a 16-year-old could not get an abortion because she lacked the maturity to make a decision, even after the parentless minor said she was not ready to have the child and was still in school."[42] In some cases, children who are pregnant leave school due to the shame and burdens of the pregnancy. Others may leave school to start working in order to pay for the costs of medical care and childcare, while still being a child themselves. Either way, the loss of educational opportunities will affect their lifetime earnings and potential. Further, some pregnant minors will be forced into marriage, which often means victims are forced to marry their rapist and will be vulnerable to further victimization by sexual assault, abuse and domestic violence.[43]

The right to reproductive healthcare and autonomy includes more than the right to an abortion. Abortion bans are also causing medical professionals and pharmacies to stop prescribing or dispensing medications to persons of child-bearing age with serious health conditions such as cancer and rheumatoid arthritis, because the medications may cause abortions.[44]

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[39] https://www.wired.com/story/the-fall-of-roe-makes-complex-pregnancies-even-riskier/ (published Aug, 8, 2022).

[40] https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html (published July 17, 2022).

[41] https://www.bloomberg.com/news/articles/2022-06-24/overturning-roe-can-impact-therapy-for-cancer-miscarriage (published June 24, 2022); https://abcnews.go.com/Health/pregnant-women-cancer-doctors-fear-abortion-bans-death/story?id=85948248 (published July 19, 2022).

[42] *See* "Florida court says teen isn't mature enough to get an abortion." The teen, identified only as Jane Doe 22-B, has no parents. https://apple.news/AdFRONuIkQbq_WA3ZgBxLhQ (published on August 16, 2022).

[43] *See* "Unintended Pregnancy and Its Adverse Social and Economic Consequences on Health System: A Narrative Review Article," at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4449999/ and "Economic burden of unintended pregnancy in the United States," https://www.rtihs.org/publications/economic-burden-unintended-pregnancy-united-states.

[44] *See* https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/ (published Aug. 8, 2022); https://www.reuters.com/world/us/state-abortion-bans-prevent-women-getting-essential-medication-2022-07-14/.

The right to reproductive health care and autonomy also includes the rights to access contraceptives and fertility treatments, which are rights that could be placed at risk by any restriction or ban on abortion. There are grave concerns that laws that ban abortion at the moment of conception could deprive persons of the ability to build a family using in vitro fertilization (IVF).[45] IVF helps many people start their families, including couples who are infertile, and "people who have cancer or have other reasons that they want to preserve their fertility for the future," as well as "same-sex couples, transgender patients, and patients with a wide range of health challenges, such as uterine abnormalities and recurrent pregnancy loss... However, if new laws specify that embryos are protected from the time of fertilization, then that could create a significant problem for patients."[46]

D. Abortion Bans Place Medical Professionals at Risk

Medical professionals are acutely aware that the potential repercussions for violating state abortion bans are harsh: they could face criminal and/or financial penalties, lose their licenses to practice medicine and jeopardize their professional reputation. For example, the Indiana doctor who treated the 10-year-old rape victim from Ohio was investigated by the Indiana's Attorney General's office, even though the procedure was legal in Indiana at the time of the treatment.[47] Even where abortion bans have exceptions for the life of the mother, "doctors say that what constitutes imminent death has remained vague under the laws, which could put pregnant patients in grave danger."[48]

Health-care providers know when abortions are medically necessary. Yet in some states, doctors are told to consult with their attorneys for clarity.[49] Physicians know when to recommend ending a pregnancy before the patient becomes severely ill, or is at risk of bleeding to death, losing organ function, permanently damaging reproductive health, or worse. But due to vague and draconian laws, doctors are sending pregnant persons home to wait until they are at imminent risk of death before they are willing to perform abortions, if ever.

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[45] *See* https://www.medpagetoday.com/special-reports/exclusives/100028 (In the IVF process, embryos "that have not progressed to a state that is normal" before implantation are typically discarded, and there may be additional embryos with chromosomal abnormalities "that are discarded or donated to research. Providers are able to determine which fertilized eggs are likely to go on to a pregnancy and which are not.").

[46] *Id.*

[47] https://www.theguardian.com/us-news/2022/jul/27/indiana-investigates-abortion-doctor-10-year-old-rape-victim.

[48] https://www.nbcnews.com/health/health-news/abortion-laws-texas-wisconsin-forcing-pregnant-women-wait-care-rcna41678.

[49] https://www.wwno.org/news/2022-07-28/louisiana-doctors-confused-about-abortion-law-advised-by-state-board-to-consult-with-lawyer.

E. Abortion Bans Exacerbate Inequity and Inequality

Abortion bans will not end abortions. They did not do so prior to 1973 and they will not do so today. Persons who need an abortion for medical reasons or other reproductive health reasons will find a way. Some will choose medication abortions, at least while such methods are legal. Persons who cannot afford or obtain medication abortions may attempt dangerous methods such as counterfeit medications, herbal supplements, and even, horribly, the methods used before *Roe*: hangers or knitting needles. Others may travel to states where abortion is accessible.[50]

Not everyone has the means or support system to make the trip to the nearest state where abortion is accessible. Some persons cannot take time away from their jobs without losing pay or risking getting fired. Some are caring for children or other family members at home and will need to find caregivers to take care of their families during their absence. Some do not have a relative or friend who can accompany them to care for them after the procedure. Some do not have the financial means to pay for gas, carfare, flights, hotels, medical care, post-surgical care, and other costs of out-of-state abortions. Abortions later in pregnancy may require two trips to the medical provider. This means that all these issues – taking time off, finding caregivers, travel, and medical costs – are likely to be more burdensome. And, where anesthesia or other sedatives are involved, hospitals and clinics are unlikely to proceed unless the patient has arranged for someone to pick them up and care for them afterward.

Persons with means and a support network are more likely to be able to travel to states where abortions are accessible. But this may be difficult, if not impossible, for others. Women without the means or support to obtain reproductive health care may be forced to carry their pregnancies to term or forced to find other, potentially dangerous, methods to terminate their pregnancies. Abortion bans thus exacerbate inequity and inequality, and deny women and all child-bearing persons equal protection under the law.

Those most impacted by abortion bans are those already impacted by lack of access to health care. They also face poverty and issues of bias in the health-care system.[51] A 2018 study by the American Journal of Public Health reached this conclusion: "[w]omen denied an abortion were more likely than were women who received an abortion to experience economic hardship and insecurity lasting years."[52] In other words, the cycle of poverty is perpetuated.

We live in a nation where there is no safety net for families. We have no universal health care, no universal childcare, and no nationwide paid family or medical leave. Millions of women and their

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[50] https://www.msn.com/en-us/travel/news/it-is-ridiculous-its-a-lot-texas-women-describe-traveling-to-new-mexico-for-abortions/ar-AA116ADC (published Aug. 25, 2022).

[51] https://abcnews.go.com/Health/abortion-restrictions-disproportionately-impact-people-color/story?id=84467809; https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes.

[52] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5803812/.

partners have relied upon *Roe* and *Casey* for family and life planning and for health care decisions.[53]

Forced pregnancies can have negative consequences not only for the person forced to carry the pregnancy to term, but also for their family members. They may lose income during any time that the pregnant family member must take unpaid leave for medical care, pregnancy-related conditions, childbirth, and recovery. They may be pushed into poverty, or further into poverty, with the addition of another child in the family. They may not have the funds to pay for the costs of prenatal care, childbirth, and other pregnancy-related medical conditions, especially if the pregnancy causes the mother to suffer severe or life-threatening medical conditions. And, in the worst-case scenario, the mother could die.

And make no mistake, abortion bans are a matter of economic and health justice that disproportionately impact people of color.

> While maternal mortality has increased among all races of U.S. women over the past 20 years, recent CDC data shows that U.S. Black women are three times more likely to "die from a pregnancy-related cause" than their White counterparts. Studies show that even when Black and White women have similar incomes, prenatal care and other health indicators, Black women have a higher risk of pregnancy-related death.[54]

With ectopic pregnancies ranking as the fifth highest cause of maternal death for Black women, the delays in care caused by abortion bans as noted above will undoubtedly increase the risk of death for Black women.[55] With higher rates of pregnancy complications, increased difficulties in accessing contraception, issues of bias in receiving health care and lower rates of insurance coverage, the likely outcome is that Black women, along with many women of color including Latinx and Indigenous women, as well as women and all child-bearing persons who are experiencing poverty, will be most directly and negatively impacted by losing access to abortion as a reproductive health option.

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[53] https://nysba.org/new-york-state-bar-associations-women-in-law-section-issues-statement-on-the-supreme-courts-decision-in-dobbs-overturning-roe-v-wade/.

[54] https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/; *see* https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm.

[55] *Id.*; *see* https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2021.306375.

F. Abortion Bans Violate Religious Freedoms

Abortion bans also violate persons' freedom of religion.[56] There are many religions that permit abortions for reasons that are not permitted by many state abortion laws, including the physical and mental health of the mother. Each pregnant person should have the option to follow their own religion and spiritual beliefs and consult with religious or spiritual leaders of their choosing when deciding whether to abort a pregnancy. An abortion ban, by making the decision for everyone regardless of their personal religious and spiritual beliefs, deprives persons of their religious freedoms.[57]

G. Abortion Must Be Kept Legal and Safe

Pregnancy is dangerous, and there are many medical reasons why abortion may be the best option for the health and well-being of the pregnant person. There is no one list that could account for all the scenarios in which abortion is the safer choice.

As the ACOG said in 2017:

> Induced abortion is an essential component of women's health care. Like all medical matters, decisions regarding abortion should be made by patients in consultation with their healthcare providers and without undue interference by outside parties. Like all patients, women obtaining abortions are entitled to privacy, dignity, respect, and support.
>
> Many factors influence or necessitate a woman's decision to have an abortion. They include but are not limited to, contraceptive failure, barriers to contraceptive use and access, rape, incest, intimate partner violence, fetal anomalies, illness during pregnancy, and exposure to teratogenic medications.
>
> Pregnancy complications, including placental abruption, bleeding from placenta previa, preeclampsia or eclampsia, and cardiac or

[56] https://verdict.justia.com/2022/06/29/the-roadmap-for-pregnant-girls-and-women-to-assert-their-religious-liberty-to-invalidate-abortion-bans; https://www.nbcnews.com/news/us-news/religions-support-abortion-rights-leaders-are-speaking-rcna27194.

[57] *See, e.g.,* https://religionnews.com/2022/10/07/3-jewish-women-file-suit-against-kentucky-abortion-bans-on-religious-grounds/; https://www.azmirror.com/2022/08/25/jewish-congregations-mount-legal-challenges-to-state-abortion-bans/; *see also Jane Doe No. 1 v. Attorney General of Indiana,* 2022 WL 5237133, at *3-9 (S.D. Ind. Sept. 26, 2022) (Indiana fetal disposition law, requiring healthcare facilities to bury or cremate fetal tissue and prohibiting them from incinerating the tissue as medical waste, violates the Free Exercise clause because it burdens plaintiffs' sincerely held religious and moral beliefs of treating aborted fetuses as medical waste).

> renal conditions, may be so severe that abortion is the only measure to preserve a woman's health or save her life.[58]

Moreover, as detailed above, abortion bans threaten the ability of persons to access life-saving medications, to make reproductive health choices involving contraception and in vitro fertilization, and to exercise their religious freedom.

As a result, we cannot support policies or laws that ban abortions even if they provide for exceptions (which some state abortion bans do not) in cases of rape, incest, fetal non-viability, or serious and life-threating health conditions of the mother. Rather, each pregnant person should have the right to assess their own situation and needs, the right to choose to consult with their own medical provider, religious advisor, and/or family member, and the right to choose whether to continue or terminate a pregnancy.

Laws that prohibit abortion after 6 weeks, or even until 15 weeks of pregnancy, are not the answer. Significantly, these laws often start the count as of the pregnant person's last menstrual cycle, which is before conception.[59] Six weeks later, a woman may be prohibited from having an abortion before she even knows that she is pregnant.[60] At 15 weeks, a woman may know that she is pregnant but not have had the opportunity to seek prenatal care to evaluate her own health and the health of the fetus. She may not have had the time to take whatever steps she needs to decide whether to continue with the pregnancy. She or the fetus may not yet have developed medical complications that would make continuing with the pregnancy a danger to her own health or lead to a determination that the fetus is not viable. Persons with forced pregnancies often cannot, or do not, obtain prenatal care, thus endangering their own health and that of the child. And women who travel for abortions may have those procedures later in their pregnancies, increasing any health risks.

For these reasons, we believe that New York's law is the best model to protect reproductive rights and health-care providers. The Reproductive Health Act of 2019 removed abortion from the criminal code and broadened abortion rights.[61] New York law permits abortion up to and including 24 weeks of pregnancy (the estimated time of fetal viability). After 24 weeks, pregnant persons can still have access to health care, including an abortion, if the patient's health or pregnancy is at risk.[62]

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[58] https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare.

[59] https://flo.health/pregnancy/week-by-week/gestational-age.

[60] https://www.npr.org/2021/09/01/1033171800/texas-abortion-ban-supreme-court-.

[61] https://www.nysenate.gov/legislation/bills/2019/s240; https://www.nysenate.gov/legislation/laws/PBH/A25-A.

[62] https://www.ny.gov/programs/abortion-new-york-state-know-your-rights; https://ag.ny.gov/sites/default/files/abortion-laws-english.pdf.

H. We Cannot Take Our Reproductive Rights for Granted

We cannot discount the significant chance that, even in New York, our rights may be in jeopardy. The *Dobbs* decision, by removing the federal Constitutional protection for abortion, cleared the path to a potential national abortion ban. Such a ban could pre-empt the laws of our State and other states that protect abortion rights, overruling the choice of the people.[63] Anti-abortion politicians in Congress have made clear their interest in enacting such a law, were they to control Congress. Pro-choice leaders in Congress recognized this risk when they brought to a vote a law that would have codified *Roe* nationwide.[64] Our State Legislature responded to *Dobbs* when it voted in favor of amending the NYS Constitution to add protected categories including protection for reproductive health care and autonomy.[65]

The risks to our reproductive rights and health-care rights are too great to sit on the sidelines. New York must adopt the ERA to the State Constitution to add "reproductive rights and autonomy" as a protected category. In addition, we must vigorously support a national law protecting reproductive health-care rights, and strenuously oppose any national law banning abortion.

To achieve these goals, it is imperative that the New York State Bar Association engage its advocacy and lobbying efforts on behalf of the ERA and federal reproductive health-care rights, including abortion rights, and reproductive autonomy.

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[63] As we recently saw in Kansas, when the people are asked to vote for or against abortion rights, they overwhelmingly choose to protect abortion rights. *See* https://news.yahoo.com/kansas-abortion-protections-results-constitutional-amendment-024132082.html (published Aug, 2, 2022).

Polls show that a majority of Americans support a woman's right to choose, including in states where abortion has been strictly curtailed. *See, e.g.*, https://news.yahoo.com/cbs-news-poll-americans-react-130011112.html (published June 26, 2022); https://www.houstonpublicmedia.org/articles/news/health-science/2022/05/04/424672/poll-shows-majority-of-texas-voters-would-oppose-overturning-roe-v-wade/ (published May 4, 2022).

[64] https://www.congress.gov/bill/117th-congress/house-bill/8296.

[65] https://www.nysenate.gov/legislation/bills/2021/s51002.

III. CONCLUSION

For the foregoing reasons, WILS strongly urges NYSBA to adopt WILS' Report and Resolution Supporting Reproductive Health-Care Rights and Reproductive Autonomy, including Abortion Rights, and the current New York State Equal Rights Amendment (ERA), so that we can maintain these important existing NYS health-care laws and preserve our right to reproductive health care and reproductive autonomy. This includes:

(i) recognizing the rights of individuals to access legal reproductive health care, including abortion;

(ii) support for amendments to the NYS Public Health Law, Education Law, and Penal Law, as enacted in NYS by the signing of S.240/A.21 in 2019;

(iii) support for N.Y. Public Health Law Article 25-A as enacted in 2019;

(iv) support for the June 13, 2022, Legislative Package as enacted by New York State and support for the policies and intent of the legislative package enacted (*see* Exhibit A for summaries of the June 13, 2022 Laws);

(v) support for S.51002 of 2022, the NYS Equal Rights Amendment (ERA), as passed by the New York State Senate and Assembly, and as policy the proposal codified in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection;

(vi) support for passage of the Women's Health Protection Act of 2022 and for the policies and intent of this bill;

(vii) opposition to laws that would ban abortion nationwide and/or diminish the current protections under New York law; and

(viii) authorization for the officers of the Association to take such other and further action as may be necessary to implement this resolution.

Submitted by:

NYSBA Women in Law Section
October 24, 2022

Exhibit A

JUNE 13, 2022 | Albany, NY

Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All

REPRODUCTIVE HEALTH (/KEYWORDS/REPRODUCTIVE-HEALTH) LEGISLATION (/KEYWORDS/LEGISLATION) WOMEN (/KEYWORDS/WOMEN)

Comprehensive Six-Bill Package Protects Both Patients and Providers in Anticipation of Final Decision by Supreme Court on Dobbs v. Jackson

S.9039A/A.10094A Establishes a Cause of Action for Unlawful Interference with Protected Rights

S.9077A/A.10372A Relates to Legal Protection for Abortion Service Providers

S.9079B/A.9687B Prohibits Misconduct Charges Against Healthcare Practitioners for Providing Reproductive Health Services to Patients Who Reside in States Where Such Services Are Illegal

S.9080B/A.9718B Prohibits Medical Malpractice Insurance Companies from Taking Adverse Action Against a Reproductive Healthcare Provider Who Provides Legal Care

S.9384A/A.9818A Includes Abortion Providers and Patients in the Address Confidentiality Program

S.470/A.5499 Authorizes a Study to Examine Unmet Health and Resource Needs and Impact of Limited Service Pregnancy Centers

Governor Kathy Hochul today signed a nation-leading legislative package to immediately protect the rights of patients and empower reproductive healthcare providers in anticipation of a final decision by the Supreme Court on abortion access. The legislation takes specific actions to address a variety of legal concerns unleashed by the Supreme Court's leaked opinion on Dobbs v. Jackson, which would overturn the landmark decision of Roe v. Wade on the eve of its 50th anniversary. Governor Hochul signed the bills at the historic Great Hall of Cooper Union, while flanked by Senate Majority Leader Andrea Stewart-Cousins, Speaker Carl Heastie, key partners in the state legislature, as well as abortion and reproductive healthcare providers and advocates.

"Reproductive rights are human rights, and today we are signing landmark legislation to further protect them and all who wish to access them in New York State. The women of New York will never be subjected to government mandated pregnancies. Not here. Not now. Not ever," **Governor Hochul said.** "Today, we are taking action to protect our service providers from the retaliatory actions of anti-abortion states and ensure that New York will always be a safe harbor for those seeking reproductive healthcare. New York has always been a beacon for those yearning to be free. And I want the world to hear — loud and clear — that will not change."

https://www.youtube.com/embed/wx6EXENuvL8

AUDIO

PHOTOS

"New York refuses to sit back and allow the Supreme Court to reverse years of progress by taking away a woman's right to make choices about her own body," **said Lieutenant Governor Antonio Delgado.** "We will provide a safe haven for women in New York with this nation leading package of legislation signed into law today which protects a patient's rights and empowers reproductive healthcare providers. New York will never stop fighting to make sure that women who are seeking safe, accessible abortion services receive them."

Majority Leader Andrea Stewart Cousins said, "The leaked Supreme Court opinion to overturn Roe v. Wade sent shockwaves throughout the nation. Taking away the right to safe and legal abortion care will harm women's health and relegate women to second-class citizens with no right to bodily autonomy. Since gaining the Senate Majority in 2019, the Democratic Majority has been actively working to safeguard the reproductive rights of New Yorkers, and we will once again lead the way to guarantee reproductive rights and protect New York women from harmful policies implemented around the country. Thank you to Governor Hochul, Speaker Heastie, and all of my members in the Democratic Conference for ensuring our rights remain safe."

Assembly Speaker Carl Heastie said, "Reproductive health care decisions should be made between a patient and their doctor. The bills being signed into law today will ensure that the medical professionals that provide these critical and lifesaving practices are protected from retaliation by states that are restricting those rights. Thank you to Governor Hochul, Senate Majority Leader Stewart-Cousins and my Assembly Majority colleagues for working together to get this done. We will keep fighting to protect women's bodily autonomy, their right to make their own health care decisions, and the doctors and nurses and everyone that ensures that women have access to reproductive healthcare."

State Health Commissioner Dr. Mary T. Bassett said, “New York has done much to enshrine abortion rights into law, and for that I am grateful and proud. Safe abortions protect our medical and physical well-being, and provide us with the choice of autonomy and intervention, but are also filtered through the inequities of our society and this will be particularly true among Black, Brown, and Indigenous people as these new barriers will mean less access for communities of color and those who are low income further entrenching long standing inequities. Today’s bill signings further preserve those rights, strengthen those protections, and provide access to services that would otherwise be denied, and so I want to thank Governor Hochul, Leader Stewart-Cousins and Speaker Heastie for their leadership and efforts to make certain New York remains a beacon of hope, a safe harbor, a sanctuary for all.”

Legislation S.9039A/A.10094A establishes a cause of action for unlawful interference with protected rights. This will allow individuals to bring a claim against someone who has sued them or brought charges against them for facilitating, aiding, or obtaining reproductive health or endocrine care services in accordance with New York State Law.

Legislation S.9077A/A.10372A aims to provide certain legal protections for abortion service providers, those who assist someone else in obtaining an abortion, or individuals who self-

manage an abortion. This bill provides those protections by creating a statutory exception for the extradition of abortion-related offenses, prohibiting courts from cooperating with out-of-state civil and criminal cases that stem from abortions that took place legally within their borders, and providing judicial protections by prohibiting law enforcement from cooperating with anti-abortion states' investigations regarding abortions that look place legally.

> ***The women of New York will never be subjected to government mandated pregnancies. Not here. Not now. Not ever.***
>
> Governor Kathy Hochul

Legislation S.9079B/A.9687B prohibits professional misconduct charges against healthcare practitioners on the basis that such healthcare practitioner, acting within their scope of practice, performed, recommended or provided reproductive healthcare services for a patient who resides in a state where such services are illegal.

Legislation S.9080B/A.9718B prohibits medical malpractice insurance companies from taking any adverse action against an abortion or reproductive healthcare provider who performs an abortion or provides reproductive healthcare that is legal in the state of New York on someone who is from out of state.

Legislation S.9384A/A.9818A allows reproductive healthcare services providers, employees, volunteers, patients, or immediate family members of reproductive healthcare services providers to enroll in the State's address confidentiality program to protect themselves from threats.

Legislation S.470/A.5499 directs the New York State Department of Health commissioner to conduct a study and issue a report examining the unmet health and resource needs facing pregnant people in New York and the impact of limited service pregnancy centers. This ensures New Yorkers have access to information and resources necessary to have healthy pregnancies with positive outcomes.

State Senator Alessandra Biaggi said, "Today, New York is one step closer to becoming a true sanctuary state for those seeking healthcare no matter the circumstances. While other states are looking to criminalize abortion and gender-affirming care, New York continues to reaffirm its commitment to reproductive justice and serve as a model for the rest of our nation. The FIRE HATE Act will protect individuals who come to New York to receive an abortion or gender-affirming care— ensuring that everyone, regardless of background, always has the right to care. I'd like to thank Governor Hochul, Assemblymember Burdick, and my Legislative colleagues for

prioritizing this crucial legislation and ensuring that New York remains a safe haven for reproductive care."

State Senator Cordell Cleare said, "As Chair of the Senate Women's Issues Committee—I am very proud that today, our State takes a number of proactive steps to ensure that we protect the fundamental human rights of health, safety and choice as it relates to reproductive healthcare. These collective measures, including my Address Confidentiality Bill (S.9384-A) will work together to ensure that New York is a safe haven for equity, justice and equal rights and outcomes for all."

State Senator Michelle Hinchey said, "With the Supreme Court poised to overturn Roe and swift action by states across our country to criminalize reproductive healthcare, we are fighting to ensure that no matter what happens at the federal level, New York is a safe place for everyone providing and seeking an abortion here. I'm proud to sponsor a bill as part of this critical package of legislation that protects medical practitioners from retaliatory actions if they perform an abortion for a patient whose home state has made this vital healthcare illegal. I will always fight to protect and expand access to reproductive healthcare, and I'm proud to stand with my colleagues and Governor Hochul today to affirm that every person in need of an abortion can find one safely here in New York."

State Senator Brad Holyman said, "Today, New York leads the nation protecting bodily autonomy. Reproductive rights are under attack nationwide, but the bills Governor Hochul is signing today ensure New Yorkers will have the right to make the best choice for them and their families and our state will become a safe haven for women across the country to exercise that right. I am proud my Limited Services Pregnancy Center bill with Assemblymember Glick, S.470, has been enacted as part of this package. The bill directs the Commissioner of Health to study and report on unlicensed, often misleading facilities that offer pregnancy-related services but don't provide or refer for comprehensive reproductive healthcare. These centers are often more interested in pushing their own agenda than doing what's best for their patient's health, and they waste precious time for pregnant people who may consider abortion. This bill will help identify the unmet health and resource needs facing pregnant people in New York and the impact of these centers on their ability to obtain, accurate, non-coercive healthcare information and timely access to services."

State Senator Anna Kaplan said, "With the fate of Roe hanging in the balance, red states across the country are salivating at the opportunity to restrict women's access to reproductive healthcare, with many declaring war on doctors who provide reproductive health services. Here in New York, we're standing up for the rights of women to access reproductive healthcare, and we're standing up for the rights of doctors to provide the services women rely on - no matter what happens at the Supreme Court. My bill will protect doctors from frivolous attacks by shameless anti-choice laws in red states, and it will ensure that women subjected to draconian restrictions on their bodies can find safe haven in New York and access health services here

without endangering the medical professionals treating them. I'm proud to be the sponsor of this legislation along with my partner Assemblymember Linda Rosenthal, and I'm grateful for the leadership of Governor Kathy Hochul in ensuring that reproductive rights in New York are protected no matter what."

State Senator Liz Krueger said, "Every day we get closer to a radical extremist Supreme Court issuing their final opinion overturning 50 years of protection for abortion rights. It is now more vital than ever that we use every available option to counter this assault on Americans' rights to make the most personal decisions about their own bodies and to access necessary reproductive healthcare services. New York must ensure abortion access both to New Yorkers and refugees from other states who are being denied their basic rights, and we must offer all the protection we can for New York healthcare providers against abhorrent and regressive laws in other states that seek to punish them for providing legal abortion services in New York. The bills that Governor Hochul is signing today are an important first step in making New York a safe haven for those in need of abortion care, those who help them, and those who provide that much-needed care."

Assemblymember Chris Burdick said, "New York must stand together with those who come here from states that are hostile to basic healthcare rights. The FIRE HATE Act will protect them from those attempting to intimidate and harass them with litigation in their home states. Plain and simple, it is an infringement on the rights established in New York law to interfere with anyone attempting to come here for reproductive or gender affirming healthcare. The FIRE HATE Act, which establishes a cause of action for interfering with these protected rights, is critical to people who simply want control over their own bodies."

Assemblymember Deborah Glick said, "I'm glad to see Governor Hochul sign my bill with Senator Hoylman, A.5499/S.470, which directs the NYS Department of Health to conduct a study on the prevalence of limited service pregnancy centers, sometimes called 'fake clinics.' The decision to keep or terminate a pregnancy may be the most challenging decision a person makes in their life. Pregnant New Yorkers must be able to make this complex and deeply personal decision with the help of a licensed medical professional, and free from fear, intimidation, and misinformation. The information collected under this legislation will help us to ensure pregnant New Yorkers have access to quality healthcare. I'm so grateful to stand with my colleagues in NYS government who are committed to protecting people's basic human rights."

Assemblymember Charles Lavine said, "Abortion service providers are being unjustly targeted by anti-abortion laws around the country, but in New York we are working to protect them. By providing legal protections for providers, we can rest assured that safe, regulated abortions are accessible for those who need them. Thank you to my partners in the Senate and Assembly for making this law, and to Governor Hochul for working tirelessly to solidify the rights of New Yorkers."

Assemblymember Amy Paulin said, "Healthcare workers, including those providing abortion care, should not be subjected to harassment, intimidation, stalking or violence, which is happening with increasing frequency nationwide. We need to protect and empower our reproductive healthcare workers who are working hard to give women the healthcare they need. Allowing them the ability to protect their identity in the face of today's local and national anti-abortion campaigns gives these workers a critical tool for their safety and security. I thank Governor Hochul for signing this bill into law, which gives protection for our reproductive healthcare workers so they can continue to give the best care possible to the women of New York State."

Assemblymember Linda Rosenthal said, "Across the country, a woman's right to safe and legal abortion is under attack. As some states work to block access to safe abortions and deprive women of the right to make their own healthcare decisions, and in anticipation of the US Supreme Court's decision striking down Roe, New York State is pushing back and doing everything in our power to safeguard abortion access. I thank Governor Hochul for signing this reproductive rights package into law, including my two bills to protect healthcare providers against professional discipline measures and adverse actions affecting medical malpractice insurance. With these laws, New York's healthcare professionals can continue to provide abortion and reproductive healthcare services for all women, including the many who will be traveling here from out of state, without fear of consequence, no matter the decision that is ultimately handed down by the Supreme Court."

Contact the Governor's Press Office

Contact us by phone:

Albany: (518) 474 - 8418
New York City: (212) 681 - 4640

Contact us by email:

Press.Office@exec.ny.gov

Translations

Arabic Translation الترجمة إلى العربية	DOWNLOAD

Exhibit B

Revised 9.24.21

Resolution of the Women in Law Section Supporting the New York State Proposed Equal Rights Amendment (S1268)

The Women in Law Section of the New York State Bar Association resolves to support the passage of New York State Equal Rights Amendment legislation (S1268) ("ERA"), which proposes adding the following new Section 19 to Article I of the New York State Constitution:

> **Section 1. Resolved (if the Assembly concur), That article 1 of the constitution be amended by adding a new section 19 to read as follows:**
>
> > **§ 19. (a) No person shall be denied equal rights under the laws of this state or any subdivision thereof based on that person's race, color, ethnicity, national origin, disability, or sex including pregnancy and pregnancy outcomes, sexual orientation, gender identity, and gender expression.**
> >
> > **(b) No government entity, nor any entity acting in concert with or on behalf of the government, nor any entity in its provision of public accommodations, employment, or personnel practices shall discriminate against any person in either intent or effect based on the characteristics listed in subdivision (a) of this section.**
> >
> > **c) No government entity, nor any entity acting in concert with or on behalf of the government, nor any entity in the provision of public accommodations, employment, or personnel practices shall discriminate against any person based on that person's religion. In interpreting this section, the courts shall analyze claims of religious discrimination under the same analysis and standards applied to claims under section three of this article.**
> >
> > **(d) Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to remedy or ameliorate demonstrated past discrimination on the basis of a characteristic listed in this section.**
> >
> > **(e) This section shall be self-executing. The legislature may expand upon the entitlement to equal rights and freedom from discrimination hereby secured.**

The Executive Committee of the Women in Law Section voted unanimously, with one abstention, in favor of supporting the ERA on May 11, 2021. By adding "sex" to the State Constitution as a protected category, we ensure that "sex" will be given the same status as race, color, creed and religion. The broad language of S1268 also protects gender, sexual orientation and pregnancy, in addition to other important characteristics.

It is time to enact an ERA to the New York Constitution.

The Women in Law Section hereby requests that the Executive Committee of the New York State Bar Association adopt the ERA as policy and support passage of S1268. Neither the United States Constitution nor the New York Constitution guarantee women equal rights to men. Indeed, the only right specifically

granted women in the U.S. Constitution is the right to vote. At the state level, New York is not among the 22 states that already have some form of explicit protection against sex discrimination in their state constitutions.

The primary purpose of an Equal Rights Amendment is to embed equality for women as a fundamental right in the Constitution. Today, under both federal and New York law, the right of women to be free of discrimination exists only through a patchwork of laws and legal interpretation, subject to the vagaries of jurists and lawmakers. The ERA would codify sex discrimination as legally coequal with discrimination based on race, color, creed, and religion. It would provide women with better footing in cases of discrimination in public education, divorce, child custody, domestic violence and sexual assault cases. It would strengthen employment laws relating to the prevention of sex discrimination in hiring, firing, promotion and benefits, and discrimination against pregnant women. It would also help bring about equal pay for equal work, which is important because, despite decades of Title VII, women, including women attorneys, are still not paid the same amount for work as their male counterparts. Without these fundamental protections written into in the New York State Constitution, women will continue to not be fully recognized as equal citizens in this country and state. Our State and Federal Constitutions should proclaim that it is women's fundamental right to be treated equal to men under the law.

New York's legislature has tried to pass an equal rights amendment multiple times, but the bill stalled each time. To add an amendment to the state constitution, the Legislature must pass the amendment twice in two consecutive legislative sessions. This year is the second year of the current 2-year legislative session. If the ERA is passed in 2022, it would allow the amendment to receive second passage in the 2023-2024 legislative session. If the ERA does not pass both chambers of the Legislature this year, the earliest the amendment could then be passed would be 2025, four years from now. Therefore, it is critical we support the ERA this year to avoid delaying this necessary amendment by another 2 years.

Accordingly, the Women in Law Section **SUPPORTS** passage of the ERA, S1268.

Revised ~~Draft~~ 9.~~24~~9.21

Resolution of the Women in Law Section Supporting the New York State Proposed Equal Rights Amendment (S1268)

The Women in Law Section of the New York State Bar Association resolves to support the passage of ~~proposed~~ New York State Equal Rights Amendment legislation (S1268) ("ERA"), which proposes adding ~~[insert description of~~ the following new ~~S~~section 19 to Article I of the New York State Constitution~~]~~:

Section 1. Resolved (if the Assembly concur), That article 1 of the constitution be amended by adding a new section 19 to read as follows:

§ 19. (a) No person shall be denied equal rights under the laws of this state or any subdivision thereof based on ~~that~~ person's race, color, ethnicity, national origin, disability, or sex including pregnancy and pregnancy outcomes, sexual orientation, gender identity, and gender expression.

(b) No government entity, nor any entity acting in concert with or on behalf of the government, nor any entity in its provision of public accommodations, employment, or personnel practices shall discriminate against any person in either intent or effect based on the characteristics listed in subdivision (a) of this section.

c) No government entity, nor any entity acting in concert with or on behalf of the government, nor any entity in the provision of public accommodations, employment, or personnel practices shall discriminate against any person based on that person's religion. In interpreting this section, the courts shall analyze claims of religious discrimination under the same analysis and standards applied to claims under section three of this article.

(d) Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to remedy or ameliorate demonstrated past discrimination on the basis of a characteristic listed in this section.

(e) This section shall be self-executing. The legislature may expand upon the entitlement to equal rights and freedom from discrimination hereby secured.

The Executive Committee of the Women in Law Section voted unanimously, with one abstention, in favor of supporting the ERA on May 11, 2021. By adding "sex"~~"~~ to the State Constitution as a protected category, we ensure that "sex" will be given the same status as race, color, creed and religion, and ~~-~~the broad language of S1268 also protects gender, sexual orientation and pregnancy, in addition to other important characteristics.

~~Now is the~~It is time to enact an ERA to the New York Constitution.

The Women in Law Section hereby requests that the Executive Committee of the New York State Bar Association adopt the ERA as policy and support passage of S1268. Neither the United States Constitution nor the New York Constitution guarantee women equal rights to men. Indeed, the only right specifically granted women in the U.S. Constitution is the right to vote. At the state level, New York is not among the 22 states that already have some form of explicit protection against sex discrimination in their state

Commented [PKW1]: I would take this out. Otherwise you have proposed and proposes 10 words apart.

Commented [CCA2]: Removed references to A760 to avoid confusion, since the Assembly version was amended in a manner we oppose.

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constitutions. ~~New York's legislature has worked to pass an equal rights amendment multiple times, but the bill stalled each time.~~

The primary purpose of an Equal Rights Amendment is to embed ~~in the Constitution~~ equality for women as a fundamental right in the Constitution. Today, under both federal and ~~in~~ New York law, the right of women to be free of discrimination exists only through a patchwork of laws and legal interpretation, subject to the vagaries of jurists and lawmakers. The ERA would ~~make~~ codify sex discrimination as legally coequal with discrimination based on race, color, creed, and religion. It would provide women with better footing~~standing~~ in cases of discrimination in public education, divorce, child custody, domestic violence and sexual assault cases. It would strengthen employment laws relating to the prevention of sex discrimination in hiring, firing, promotion and benefits, and ~~help prevent policies that~~ discriminati~~on~~e against pregnant women. It would also help bring about equal pay for equal work, which is important because, despite decades of Title VII, women, including women attorneys, are still not paid the same amount for work as their male counterparts. Without these fundamental protections written into in the New York State Constitution, ~~providing women with constitutional equality,~~ women will continue to be not ~~be~~ fully recognized as equal citizens in this country and state. Our State and Federal Constitutions should proclaim that it is women's fundamental right to be treated equal to men under the law.

New York's legislature has tried~~worked~~ to pass an equal rights amendment multiple times, but the bill ~~has~~ stalled each time. To add an amendment to the state constitution, the Legislature must pass the~~a constitutional~~ amendment twice in two consecutive legislative sessions. This year is the second year of the current 2-year legislative session. If the ERA is passed in 2022, it would allow the amendment to receive second passage in the 2023-2024 legislative session. If the ERA does not pass both chambers of the Legislature this year, the earliest the amendment could then be passed would be ~~realized is~~ 2025, four years from now. Therefore, it is critical we support the ERA this year to avoid delaying this necessary amendment by another 2 years.

~~The primary purpose of an Equal Rights Amendment is to embed in the Constitution equality for women as a fundamental right. Today, under both federal law and in New York, the right of women to be free of discrimination exists only through a patchwork of laws and legal interpretation, subject to the vagaries of jurists and lawmakers. The ERA would make sex discrimination legally coequal with discrimination based on race, color, creed, and religion. It would provide women with better standing in cases of discrimination in public education, divorce, child custody, domestic violence and sexual assault. It would strengthen employment laws relating to the prevention of sex discrimination in hiring, firing, promotion and benefits; and help prevent policies that discriminate against pregnant women.; and It would also help bring about equal pay for equal work, which is important because, despite decades of Title VII, women, including women attorneys, are still not paid the same amount for work as their male counterparts. Without these fundamental protections in the New York State Constitution providing women with constitutional equality, women will not be fully recognized as equal citizens in this country and state. Our State and Federal Constitutions should proclaim that it is women's fundamental right to be treated equal to men under the law.~~

Accordingly, the Women in Law Section **SUPPORTS** passage of the ERA, S1268.

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Support

NYSBA #11 February 26, 2019

S. 3249	By:	Sen. Salazar
A. 271	By:	M of A Seawright
	Senate Committee:	Judiciary
	Assembly Committee:	Judiciary
S. 517	By:	Sen. Kruegar
A. 272	By:	M of A Seawright
	Senate Committee:	Judiciary
	Assembly Committee:	Judiciary

THE NEW YORK STATE BAR ASSOCIATION
SUPPORTS PASSAGE OF THE STATE EQUAL RIGHTS AMENDMENT

The New York State Bar Association (NYSBA), through its Women in Law Section (WILS), supports the passage of A.271/S.3249, which proposes adding "sex" to the list of enumerated protected classes in Section 11 of Article 1 of the New York State Constitution:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, sex, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.[1]

By adding "sex" to the State Constitution as a protected category, we ensure that "sex" will be given the same status as race, color, creed, and religion.

Governor Andrew Cuomo included first passage of the state ERA in his 2019 budget proposal, providing that, "[e]nactment of this bill is necessary to implement the FY2020 Executive Budget as agency operations for the Division of Human Rights are dependent upon a clear definition of protected classes."[2]

Additionally, NYSBA supports A.272/S.517,[3] which is broader in scope than A.271/S.3249 and would prohibit denial of equality of rights on the basis of "race, color, creed,

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[1] A271 is sponsored by Seawright. See https://nyassembly.gov/leg/?default_fld=&bn=A00271&Summary=Y&Actions=Y&Memo=Y

[2] FY2020 New York State Executive Budget, Equal Rights Amendment, Concurrent Resolution, Memorandum in Support, Governor Andrew Cuomo.

[3] A272/S517 is a concurrent resolution of the Assembly and Senate. A272 is sponsored by Assemblyperson Seawright. See https://www.nysenate.gov/legislation/bills/2019/A272. S517 is sponsored by Senator Krueger and co-sponsored by Senators Bailey, Benjamin,

religion, national origin, citizenship, marital status, age, gender, sex, pregnancy, sexual orientation, gender identity or expression, military status, physical or mental disability, other immutable or ascriptive characteristic, or like grounds for discrimination."[4]

While the narrower A.271/S.3249 would protect women, the broader A.272/S.517 would also protect gender, sexual orientation and pregnancy, in addition to other important characteristics.

Now is the time to enact an Equal Rights Amendment to the New York Constitution.

Background

Neither the U.S. Constitution nor the New York Constitution guarantee women equal rights to men. About the U.S. Constitution, Justice Antonin Scalia famously once remarked:

> Certainly the [U.S.] Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.[5]

In fact, the only right specifically guaranteed to women in the U.S. Constitution is in the 19th Amendment's right to vote.

Since the birth of the women's movement in Seneca Falls, New York, in 1848, when Elizabeth Cady Stanton introduced the "Declaration of Sentiments" by proclaiming, "All men and women are created equal," women have been fighting for constitutional equal rights.[6] Following passage of the 19th Amendment, Alice Paul, lawyer and suffragist, proposed a federal equal rights amendment in 1923 to ensure constitutional equality for all. That amendment read, "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction."[7]

In the 1970s, Congress finally passed the Equal Rights for Women Amendment ("ERA"). To become a constitutional Amendment, two-thirds – or 38 – states needed to ratify the ERA within a Congressionally-imposed seven-year timeframe. New York ratified the ERA on May 18, 1972. By 1977, 35 states had ratified the Amendment, but opposition to the ERA had heated up.[8] New York's own Representative Elizabeth Holtzman proposed a strategy to extend the deadline, but even with the new 1982 deadline, the ERA was still three states short of

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Biaggi, Breslin, Carlucci, Comrie, Hoylman, Jackson, Kaplan, Mayer, Metzger, Parker, Persaud, Sanders, Sepulveda, Serrano and Stavisky. https://www.nysenate.gov/legislation/bills/2019/s517

4 A272/S517, Jan. 9, 2019.

5 Interview with Justice Scalia, *California Lawyer (*January 2011).

6 See Elizabeth Cady Stanton, "Declaration of Sentiments," https://www.historyisaweapon.com/defcon1/stantonsent.html .

7 J. Neuwirth & M. Tormey, "The Time is Now for the Equal Rights Amendment" Women@Forbes (Mar. 7, 2018, 1:44PM).

8 "The Proposed Equal Rights Amendment: Contemporary Ratification Issues," Congressional Research Services, R42979, p.15 (July 2018). Five states (Idaho, Kentucky, Nebraska, Tennessee and South Dakota) have since attempted to rescind their support (in Kentucky, the Acting Governor vetoed the rescinding resolution), but most legal scholars do not think states have the legal capacity to rescind. The states which have ratified the ERA are Hawaii (March 22, 1972), New Hampshire (March 23, 1972), Delaware (March 23, 1972), Iowa (March 24, 1972), *Idaho* (March 24, 1972), Kansas (March 28, 1972), Nebraska (March 29, 1972), Texas (March 30, 1972), Tennessee (April 4, 1972), Alaska (April 5, 1972), Rhode Island (April 14, 1972), New Jersey (April 17, 1972), Colorado (April 21, 1972), West Virginia (April 22, 1972), Wisconsin (April 26, 1972), New York (May 18, 1972), Michigan (May 22, 1972), Maryland (May 26, 1972), Massachusetts (June 21, 1972), Kentucky (June 26, 1972), Pennsylvania (September 27, 1972), California (November 13, 1972), Wyoming (January 26, 1973), South Dakota (February 5, 1973), Oregon (February 8, 1973), Minnesota (February 8, 1973), New Mexico (February 28, 1973), Vermont (March 1, 1973), Connecticut (March 15, 1973), Washington (March 22, 1973), Maine (January 18, 1974), Montana (January 25, 1974), Ohio (February 7, 1974), North Dakota (March 19, 1975), Indiana (January 18, 1977), Nevada (March 22, 2017), Illinois (May 30, 2018).

ratification. More recently, in 2017, Nevada, and in 2018, Illinois, also ratified the ERA,[9] leaving ratification short by one state.[10] Although polls indicate that up to 94% of Americans "support enshrining this right to equality in the highest law of the land,"[11] the hurdles to amending the U.S. Constitution— 1) lifting of the 1982 deadline and ratification by one more state ("single state strategy"), or 2) a vote by two-thirds of the House of Representatives and the Senate or a constitutional convention called for by two-thirds of the state legislatures ("fresh start strategy")—have been and remain daunting.

At the state level, New York is not among the 22 states that already have some form of explicit protection against sex discrimination in their state constitutions.[12] New York's legislature has worked to pass an equal rights amendment multiple times, most recently in 2018, but the bill stalled in the Senate Judiciary Committee.[13] With a one-party Governor and Legislature currently in session, a New York ERA has a stronger likelihood of passing this legislative session.

Equality Under the Law

The primary purpose of an Equal Rights Amendment is to embed in the Constitution equality for women as a fundamental right.[14] Today, under federal law and in New York, the right of women to be free of discrimination exists only through a patchwork of laws and legal interpretation, subject to fickle jurists and lawmakers. The Fifth and Fourteenth Amendments to the U.S. Constitution promise equal protection under the law and have been extended to sex discrimination by courts, but are limited to federal or state governmental action (respectively), and classifications based on sex are subject only to intermediate scrutiny (i.e., law must be substantially related to achieving an important government objective).[15] Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating based on the sex of a job applicant or employee, leaving out hundreds of thousands of small business employees.[16] Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs, but only when the educational program is the recipient of federal funding.[17]

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9 Id.

10 It is unclear whether post-1982 ratifications are constitutionally acceptable or if a "fresh start" of the process will be required by Congress. Congress members Jackie Speier and Carolyn Maloney have introduced legislation to lift the 1982 ratification deadline. ERA Coalition Press Release (Jan. 29, 2019). See also Congressional Research Service, supra, p. 16. Rep. Maloney (D-N.Y.) has reintroduced a federal ERA at least 11 times without traction. In support of an ERA she states, "U.S. women lack the tools they need to demand equal treatment in a variety of areas, including pensions, taxes and law enforcement. Women lag behind men in clout positions, including board and executive positions. The wage gap has been virtually unchanged for more than 20 years." (citations omitted).

11 Women@Forbes, supra.

12 See Wharton, Linda J., "State Equal Rights Amendments Revisited: Evaluating their Effectiveness in Advancing Protection Against Sex Discrimination," (2005) 36 Rutgers LJ 1201-1292 at 1202, and the Appendix setting out the text of state equal rights amendments. See also Linton, P., "State Equal Rights Amendments: Making a Difference or Making a Statement?" (1997) 70 Temple L.R. 907-944 at 908.

13 See https://www.nysenate.gov/legislation/bills/2017/a7990.

14 See S. Russell-Kraft, "Why the Equal Rights Amendment Still Matters," The New Republic, (June 14, 2018) ("[T]he ERA is not just a relic of second-wave feminism. It is still necessary today, as equality for women is not enshrined in the Constitution; it is merely a matter of legal interpretation.").

15 "Sex Discrimination and the United States Supreme Court: Developments in the Law," Congressional Research Service, RL30253, p.1 (Dec. 2015).

16 Id., p.6-17. Hundreds of thousands probably underrepresents that actual number by hundreds of thousands. See "Small Business Profile," U.S. Small Business Admin, Office of Advocacy (2018) (estimating that of the 56.8 million people employed by small business, 17.3 percent, or 9.8 million, are employed by businesses with 19 or fewer employees).

17 Id., p.17-20.

Protections against discrimination on the basis of sex are more robust in New York. The New York State Human Rights Law (codified as N.Y. Executive Law, Article 15) prohibits discrimination in the workplace (as of March 2018, by employers of any size), in housing and in places of public accommodation.[18] The Equal Pay Act prohibits employers from paying employees of one sex less than employees of the opposite sex for work at the same establishment where the work requires equal skill, effort and responsibility, and is performed under similar working conditions.[19] In March 2018, the New York Legislature bolstered the sexual harassment laws by adopting a revision of state laws to ban most nondisclosure agreements and mandatory arbitration of sexual harassment complaints, and requiring government employees found responsible for committing harassment to refund taxpayer-financed payouts.[20]

New York City has expanded protections for women even further, banning prospective employers from inquiring about salary history, strengthening anti-harassment laws, and prohibiting gender-based discrimination in the workplace regardless of the employer's size.

Analysis

Even today, however, with fresh legislation aimed at expanding protections for women, not all women in New York State or City who are discriminated against are protected. The protections that exist are piecemeal, not comprehensive, and, importantly, not unassailable by future courts and lawmakers.

NYSBA agrees with the reasoning in the sponsor's justification in support of A.272/S.517, which underscores key points why this ERA Bill should be enacted. They include:

- Equal rights for women are noticeably absent from the list of protected categories.
- Most New Yorkers assume incorrectly that the State Constitution already provides equal rights to women.
- We can build on the momentum from the New York State Assembly's 2017 passage of a resolution with bi-partisan support and without negative votes calling on Congress to pass the federal ERA.

Further, and critically, a state ERA would help to prevent rollback of women's rights in education, health, employment, and domestic violence at the federal level from affecting women in New York.[21] It would clarify the legal status of sex discrimination for the courts and make sex discrimination legally coequal with discrimination based on race, color, creed, and religion. It would provide women with better standing in cases of discrimination in public education, divorce, child custody, domestic violence and sexual assault.[22] It would give weight to employment laws relating to the prevention of sex discrimination in hiring, firing, promotions and benefits.[23] It would help prevent policies that discriminate against pregnant women. It

18 NY Exec. Law Sec. 290 *et seq.*

19 NY Labor Law Sec. 194 *et seq.*

20 V. Wang, "New York Rewrites Harassment Laws, but Some Say the Changes Fall Short," NY Times (March 30, 2018).

21 "Need for Equal Rights Amendment for Women Highlighted This Women's History Month" Queens Gazette (Mar. 14, 2018).

22 Id.

23 Id.

would help bring about equal pay for equal work, important because, despite decades of Title VII,[24] women, including women attorneys, are still not paid the same amount for the same work as their male counterparts.[25]

In short, we need these fundamental protections enshrined in an Equal Rights Amendment to the State Constitution. As long as women do not have constitutional equality, women will not be fully recognized as equal citizens in this country and state – despite the fact that we are expected to contribute our fair share to government and public services through local, state, and federal taxes.

If either the narrower Bill A.271/S.3249 or the broader A.272/S.517 Bill pass in New York State, not only will the women of our state be better protected than they are now, it may also encourage more states to support constitutional protection of women from discrimination and aid in the passage of a federal ERA.

The time is ripe to pass a state ERA.

Conclusion

Our State and Federal Constitutions should proclaim that it is women's fundamental right to be treated equal to men under the law. Despite this state's ratification of the federal ERA in 1972, the New York Constitution still does not protect women from sex discrimination as it protects against discrimination based on race, color, creed and religion. If either the narrower A271 or broader A.272/S.517 New York State Bill passes, a state ERA would give women much better protection from discrimination than they have now in a wider variety of contexts, provide a backbone to legal disputes regarding equal pay, and assist victims of sex discrimination to address the harm.

Based on the foregoing, the NYSBA **SUPPORTS** passage of A.271/S.3249, which proposes adding "sex" to the list of enumerated protected classes in Section 11 of Article 1 of the New York State Constitution or, in the alternative, the broader A.272/S.517, which provides protection to more categories of persons.

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[24] See e.g., Cnty. Of Washington v. Gunther, 452 U.S. 161 (1981); Am. Fed'n of State, Cnty., & Municipal Emps., v. Washington, 770 F2d. 1401, 1407 (9th Cir. 1985), cited by MacKinnon, Catherine A. at 575, n.28.

[25] Data released by Governor Andrew M. Cuomo's office on January 10, 2017, shows that women in New York State earn 87 cents on the dollar in comparison to what men earn. Women of color, compared to white men, fare worse: African-American women earn on average 69 cents on the dollar and Latinas 58 cents on the dollar. A study in August 2016, commissioned by New York City public advocate Letitia James adds that women in New York State earn some $20 billion less than men annually. In New York City, women are paid nearly $6 billion less than men annually.

This Report was Adopted as Policy by NYSBA Executive Committee in February 2019.

To: NYSBA Executive Committee

From: Women in Law Section

Date: February 6, 2019

Re: Updated Memorandum in Support of Equal Rights Amendment to the New York State Constitution, Bills A271 and A272/S517

The Women in Law Section (WILS) supports the passage of A271 (Seawright), which proposes adding "sex" to the list of enumerated protected classes in Section 11 of Article 1 of the New York State Constitution:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, sex, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.[1]

By adding "sex" to the State Constitution as a protected category, we ensure that "sex" will be given the same status as race, color, creed, and religion.

Governor Andrew Cuomo included first passage of the state ERA, specifically A271, in his 2019 budget proposal, providing that, "[e]nactment of this bill is necessary to implement the FY2020 Executive Budget as agency operations for the Division of Human Rights are dependent upon a clear definition of protected classes."[2]

Additionally, WILS also supports A272 (Seawright)/S517 (Krueger),[3] which is broader in scope than A271 and would prohibit denial of equality of rights on the basis of "race, color, creed, religion, national origin, citizenship, marital status, age, gender, sex, pregnancy, sexual orientation, gender identity or expression, military status, physical or mental disability, other immutable or ascriptive characteristic, or like grounds for discrimination."[4]

While the narrower A271 would protect women, the broader A272/S517 would also protect gender, sexual orientation and pregnancy, in addition to other important characteristics.

Now is the time to enact an Equal Rights Amendment to the New York Constitution.

Background

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1 A271 is sponsored by Seawright and cosponsored by Fernandez, Weprin and Otis. See https://nyassembly.gov/leg/?default_fld=&bn=A00271&Summary=Y&Actions=Y&Memo=Y

2 FY2020 New York State Executive Budget, Equal Rights Amendment, Concurrent Resolution, Memorandum in Support, Governor Andrew Cuomo.

3 A272/S517 is a concurrent resolution of the Assembly and Senate. A272 is sponsored by Assemblyperson Seawright and co-sponsored by Assemblyperson Otis. See https://www.nysenate.gov/legislation/bills/2019/A272. S517 is sponsored by Senator Krueger and co-sponsored by Senators Bailey, Benjamin, Biaggi, Breslin, Carlucci, Comrie, Hoylman, Jackson, Kaplan, Mayer, Metzger, Parker, Persaud, Sanders, Sepulveda, Serrano and Stavisky. https://www.nysenate.gov/legislation/bills/2019/s517

4 A272/S517, Jan. 9, 2019.

Neither the U.S. Constitution nor the New York Constitution guarantee women equal rights to men. About the U.S. Constitution, Justice Antonin Scalia famously once remarked:

> Certainly the [U.S.] Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.[5]

In fact, the only right specifically guaranteed to women in the U.S. Constitution is in the 19th Amendment's right to vote.

Since the birth of the women's movement in Seneca Falls, New York, in 1848, when Elizabeth Cady Stanton introduced the "Declaration of Sentiments" by proclaiming, "All men and women are created equal," women have been fighting for constitutional equal rights.[6] Following passage of the 19th Amendment, Alice Paul, lawyer and suffragist, proposed a federal equal rights amendment in 1923 to ensure constitutional equality for all. That amendment read, "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction."[7]

In the 1970s, Congress finally passed the Equal Rights for Women Amendment ("ERA"). To become a constitutional Amendment, two-thirds – or 38 – states needed to ratify the ERA within a Congressionally-imposed seven-year timeframe. New York ratified the ERA on May 18, 1972. By 1977, 35 states had ratified the Amendment, but opposition to the ERA had heated up.[8] New York's own Representative Elizabeth Holtzman proposed a strategy to extend the deadline, but even with the new 1982 deadline, the ERA was still three states short of ratification. More recently, in 2017, Nevada, and in 2018, Illinois, also ratified the ERA,[9] leaving ratification short by one state.[10] Although polls indicate that up to 94% of Americans "support enshrining this right to equality in the highest law of the land,"[11] the hurdles to amending the U.S. Constitution— 1) lifting of the 1982 deadline and ratification by one more state ("single state strategy"), or 2) a vote by two-thirds of the House of Representatives and the Senate or a constitutional convention called for by two-thirds of the state legislatures ("fresh start strategy")—have been and remain daunting.

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- We can build on the momentum from the New York State Assembly's 2017 passage of a resolution with bi-partisan support and without negative votes calling on Congress to pass the federal ERA.

Further, and critically, a state ERA would help to prevent rollback of women's rights in education, health, employment, and domestic violence at the federal level from affecting women in New York.[21] It would clarify the legal status of sex discrimination for the courts and make sex discrimination legally coequal with discrimination based on race, color, creed, and religion. It would provide women with better standing in cases of discrimination in public education, divorce, child custody, domestic violence and sexual assault.[22] It would give weight to employment laws relating to the prevention of sex discrimination in hiring, firing, promotions and benefits.[23] It would help prevent policies that discriminate against pregnant women. It would help bring about equal pay for equal work, important because, despite decades of Title VII,[24] women, including women attorneys, are still not paid the same amount for the same work as their male counterparts.[25]

In short, we need these fundamental protections enshrined in an Equal Rights Amendment to the State Constitution. As long as women do not have constitutional equality, women will not be fully recognized as equal citizens in this country and state – despite the fact that we are expected to contribute our fair share to government and public services through local, state, and federal taxes.

If either the narrower Bill A271 or the broader A272/S517 Bill pass in New York State, not only will the women of our state be better protected than they are now, it may also encourage more states to support constitutional protection of women from discrimination and aid in the passage of a federal ERA.

The time is ripe to pass a state ERA.

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21 "Need for Equal Rights Amendment for Women Highlighted This Women's History Month" Queens Gazette (Mar. 14, 2018).

22 Id.

23 Id.

24 See e.g., Cnty. Of Washington v. Gunther, 452 U.S. 161 (1981); Am. Fed'n of State, Cnty., & Municipal Emps., v. Washington, 770 F2d. 1401, 1407 (9th Cir. 1985), cited by MacKinnon, Catherine A. at 575, n.28.

25 Data released by Governor Andrew M. Cuomo's office on January 10, 2017, shows that women in New York State earn 87 cents on the dollar in comparison to what men earn. Women of color, compared to white men, fare worse: African-American women earn on average 69 cents on the dollar and Latinas 58 cents on the dollar. A study in August 2016, commissioned by New York City public advocate Letitia James adds that women in New York State earn some $20 billion less than men annually. In New York City, women are paid nearly $6 billion less than men annually.

Conclusion

Our State and Federal Constitutions should proclaim that it is women's fundamental right to be treated equal to men under the law. Despite this state's ratification of the federal ERA in 1972, the New York Constitution still does not protect women from sex discrimination as it protects against discrimination based on race, color, creed and religion. If either the narrower A271 or broader A272/S517 New York State Bill passes, a state ERA would give women much better protection from discrimination than they have now in a wider variety of contexts, provide a backbone to legal disputes regarding equal pay, and assist victims of sex discrimination to address the harm.

Further, we recommend that the State Bar Association should also take this opportunity to establish policy that the U.S. Constitution should ensure that no person shall because of sex be subjected to any discrimination.

For the foregoing reasons, the Women in Law Section recommends the support and passage of A271, which proposes adding "sex" to the list of enumerated protected classes in Section 11 of Article 1 of the New York State Constitution or, in the alternative, the broader A272/S517, which provides protection to more categories of persons.

Submitted by:

Susan L. Harper, Chair
Women in Law Section

Denise Bricker & Sarah Simpson
Co-Chairs, Legislative Affairs Committee
Women in Law Section

Date: February 6, 2019

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

October 14, 2022

TO: Women in Law Section

FROM: President's Committee on Access to Justice

RE: Support of the Resolution of the Women in Law Section

The President's Committee on Access to Justice has reviewed the resolution and report of the Women in Law Section supporting abortion rights and the New York State Equal Rights Amendment. The Committee fully supports the resolution to the extent that the recommendations contained therein would advance access to justice.

From:	Brandon Lee Wolff
To:	reportsgroup
Subject:	YLS
Date:	Tuesday, October 4, 2022 10:35:09 PM

The Young Lawyers Section supports the Women in Law Section resolution and report.

Sincerely,

Brandon Lee Wolff
Chair, Young Lawyers Section

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

LABOR AND EMPLOYMENT LAW SECTION

TO: NYSBA Reports Group

FROM: NYSBA Labor & Employment Law Section

DATE: October 19, 2022

The Labor & Employment Law Section supports the Women in Law Section in its request of the New York State Bar Association to adopt as Association policy (1) support for the rights of individuals to access legal reproductive health care including abortion; (2) support for the laws of the State of New York that have codified the rights of individuals to access legal reproductive health care including abortion; (3) as state legislative priority, support for New York State Senate Bill S.51002, the Equal Rights Amendment to the New York State Constitution; and (4) as federal legislative priority, support for a bill such as the Women's Health Protection Act of 2022 that codifies the rights of individuals to access legal reproductive health care including abortion.
The foregoing motion was adopted unanimously at the LELS Executive Committee meeting held on September 18, 2022.

Robert L. Boreanaz,
Chair, Labor & Employment Law Section

From:	Filabi, Azish
To:	reportsgroup
Cc:	Sheryl Galler; Jay L Himes; Forgea, Carra; "diane.oconnell@ocolegal.com"; T. Andrew Brown
Subject:	Women in Law Section Resolution
Date:	Friday, October 21, 2022 12:01:17 PM

Dear Reports Group,

I'm pleased to share that at its October 12 Executive Committee meeting the NYSBA International Section Executive Committee passed a motion in support of the *Women in Law Section Report & Resolution Supporting Abortion Rights and the New York State Equal Rights Amendment*. Our delegates to the upcoming House of Delegates meeting (cc'd here) will be voting in support of this item.

My best,
Azish Filabi
Chair, International Section

Azish Filabi
Executive Director | Maguire Center for Ethics
Associate Professor & Charles Lamont Post Chair of Business Ethics
The American College of Financial Services
630 Allendale Road, Suite 400, King of Prussia, PA 19406
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The Cary M. Maguire Center for Ethics in Financial Services

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NYSBA FAMILY LAW SECTION
MEMORANDUM SUPPORTING THE REPORT OF THE WOMEN IN LAW SECTION ENTITLED "SUPPORTING ABORTION RIGHTS AND THE NEW YORK STATE EQUAL RIGHTS AMENDMENT"

October 20, 2022

WHEREAS, the Women in Law Section of the New York State Bar Association has requested the support of the Family Law Section for its report entitled "Supporting Abortion Rights and the New York State Equal Rights Amendment";

NOW, THEREFORE,

IT IS RESOLVED, that the Family Law Section of the New York State Bar Association supports the proposals set forth in the report of the Women in Law Section entitled "Supporting Abortion Rights and the New York State Equal Rights Amendment" and joins the Women in Law Section in requesting that the New York State Bar Association adopt the proposed resolution.

Memorandum prepared by: Erik Kristensen, Esq.
Chair of the Section: Joan Adams, Esq.

NYSBA COMMITTEE ON DIVERSITY, EQUITY, AND INCLUSION
MEMORANDUM SUPPORTING THE REPORT OF THE WOMEN IN LAW SECTION ENTITLED "SUPPORTING ABORTION RIGHTS AND THE NEW YORK STATE EQUAL RIGHTS AMENDMENT"

October 25, 2022

WHEREAS, the Women in Law Section of the New York State Bar Association has requested the support of the Committee on Diversity, Equity, and Inclusion for its report entitled "Supporting Abortion Rights and the New York State Equal Rights Amendment";

NOW, THEREFORE,

IT IS RESOLVED, that the Committee on Diversity, Equity, and Inclusion of the New York State Bar Association supports the proposals set forth in the report of the Women in Law Section entitled "Supporting Abortion Rights and the New York State Equal Rights Amendment" and joins the Women in Law Section in requesting that the New York State Bar Association adopt the proposed resolution.

Memorandum prepared by: Samuel W. Buchbauer, Esq.

Co-Chairs of the Committee: Nihla Sikkander, Esq.
Samuel W. Buchbauer, Esq.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #16

REQUESTED ACTION: None, as the report is informational.

Hon. Cheryl E. Chambers, vice president of The New York Bar Foundation, will update the House on the ongoing work and mission of The Foundation.

NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK, AND REMOTE MEETING
JUNE 16-17, 2022

Present: Gregory K. Arenson, Simeon H. Baum, T. Andrew Brown, David Louis Cohen, Orin J. Cohen, Sarah E. Gold, Taa R. Grays, LaMarr J. Jackson, Elena DeFio Kean, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Ronald C. Minkoff, Mark J. Moretti, Hon. James P. Murphy, Domenick Napoletano, Christopher R. Riano, Violet E. Samuels, Mirna M. Santiago, Nancy Sciocchetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Sherry Levin Wallach, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Anthony Ciolli, Donald C. Doerr, Alexandra Ferlise, Albert Feuer, Evan M. Goldberg, Jerry H. Goldfeder, Natalie Gomez-Velez, David E. Gutowski, Shawndra G. Jones, Anna Masilela, Lillian M. Moy, Leah Nowotarski, James Q. Walker

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order, and Gregory K. Arenson, Elena DeFio Kean, Michael A. Markowitz, Michael R. May, Hon. James P. Murphy, Violet E. Samuels, Kaylin L. Whittingham, and Pauline Yeung-Ha were welcomed as new members of the Executive Committee.

2. Approval of minutes of April 1, and June 1, 2022, meetings. The minutes were accepted as distributed. Judge Murphy and Ms. DeFio Kean abstained from the vote.

3. Consent Calendar
   a) Amendment to Mission Statement of Committee on Civil Practice Law and Rules

   Item 3(a) of the consent calendar was approved.

   b) Approval of Mission Statement of Task Force on the Ethics of Local Public Sector Lawyering

   The Mission Statement of Item 3(b) was amended to add "the Committee on Standards of Attorney Conduct" to the listing of bar groups with which the Task Force will engage. As amended, the creation of the Task Force and its respective mission statement was approved.

4. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported that through April 30, 2022, the Association's total revenue was $11,973,929, a decrease of approximately $888,462 from the previous year, noting the increased expenses associated with the relocation of the print shop, the April 2022 meetings of the Executive Committee and House of Delegates held in New York City, software licensing fees, and increased

health insurance premiums. Mr. Napoletano also reported on the status of the Association's investment portfolio, and reviewed larger income items including member dues, section dues, and CLE income. The report was received with thanks.

5. Report of Executive Director. Executive Director Pamela McDevitt and Associate Executive Director Gerard McAvey updated the Executive Committee with respect to the administration and operations of the Association, including logistical considerations, costs, and member preferences surrounding the scheduling of virtual and hybrid meetings, staff participation with the Strategic Planning Committee, and the status of the Bar Center. Mr. McAvey also advised on recent and planned membership initiatives including a member census, launch of an online mediator directory, a virtual career fair, outbound recruitment calls to non-members, print advertising directed at non-members, a member referral program, and a focus on member engagement with newly admitted attorneys. The report was received with thanks.

6. Report of Strategic Planning Committee. In their capacities as co-chairs of the Strategic Planning Committee, Taa R. Grays and Christopher R. Riano reported to the Executive Committee on the mandate and composition of the Strategic Planning Committee, the anticipated work of the committee, and the timeline for this work. The report was received with thanks.

7. Discussion of Executive Committee liaison responsibilities and duties of Vice Presidents. Ms. Levin Wallach reviewed the listing of Executive Committee member liaison assignments and led a discussion on liaisons' roles in facilitating communication, providing guidance on policy and procedure, and encouraging sections and committees to undertake projects. Ms. Levin Wallach reminded the members that they are *ex officio* members of their assigned groups and should abstain from all votes taken by the assigned committee or section.

   Ms. Levin Wallach asked liaisons to maintain regular contact with their groups, and, as necessary, with the respective chairs and staff liaisons, and to encourage the assigned groups to submit reports for consideration by the Executive Committee and/or House of Delegates and comment on reports submitted by other groups, and to be mindful of the need for diversity at all levels of the Association.

   Ms. Levin Wallach also reviewed the responsibilities of Vice Presidents, as set forth in the Bylaws, to promote relations with local bars, affinity bars, and members in their respective districts. She encouraged the Vice Presidents to advise the Executive Committee of local bar concerns and noted her expectation that both Executive Committee liaisons and Vice Presidents will make reports to the Executive Committee with respect to the activity within their respective districts and/or their assigned groups, or on other matters of interest or concern.

8. Report of Lawyer Assistance Committee. Committee co-chair David E. Gutowski and Stacey Whiteley, director of the Lawyer Assistance Program, reported on the mandate and ongoing work of the Lawyer Assistance Committee and Lawyer Assistance Program,

including the recently-held annual retreat in Silver Bay, the launch of a mental health counseling hotline, expansion of the Lawyers Helping Lawyers network and associated local programming, and the formal creation of the Committee on Attorney Wellbeing as a standing committee of the Association. The presenters noted the continued focus on diversity initiatives within the Program. The report was received with thanks. Mr. Gutowski then presented an award to T. Andrew Brown for his support of the Lawyer Assistance Committee and Lawyer Assistance Program during his presidency.

9. Report and recommendations of Trusts and Estates Law Section. Albert Feuer and Anna Masilela, members of the section, outlined an affirmative legislative proposal in support of the New York Equity for Surviving Spouses Act ("ESSA"), including an overview of components of the proposal which to take effect would require New York City approval. After discussion, a motion was adopted to table the proposal so that the section could address concerns raised by the New York State Teachers' Retirement System, and confer with other relevant sections of the Association, including the Elder Law and Special Needs Section, the Family Law Section, Labor and Employment Law Section, and Local and State Government Law Section, before the proposal is resubmitted for the consideration of the Executive Committee.

10. Report and recommendations of the Illinois State Bar Association seeking co-sponsorship for ABA Resolution. Mr. Lewis, on behalf of the Illinois State Bar Association, reviewed a request that the New York State Bar Association co-sponsor a resolution submitted for consideration at the August 2022 Annual Meeting of the American Bar Association in Chicago, Illinois. After discussion, a motion was adopted for the New York State Bar Association to co-sponsor the following resolution:

> RESOLVED, That the American Bar Association reaffirms the following policy, adopted July 2000:
>
> The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.

Mr. Brown abstained from the vote.

11. Report of Committee on Continuing Legal Education. Committee chair Shawndra G. Jones and senior director of CLE Katherine Suchocki updated the Executive Committee on CLE programming and revenue. Ms. Suchocki advised that the Continuing Legal Education Board had extended the exception allowing newly admitted attorney to earn Skills credits in live, non-traditional formats (i.e., CLE webinars) through December 31, 2022, and reported on pending formal action by the Continuing Legal Education Board to promulgate a new rule requiring newly admitted and experienced attorneys to complete one CLE credit in Cybersecurity, Privacy, and Data Protection per CLE reporting period. The report was received with thanks.

12. Report and recommendations of Committee on Committees. Donald C. Doerr, chair of the committee, reviewed the committee's report and recommendations with respect to the operation of thirteen committees, as well as general recommendations. After discussion, the report was acted on in three parts. First, a motion was unanimously adopted to approve recommendations 1 through 5 of the report. Second, after a motion was made to approve recommendations 7 through 16 of the report, a motion was successfully carried to amend recommendation 9 of the report to mandate that the Committee on Media Law utilize the NYSBA website and cease use of any third-party website for committee business. The main motion as to recommendations 7 through 16 was approved and the recommendations adopted as amended. Third, a motion was adopted to approve recommendation 6 of the report, that the Committee on Lawyers in Transition be merged into and become a subcommittee of the Committee on Law Practice management. Ms. Whittingham abstained from the third vote.

13. Report of President. President Levin Wallach highlighted the items contained in her written report, a copy of which is appended to these minutes. The report was received with thanks.

14. Report of Task Force on the U.S. Territories. Task Force co-chairs Natalie M. Gomez-Velez and Mirna Martinez Santiago, together with vice chair Anthony Ciolli, reported on the objectives and charge of the Task Force as the group begins its work. The report was received with thanks.

15. Report and recommendations of Task Force on Voting Rights and Democracy. Jerry H. Goldfeder, Task Force chair, outlined the recommendations contained in the report pertaining to election administration in New York State. After discussion, and a motion being made to endorse the report for favorable action by the House, a motion was made to amend two recommendations contained in the report and to add a new sixth recommendation. The motion to amend was acted on in three parts. First, a motion to amend the first recommendation to read "It should be encouraged that senior election board staff should be hired in a way consistent with best professional practices" successfully carried. Second, a motion to amend the third recommendation to delete the sentence in the paragraph that read "The United States' Carter-Baker Commission and the International Institute for Democracy and Electoral Assistance, for instance, embraced codes of conduct that would require election administrators to restrict participation in partisan political activity." successfully carried. Mr. Brown abstained from the vote on the second motion to amend. Third, a motion to amend the report to add a new sixth recommendation to read "6: Funding of the Recommendations. For any recommendation that requires funding to be implemented, the New York State Bar Association recommends that this funding be provided by New York State." successfully carried. The main motion was then approved, and the report endorsed for favorable action by the House of Delegates.

16. Reports and recommendations of Committee on Mandated Representation.

A) Affirmative Legislative Proposal – Amendments to Criminal Procedure Law §150.10

Committee chair Leah Nowotarski reviewed the committee's affirmative legislative proposal to amend Criminal Procedure Law §150.10 to require A) that appearance tickets include language advising defendants of their right to counsel, the availability of assigned counsel should defendant be unable to afford counsel, and the contact information for local criminal defense providers, and B) that the police officer or other public servant issuing the appearance ticket file a copy of the appearance ticket with the court and with local criminal defense providers. After discussion, and a motion being made to approve the proposal, a motion was successfully carried to amend the proposed language of subsection "1" of Criminal Procedure Law §150.10 to read:

> An appearance ticket is a written notice issued and subscribed by a police officer or other public servant authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue the same, directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense. ***An appearance ticket shall include on its face, printed or typewritten in a conspicuous font or manner, language advising the recipient of the right to counsel, and the right to assigned counsel if unable to afford counsel. This notice shall also include contact information for the local criminal defense provider or, in those jurisdictions with multiple providers, contact information for each provider, and the contact information for any bar association lawyer referral service that covers that county.*** A notice confirming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provisions of law as a summons or by any other name of title.
>
> [Emphasis in original].

The main motion was then approved, and the proposal adopted as amended.

B) Affirmative Legislative Proposal – Support for Bill A4558-B/S2832-B on Procedures for Issuing, Reviewing, and Challenging Orders of Protection

Committee member Alexandra Ferlise outlined the committee's proposal in support of the PromPT Stability Act, Bill A4558-B/S2832-B, which would authorize courts to hold evidentiary hearings for a temporary order of protection in certain circumstances and grants superior court judges the authority to issue a temporary order of protection when an action is pending in a local criminal court in certain circumstances. After discussion, and a motion being made to approve the proposal, a motion was successfully carried to amend the proposal to include a disclaimer that "NYSBA supports the intent and language contained in Senate Bill S2832-B and Assembly Bill A4558-B introduced in the 2021-2022 legislative session." The main motion was then approved, and the proposal adopted as amended.

17. Report and recommendations of Committee on Standards of Attorney Conduct.
In his capacity as a member of the committee, Mr. Minkoff, together with committee vice-chair James Q. Walker, reviewed the committee's proposal to add new comments to Rules

1.4 and 5.6 of the New York Rules of Professional Conduct concerning the obligations of departing lawyers and law firms to notify clients when a lawyer with primary or substantial responsibility for specific matters or clients intends to leave a law firm to join a different firm. After discussion, the report was acted on in two parts. First, a motion was adopted to endorse the recommendation on new comments to Rule 1.4 for favorable action by the House. Second, a motion was adopted to endorse the recommendations on new comments to Rule 5.6 for favorable action by the House. Ms. Whittingham abstained from the second vote.

18. Report and recommendations of Committee on Diversity, Equity, and Inclusion. In her capacity as immediate past chair of the committee, Ms. Santiago, together with committee member Lillian M. Moy, outlined the committee's recommendation to remove the sunset clauses from Bylaws provisions V.3.H. and VII.1.F.1., thereby permanently providing for the diversity delegates and diversity members-at-large positions. After discussion, a motion was made to endorse the resolution for favorable action by the House, after which a motion to amend the resolution to extend the sunset provisions for an additional ten years through May 31, 2034, failed. The main motion was then approved, with Messrs. O. Cohen and Marinaccio abstaining from the vote, and the resolution endorsed as follows:

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association reaffirms its unwavering and longstanding commitment to increase racial and ethnic diversity within its leadership ranks based upon its firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large.

FURTHER RESOLVED, that the mission of the New York State Bar Association's Committee on Diversity, Equity and Inclusion is to promote the full and equal participation of attorneys of color and other diverse attorneys in the Association and in all sectors and at every level of the legal profession.

FURTHER RESOLVED, that the Association is made stronger and more capable of implementing change through the law when its membership reflects the diversity of the individuals and communities served by the legal profession.

FURTHER RESOLVED, that the subject bylaws provisions institutes a deliberate and thoughtful process to identify and recruit diverse members whose perspectives help inform and strengthen the Association's decisions and policies.

FURTHER RESOLVED, that the increased participation of attorneys of color in leadership positions also helps foster a welcoming environment for and serves as an incentive to diverse lawyers considering membership within the Association.

FURTHER RESOLVED, that the subject bylaws provisions promote the objectives approved by the Association in its adoption of the 2020 Diversity Plan which commits the Association to require diversity as an emphasis in all leadership

nomination processes, including diversity among the decision-makers on the Nominating Committee.

RESOLVED, that consistent with these stated principles and commitments, the Association hereby approves the continuation of the bylaws provisions, without any sunset clause, to ensure that at least 12 members of the Association will be appointed by the President from underrepresented racial and ethnic groups to serve in the House of Delegates and that two members-at-large of the Executive Committee of the Association shall be selected to further ethnic and racial diversity.

19. Report of Task Force on Racism, Social Equity, and the Law. In her capacity as Task Force co-chair, Taa R. Grays, together with co-chair Lillian M. Moy, updated the Executive Committee on the Task Force's ongoing work in anticipation of submission of a final report for consideration at the November 2022 meeting of the House of Delegates. The report was received with thanks.

20. Report of Committee on Legislative Policy. Committee chair Evan M. Goldberg, together with director of policy Hilary F. Jochmans and associate director of Government Relations Cheyenne Burke, reviewed advocacy activity undertaken by the Association during the 2022 legislative session, with emphasis on the status of the Association's legislative priorities. Ms. Jochmans reported on ongoing federal activity surrounding proposed gun control legislation. The report was received with thanks.

21. Date and place of next meeting. The next meeting of the Executive Committee will take place on Friday, November 4, 2022, at the Bar Center in Albany.

22. 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
JULY 19, 2022

Present: Simeon H. Baum, T. Andrew Brown, David Louis Cohen, Orin J. Cohen, Sarah E. Gold, Taa R. Grays, LaMarr J. Jackson, Elena DeFio Kean, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Mark J. Moretti, Hon. James P. Murphy, Domenick Napoletano, Christopher R. Riano, Violet E. Samuels, Mirna M. Santiago, Nancy Sciocchetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Sherry Levin Wallach, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Anthony Ciolli, Azish Filabi, Natalie Gomez-Velez, Serhiy Hoshovsky, Scott M. Karson, Neil Weare, Gonzalo Zeballos

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order.

2. Consent Calendar
   a) Amendment to Mission Statement of Committee To Review Judicial Nominations

   The consent calendar, consisting of the item above, was unanimously approved.

3. Report and resolution of Task Force on the U.S. Territories. In her capacity as co-chair of the Task Force on the U.S. Territories, Ms. Santiago, together with co-chair Natalie Gomez-Velez, vice chair Anthony Ciolli, and Task Force member Neil Weare, reviewed a request that the New York State Bar Association, with the Virgin Islands Bar Association, co-sponsor a resolution to be submitted for consideration at the August 2022 Annual Meeting of the American Bar Association in Chicago, Illinois. After discussion, a motion was adopted to approve the following resolution:

   > WHEREAS, it is the mission of the New York State Bar Association to promote equal access to justice for all both within the State of New York and throughout the United States; and
   >
   > WHEREAS, consistent with its mission, the New York State Bar Association established the Task Force on the U.S. Territories, and vested it with the mission, among other things, to evaluate and study judicial decisions, including the Insular Cases, affecting the individual rights and liberties of the people of the U.S. Territories; and
   >
   > WHEREAS, the New York State Bar Association has established a chapter within the U.S. Virgin Islands, and executed a memorandum of understanding with the Virgin Islands Bar Association in which among other things the New York State

Bar Association and the Virgin Islands Bar Association mutually recognized the need to develop and improve understanding of the law in both of their jurisdictions, including human rights laws; and

WHEREAS, the relationship between the federal government and the five inhabited United States territories—the U.S. Virgin Islands, Puerto Rico, Guam, the Northern Mariana Islands, and American Samoa—continues to be governed by the Insular Cases, a series of early 20th century decisions in which the Supreme Court of the United States held that the United States Constitution and its Bill of Rights did not extend *ex proprio vigore* to these territories because they were "inhabited by alien races, differing from us in religion, customs, … and modes of thought", making it impossible to govern "according to Anglo-Saxon principles;" and

WHEREAS, the Insular Cases and the doctrine of territorial incorporation that they established rest on racial views and stereotypes from the era of Plessy v. Ferguson,163 U.S. 537 (1896) that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession; and

WHEREAS, sitting justices of the Supreme Court of the United States, including Justices Neil Gorsuch and Sonia Sotomayor, have called for overruling the Insular Cases in an appropriate case, with Justice Gorsuch identifying the decision of the United States Court of Appeals for Tenth Circuit in Fitisemanu v. United States,1 F.4th 862 (2021) as an appropriate vehicle to consider that issue; and

WHEREAS, a petition for writ of certiorari was filed with the Supreme Court of the United States in the Fitisemanu matter on April 27, 2022, with the respondents' brief due on or before July 29, 2022; and

WHEREAS, if no further extensions of time are granted, it is likely that the Supreme Court of the United States will consider the Fitisemanu certiorari petition at an October 2022 conference and, if certiorari is granted, issue a briefing schedule in which the petitioner's brief and any amicus curiae briefs in support of the petitioner would be due in November or December 2022; and

WHEREAS, because the next meeting of the New York State Bar Association House of Delegates will not occur until November 5, 2022, approval of the Executive Committee is needed to permit the New York State Bar Association to file an *amicus curiae* brief in support of the petitioner in the *Fitisemanu* matter;

WHEREAS, the American Bar Association House of Delegates will meet on August 8-9, 2022, and state and territorial bar associations may submit a resolution for consideration at that meeting on or before August 6, 2022; and

WHEREAS, the American Bar Association has filed *amicus curiae* briefs in support of equal rights for the people of the U.S. territories in other cases before

the Supreme Court of the United States, such as *United States v. Vaello-Madero*, but has no policy directly urging that the *Insular Cases* be overruled; and

WHEREAS, the Virgin Islands Bar Association has asked that the New York State Bar Association co-sponsor a resolution for the August 8-9, 2022 meeting of the American Bar Association House of Delegates which, if adopted, would establish policy urging the overruling of the Insular Cases and permit the American Bar Association to file an *amicus curiae* brief in the *Fitisemanu* matter if certiorari is granted; and

WHEREAS, if such a resolution is not submitted for and approved at the August 8-9, 2022, meeting, the American Bar Association will not be able to file an *amicus curiae* brief in the *Fitisemanu* matter, given that the next meeting of the American Bar Association House of Delegates would not be until February 6, 2023, well after briefing has concluded; and

WHEREAS, the New York State Bar Association Task Force on U.S. Territories has collaborated with the Virgin Islands Bar Association to draft such a resolution and report for consideration by the American Bar Association House of Delegates at its August 8-9, 2022, meeting, approved a draft resolution and report after its July 11, 2022, meeting; and

WHEREAS, because the next meeting of the New York State Bar Association House of Delegates will not occur until November 5, 2022, approval of the Executive Committee is needed to permit the New York State Bar Association to co-sponsor such a resolution with the Virgin Islands Bar Association for the August 8-9, 2022, meeting of the American Bar Association House of Delegates; and

WHEREAS, the Task Force on U.S. Territories has requested that the Executive Committee authorize the New York State Bar Association to support and work on efforts to overrule the *Insular Cases*, which may include, but are not necessarily limited to, the filing of an *amicus curiae* brief in the *Fitisemanu* matter and co-sponsor a resolution and report with the Virgin Islands Bar Association for consideration by the American Bar Association House of Delegates;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association supports efforts to overrule the *Insular Cases* and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of *amicus curiae* briefs in appropriate litigation; and it is further

RESOLVED, that the New York State Bar Association is authorized to co-sponsor with the Virgin Islands Bar Association the draft resolution and report attached as "Exhibit 1" to this resolution for consideration at the August 8-9, 2022 meeting of the American Bar Association House of Delegates; and it is further

RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution including agreeing to any changes in language or form to the draft resolution and report suggested by the American Bar Association House of Delegates Committee on Rules and Calendar or other entities represented in the American Bar Association House of Delegates.

Three members abstained from the vote.

4. Report and resolution of International Section. Scott M. Karson, co-chair of the International Section Ukraine Task Force, together with International Section chair Azish Filabi, International Section chair-elect Gonzalo Zeballos, and Serhiy Hoshovsky, co-chair of the International Section Ukraine Chapter and Ukraine Task Force, reviewed the Section's report and resolution entitled "Regarding Investigation and Prosecution of the Russian Federation and its Culpable Officials Arising from Its Illegal Military Invasion of Ukraine." After discussion, a motion was unanimously adopted to approve the following resolution:

WHEREAS, NYSBA, the nation's largest voluntary state bar association, has a long, consistent and proud tradition of defending the rule of law, both domestically and internationally; and

WHEREAS, NYSBA's defense of the rule of law has included support for the establishment of the Permanent Court for Arbitration at The Hague and the ICC; and

WHEREAS, Russia's unlawful invasion of Ukraine is a direct attack on the rule of law, in that it violates the prohibition of the use of force against the territorial integrity and political independence of another state as proscribed by Article 2(4) of the Charter of the United Nations and most fundamental peremptory norms of international law, and is contradictory to the mission of the United Nations to end war and promote peace; and

WHEREAS, the actions by Russia in launching its prolonged armed attack on Ukraine constitutes a direct violation of the 1994 Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, whereby Russia reaffirmed its obligation to refrain from the threat or use of force against the territorial integrity and political independence of Ukraine, and also agreed to refrain from any form of economic coercion designed to subordinate to its own interest the exercise by Ukraine of the rights inherent in Ukraine's sovereignty and thus to secure advantages of any kind at Ukraine's expense; and

WHEREAS, the invasion of Ukraine by Russia constitutes an "act of aggression" and, by virtue of its sustained military presence and offensive within the borders of

Ukraine, “a war of aggression” and, therefore, a “crime against peace,” all as defined in the Declaration of the United Nations General Assembly on Principles of International Law Concerning Friendly Relations and Cooperation Among States (Resolution 2625 (XXV) and the General Assembly’s Resolution 3314 (XXIX) on the Definition of Aggression; and

WHEREAS, the reported actions by Russia, including, wantonly attacking and decimating cities, towns and villages of Ukraine; in targeting civilian institutions, buildings, and property, resulting in the deaths of thousands of civilians; deporting civilians to the Russian territory, imposing Russian political control over occupied parts of Ukraine, among other acts, which if proven, would constitute war crimes and crimes against humanity committed in connection with the crime of a war of aggression, and therefore are worthy of investigation, prosecution, and upon conviction, punishment under the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; and

WHEREAS, these reported actions of Russia, while it calls into question Ukraine’s legitimacy and its inherent right to independence and sovereignty, would constitute genocide within the meaning of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, which is also a crime against international law and punishable thereunder; and

WHEREAS, Russia’s war of aggression has caused untold damage to the people and property of Ukraine, resulting in immense economic loss and privation, for which Russia has state responsibility as a matter of customary international law as most recently articulated in the Articles proposed by the International Law Commission on Responsibility of States for Internationally Wrongful Acts, for which Ukraine is entitled to reparation by Russia in the form of restitution, compensation and satisfaction; and

WHEREAS, NYSBA is encouraged that democratic nations around the world are standing together to assist Ukraine in fighting Russia’s aggression and taking appropriate legal actions to support Ukraine; and

WHEREAS, NYSBA is also encouraged that, among other organizations, the Council of Europe Parliamentary Assembly and the Parliament of the European Union have condemned Russia’s War Crimes, including the crime of aggression, committed in and against Ukraine, and have called for appropriate legal actions to support Ukraine; and

WHEREAS, NYSBA supports the United Nations General Assembly’s condemnation of the invasion of Ukraine by Russia and Russia’s alleged violations of international law; and

WHEREAS, there already exists strong legal and diplomatic precedent, supported by well settled jurisprudence, for the establishment of a justice mechanism to

investigate, indict, and prosecute the leadership of Russia and its armed forces and agents for violations of international law such as the crime of aggression, crimes against the peace, crimes against humanity, and acts constituting genocide; and

WHEREAS, the jurisdiction of the ICC over Russia for the crime of aggression is uncertain but, nevertheless, Russia's aggression against Ukraine must be fully investigated and prosecuted by the international community through some other appropriate tribunal in accordance with the rule of law; and

WHEREAS, the United Nations General Assembly, in its very first session, in the aftermath of World War II, in Resolution 3, called on member and non-member states to take all necessary measures to cause the arrest of those war criminals who have been responsible for or taken a consenting part in such crimes and to cause them to be returned to the countries where they committed their crimes "that they may be and punished according to the law of those countries"; and

WHEREAS, the United Nations General Assembly, in Resolution 3074, enunciated Principles of International Cooperation in the Detection, Arrest, Extradition & Punishment of Persons Guilty of War Crimes & Crimes Against Humanity, including that States shall cooperate with each other in the collection of information and evidence which would help to bring to trial persons against whom there is evidence that they have committed international crimes; and

WHEREAS, the United Nations General Assembly, has played a leading role in establishing judicial mechanisms and commissions to investigate and prosecute criminal violations of international law, including Resolutions 52/135 and 57/228 calling for the formation of the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, and in Resolution 63/19, endorsing the International Commission Against Impunity in Guatemala;

IT IS THEREFORE RESOLVED THAT:

NYSBA hereby deplores and condemns Russia's unlawful invasion of Ukraine, causing untold harm to the people of Ukraine; and it is further resolved that

NYSBA hereby supports any and all international and domestic efforts to investigate, prosecute, and hold Russia's armed forces and officials accountable for acts committed by Russia, its military and its agents, in the prosecution of its unlawful war of aggression; and it is further resolved that

NYSBA hereby calls upon those members of the international community with deep, actual experience in the investigation and prosecution of war crimes, to investigate, prosecute, and bring to justice Russia and its culpable officials, its military and its agents; and it is further resolved that

NYSBA calls upon the United Nations General Assembly to take action by authorizing the Secretary General of the United Nations to establish, at an appropriate time and place, such tribunals – e.g., a hybrid international war crimes tribunal involving Ukraine, similar to those established to investigate and prosecute war crimes in Sierra Leone, Rwanda, and Cambodia – as he shall deem appropriate to exercise jurisdiction and hear and determine whether Russia and its culpable officials violated international law, including but not limited to the crime of aggression against Ukraine, and hold to account those responsible.

5. Approval of Service Agreement and Property Transfer for One Elk Street. Ms. Levin Wallach reported that, pursuant to the resolution adopted by the House of Delegates on June 12, 2021, the approval of the Executive Committee was sought to authorize her as president to enter into a final agreement regarding the property transfer of One Elk Street from The New York Bar Foundation to the New York State Bar Association. After discussion, a motion was adopted to approve the following resolution:

> Whereas, on June 12, 2021, the House of Delegates adopted a resolution approving the transfer of One Elk Street from The New York Bar Foundation to the New York State Bar Association.
>
> Whereas, the Association and Foundation have concluded negotiations regarding the property at One Elk Street.
>
> Whereas, in accordance with the resolution as adopted by the House of Delegates, the Executive Committee is now asked to approve the final agreement regarding the property transfer of One Elk Street from The New York Bar Foundation to the New York State Bar Association.
>
> Now, therefore, it is resolved, that the Association President is authorized to enter into a final agreement regarding the property transfer of One Elk Street from The New York Bar Foundation to the New York State Bar Association as outlined in the Memorandum of Understanding.

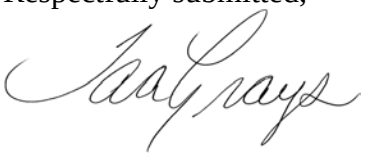
Mr. Orin Cohen, Judge Murphy, Ms. Santiago, and Ms. Sharkey abstained from the vote.

6. Request for Assistance from the Vice-Presidents to Compile Contact Information for Bar Associations and Bar Leaders from the Judicial Districts. Ms. Levin Wallach requested that the Vice-Presidents, in the context of their duties as set forth in the Bylaws to promote relations with local bars, affinity bars, and members in their respective districts, reach out to bar associations from within their judicial districts to ensure that the contact information for these associations on file with NYSBA is updated and accurate. A listing with contact information for statewide bar associations and bar leaders was then circulated for the review and attention of the Vice-Presidents.

7. Date and place of next meeting. The next meeting of the Executive Committee will take place on Friday, November 4, 2022, at the Bar Center in Albany.

8. 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
OCTOBER 25, 2022

Present: Gregory K. Arenson, David Louis Cohen, Sarah E. Gold, Taa R. Grays, LaMarr J. Jackson, Elena DeFio Kean, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Domenick Napoletano, Violet E. Samuels, Nancy Sciocchetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Sherry Levin Wallach, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Rezwanul Islam, Edwina Frances Martin

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order.

2. Application to Commence Litigation Against the State of New York Regarding Assigned Counsel Rates. Ms. Levin Wallach reviewed an application for the approval of the commencement of litigation against the State of New York regarding assigned counsel rates, addressing, per the Rules of the Commencement of Litigation on Behalf of the New York State Bar Association, the basis on which the Association would have standing to commence litigation and the relief to be sought by the Association should the commencement of litigation be authorized. Ms. Levin Wallach reported that Michael J. Dell, Esq., of Kramer Levin Naftalis & Frankel LLP had agreed to represent the Association in this case *pro bono*. After discussion, a motion was adopted to authorize the Association to commence litigation.

   Kaylin L. Whittingham abstained from the vote.

3. Report and recommendations of Committee on Legal Aid and President's Committee on Access to Justice. Rezwanul Islam, co-chair of the President's Committee on Access to Justice, and Hon. Edwina F. Martin, immediate past co-chair of the President's Committee on Access to Justice, reported on the work of the committees' joint Working Group on Access to Justice During the COVID-19 Pandemic and surveyed the recommendations contained in the Working Group's report. After discussion, a motion was unanimously adopted to endorse the report for favorable action by the House of Delegates.

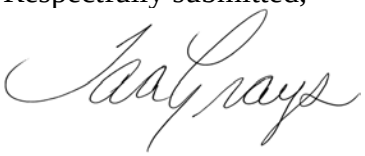
4. Approval of Reinstatement of Committee on Court Rules and Practice. In his capacity as chair of the former Task Force on Uniform Rules, Mr. Lewis outlined a request that the Executive Committee approve reinstatement of the above-named task force as a committee of the Association. Mr. Lewis reviewed the proposed mission statement of the Committee, reading that "The Committee on Court Rules and Practice shall monitor and review proposed amendments to court rules and practice in New York State." After discussion, a motion was adopted to approve reinstatement of the Committee.

5. New Business. Ms. Levin Wallach advised that the Friday, November 4, 2022, meeting of the Executive Committee would be held in person at the Bar Center in Albany and urged members to make travel arrangements as needed. Ms. Levin Wallach noted that member renewal for 2023 had begun and encouraged members to refer their colleagues and associates to join the Association. Ms. Levin Wallach also reported that registration would soon open for the 2023 Annual Meeting, with in-person events scheduled for Wednesday, January 18, 2023, through Saturday, January 21, 2023, at the New York Hilton Midtown in Manhattan.

6. Date and place of next meeting. The next meeting of the Executive Committee will take place on Friday, November 4, 2022, at the Bar Center in Albany.

7. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Taa R. Grays
Secretary