



# House of Delegates Materials

 April 1, 2023



**NEW YORK STATE BAR ASSOCIATION  
MEETING OF THE HOUSE OF DELEGATES  
BAR CENTER, ALBANY, NEW YORK  
AND REMOTE MEETING  
SATURDAY, APRIL 1, 2023 – 9:00 A.M.**

**AGENDA**

1. Call to order, Pledge of Allegiance, and Welcome 9:00 a.m.
2. Approval of minutes of January 20, 2023, meeting 9:03 a.m.
3. Report of Treasurer – Domenick Napoletano, Esq. 9:05 a.m.
4. Address by Hon. Elizabeth A. Garry – Presiding Justice, Appellate Division, Third Department 9:15 a.m.
5. Report of President – Sherry Levin Wallach, Esq. 9:30 a.m.
6. Presentation of 2023 Ruth Bader Ginsburg Memorial Scholarship Award to Shelley Wu – Sherry Levin Wallach, Esq. 9:55 a.m.
7. Election of Nominating Committee and State Bar Delegates to ABA House of Delegates – Henry M. Greenberg, Esq. 10:10 a.m.
8. Report of Task Force on Mental Health and Trauma Informed Representation – Joseph A. Glazer, Esq. 10:15 a.m.
9. Report of Task Force on Modernization of Criminal Practice – Catherine A. Christian, Esq. and Andrew Kossover, Esq. 10:35 a.m.
10. Report and recommendations of Task Force on Emerging Digital Finance and Currency – Jacqueline J. Drohan, Esq.  
A) Legislative Regulatory Resolution  
B) Web3 Resolution 10:55 a.m.
11. Reports and recommendations of Task Force on Notarization – Jaime D. Lewis, Esq., Richard C. Lewis, Esq., Ellen G. Makofsky, Esq., and Michael A. Markowitz, Esq. 11:25 a.m.
12. Report of Task Force on Ethics of Local Public Sector Lawyering – Steven G. Leventhal, Esq. 11:45 a.m.

13. Report of Committee on Membership – Clotelle L. Drakeford, Esq.,  
and Michelle H. Wildgrube, Esq. 12:05 p.m.
14. Report of The New York Bar Foundation – Carla Palumbo, Esq. 12:20 p.m.
15. Administrative Items – Richard C. Lewis, Esq. 12:30 p.m.
16. New Business 12:35 p.m.
17. Date and place of next meeting:  
Saturday, June 10, 2023  
The Otesaga, Cooperstown, New York, and Remote Meeting

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
NEW YORK HILTON MIDTOWN, NEW YORK  
JANUARY 20, 2023**

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**PRESENT:** Ahn; Aidala; Alcott; Alomar; Arenson; Baum; Beecher; Beltran; Berman; Block; Braverman; Brown; Bucki; Buholtz; Campbell; Chandrasekhar; Chang; Christian; B. Cohen; D. Cohen; O. Cohen; Cohn; Davidoff; Degnan; Doyle; Dubowski; Effman; Feal; Fernandez; Fogel; French; Gerstman; Gilmartin; Gold, Grays; Gross; Haig; Harper; Heath; Jackson; Jacobson; Jaglom; James; Jamieson; Jones; Kamins; Karson; Kenney; Kiernan; Klass; Kobak; Koch; Kohlmann; LaMancuso; Lara-Garduno; LaRose; Lathrop; Lau-Kee; Leber; Lenci; Lessard; Levin Wallach; Lewis; Lisi; Loyola; Lustbader; Lynn; Madigan; Marinaccio; Markowitz; Maroney; Martin; Matthews; May; McCann; McGinn; McKeegan; McNamara; C. Miller; M. Miller; Minkoff; Moretti; Morrissey; Muller; Mulry; Napoletano; Nowotarski; Petterchak; Quay; Riano; J. Richardson; Richter; Riedel; Rothberg; Russell; Santiago; Sargente; Seiden; Sen; Sharkey; Silkenat; Simon; Skidelsky; Sonberg; Stephenson; Sunshine; Swanson; Sweet; Tambasco; Vaughn; Wesson; Westlake; Wolff; Woodley; Yeung-Ha; Younger

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

The meeting was called to order.

1. Approval of Minutes of November 5, 2022, meeting. The minutes were deemed accepted as distributed.
2. Report of the Nominating Committee and election of officers and members-at-large of the Executive Committee. Sharon Stern Gerstman, in her capacity as alternate member-at-large of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2023-2024 Association year: President-Elect: Domenick Napoletano, Brooklyn; Secretary: Taa R. Grays, New York City; Treasurer: Susan Harper, New Jersey; and Vice Presidents: First District – Bridgette Ahn and Michael McNamara, New York City; Second – Pauline Yeung-Ha, Brooklyn; Third – Jane Bello Burke, Albany; Fourth – Nancy Sciocchetti, Saratoga Springs; Fifth – Hon. James P. Murphy, Syracuse; Sixth – Michael R. May, Ithaca; Seventh – Mark J. Moretti, Rochester; Eighth – Kathleen M. Sweet, Buffalo; Ninth – Hon. Karen T. Beltran, Yonkers; Tenth – Michael A. Markowitz, Hewlett; Eleventh – David Louis Cohen, Kew Gardens; Twelfth – Michael A. Marinaccio, White Plains; Thirteenth – Orin J. Cohen, Staten Island. Nominated as members-at-large of the Executive Committee were Thomas J. Maroney and Christopher R. Riano, New York City; LaMarr J. Jackson of Rochester (Diversity Seat); Barry D. Skidelsky, New York City (Section Seat); and Lauren E. Sharkey, Schenectady (Young Lawyers Seat).

There being no further nominations, a motion was made and unanimously carried to elect the above-named individuals as officers and members-at-large of the Executive Committee.

3. Report and recommendations of LGBTQ Law Section. Samuel W. Buchbauer, a member of the LGBTQ Law Section, reviewed the Section’s report and resolution in support of the “New York State Unified Court System’s UCS Bench Card and Best Practices for Judges ‘Using LGBTQ+ Inclusive Language and Pronouns’.” After discussion, a motion was made to adopt the resolution, after which a motion to amend the resolution to reference that “A group, or an individual who has requested otherwise, may be addressed by a gender specific pronoun.” failed. The main motion was then approved, and the following resolution was adopted by the House:

WHEREAS, judges have a duty to foster an environment free of bias, prejudice, and harassment.

WHEREAS, our profession must be vigilant in protecting the LGBTQ+ community, and especially transgender individuals, within the New York State Courts and require all judges to adhere to the Rules of Judicial conduct, the Bench Card both fosters a more welcoming, gender-inclusive space while simultaneously assisting judges in removing one form of bias from the administration of justice.

NOW, THEREFORE, IT IS RESOLVED, that the New York State Bar Association supports the respectful treatment of all persons in the courtroom; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the Rules of the Chief Administrative Judge that judges have a duty to foster an environment free of bias, prejudice, and harassment; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the use of LGBTQ+ inclusive language and pronouns; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the adoption of the “Using LGBTQ+ Inclusive Language and Pronouns” Bench Card;

FURTHER RESOLVED that the New York State Bar Association approves this report and the recommendations of the LGBTQ Law Section; and it is

FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

4. Remarks by Deborah Enix-Ross, Esq. Deborah Enix-Ross, President of the American Bar Association, addressed the House on matters of mutual interest to the ABA and NYSBA, including the role of the New York delegation to the ABA, the integrity of the justice system, the importance of civics education, and partnership between the two associations. The report was received with thanks.
5. Presentation of the Ruth G. Schapiro Memorial Award. Ms. Levin Wallach presented the annual Ruth G. Schapiro Memorial Award to Hon. Elizabeth A. Wolford in recognition of

her contributions on behalf of women, and commitment to championing equal opportunities for all.

6. Report and recommendations of Committee on the New York State Constitution. Christopher Bopst, chair of the Committee on the New York State Constitution, and Alan Rothstein, chair of the Committee's Subcommittee on the Lieutenant Governor, presented the Committee's report entitled "Gubernatorial Selection in New York: Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability." After discussion, a motion was adopted to approve the report and recommendations.
7. Report of Task Force on Mental Health and Trauma Informed Representation. Joseph A. Glazer, co-chair of the Task Force on Mental Health and Trauma Informed Representation, reported on the mission, composition, and goals of the Task Force. The report was received with thanks.
8. Report and recommendations of Task Force on Racism, Social Equity, and the Law. Taa R. Grays and Lillian M. Moy, co-chairs of the Task Force on Racism, Social Equity, and the Law, outlined the Task Force's report and recommendations addressing legal, regulatory, and societal structures currently affecting people of color in New York State. After discussion, a motion was unanimously adopted to approve the report and recommendations.
9. Administrative items. Mr. Lewis reported that at the April 1, 2023, meeting, the House will be requested to elect five of the Association's eleven delegates to the American Bar Association House of Delegates. The Nominating Committee had nominated the following individuals for the 2023-2025 term: Claire P. Gutekunst, Yonkers; Michael Miller, New York City; Scott M. Karson, Stony Brook; Sherry Levin Wallach, White Plains; and Domenick Napoletano, Brooklyn.

Mr. Lewis announced the names of the members designated by Article VIII of the Bylaws to serve as members-at-large of the Nominating Committee for the 2023-2024 Association year. The members-at-large will be as follows: Scott M. Karson, chair, of Stony Brook; Henry M. Greenberg of Albany; T. Andrew Brown of Rochester; and Michael Miller, alternate, of New York City.

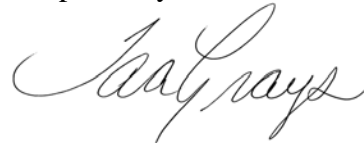
10. New Business. Mr. Lewis read the following statement:

Yesterday, the New York State Bar Association Executive Committee approved the appointment of a Special Committee on the Selection of Judges for the Court of Appeals in response to concerns raised in recent weeks over the appointment of a chief judge. The committee will examine the selection process, including its history, and make recommendations to the association.

The Executive Committee reaffirms that the rule of law and the independence of the judiciary are crucial to the administration of justice. It is of the utmost importance to public confidence that there is a fair process that allows the judiciary to operate independently and effectively.

11. Report of Task Force on Emerging Digital Finance and Currency. Dana Syracuse, co-chair of the Task Force on Emerging Digital Finance and Currency, presented on the Task Force's ongoing work and programming. The report was received with thanks.
12. Date and place of next meeting. Mr. Lewis announced that the next meeting of the House of Delegates would take place on Saturday, April 1, 2023, at the Bar Center in Albany, New York, with an option for remote participation.
13. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Taa R. Grays".

Taa R. Grays  
Secretary

**NEW YORK STATE BAR ASSOCIATION**

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*In Memoriam*

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**JOHN J. YANAS, SR.**



**JOHN J. YANAS, SR.**

**MEMORIAL  
To**

**JOHN J. YANAS, SR.**

*Presented by  
Justin L. Vigdor*

*New York State Bar Association*

*at the  
House of Delegates Meeting  
January 20, 2023  
New York, New York*

***John J. Yanas, Sr.***  
**1929-2023**

*Good morning, ladies and gentlemen. I am moved and honored to have been asked to say a few words and tribute in honor of the Honorable John J. Yanas, Sr., who passed away early in this month.*

*Although regrettably I had too little contact with him in the last several years, I had known John for almost 50 years, as we devoted that time and such talent as we had to this Bar Association and the Foundation. We served together over many years on many Association committees, and we both had the honor to serve as President of the Association.*

*As we mourn his death in sadness, we must also celebrate his long life, and the lessons that we learn from it.*

*John was devoted to the profession. He was a highly esteemed trusts and estates lawyer and real estate lawyer. He was also very active in the American Bar Association and the College of Real Estate lawyers.*

*John's life is an example of how life ought to be lived with modesty, and as a role model husband, father, grandfather, and great grandfather. In this example, he is a role model for us all.*

*John's leadership in the Bar was matched by his leadership in the Albany community. He served as City Court judge and chair of the Mayor's Selection Committee, and as a member of the board of the Home and City Savings Bank, the Monroe Abstract and Title Corporation, and the Fort Orange Club, among others.*

*As a person of very deep faith, John gave much of himself to the Christian Brothers of New York, from which he received Letters of Benefaction and the Distinguished Lasallian Trustee Award from the Christian Brothers of the New York Province.*

*Nor did he neglect his alma mater, Albany Law School, on whose board he served as chair. The Law School awarded him an honorary doctoral degree and made him a Trustee Emeritus of the Board of Trustees.*

*For all this John was recognized with a listing in Who's Who in American Law.*

*And with all this activity devoted to law and his community, John still made time for his love of jazz, the American musical theatre, and the great game of golf.*

*In short, John clearly met Mark Twain's test of a good man – one who so lives that when he dies, even the undertaker is sorry.*

*Our profession, and indeed, our society, is poorer for his loss.*



**SHERRY LEVIN WALLACH, ESQ.**

President

The Legal Aid Society of Westchester County

150 Grand St

White Plains, NY 10601-4821

(914) 286-3407

[slw@laswest.org](mailto:slw@laswest.org)

**Report of President Sherry Levin Wallach to the  
House of Delegates of the New York State Bar Association  
January 20, 2023**

Dear Colleagues:

It is wonderful to be together again in New York City for the 146th Annual Meeting. Hundreds of lawyers from across the state, nation, and world are gathered here for this cherished week devoted to celebration of the law and the legal profession. After three years of anxiety, uncertainty, and disruption, it is good to be home!

While it has been several years since we were together for our Annual Meeting in New York City, we have been as busy and productive as ever. Our Sections and committees are meeting in person again reestablishing old relationships and forming new ones. We have had several successful destination meetings and events. Moving forward, we are working hard to find the proper balance needed to incorporate the new virtual tools that we learned during the pandemic while recognizing the importance of in person collaboration.

I am pleased to report that our membership numbers remain steady as we actively pursue the best ways to engage with new members and retain existing ones. To grow as an Association, we must stay relevant, embrace new technologies and new issues, and work together to help our membership be the best they can be for their clients and the legal community. We also strive to make optimal use of the Association's resources to reach our members – and prospective members – across the state, nation, and world.

We continue to live in unprecedented times, and legal and constitutional processes that have been in place for many years are being questioned. Yesterday, the Executive Committee adopted the following resolution:

The New York State Bar Association Executive Committee approves the appointment of a Special Committee on the Selection of Judges for the Court of Appeals in response to concerns raised in recent weeks over the appointment of a chief judge. The committee will examine the selection process, including its history, and make recommendations to the Association.

The Executive Committee reaffirms that the rule of law and the independence of the judiciary are crucial to the administration of justice. It is of the utmost

importance to public confidence that there is a fair process that allows the judiciary to operate independently and effectively.

There is a dire need to ensure the functionality of our system of government and the protection of our constitutional rights. As lawyers, preservation of the rule of law is front and center as a core duty of our profession. In that light, I am justly proud of the efforts within our Association. Last November, the House of Delegates adopted a historic resolution from the Women in Law Section in support of reproductive rights and the New York State Equal Rights Amendment. The House of Delegates also adopted a major report from the President's Committee on Access to Justice and the Committee on Legal Aid on access to justice during the COVID-19 pandemic. And later today the House of Delegates will consider a resolution from the LGBTQ Law Section in support of the New York State Unified Court System's UCS Bench Card and Best Practices for Judges 'Using LGBTQ+ Inclusive Language and Pronouns.' I hope, if adopted by the House, that the Bench Card will serve as a template for similar efforts nationwide.

Our global presence allows us to take a leading role in the worldwide struggle to protect and defend the rule of law. Led by our International Section, we continue to support and assist the people of Ukraine through engagement with the Ukrainian Bar Association, American Bar Association and other stakeholders committed to the international rule of law. I have traveled locally, nationally, and internationally to raise awareness about our great Association and offer our continued partnership and support to bar associations across the state, nation, and world. To that end, I have signed Memorandums of Understanding with the Law Society of England and Wales, the Law Society of Scotland, the Bar Council of England and Wales, the Serbia Bar Association, the Puerto Rico Bar Association (*Collegio de Abogados y Abogadas de Puerto Rico*) and reaffirmed our partnerships and Memorandum of Understanding with the Virgin Islands Bar Association. I have attended the opening of the legal year in England and Wales and developed relationships with bar leaders worldwide. Worldwide associations and legal communities look to New York for guidance and collaboration. NYSBA members come from across the world, and we will continue to ensure that attorneys feel at home within our Association no matter where they may practice or reside.

I established five presidential task forces at the start of my term on June 1<sup>st</sup> of last year. I am proud to report that all five groups quickly sprang into action – producing programs, drafting reports with legal and policy recommendations, publishing articles, and educating and informing our members on developments.

The Task Force on Mental Health and Trauma Informed Representation has identified a need for more access to community-based care and the diversion of people living with serious mental illness from prisons and jails. Further, we as leaders of the bench and bar must better support both clients with mental health and wellbeing needs and our attorneys who work with these clients daily.

I am extremely proud that NYSBA is leading by example here. The January / February issue of the NYSBA Journal focuses on the intersection of mental health and the legal system, with thoughtful articles on criminal justice considerations, disability law, and wellbeing. The theme of my Presidential Summit was "Mental Health and the Justice System: Impacts, Challenges, Potential Solutions." It was a great privilege to see so many colleagues in attendance for what was truly a candid and necessary conversation on the cruel intersection between the mental health crisis and our civil and criminal justice systems. Last week, Governor Hochul in her State of the State

address announced a proposal to invest \$1 billion in mental health care. This proposal is welcome news and will do much to remedy the severe lack of treatment options for New Yorkers living with mental illness who need compassionate care.

The Task Force on the U.S. Territories quickly sprang into action last summer, drafting a resolution that the NYSBA and ABA House of Delegates soon adopted calling for the *Insular Cases* to be overturned. Unfortunately, the U.S. Supreme Court declined to hear the case of *Fitisemanu v. United States* last fall. Despite this disappointment, the Task Force's good work will continue – I am sure that many of you attended the Constance Baker Motley Symposium, which featured a mock argument conducted by law students of what could have been if the Supreme Court had granted cert in *Fitisemanu*. I look forward to the continued work of this important Task Force and to further reports and recommendations.

The Task Force on the Ethics of Local Public Sector Lawyering, which is comprised of some of the leading public sector, municipal, and ethics attorneys in the state, has been tasked to prepare a comprehensive report focusing on the ethical considerations surrounding representation of a governmental organization, including conflicts of interest.

The Task Force on Modernization of Criminal Practice, in partnership with other stakeholders, including the Commission to Reimagine the Future of New York's Courts Pandemic Practices Working Group, is actively working to review these changes and develop practicable solutions for criminal law practitioners, defendants, and the courts alike. Recommendations will focus on sentencing reform, uniformity and predictability with e-filing, e-discovery, and service of legal documents, and improvements to the delivery of justice within our state's thousands of town and village courts.

Looking toward the future, I would be remiss not to mention the Task Force on Emerging Digital Finance and Currency. NFTs, cryptocurrency, digital assets, stablecoin, the Metaverse – the effects of these new and evolving technologies on business, law, and society, are playing out in real time around the world. The Task Force, in partnership with New York University, recently produced a major conference on Preparing Your Practice and Clients for the Newest Digital Revolution, the video of which is available on the NYSBA webpage. The Task Force has also scheduled an exciting CLE program that is taking place tomorrow. I encourage you to attend. Over the next few months, the Task Force will continue to develop cutting-edge programming for our members, make recommendations on the legal and regulatory issues surrounding digital finance and currency, and promote the appropriate use of digital assets and Web3 resources by the New York State Bar Association to keep pace with the industry and expand global membership.

2023 will be a year of great opportunity for the New York State Bar Association. In Washington, NYSBA leaders will continue to engage with Congress and the Biden Administration to implement our federal legislative priorities, including student loan debt relief, funding for the Legal Services Corporation, the sealing of federal criminal records, measures to safeguard voting rights and voter participation, and passage of the Equality Act. Concerning equal rights, I am proud that the Association participated as amicus curiae in *303 Creative LLC v. Elenis*, a pending case before the Supreme Court on the intersection of LGBTQ rights in public accommodations and the Free Speech Clause of the First Amendment. No matter the decision of the Court, NYSBA is committed

to equal rights for all, and will ceaselessly advocate for its members and the constitutional rights of all Americans.

At the state level, we look forward to working with the new Chief Judge on matters of interest to the bench, the bar, and the court users of New York State. In Albany, the Association's advocacy efforts will focus on several major legislative goals, including support for the Equal Rights Amendment, the Clean Slate Act, and right to counsel in housing proceedings and immigration matters. We will continue work on the repeal of the century-old Judiciary Law Section 470 – as the past few years have demonstrated, a physical office is not needed, and the time has long passed for New York admitted attorneys to practice law having to maintain an office in New York State.

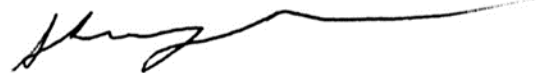
And, as I reported to the House in November of last year, our 18B litigation against the State of New York is underway. The time has long passed for an immediate statewide state-funded increase in assigned counsel rates – we are optimistic as to the merits and our ultimate success on this foremost priority for the Association.

I would like to take this opportunity to give an update on One Elk – our Bar Center. I am happy to report that a professional engineer and architect have been retained to assess the structural needs of the facility and expedite the work and planning necessary to revitalize our Bar Center as our home for generations of members to come. I encourage our Sections to make use of the Bar Center for meetings and programs, with emphasis on the cost savings associated with the use of the in-house technology, staffing, and centralized location.

The theme of my presidency is Investing in the Future of the Profession. NYSBA – through the work of its sections, which are the lifeblood of our Association, the efforts our task forces and committees, and, most importantly, the dedication of our members – is better positioned than ever before to advocate for and support the practices of New York lawyers, no matter where they might reside.

I will never forget the inspiration that I felt at the Annual Meeting eighteen years ago when the President of the New York State Bar Association – my good friend and mentor, Kenneth G. Standard – chatted with me on the escalator at the Marriott Marquis. As a young lawyer and junior member of the Association, this interaction was akin to meeting with a celebrity, and encouraged me to aspire for leadership both within the Association and the profession at large.

Colleagues, the Member Referral Program will close on March 31<sup>st</sup> of this year. If you were not already convinced, I hope that the activities you have participated in over the last few days here at the Annual Meeting – the cutting-edge CLE programs, the inspirational award ceremonies, the collegial dinners, luncheons, and networking events – have persuaded you that bar association membership is essential for a productive, successful, and happy career. Do your part for our Association and our profession and encourage your colleagues, your peers, and most importantly, young and new attorneys, to join NYSBA. I promise you it will be a worthwhile investment.



Sherry Levin Wallach  
President





# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item # 3

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 February 28, 2023.

The report will be presented by Association treasurer Domenick Napoletano.

**NEW YORK STATE BAR ASSOCIATION  
2023 OPERATING BUDGET  
TWO MONTHS OF CALENDAR YEAR 2023**

**REVENUE**

	<b>2023 BUDGET</b>	<b>UNAUDITED RECEIVED 2/28/2023</b>	<b>% RECEIVED 2/28/2023</b>	<b>2022 BUDGET</b>	<b>UNAUDITED RECEIVED 2/28/2022</b>	<b>% RECEIVED 2/28/2022</b>
<b>MEMBERSHIP DUES</b>	9,000,000	7,574,630	84.16%	9,372,690	7,659,597	81.72%
<b>SECTIONS:</b>						
Dues	1,181,350	937,798	79.38%	1,219,400	950,150	77.92%
Programs	2,587,528	518,328	20.03%	2,841,555	114,032	4.01%
<b>INVESTMENT INCOME</b>	494,215	(34,765)	-7.03%	486,225	(38,329)	-7.88%
<b>ADVERTISING</b>	319,500	38,223	11.96%	218,000	62,604	28.72%
<b>CONTINUING LEGAL EDUCATION</b>	2,390,000	354,450	14.83%	2,950,000	243,312	8.25%
<b>USI AFFINITY PAYMENT</b>	2,000,000	333,333	16.67%	1,912,000	333,333	17.43%
<b>ANNUAL MEETING</b>	895,000	862,957	96.42%	400,000	439,062	109.77%
<b>HOUSE OF DELEGATES &amp; COMMITTEES</b>	36,700	7,995	21.78%	47,500	724	1.52%
<b>PUBLICATIONS, ROYALTIES AND OTHER</b>	308,000	38,709	12.57%	213,500	12,602	5.90%
<b>REFERENCE MATERIALS</b>	1,309,350	37,160	2.84%	1,247,000	87,900	7.05%
<b>TOTAL REVENUE</b>	<b>20,521,643</b>	<b>10,668,818</b>	<b>51.99%</b>	<b>20,907,870</b>	<b>9,864,987</b>	<b>47.18%</b>

**EXPENSE**

	<b>2023 BUDGET</b>	<b>UNAUDITED EXPENDED 2/28/2023</b>	<b>% EXPENDED 2/28/2023</b>	<b>2022 BUDGET</b>	<b>UNAUDITED EXPENDED 2/28/2022</b>	<b>% EXPENDED 2/28/2022</b>
<b>SALARIES &amp; FRINGE</b>	8,759,290	1,452,882	16.59%	8,588,946	1,403,791	16.34%
<b>BAR CENTER:</b>						
Rent						
Building Services	325,500	51,490	15.82%	342,000	50,699	14.82%
Insurance	206,000	31,760	15.42%	190,000	36,100	19.00%
Taxes	93,750	11,019	11.75%	167,250	82,561	49.36%
Plant and Equipment	791,000	129,067	16.32%	862,000	140,754	16.33%
Administration	546,900	115,948	21.20%	610,750	150,358	24.62%
<b>SECTIONS</b>	3,739,828	385,166	10.30%	4,039,155	112,631	2.79%
<b>PUBLICATIONS:</b>						
Reference Materials	131,500	22,789	17.33%	121,500	15,447	12.71%
Journal	250,300	48,737	19.47%	265,000	44,488	16.79%
Law Digest	52,350	11,050	21.11%	47,000	11,047	23.50%
State Bar News	122,300	43,827	35.84%	100,300	35,547	35.44%
<b>MEETINGS:</b>						
Annual Meeting	383,100	1,461,453	381.48%	360,100	37,425	10.39%
House of Delegates, Officers and Executive Committee	487,175	27,187	5.58%	561,550	39,928	7.11%
<b>COMMITTEES:</b>						
Continuing Legal Education	378,150	(52,534)	-13.89%	370,400	(15,028)	-4.06%
LPM / Electronic Communication Committee	8,100	218	2.69%	35,150	-	0.00%
Marketing / Membership	1,092,700	183,054	16.75%	909,450	135,413	14.89%
Media Services	285,750	55,567	19.45%	290,000	39,009	13.45%
All Other Committees and Departments	2,818,870	482,579	17.12%	2,925,875	552,144	18.87%
<b>TOTAL EXPENSE</b>	<b>20,472,563</b>	<b>4,461,259</b>	<b>21.79%</b>	<b>20,786,426</b>	<b>2,872,314</b>	<b>13.82%</b>
<b>BUDGETED SURPLUS</b>	<b>49,080</b>	<b>6,207,559</b>		<b>121,444</b>	<b>6,992,673</b>	

**NEW YORK STATE BAR ASSOCIATION  
STATEMENTS OF FINANCIAL POSITION  
AS OF FEBRUARY 28, 2023**

<u>ASSETS</u>	UNAUDITED <u>2/28/2023</u>	UNAUDITED <u>2/28/2022</u>	UNAUDITED <u>12/31/2022</u>
<b><u>Current Assets:</u></b>			
General Cash and Cash Equivalents	20,645,681	20,338,171	20,224,069
Accounts Receivable	36,273	74,554	76,759
Prepaid expenses	1,128,975	1,047,581	1,754,912
Royalties and Admin. Fees receivable	333,333	811,552	768,684
Total Current Assets	22,144,262	22,271,858	22,824,424
<b><u>Board Designated Accounts:</u></b>			
<b><u>Cromwell Fund:</u></b>			
Cash and Investments at Market Value	2,822,930	3,136,872	2,778,996
Accrued interest receivable	0	0	0
	2,822,930	3,136,872	2,778,996
<b><u>Replacement Reserve Account:</u></b>			
Equipment replacement reserve	1,118,067	1,117,956	1,118,049
Repairs replacement reserve	794,722	794,642	794,709
Furniture replacement reserve	220,048	220,026	220,044
	2,132,837	2,132,624	2,132,802
<b><u>Long-Term Reserve Account:</u></b>			
Cash and Investments at Market Value	29,714,922	32,168,084	28,907,317
Accrued interest receivable	0	0	163,465
	29,714,922	32,168,084	29,070,782
<b><u>Sections Accounts:</u></b>			
Section Cash and Investments at Market Value	3,858,535	3,973,038	3,846,571
Cash	1,071,002	951,551	203,122
	4,929,537	4,924,589	4,049,693
<b><u>Fixed Assets:</u></b>			
Building - 1 Elk	3,566,750	0	3,566,750
Land	283,250	0	283,250
Furniture and fixtures	1,483,275	1,463,037	1,480,650
Building Improvements	905,924	0	898,570
Leasehold Improvements	0	1,470,688	0
Equipment	3,016,800	4,089,634	3,006,400
	9,255,999	7,023,359	9,235,620
Less accumulated depreciation	4,090,267	4,804,827	3,976,267
Net fixed assets	5,165,732	2,218,532	5,259,353
Operating Lease Right-Of-Use Asset	121,205	0	129,472
Finance Lease Right-Of-Use Asset	18,170	0	21,208
	139,375	0	150,680
Total Assets	67,049,595	66,852,559	66,266,730
<b><u>LIABILITIES AND FUND BALANCES</u></b>			
<b><u>Current liabilities:</u></b>			
Accounts Payable & other accrued expenses	1,187,208	591,730	771,399
Post Retirement Health Insurance Liability	18,241	0	18,241
Deferred dues	0	0	6,167,778
Deferred income special	0	0	0
Deferred grant revenue	17,149	29,905	17,149
Other deferred revenue	773,728	391,026	1,077,025
Payable To TNYBF - Service Agreement	3,542,245	0	3,597,110
Payable To The New York Bar Foundation	11,445	(248)	12,250
Operating Lease Obligation	101,679	0	101,506
Finance Lease Obligation	11,966	0	14,221
Total current liabilities & Deferred Revenue	5,663,661	1,012,413	11,776,679
<b><u>Long Term Liabilities:</u></b>			
LT Operating Lease Obligation	19,527	0	27,966
LT Finance Lease Obligation	6,322	0	7,102
Accrued Other Postretirement Benefit Costs	8,576,910	8,216,910	8,516,910
Accrued Defined Contribution Plan Costs	61,759	518,670	303,263
Total Liabilities & Deferred Revenue	14,328,179	9,747,993	20,631,920
<b><u>Board designated for:</u></b>			
Cromwell Account	2,822,930	3,136,872	2,778,996
Replacement Reserve Account	2,132,837	2,132,624	2,132,802
Long-Term Reserve Account	21,076,253	23,432,504	20,087,144
Section Accounts	4,929,537	4,924,589	4,049,693
Invested in Fixed Assets (Less capital lease)	5,165,732	2,218,532	5,259,353
Undesignated	16,594,127	21,259,445	11,326,822
Total Net Assets	52,721,416	57,104,566	45,634,810
<b>Total Liabilities and Net Assets</b>	<b>267,049,595</b>	<b>66,852,559</b>	<b>66,266,730</b>

**New York State Bar Association**  
**Statement of Activities**  
**For the Two Months Ending February 28, 2023**

	<b>February 2023</b>	<b>February 2022</b>	<b>December 2022</b>
<b>REVENUES AND OTHER SUPPORT</b>			
Membership dues	7,574,630	7,659,597	9,060,075
Section revenues			
Dues	937,798	950,150	1,112,055
Programs	518,328	114,032	1,264,530
Continuing legal education program	354,450	243,312	2,266,156
Administrative fee and royalty revenue	367,649	343,303	2,310,597
Annual meeting	862,957	439,062	446,281
Investment income	2,364	(28,214)	1,393,587
Reference Books, Formbooks and Disk Products	37,160	87,900	1,182,198
Other revenue	83,421	93,386	575,190
<b>Total revenue and other support</b>	<b>10,738,757</b>	<b>9,902,528</b>	<b>19,610,669</b>
<b>PROGRAM EXPENSES</b>			
Continuing legal education program	201,374	100,467	1,210,191
Graphics	130,808	270,180	1,001,577
Government relations program	34,236	52,705	294,697
Lawyer assistance program	48,710	21,705	85,632
Lawyer referral and information services	-	-	-
Law practice management services	-	-	-
Media / public relations services	110,928	87,232	624,280
Business Operations	445,262	415,266	2,499,203
Marketing and Membership services	346,684	255,690	1,834,420
Pro bono program	18,868	14,918	95,313
House of delegates	26,263	39,928	536,024
Executive committee	924	-	70,688
Other committees	19,343	6,262	252,271
Sections	385,124	112,631	2,173,463
Section newsletters	36,549	41,698	254,776
Reference Books, Formbooks and Disk Products	101,156	89,043	609,087
Publications	103,614	91,081	384,028
Annual meeting expenses	1,461,453	37,425	37,545
<b>Total program expenses</b>	<b>3,471,296</b>	<b>1,636,231</b>	<b>11,963,195</b>
<b>MANAGEMENT AND GENERAL EXPENSES</b>			
Salaries and fringe benefits	476,611	579,704	3,023,612
Pension plans and other employee benefit plan costs	114,117	180,110	673,065
Rent and equipment costs	125,617	192,677	837,398
Consultant and other fees	142,459	154,547	749,755
Depreciation and amortization	114,000	124,200	595,798
Operating Lease	11,543	-	102,913
Other expenses	5,571	4,843	125,098
<b>Total management and general expenses</b>	<b>989,918</b>	<b>1,236,081</b>	<b>6,107,639</b>
<b>CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS</b>			
Realized and unrealized gain (loss) on investments	6,277,543	7,030,216	1,539,835
Realized gain (loss) on sale of equipment	809,068	(3,022,114)	(8,652,105)
Realized gain (loss) on sale of equipment	-	-	(349,385)
Loan forgiveness	-	-	-
<b>CHANGES IN NET ASSETS</b>	<b>7,086,611</b>	<b>4,008,102</b>	<b>(7,461,655)</b>
Net assets, beginning of year	45,634,808	53,096,463	53,096,463
Net assets, end of year	52,721,419	57,104,565	45,634,808



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

Hon. Elizabeth A. Garry, presiding justice, Appellate Division, Third Department, will address the House on initiatives and updates of interest being undertaken in the courts of the Third Department.



# Staff Memorandum

**HOUSE OF DELEGATES  
Agenda Item #5**

REQUESTED ACTION: None, as the report is informational.

Association president Sherry Levin Wallach will report to the membership with respect to her presidential initiatives, the governance of the Association, and other developments of interest. A copy of the written report will be distributed during the meeting.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #6

REQUESTED ACTION: None, as the report is informational.

Shelley Wu, a third year JD candidate at, has been selected as the recipient of the 2023 Ruth Bader Ginsburg Memorial Scholarship Award.

In November 2020, the Association's Executive Committee approved the creation of the Scholarship Award, to be awarded annually to a law student who, through written submission, research project, or an exemplary internship, externship, or pro bono service, demonstrates character consistent with and honoring the legacy of the late Supreme Court associate justice and native New Yorker Ruth Bader Ginsburg.

Association president Sherry Levin Wallach will present the Scholarship Award to Shelley Wu.

# CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

MELANIE LESLIE  
Dean  
Dr. Samuel Belkin Professor of Law

Phone: 212.790.0310  
Fax: 212.790.0203  
EMAIL DeansOfficeCardozo@yu.edu

February 27, 2023

Ruth Bader Ginsburg Memorial Scholarship Committee  
New York State Bar Association  
1 Elk Street  
Albany, New York 12207

RE: Ruth Bader Ginsburg Scholarship

Dear Scholarship Committee,

Cardozo Law School is pleased to nominate Shelley Wu for the New York State Bar Association Ruth Bader Ginsburg Memorial Scholarship. Inspired by Justice Ginsburg's steadfast commitment to women's rights, Shelley has dedicated my career to providing legal services for women and children who have experienced violence and discrimination.

Shelley's commitment to protecting the rights of women and children, especially those who have experienced domestic violence and discrimination, has informed all of her practical experiences. Before law school, Shelley was a paralegal for two years in the Child Abuse and Domestic Violence Units of the New York County District Attorney's Office. Her commitment to women's rights seamlessly continued into her law school career. During her time at the Urban Justice Center's Domestic Violence Project, Shelley worked one-on-one with survivors of domestic violence, providing civil legal services to help survivors regain independence.

In addition, Shelley coordinates the Courtroom Advocates Project, a pro bono, student-led program which allows students to work in family courts to assist survivors of domestic violence with obtaining orders of protection. Her Note, *Mission Impossible? The Case for Municipal Tort Liability Reform in a Post-Valdez World*, which will be published in Volume 44 of the Cardozo Law Review, argues that New York's special duty doctrine leaves no legal recourse for survivors of domestic violence when officers negligently fail to enforce mandatory arrest laws. Additionally, as treasurer of the Cardozo Law chapter of If/When/How, Shelley helped fundraise for the Indigenous Women Rising Abortion Fund, as well as organized panels and community-focused discussions regarding reproductive rights. Throughout her experiences, Shelley has cultivated a service-oriented mindset and a commitment to advancing women's rights.

JACOB BURNS INSTITUTE FOR ADVANCED LEGAL STUDIES

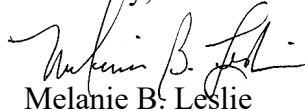
BROOKDALE CENTER • 55 FIFTH AVENUE • NEW YORK, NY 10003-4391

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY



We are pleased to nominate Shelley because of her passion and experience advocating for women's rights and gender equality. Her resume, transcript, personal statement and two letters of recommendation are attached. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Melanie B. Leslie". The signature is fluid and cursive, with a large initial "M" and "L".

Melanie B. Leslie

Dean

Dr. Samuel Belkin Professor of Law

## Shelley Wu

I am a proud daughter of working-class parents. My parents emigrated from rural China to Brooklyn, with nothing but a suitcase and some family photos. Due to their language and financial barriers, it was not always easy to make ends meet, and growing up, I helped them navigate situations where their language and cultural customs were frequently misunderstood. As a result, early on, I learned how to be an advocate for others. My upbringing instilled in me a strong sense of justice and a commitment to helping those who have faced discrimination.

Throughout my professional life, I have sought to apply my skills and experiences in service of communities in need, with a focus on the rights of women and children. In college, I served as a community liaison for my local State Senator and helped resolve quality of life concerns for constituents. After graduating college early with honors, I served as a paralegal in the Child Abuse and Domestic Violence Units of the New York County District Attorney's Office, where I learned how legal services can be a powerful tool to protect women and children. I worked closely with attorneys to understand and hear the experiences of survivors of domestic violence and sexual assault, so that we could corroborate their testimony with evidence and hold their abusers accountable. My experience inspired me to become an attorney to further advocate for women's rights and gender equality.

During my time in law school, I have actively pursued opportunities to advance the rights of women, children, and underrepresented communities. Beginning in my first year, I helped survivors file for orders of protection through the Courtroom Advocates Project, in response to the increased rates of domestic violence during the COVID pandemic. I also volunteered with the Asian American Bar Association of New York to help non-English speakers apply for COVID rent relief programs. Through my summer internship at the Urban Justice Center, I developed extensive experience interviewing survivors of domestic violence and providing counseling and civil legal services.

## Shelley Wu

In my second year of law school, I participated in a year-long internship at the Bet Tzedek Civil Litigation Clinic, where I had the amazing opportunity to assist with writing an amicus brief in support of a disabled student who had been denied sign language access, a case which was then granted certiorari and heard by the Supreme Court this past January.

Additionally, on behalf of a disabled client, I successfully appealed a state agency's reduction of their public benefits without notice. My continued interest in civil rights advocacy led me intern for the United States Attorney's Office of the Southern District of New York, where I assisted in the enforcement of civil rights laws. My legal research contributed to a voluntary compliance agreement where a major university committed to increasing accessibility for students with disabilities. Throughout my second and third year of law school, I continued my commitment to advocating for women's rights through various student leadership roles, where I lead pro bono programming, community organizing, and fundraising in support of advancing gender equality.

In my final year of law school, I have focused on work in chambers, including as a full-time legal intern for Judge Joseph A. Greenaway Jr., of the United States Court of Appeals for the Third Circuit. I received this opportunity through the Alexander Fellows program, which places outstanding second- and third-year students as junior clerks with prominent federal judges. After I graduate in May, I will be clerking for Judge Greta Gooden Brown on the New Jersey Superior Court, Appellate Division, where I will continue to work in the judiciary. With my experiences and demonstrated commitment to advancing and strengthening women's rights, I hope to pursue a career in civil rights and public service. My career and aspirations would be impossible without Justice Ginsburg's tireless fight for gender equality, which paved the way for generations of women like me to pursue our dreams.

# CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

**Stewart Sterk**

*H. Bert and Ruth Mack Professor of Real Estate Law*

PHONE: 646-592-6464

E-MAIL: Sterk@yu.edu

February 27, 2023

Ruth Bader Ginsburg Memorial Scholarship Committee

New York State Bar Association

1 Elk Street

Albany, New York 12207

RE: Ruth Bader Ginsburg Scholarship

Dear Scholarship Committee:

I write on behalf of Shelley Wu. Shelley is an outstanding student who has all of the qualities necessary to make her worthy of the Ruth Bader Ginsburg Memorial Scholarship. I recommend her with enthusiasm.

I first came to know Shelley when she was a student in my first-year Property class. Because the class was held entirely over zoom I did not get to know the students as well as I might have in other circumstances, but Shelley nevertheless stood out. I conducted the class socratically, even over zoom, and when I called on her, Shelley was always prepared for a thoughtful discourse. I required all of the students to prepare a written exercise during the course of the term, and Shelley's was one of the best in a class of more than 100 students. Not only did Shelley hit the major issues, but the paper was well written. It was not at all surprising that Shelley wrote an "A" exam in the course.

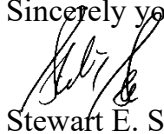
Last year, I asked Shelley to serve as a teaching assistant. When I select teaching assistants, I look for a variety of qualities. Analytical ability is critical, but I frequently pass over excellent students when I don't think they will be able to develop a rapport with the students they will be helping. I had no such concerns with Shelley. Although she demands a lot of herself, she is also personable and engaging. Her performance over the course of the semester vindicated my faith in her. The feedback I received from the students she worked with was extraordinarily positive. I would have no hesitation in asking Shelley to serve again.

Shelley has played an active role in the law school community. This past fall, she recruited me to participate in a panel on the eviction moratorium. The panel was well attended, but my basic point is that Shelley is not a passive law student; she has tried to make the most of her law school education outside, as well as in, the classroom.

I have also had occasion to read Shelley's Law Review Note, which explores and critiques New York law on municipal liability to victims of police failure to enforce mandatory arrest laws. The Note does an excellent job of synthesizing existing New York law, and then proposes reform. The Note demonstrates that Shelley's analytical abilities are matched by her ability to write clearly and concisely.

In short, Shelley Wu has all of the skills necessary to make her a worthy scholarship recipient and she merits your careful attention. If you have any questions about Shelley, please do not hesitate to call me at 646-592-6464.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Stewart E. Sterk', written over a light blue horizontal line.

Stewart E. Sterk

H. Bert and Ruth Mack Professor of Real Estate Law

# CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

## BET TZEDEK LEGAL SERVICES

**Rebekah Diller**  
*Clinical Professor of Law*  
*Co-Director*

Tel: 646-592-6572  
Email: Rebekah.Diller@yu.edu

February 27, 2023

Ruth Bader Ginsburg Memorial Scholarship Committee  
New York State Bar Association  
1 Elk Street  
Albany, New York 12207

RE: Ruth Bader Ginsburg Scholarship

Dear Scholarship Committee,

I write to offer my highest recommendation for Shelley Wu for the Ruth Bader Ginsburg Memorial Scholarship. I co-direct a clinic that represents older adults and people with disabilities in a range of civil matters, including civil rights impact litigation. Shelley was a student in the clinic last year and was easily one of the best in the class.

Shelley distinguished herself as an excellent researcher and writer. She is thorough, pays attention to detail, and has strong analytical skills. Her writing is clear and well-organized, and she works through legal issues systematically and swiftly.

Shelley worked on several major clinic matters during the year. In the first case, she drafted parts of an amicus brief in a case concerning the intersection of two federal statutes that protect the rights of children with disabilities: the Individuals with Disabilities Education Act (IDEA), which governs special education, and the Americans with Disabilities Act (ADA). The question in the case was whether a deaf student who had suffered years of disability-based discrimination in school would be barred from bringing an ADA claim for damages against the school district due to an exhaustion requirement in the IDEA special education statute. The issue was complicated, technical, and unsettled. Shelley quickly grasped the statutory schemes and wrote an outstanding memo surveying the circuit case law on the application of a futility exception to the IDEA's exhaustion requirement. Shelley also researched a number of other discrete legal issues for the brief. Out of the four students who worked on the project, all of whom were also very high-achieving students, Shelley was the only one whose work required minimal editing before being incorporated into the brief.

In her second major project, Shelley worked on a case representing individuals with disabilities who had been receiving certain state-funded housing subsidies that enabled them to live independently in the community and avoid institutionalization. The state agency had cut our clients' subsidies without providing them with notices explaining the reductions and without providing them an opportunity to contest the reductions at a hearing. Shelley researched the

statutory, regulatory and sub-regulatory authority governing the subsidy and investigated the facts concerning our clients' underlying entitlement to the subsidy. She drafted parts of a substantive appeal letter for one client and did comprehensive research on the due process standards that govern this type of entitlement program. Her work was excellent and she took the initiative to go beyond her discrete tasks to think more globally about strategy for the case. In this way, she functioned much more like a fellow lawyer than a second-year law student.

Shelley's work on the housing subsidy case also involved intense attention to detail, as part of her task was to figure out whether the agency had properly applied its formula to calculate our clients' subsidies. She had to compile evidence of various expenses that our clients incurred and had to ensure that receipts and other documentation supported our claims. I could trust that Shelley's work was thorough and accurate.

In addition to these two main projects, Shelley also worked on a community outreach project involving a presentation on advance directives at a local senior center. She did a very strong job distilling legal concepts concerning powers of attorney and health care proxies into clear, understandable explanations for the attendees. She took the time to master the underlying statutes, read various practice commentaries, and plan for anticipated questions in advance. Her thorough preparation ensured that she was able to field the audience questions with relative ease.

Shelley's final project in the clinic involved assisting an individual in prison with his parole interview. This work on behalf of people in prison was new for the clinic and Shelley was able to forge ahead with minimal supervision. She compiled an impressive packet for the parole board on the client's behalf and left no stone unturned as she assembled support letters for her client.

In all her clinic work, Shelley was methodical and highly productive, and consistently produced drafts at a very high level. She sought guidance when appropriate but always took initiative to try to figure things out, even when they were unfamiliar. She is a very hard worker and is eager to do a good job in everything she undertakes. She also responds very well to feedback and incorporates it immediately—one never has to tell her anything twice.

Along with the casework, students participate in a year-long civil litigation seminar, which takes students through simulations covering the major phases of litigation. Shelley's performance in the seminar was consistently excellent. She drafted parts of a preliminary injunction motion in a simulated case concerning benefits under the Medicaid program. She readily identified the most important facts, made the wise choice about which claim to foreground as likely to succeed on the merits, and drafted persuasive papers.

At the end of the year, students conduct a simulated trial in the seminar. Shelley delivered a very strong performance. She had good judgment about which facts were important and which were superfluous. She also wrote a thoughtful and insightful reflection memo after the hearing that identified areas for improvement and the pros and cons of the various strategic decisions she had made in approaching the trial.

Shelley accomplished all of this in the clinic while taking a demanding course load, serving as an active member of the *Law Review*, working on her note, serving as President of the Public Interest Law Students Association, and engaging in other student activities at the law school. She has excellent time management skills and balanced all of her obligations gracefully.

Finally, Shelley was a pleasure to work with. She was dedicated, professional, and responsible. She understands what it means to be professional in a legal setting, how to be a good colleague, and how to manage projects. Much of her clinic work was done within a team of four, which created some challenges in coordination. Shelley always kept her eye on the ball and made sure to move the work forward and keep the group organized.

For all these reasons, I recommend Shelley without a single hesitation and would be happy to discuss Shelley's qualifications further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rebekah Diller', with a stylized flourish at the end.

Rebekah Diller





# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #7**

REQUESTED ACTION: Election of members of the 2023-2024 Nominating Committee and State Bar Delegates to the ABA House of Delegates.

Attached is a listing of nominations for district representatives for the 2023-2024 Association year, plus alternate members, and a listing of nominations for delegates to the American Bar Association House of Delegates for the 2023-2025 term.

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

**ELECTION OF 2023-2024**  
**NOMINATING COMMITTEE**

**FIRST DISTRICT**

Jai K. Chandrasekhar  
Vincent Ted Chang  
Lisa M. Stenson Desamours  
Margaret J. Finerty  
Stephen Charles Lessard  
Seth Rosner  
Jay G. Safer  
Diana S. Sen  
Richard P. Swanson  
Mira C. Weiss, 1<sup>st</sup> alternate  
Mark Griffin, 2<sup>nd</sup> alternate  
David Cohn, 3<sup>rd</sup> alternate

**SECOND DISTRICT**

Hon. Cheryl Chambers  
Aimee Richter  
Hon. Joanne D. Quiñones, alternate

**THIRD DISTRICT**

Elena DeFio Kean  
Matthew J. Kelly  
Matthew Griesemer, alternate

**FOURTH DISTRICT**

Peter V. Coffey  
Margaret Gilmartin  
M. Elizabeth Coreno, alternate

**FIFTH DISTRICT**

Donald C. Doerr  
Jean Marie Westlake  
John McCann, alternate

**SIXTH DISTRICT**

Kathryn Grant Madigan  
Bruce McKeegan  
Alyssa Barreiro, alternate

**SEVENTH DISTRICT**

Eileen E. Buholtz  
Amy Schwartz Wallace  
Kevin F. Ryan, alternate

**EIGHTH DISTRICT**

Norman P. Effman  
Sharon Stern Gerstman  
Vincent E. Doyle, III, alternate

**NINTH DISTRICT**

Claire J. Degnan  
John A. Pappalardo  
Hon. Jonah Triebwasser  
Hon. Adam Seiden, alternate

**TENTH DISTRICT**

Justin M. Block  
Dorian Ronald Glover  
Lynn D. Poster-Zimmerman  
Sanford Strenger  
Ilene S. Cooper, 1<sup>st</sup> alternate  
Steven Leventhal, 2<sup>nd</sup> alternate

**ELEVENTH DISTRICT**

Richard M. Gutierrez  
Zenith Taylor  
Arthur Terranova, alternate

**TWELFTH DISTRICT**

Hugh Campbell

Suzanne McElwreath

Steven E. Millon, alternate

**THIRTEENTH DISTRICT**

Jonathan B. Behrins

Sheila T. McGinn

Claire Cody Miller, alternate

**NYSBA DELEGATES TO  
ABA HOUSE OF DELEGATES**

Claire P. Gutekunst, Yonkers

Michael Miller, New York City

Scott M. Karson, Stony Brook

Sherry Levin Wallach, White Plains

Domenick Napoletano, Brooklyn



# Staff Memorandum

**HOUSE OF DELEGATES  
Agenda Item #7**

REQUESTED ACTION: None, as the report is informational.

Joseph A. Glazer, co-chair of the Task Force on Mental Health and Trauma Informed Representation, will present on the ongoing work of the Task Force and update on the status of the Task Force's forthcoming report and recommendations.

The mission of the Task Force is as follows:

The Task Force on Mental Health and Trauma Informed Representation is created to explore, study, and evaluate the intersection between the mental health crisis and our civil and criminal justice systems. There is a well-documented crisis of mental health care in the United States that has failed to meet the needs of people with mental health challenges and/or histories of trauma. People living with mental health challenges or trauma histories are increasingly incarcerated, homeless, or boarded in hospital emergency rooms. They often bear additional burdens and stigma of racial discrimination, sex or gender identity discrimination, and poverty. The Task Force will focus on the need for the Bar to better serve individuals with mental health challenges and/or trauma histories, both adults and children, through trauma-informed practice, such as informing attorneys and the judiciary of available resources to assist in the representation of clients, by raising awareness of intersectional stigma and trauma, and by recommending education on best practices in the representation of these clients. Criminal diversion and civil processes will be examined to ensure that people living with mental health challenges and/or trauma histories are able to fully participate in legal proceedings that impact their liberty and well-being. State policy and budget priorities will be examined, and appropriate recommendations made.



# Staff Memorandum

**HOUSE OF DELEGATES  
Agenda Item #9**

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 ongoing work of the Task Force and update on the status of the Task Force's forthcoming report and recommendations.

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.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #10

REQUESTED ACTION: Approval of resolutions of Task Force on Emerging Digital Finance and Currency.

The Task Force on Emerging Digital Finance and Currency 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 assets, digital finance, and digital currency industries in New York State, including technological innovations with the Metaverse.

The Task Force has submitted two resolutions and a report for the consideration of the House.

The first resolution, entitled “Legislative Regulatory Resolution,” reads as follows:

**Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.

**Whereas** The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.

**Whereas** NYSBA, in conjunction with the Task Force, has taken notice of the rapid growth and expanded application of digital finance and underlying distributed ledger and other decentralized web technologies, and has undertaken a careful consideration of the manifest need for consumer and environmental protection against certain risks posed by virtual currency markets.

**Whereas** Given the interest, knowledge base and broader informational needs of its membership in the complex legal, regulatory and practice

aspects of the industry, and the leading role New York State has played in licensing and enforcement, the Association shall take a position of public advocacy for clear, efficient, and effective state regulation.

**Resolved** The New York State Bar Association supports prioritizing consumer and environmental protection while balancing and encouraging the growth of well-regulated digital finance and related business within New York State.

**Resolved** The New York State Bar Association recommends regulation, legislation and licensing that is consistent across the country to prevent inequities in the use of currency and assets across the country.

**Resolved** The New York State Bar Association suggests exploration of regulation, legislation and licensing of digital finance and currency, digital assets, and Web 3 across the country and globally.

The second resolution, entitled “Web3 Resolution,” reads as follows:

**Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.

**Whereas** The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.

**Resolved**, that the Task Force recommends that the New York State Bar Association explore and engage in the Web3 space by providing information-sharing opportunities, educating its members, and promoting the mission of the Association through use of the Web3 and other emerging digital technologies, including the potential use of blockchain, the Metaverse, NFTs, and digital currency to store and deliver content and provide value and access to the membership.

The accompanying report, which was circulated to the House for informational purposes at the January 2023 meeting, provides a primer on blockchain and digital assets, identifies the governing regulatory frameworks, and outlines the Task Force’s areas of focus.

The resolutions were submitted to the Reports Group in February 2023. No comments have been submitted as of March 17, 2023.

The resolutions will be presented by Task Force co-chair Jacqueline J. Drohan.



**New York State Bar Association  
Task Force on Emerging Digital Finance and Currency**

**April 2023**

**Legislative Regulatory Resolution of the NYSBA Task Force on Emerging Digital Finance and Currency**

**Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.

**Whereas** The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.

**Whereas** NYSBA, in conjunction with the Task Force, has taken notice of the rapid growth and expanded application of digital finance and underlying distributed ledger and other decentralized web technologies, and has undertaken a careful consideration of the manifest need for consumer and environmental protection against certain risks posed by virtual currency markets.

**Whereas** Given the interest, knowledge base and broader informational needs of its membership in the complex legal, regulatory and practice aspects of the industry, and the leading role New York State has played in licensing and enforcement, the Association shall take a position of public advocacy for clear, efficient, and effective state regulation.

**Resolved** The New York State Bar Association supports prioritizing consumer and environmental protection while balancing and encouraging the growth of well-regulated digital finance and related business within New York State.

**Resolved** The New York State Bar Association recommends regulation, legislation and licensing that is consistent across the country to prevent inequities in the use of currency and assets across the country.

**Resolved** The New York State Bar Association suggests exploration of regulation, legislation and licensing of digital finance and currency, digital assets, and Web 3 across the country and globally.

**New York State Bar Association  
Task Force on Emerging Digital Finance and Currency**

**April 2023**

**Web3 Resolution of the  
NYSBA Task Force on Emerging Digital Finance and Currency**

**Whereas** The New York State Bar Association formed a Task Force on Emerging Digital Finance and Currency in June 2022 to study the impact of digital assets, digital currency, non-fungible tokens, Web3, and the Metaverse on the legal profession, to educate lawyers on how to represent clients effectively, ethically, and knowledgeably in these areas, and to evaluate and study the regulatory, legislative, and licensing structures governing emerging digital assets, finance and currency.

**Whereas** The Task Force has held education programs on the topics of digital assets, digital currency, non-fungible tokens, Web3 and the Metaverse and its impact in and on the law and legal profession and presented to bar leaders on the effects of these emerging technologies across many practice areas.

**Resolved**, that the Task Force recommends that the New York State Bar Association explore and engage in the Web3 space by providing information-sharing opportunities, educating its members, and promoting the mission of the Association through use of the Web3 and other emerging digital technologies, including the potential use of blockchain, the Metaverse, NFTs, and digital currency to store and deliver content and provide value and access to the membership.

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## **Report - Task Force on Emerging Digital Finance and Currency**

### **I. INTRODUCTION**

Fourteen years ago, Satoshi Nakamoto released a white paper entitled “Bitcoin: A Peer-to-Peer Electronic Cash System.”<sup>1</sup> Nakamoto proposed a protocol that would allow an individual to transfer Bitcoin—a digital and decentralized alternative to fiat currency—directly to another individual without the need to involve a bank or other financial institution.<sup>2</sup> Unlike prevailing payment ecosystems, which relied on trust between individuals and financial institutions, the Bitcoin protocol relied on cryptography.

Bitcoin’s innovation was not the creation of a digital-only alternative to fiat currency; proposed substitutes for government-issued money predated Bitcoin. Instead, Bitcoin’s innovation was the creation of a blockchain: a type of distributed ledger in which a group of computers programmatically reach agreement on the state and changes to certain shared data.

Blockchain technology has the potential reshape how we transact: it decreases the need to trust centralized parties—who charge rent for their services and represent a single point of failure—by creating immutable and auditable records that no single person controls. Rather than being reliant on financial institutions to carry out instructions faithfully, individuals have the capability, through blockchain technology, to digitally transact with one another directly and then cryptographically prove that the transaction occurred (not just trust that it did).

The launch of the Ethereum network, for example, extended a blockchain’s utility by introducing embedded software applications—commonly called “smart contracts”—onto the blockchain ledger itself.<sup>3</sup> Smart contracts have enabled decentralized finance (referred to colloquially as “DeFi”) applications through which financial services like borrowing, lending, and trading take place on the blockchain without intermediary financial institutions. Non-fungible tokens (“NFTs”), which are unique blockchain-based digital assets that often link to other digital or real-world assets, enable claims of ownership of specific items—everything from concert tickets to property titles—to be directly and transparently proven. The Web3 ecosystem seeks to utilize blockchain technology to decrease some of the reliance on centralized third parties and democratize commerce by empowering developers, operators, and users of a platform to own or directly benefit from their efforts.

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<sup>1</sup> Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, <https://bitcoin.org/bitcoin.pdf>. The name Satoshi Nakamoto is believed to be a pseudonym for an individual or group of individuals. *Who is Satoshi Nakamoto?* COINDESK (Aug. 5, 2022), <https://www.coindesk.com/learn/who-is-satoshi-nakamoto/>.

<sup>2</sup> Nakamoto, *supra* note 1.

<sup>3</sup> Vitalik Buterin, *Ethereum: A Next-Generation Smart Contract and Decentralized Application Platform* (2014), at 13, [https://ethereum.org/669c9e2e2027310b6b3cdce6e1c52962/Ethereum\\_Whitepaper\\_-\\_Buterin\\_2014.pdf](https://ethereum.org/669c9e2e2027310b6b3cdce6e1c52962/Ethereum_Whitepaper_-_Buterin_2014.pdf).

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These innovations have also introduced new challenges. The ability to engage in peer-to-peer, pseudonymous transfers of digital assets with real-world value has resulted in digital assets becoming the preferred payment method on darknet marketplaces<sup>4</sup> and in ransomware schemes.<sup>5</sup> Bad actors have taken advantage of the hype around digital assets to defraud consumers, with the U.S. Department of Treasury estimating that \$7.8 billion in digital assets were stolen in 2021 through scams.<sup>6</sup> The smart contracts underlying DeFi applications have been exploited, leading to billions of additional dollars in lost assets.<sup>7</sup> Most recently, FTX, previously one of the world's largest digital asset exchanges, filed for bankruptcy after reports of shaky financials led to the blockchain-equivalent of bank run on the exchange<sup>8</sup> and ultimately resulted in civil and criminal charges against its founder and former CEO that centered around allegations that he fraudulently misappropriated funds that customers had deposited with the exchange<sup>9</sup>.

As the home of the world's largest financial center, New York State and, by extension, members of the New York State Bar Association ("NYSBA") have played key roles in the emerging digital asset ecosystem. NYSBA members have guided innovators and entrepreneurs seeking to launch new products and services utilizing digital assets. NYSBA members at the New York State Department of Financial Services, recognizing the limitations of existing regulatory frameworks, shaped the department's BitLicense regulations, a first-of-its kind regulatory regime tailored to the risks associated with digital asset activities. And NYSBA members have held bad actors to account when they sought to misuse digital assets for illicit purposes.

NYSBA members who have not already encountered blockchain-related issues in their legal practices likely will soon. The technology is not just relevant to financial services lawyers: it has the potential to broadly impact everything from how elections are held to how the supply chain is managed. Anywhere that is reliant upon whether information or data is trustworthy has the potential to be impacted by the technology. Where such change occurs, NYSBA members will

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<sup>4</sup> *Advisory on Illicit Activity Involving Convertible Virtual Currency*, FINCEN ADVISORY, FIN-2019-A003 (May 9, 2019), <https://www.fincen.gov/sites/default/files/advisory/2019-05-10/FinCEN%20Advisory%20CVC%20FINAL%20508.pdf>.

<sup>5</sup> *Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments*, FINCEN ADVISORY, FIN-2021-A004 (Nov. 8, 2021), [https://www.fincen.gov/sites/default/files/advisory/2021-11-08/FinCEN%20Ransomware%20Advisory\\_FINAL\\_508\\_.pdf](https://www.fincen.gov/sites/default/files/advisory/2021-11-08/FinCEN%20Ransomware%20Advisory_FINAL_508_.pdf).

<sup>6</sup> *Crypto-Assets: Implications for Consumers, Investors, and Businesses*, U.S. DEPT. OF TREASURY, at 27-28, [https://home.treasury.gov/system/files/136/CryptoAsset\\_EO5.pdf](https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf).

<sup>7</sup> The U.S. Department of Treasury estimates that \$2.3 billion worth of digital assets were stolen from DeFi applications in 2021. *Id.* at 28.

<sup>8</sup> *FTX creditors may number over 1 million as regulators seek answers*, REUTERS, Nov. 15, 2022, <https://www.reuters.com/technology/ftx-officials-contact-with-us-regulators-filing-2022-11-15/>.

<sup>9</sup> See *SEC v. Bankman-Fried*, No. 22-cv-10501 (S.D.N.Y. 2022); *CFTC v. Bankman-Fried*, No. 22-cv-10503 (S.D.N.Y. 2022); *United States v. Bankman-Fried*, No. 22-cr-00673 (S.D.N.Y. 2022).

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have to advise on, advocate for, and decide (in the case of judges) how the existing laws apply and, where change is needed, help draft new laws.

Applying the law to blockchain-technologies is frequently difficult, raising risks for those attorneys who provide blockchain-related legal services. NYSBA members have an ethical obligation to provide “competent representation.”<sup>10</sup> Because the blockchain ecosystem is quickly evolving and the legal questions that arise are often novel, attorneys risk violating their ethical obligations when they merely dabble in blockchain-related legal issues. Attorneys also face “gatekeeper liability” risks, in which attorneys may be liable for their client’s violations of law where the attorney’s services facilitated the violation. Officials from the Securities and Exchange Commission (“SEC”) have highlighted the duty of attorneys, as gatekeepers to U.S. capital markets, to prevent clients from engaging in digital asset activities that violate the securities laws<sup>11</sup> and warned that enforcement against gatekeepers is a priority for the agency<sup>12</sup>.

NYSBA’s mission is to “shape the development of law, educate and inform the public,” and “respond to the demands of [a] diverse and ever changing legal profession.”<sup>13</sup> In line with that mission, NYSBA’s Task Force on Emerging Digital Finance and Currency (the “Task Force”) has been directed 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.”<sup>14</sup>

The Task Force’s mission has three components:

1. Develop and educate members on best practices for attorneys representing clients on digital finance and digital currency matters.
2. 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.
3. Promote the appropriate use of digital assets and Web3 resources to keep pace with the industry and expand global membership.

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<sup>10</sup> 22 N.Y. C.R.R. Part 1200.0, Rule 1.1.

<sup>11</sup> See, e.g., Jay Clayton, Chairman, SEC, Opening Remarks at the Securities Regulation Institute (Jan. 22, 2018).

<sup>12</sup> Gurbir Grewal, Director, Division of Enforcement, SEC, Testimony on “Oversight of the SEC’s Division of Enforcement” Before the United States House of Representatives Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets (July 21, 2022) <https://www.sec.gov/news/statement/grewal-statement-house-testimony-071922>.

<sup>13</sup> About, NEW YORK STATE BAR ASSOCIATION, <https://nysba.org/about/#:~:text=Our%20mission%20is%20to%20shape,access%20to%20justice%20for%20all>. (last visited Nov. 15, 2022).

<sup>14</sup> Task Force on Emerging Digital Finance and Currency, NEW YORK STATE BAR ASSOCIATION, <https://nysba.org/committees/task-force-on-emerging-digital-finance-and-currency/> (last visited Nov. 15, 2022).

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This interim report represents the beginning of the Task Force’s work and has three parts. First, we provide a primer on blockchain and digital assets. Second, we identify the key regulatory frameworks that currently apply to digital assets. Third, we outline the Task Force’s intended areas of focus.

## **II. BACKGROUND**

### **A. Overview of Blockchain Technology**

A blockchain is a type of digital ledger consisting of time-stamped blocks—i.e., groups of transactions—that are chained (hence, the term “blockchain”) together in chronological order through cryptography. Blockchains have three key components:

1. A peer-to-peer network of computers (commonly called “nodes”);
2. A consensus protocol, which is a preprogrammed mechanism by which nodes reach agreement on the state of, and updates to, the ledger; and
3. Certain shared data, often embodied as a digital token.

In a typical blockchain transaction, a node broadcasts the proposed transaction to other nodes. The nodes then combine the proposed transaction, along with other proposed transactions, into a proposed block. The underlying protocol’s consensus mechanism determines which node will mine the next block and receive compensation (often in the form of block rewards—i.e., newly created digital assets—and/or transaction fees) for adding a new block to the ledger. However, before the block is actually mined to the blockchain, the other nodes—using cryptography—check whether the miner’s block is valid. If the nodes agree, the accepted block is added to the ledger.

Bitcoin was the first blockchain-based digital asset and was intended as a general-purpose medium of exchange, but a recent report by the Bank for International Settlements estimated that there are over 10,000 distinct types of blockchain-based digital assets.<sup>15</sup> Digital asset features and functionality can vary significantly, but they broadly fall into five categories:

1. **Virtual Currencies.** Virtual currencies are fungible digital assets designed to be used as a general-purpose medium of exchange. Under this framework, Bitcoin would be considered a virtual currency.

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<sup>15</sup> *The Future Monetary System*, BIS ANNUAL ECONOMIC REPORT 2022, at 78, <https://www.bis.org/publ/arpdf/ar2022e3.pdf>.

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2. **Stablecoins.** Stablecoins are fungible digital assets whose value is intended to be pegged to another asset (commonly, fiat currency). USD Coin (“USDC”) is an example of a stablecoin that is pegged to the U.S. dollar.
3. **Utility Tokens.** Utility tokens are fungible digital assets designed for use within a particular application or platform. An example of a utility token is VCOIN. VCOIN was designed by IMVU, the asset’s issuer, as a way for users of IMVU’s virtual world platform to buy goods and services from vendors within that platform.
4. **Security Tokens.** Security tokens are digital assets that expressly (or implicitly or indirectly) represent equity in a company.
5. **Non-fungible Tokens (“NFTs”).** NFTs are unique blockchain-based digital assets with metadata that, as most commonly used today, link to or embody one or more physical or digital items. The NFT functions as a verifiable and transferable digital record that evidences the holder’s right to access and use these items. NFTs can represent rights to everything from digital artwork and concert tickets to real property.

Developers have built upon Bitcoin’s protocol to launch new blockchains that incorporate new features. The most important innovation has been the blockchain-based smart contract, first implemented in the Ethereum protocol.<sup>16</sup> A blockchain-based smart contract is computer code—written to the blockchain itself—that is capable of running automatically and autonomously based upon the occurrence or nonoccurrence of a specified condition or conditions (e.g., delivery of an asset, change in a reference rate, or weather conditions).<sup>17</sup> If the smart contract is triggered, the code’s output is written onto the ledger.

## **B. The Emerging Digital Asset Ecosystem**

Blockchain technology has spurred significant initiatives to reshape commerce through decentralization. This subsection seeks to define key aspects of the emerging digital asset ecosystem.

### **1. Web3**

Many observers view blockchain technology as being a key component of a new era of the internet called Web3.<sup>18</sup> The first iteration—Web1—enabled consumers to connect to the internet

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<sup>16</sup> Broadly defined, the smart contract predated the blockchain by at least 15 years, comprising computerized transaction protocols that execute terms of a contract. See Nick Szabo, *Formalizing and Securing Relationships on Public Networks*, FIRST MONDAY, <https://firstmonday.org/ojs/index.php/fm/article/view/548/469> (last visited Nov. 15, 2022).

<sup>17</sup> Buterin, *supra* note 3.

<sup>18</sup> *What is Web3?*, ETHEREUM.ORG, <https://ethereum.org/en/web3/> (last updated Nov. 14, 2022).

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and access mostly static, noninteractive content.<sup>19</sup> Web2 enabled social media, removing most barriers for end users to publish their own content to the internet.<sup>20</sup> The tradeoff was that, in order to do so, consumers placed control of personal data in the hands of centralized providers.<sup>21</sup>

Web3 is frequently defined as a decentralized version of the internet that decreases end-user reliance on centralized, often noninteroperable platforms.<sup>22</sup> Optimists view blockchain, in its role as a part of Web3, as ultimately returning some control over personal data to the end user and democratizing commerce by enabling both platform developers and users to directly benefit from their contributions with less intermediation.<sup>23</sup>

## **2. Decentralized Finance**

DeFi applications are the most visible arm of the current Web3 ecosystem. DeFi is an umbrella term for financial services deployed on and accessible via public blockchains.<sup>24</sup> Using smart contracts, DeFi applications are intended to enable users to earn interest, borrow, lend, buy insurance, trade derivatives, trade assets, and more without intermediaries. Frequently, DeFi developers provide a front-end website through which end users can access the DeFi application (albeit in an intermediated way).<sup>25</sup> However, because these smart contracts often exist on a public, often permissionless blockchain, many DeFi application contracts can be accessed directly by those with sufficient technical skills.<sup>26</sup>

## **3. Metaverses**

Over the longer term, Web3 proponents expect metaverses to be a key component of the decentralized internet by providing digital analogs to the real world. Although definitions vary, at a high level, a metaverse is a virtual- or augmented-reality environment in which users interact on a peer-to-peer basis.<sup>27</sup> Virtual reality environments are not new, but incorporation of blockchain-

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *The web3 Landscape*, A16Z (Oct. 2021), <https://a16z.com/wp-content/uploads/2021/10/The-web3-Reading-List.pdf>.

<sup>24</sup> *What is Blockchain Technology?*, CBINSIGHTS (Nov. 9, 2021), <https://www.cbinsights.com/research/what-is-blockchain-technology/>.

<sup>25</sup> *How DeFi Platforms are Using Data from TRM Labs to Respond to Tornado Cash Sanctions*, TRM Labs (Aug. 15, 2022), <https://www.trmlabs.com/post/how-defi-platforms-are-using-data-from-trm-labs-to-respond-to-tornado-cash-sanctions>.

<sup>26</sup> *Id.*

<sup>27</sup> *The Metaverse in 2040*, PEW RESEARCH CENTER (June 30, 2022), <https://www.pewresearch.org/internet/2022/>



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based digital assets within the metaverse itself is. Bringing these assets into the metaverse allows individuals to transact on a peer-to-peer basis in assets that have real-world value.<sup>28</sup>

#### **4. Decentralized Autonomous Organizations**

Blockchain has also spurred efforts to decentralize organizational governance. So-called decentralized autonomous organizations (“DAOs”) are organizations with (purportedly) no central authority (e.g., no board of directors or executive officers).<sup>29</sup> Instead, governance decisions are made by the holders of governance tokens—digital assets that represent a right to participate in the organization’s governance—who vote on proposals made by community members.<sup>30</sup> Commonly, portions of the organization’s governance structure are enforced through smart contracts, enhancing the transparency and auditability of governance decisions and, in some cases, allowing the outcomes of those decisions to automatically and autonomously execute on the blockchain.<sup>31</sup> DAOs are generally not incorporated, creating uncertainty as to the organization’s proper legal classification.

### **III. KEY FRAMEWORKS APPLICABLE TO DIGITAL ASSETS**

Regulators have largely sought to apply existing financial services regulatory frameworks to digital assets, where the applicable regulatory framework depends on the digital asset involved and the activity being performed. There are notable exceptions, including New York’s BitLicense framework, which was developed by the regulators at the New York State Department of Financial Services to provide a regulatory framework tailored to digital asset activities.

Federal regulators have been active in enforcing the application of statutes within their authority to digital asset activities. However, those regulators with supervisory authority—such as the SEC which oversees securities broker-dealers and exchanges, and the Office of the Comptroller

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[06/30/the-metaverse-in-2040/](#) (“In today’s terms, the metaverse is the realm of computer-generated, networked extended reality, or XR, an acronym that embraces all aspects of augmented reality, mixed reality and virtual reality (AR, MR and VR)”).

<sup>28</sup> *The Block 2022 Digital Asset Outlook*, GSR (Dec. 2022) (“The term metaverse dates back to Neal Stephenson’s 1992 novel, *Snow Crash*, in which he refers to the metaverse as a persistent virtual world. The idea is that the metaverse is a real-time 3D social medium where people collaborate and participate in an economy. . . . One of the common aspects is about how the metaverse will also be integral to digital economies. And if this is the case, asserting ownership, proving digital scarcities will be vital attributes of the metaverse. Imagining a metaverse without blockchains and NFTs is difficult as they already have the characteristics of the metaverse.”).

<sup>29</sup> Although DAOs aim to operate in a decentralized manner, the U.S. Government has warned that many purportedly decentralized services are “decentralized more in name than in fact.” *The Report of the Attorney General Pursuant to Section 5(b)(iii) of Executive Order 14067: The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets*, U.S. DEPT. OF JUSTICE (Sep. 6, 2022), <https://www.justice.gov/ag/page/file/1535236/download>.

<sup>30</sup> What is Web3?, *supra* note 18.

<sup>31</sup> *Id.*

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of the Currency, which supervises national banks—have been reluctant to register or charter new entities seeking to engage in digital asset activities. The result is that supervision of persons engaged in regulated digital asset activities has largely been left to the states, typically pursuant to state money transmitter and/or trust company statutes. Because these statutes do not authorize regulated digital asset service providers to operate nationwide, digital asset service providers are supervised by dozens of state regulators. By contrast, the European Union (“EU”) is developing an overarching supervisory framework for digital asset activities that will provide a passporting mechanism to avoid country-by-country licensing within the EU.<sup>32</sup>

Initial regulatory and enforcement efforts have focused on centralized providers of digital asset services, such as exchanges that facilitate the trade of digital assets on internal, non-blockchain-based orderbooks and ledgers. More recently, regulators and law enforcement have sought to apply financial services laws to persons that the government believes are operating or controlling DeFi applications. The premise underlying these recent actions is that if DeFi protocols perform regulated financial activities, those in control of the protocols are responsible for complying with applicable laws.<sup>33</sup>

Below, we provide an overview of the key financial services-related regulatory frameworks that currently apply to digital assets.

#### **A. Bank Secrecy Act**

The Bank Secrecy Act (“BSA”) is the principal federal statute aimed at preventing money laundering. The BSA and its implementing regulations (the “BSA Regulations”), adopted by the Financial Crimes Enforcement Network (“FinCEN”), impose a wide range of anti-money laundering (“AML”) obligations on financial institutions, including:

- State or federally chartered banks;
- Broker-dealers registered with the SEC and persons required to be registered as broker-dealers (i.e., unregistered broker-dealers);

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<sup>32</sup> Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and Amending Directive (EU) 2019/1937, COM (2020) 593 final (Sep. 24, 2020).

<sup>33</sup> See, e.g., *Action Plan to Address Illicit Financing Risks of Digital Assets*, U.S. DEP’T OF TREASURY, , <https://home.treasury.gov/system/files/136/Digital-Asset-Action-Plan.pdf>, (last visited Nov. 11, 2022) (“Frequently, DeFi services purport to run autonomously without the support of a central company, group, or person, despite having a controlling organization—through a decentralized autonomous organization, concentrated ownership or governance rights, or otherwise—that provides a measure of centralized administration or governance. When such an entity accepts and transmits currency, funds, or value that substitutes for currency, it may be operating as a money transmitter and have AML/CFT obligations, and may be decentralized only or partly in name.”).

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- Futures commission merchants registered with the Commodity Futures Trading Commission (“CFTC”) and persons required to be registered with the CFTC as futures commission merchants (i.e., unregistered futures commission merchants); and
- A class of nonbank financial institutions called “money services businesses” (“MSBs”).<sup>34</sup>

As applied to digital assets, FinCEN guidance and enforcement efforts have focused on MSBs. MSBs are persons “wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States” acting in one of seven enumerated capacities, including as a “money transmitter.”<sup>35</sup> A “money transmitter” is a person that (i) accepts “currency, funds, or other value that substitutes for currency from one person” and transmits “currency, funds, or other value that substitutes for currency to another location or person by any means” or (ii) is “engaged in the transfer of funds.”<sup>36</sup>

Among other requirements, MSBs must (i) register with FinCEN; (ii) develop, implement, and maintain an effective AML program; and (iii) adhere to recordkeeping and reporting obligations (including filing suspicious activity reports). Operating as an unlicensed MSB may result in civil and potentially criminal penalties under federal law.

FinCEN has published guidance outlining which blockchain-related activities it interprets as being regulated money transmission and, thus, render an entity an MSB under the BSA. Specifically, in March 2013, FinCEN released the “Virtual Currency Guidance,”<sup>37</sup> in which FinCEN interpreted the definition of a money transmitter to cover transactions involving “convertible virtual currency” (“CVC”).<sup>38</sup> FinCEN defines CVC as a “type of virtual currency [that] either has an equivalent value in real currency, or acts as a substitute for real currency.”<sup>39</sup>

FinCEN reiterated in the guidance that “[a]ccepting and transmitting anything of value that substitutes for currency makes a person a money transmitter.”<sup>40</sup> FinCEN then concluded that persons are engaging in “money transmission services”—and thus are MSBs—when (1) they accept and transmit CVC or (2) they buy and sell CVC *and* they are either

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<sup>34</sup> 31 C.F.R. § 1010.100(t).

<sup>35</sup> *Id.* § 1010.100(ff).

<sup>36</sup> *Id.* § 1010.100(ff)(5).

<sup>37</sup> *Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FinCEN, FIN-2013-G001 (Mar. 18, 2013), <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1.

<sup>40</sup> *Id.* at 3.

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- An “exchanger,” which is a person engaged as a business in the exchange of CVC for real currency, funds, or other CVC; or
- An “administrator,” which is a person engaged as a business in issuing CVC, and who has the authority to redeem such CVC.<sup>41</sup>

On May 9, 2019, FinCEN issued guidance that explained how it interprets the BSA Regulations as applying to certain CVC business models.<sup>42</sup> Most notably, FinCEN concluded that some “decentralized applications” (“dApps”) are engaged in money transmission. As defined by FinCEN, dApps are software programs that run on the blockchain and are “designed such that they are not controlled by a single person or group of persons.”<sup>43</sup> FinCEN analogized dApps to Bitcoin ATMs, stating that “[t]he same regulatory interpretation that applies to mechanical agencies” like Bitcoin ATMs—which accept cash and then typically transfer CVC to the purchaser—applies equally to “[d]Apps that accept and transmit value, regardless of whether they operate for profit.”<sup>44</sup> In other words, FinCEN’s guidance indicates that a dApp might be engaged in money transmission if it accepts and transmits value and the operator of the dApp may be an MSB.<sup>45</sup> FinCEN clarified that developing a dApp is not money transmission, “even if the purpose of the [d]App is to issue a CVC or otherwise facilitate financial activities denominated in CVC.”<sup>46</sup> But if a person uses or deploys the dApp to conduct money transmission, then that person will generally be an MSB.<sup>47</sup>

## **B. State Money Transmitter Statutes**

Every U.S. state, except Montana, regulates “money transmission” as a licensable activity, in some fashion. These statutes are primarily consumer protection statutes that aim to protect consumers by ensuring that licensees can meet their outstanding financial obligations to their customers.<sup>48</sup> If a person engages in money transmission as defined by a particular state, that person

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<sup>41</sup> *Id.* at 2, 3.

<sup>42</sup> *Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FinCEN, FIN-2019-G001 (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

<sup>43</sup> *Id.* at 18.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 27.

<sup>47</sup> *Id.*

<sup>48</sup> RCW 19.230.005 (“It is the intent of the legislature to establish a state system of licensure and regulation to ensure the safe and sound operation of money transmission and currency exchange businesses, to ensure that these businesses are not used for criminal purposes, to promote confidence in the state’s financial system, and to protect the public interest.”); *see also The State of State Money Services Businesses Regulation & Supervision*, CONFERENCE OF STATE BANK SUPERVISORS & MONEY TRANSMITTERS REGULATORS ASSOCIATION (May 2016), <https://www.csbs.org/sites/default/files/2017-11/State%20of%20State%20MSB%20Regulation%20and%20>

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likely would need to obtain a license in order to lawfully offer services to customers within that state.

State money transmission statutes generally define money transmission to include three often overlapping categories of activity:

1. Receiving money or monetary value for transmission.<sup>49</sup>
2. Selling or issuing stored value. “Stored value” is generally defined as money or monetary value that is evidenced by an electronic record.<sup>50</sup> A closed-loop prefunded card/certificate/code issued by a seller for the future provision of goods or services is commonly exempt from regulation as stored value.
3. Selling or issuing payment instruments. The term “payment instrument” is typically defined as “a check, draft, warrant, money order, travelers check or other instrument or payment of money, whether or not negotiable.”<sup>51</sup>

“Money” is frequently defined as “a medium of exchange that is authorized or adopted by a domestic or foreign government.”<sup>52</sup> Notably, Texas has advised that a digital asset backed by a sovereign currency (i.e., currency-backed stablecoins) constitutes “money.”<sup>53</sup> Many states define “monetary value” as “a medium of exchange, whether or not redeemable in money.”<sup>54</sup> A few states have amended their statutes to expressly cover digital asset activities, although most have not.<sup>55</sup> Several states that have not done so have nonetheless construed their existing money transmission

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[Supervision%202.pdf](#) (identifying “customer protection, safety and soundness and adherence to Bank Secrecy Act and Anti-Money Laundering (“BSA/AML”) requirements” as the principal goals of the state regulatory requirements for money transmitters and other money services businesses).

<sup>49</sup> See, e.g., Cal. Fin. Code § 2003(s); Iowa Code Ann. § 533C.201; Kan. Rev. Stat. § 286.01; Ariz. Rev. Stat. Ann. § 6-1201.

<sup>50</sup> See, e.g., A.C.A. § 23-55-102(12)(A); Cal. Fin. Code § 2003(x); Conn. Gen. Stat. § 36a-596(12).

<sup>51</sup> See, e.g., Florida Statutes § 560.103(29).

<sup>52</sup> See, e.g., Ariz. Rev. Stat. § 6-1201; Iowa Code § 533C.102; Kan. Rev. Stat. § 286.11-003(16).

<sup>53</sup> Texas Dep’t of Banking, Supervisory Memorandum 1037, Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act (April 1, 2019), <https://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf> (stating that a sovereign-backed stablecoin constitutes “money” if the stablecoin provides the holder with a redemption right for sovereign currency and thus is subject to regulation under the Texas Money Services Act).

<sup>54</sup> See, e.g., Cal. Fin. Code § 2003(m); Conn. Gen. Stat. § 36a-596; Fla. Stat. Ann. § 560.103; Iowa Code Ann. § 533C.102; Kan. Stat. Ann. § 9-508(f).

<sup>55</sup> See, e.g., RCW 19.230.010(18); Conn. Gen. Stat. § 36a-596(9), (18).

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statutes to cover digital asset activity, concluding that fungible digital assets like Bitcoin are monetary value.<sup>56</sup>

State regulators often have varying views regarding into which money transmission prong a given activity falls—i.e., one regulator will consider selling Bitcoin to be the sale of stored value while another might consider that activity to involve the sale of a payment instrument. Broadly speaking, state regulators take the position that an entity is engaged in money transmission when it exercises custody or control over money or monetary value owned by or owed to another.

### **C. BitLicense Regulations**

New York has implemented a separate regulatory regime, commonly called the BitLicense, that—unlike state money transmitter regulations—is specific to “virtual currency” activities. Under the BitLicense regulations, “virtual currency” is generally defined to mean “any type of digital unit that is used as a medium of exchange or a form of digitally stored value,” irrespective of whether the digital units have a centralized repository or administrator.<sup>57</sup>

The regulations require any entity providing one or more of the following services to New York residents to obtain a BitLicense: (1) receiving virtual currency for transmission or transmitting virtual currency; (2) storing, holding, or maintaining custody or control of virtual currency on behalf of others; (3) buying and selling virtual currency; (4) performing virtual currency exchange services; or (5) controlling, administering, or issuing a virtual currency.<sup>58</sup> The BitLicense regulations exempt from its licensing requirements persons engaging in the activities as (a) an entity chartered under New York Banking Law and approved by the New York State Department of Financial Services to engage in virtual currency business activities or (b) a merchant or consumer that uses virtual currency “solely for the purchase or sale of goods or services or for investment purposes.”<sup>59</sup>

The BitLicense regulations impose several supervisory requirements that go beyond the requirements imposed pursuant to state money transmitter statutes. The regulations, for instance, authorize the Superintendent of the New York State Department of Financial Services to impose capital requirements that account for the BitLicense holder’s particular safety and soundness risks.<sup>60</sup> In practice, this can mean that a BitLicense holder may be required to maintain a positive net worth in the tens of millions of dollars at all times if the Superintendent determines that

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<sup>56</sup> See, e.g., *General FAQs*, NEW MEXICO REGULATION & LICENSING DEPT., <https://www.rld.nm.gov/financial-institutions/about-us/faqs/>, (last visited Nov. 11, 2022); *Digital or virtual currencies what are they?*, CONSUMER PROTECTION, OREGON.GOV, <https://dfr.oregon.gov/help/Documents/5342-virtual-currencies.pdf> (last visited Nov. 11, 2022).

<sup>57</sup> 23 N.Y. C.R.R. Part 200.2(p).

<sup>58</sup> *Id.* Part 200.2(q).

<sup>59</sup> *Id.* Part 200.2(q).

<sup>60</sup> *Id.* Part 200.9.

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circumstances warrant it. By contrast, capital requirements under state money transmitter statutes are considerably less flexible and, at the high end of the spectrum, require a positive net worth of a few million dollars. BitLicense holders must generally receive preapproval to launch materially new products and services, which differs from state money transmitter statutes which typically only require the license holders notify the regulator of the change. And the BitLicense regulations also impose specific AML and cybersecurity requirements on BitLicense holders.<sup>61</sup>

#### **D. Trust Company Laws**

Trust companies are non-depository financial institutions chartered under state law to offer fiduciary services to the public. Trust companies are subject to prudential regulation and supervision, meaning these institutions are commonly subject to supervisory requirements that go beyond the requirements imposed on money transmitter licensees, including, for example, (i) capitalization requirements that account and control for categories of risks, such as price risks, liquidity risks, and market risks; (ii) enhanced supervisory controls; and (iii) restrictions on business activities.

Trust companies are increasingly being used as a vehicle to custody digital assets, particularly the assets of institutional customers. The process for obtaining a trust charter is more involved than the process for obtaining a money transmitter license, as the state is effectively assessing whether there is a business case to issue a charter. However, obtaining a trust charter does offer several benefits, including the following:

- Because state trust companies are subject to prudential regulation, they are frequently perceived as a safer vehicle for holding digital assets compared to a money transmitter licensee.
- A state trust company has a stronger legal argument than a money transmitter licensee that customer assets should not become part of a bankruptcy or receivership estate.
- Obtaining a trust charter potentially enables the entity to serve as a “qualified custodian” under the Investment Advisers Act of 1940. Status as a qualified custodian<sup>62</sup> allows the entity to custody funds on behalf of registered investment advisers, who are required to place client funds and securities with a qualified custodian<sup>63</sup>. The definition of a “qualified custodian” includes state trust companies but only to the extent “a

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<sup>61</sup> *Id.* Part 200.15-16.

<sup>62</sup> 17 C.F.R. § 275.206(4)-2(d)(6) (defining as “qualified custodian” to include an entity that meets the definition of a “bank” under 15 U.S.C. 80b-2(a)(2)); *see also* 15 U.S.C. 80b-2(a)(2) (defining a bank to include a state chartered trust company if a “substantial portion of the business . . . consists of . . . exercising fiduciary powers”).

<sup>63</sup> *Id.* § 275.206(4)-2(a).

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substantial portion of the business” of such entities “consists of exercising fiduciary powers similar to those permitted to national banks.”<sup>64</sup>

- If the state trust company seeks to engage in activities beyond custody (and is authorized to do so)—e.g., settlement or exchange services—the state trust company potentially would be able to avail itself of money transmitter license exemptions in ten or more states.<sup>65</sup>

Which activities a state-chartered trust company can engage in depends largely on which state issued the charter. South Dakota, for instance, has granted trust charters to digital asset service providers, but those charters generally limit the trust company to the provision of custodial services. By contrast, limited-purpose trust companies chartered by the New York State Department of Financial Services and authorized to engage in virtual currency business activity may also provide virtual currency exchange services with the department’s approval.

## **E. Federal Securities Laws**

The federal securities laws define the term “security” broadly to cover virtually all types of investment instruments. The laws generally cover digital assets that are intended to be securities—e.g., digital assets that are intended to represent equity in a company—and digital assets that qualify as “investment contracts.” In determining whether digital assets are investment contracts under federal law, the “*Howey*” test typically applies. The *Howey* test requires an assessment of whether there is (i) an investment of money (ii) in a common enterprise (iii) with an expectation of profits (iv) derived from the entrepreneurial or managerial efforts of others.<sup>66</sup> Classification as a security has wide-reaching implications affecting, among other things, how the digital asset can be issued and where it can be traded on secondary markets.

In July 2017, the SEC issued a Report of Investigation (the “DAO Report”) in response to the increasing use by “virtual organizations and associated individuals and entities [of] distributed ledger technology to offer and sell instruments such as DAO tokens to raise capital.”<sup>67</sup> The SEC issued the report “to stress that the U.S. federal securities law may apply to various activities, including distributed ledger technology, depending on the particular facts and circumstances, without regard to the form of the organization or technology used to effectuate a particular offer

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<sup>64</sup> 15 U.S.C. 80b-2(a)(2))

<sup>65</sup> See, e.g., Fla. Stat. § 560.104 (exempting trust companies from the provisions of the state’s money transmitter statute).

<sup>66</sup> *S.E.C. v. Edwards*, 540 U.S. 389, 394 (2004).

<sup>67</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, SEC, Exchange Act Release No. 81207 (July 25, 2017) [hereinafter DAO Report]; See also SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities, SEC (July 25, 2017), <https://www.sec.gov/news/press-release/2017-131>.



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or sale.”<sup>68</sup> The DAO Report confirmed that, unless properly conducted, selling tokens that are transferable on a distributed ledger may violate the Securities Act of 1933 (“Securities Act”), the Securities Exchange Act of 1934 (“Exchange Act”), and other federal and state securities laws.<sup>69</sup>

After the SEC issued the DAO Report, it brought an enforcement action against Munchee, Inc., a token issuer, for issuing unregistered securities.<sup>70</sup> Munchee had issued a “utility token,” but it had also made statements in its marketing materials such as the fact that it would ensure a secondary market for its tokens and guarantee high levels of returns.<sup>71</sup> Because the marketing materials contained such statements and were directed toward virtual currency investors rather than likely potential users of Munchee’s product, the SEC determined that the Munchee token was a security under the *Howey* test.<sup>72</sup> In particular, the SEC focused on the prong of “reasonable expectation of profits,” finding that it was reasonable to conclude that the marketing materials from Munchee gave potential investors certain expectations of a passive increase in value over time.<sup>73</sup>

On June 14, 2018, William Hinman, then-director of the SEC’s Division of Corporation Finance, gave a speech at a conference in which he outlined that, in his view, the sale of digital assets may not be a securities offering under certain circumstances.<sup>74</sup> Such circumstances include when the network is sufficiently decentralized that “purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts.”<sup>75</sup>

Director Hinman emphasized that the economic substance of the transaction matters when determining whether a token is a security and outlined several factors that the SEC will consider when evaluating token sales.<sup>76</sup> These factors include, among other things, whether:

- a sponsor or promoter’s efforts play a significant role in the development and maintenance of the token or token network;
- a sponsor or promoter retains a stake or interest in the token such that the person or entity is motivated to expend efforts to cause an increase in the value of the token;

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<sup>68</sup> DAO Report, *supra* note 67, at 10.

<sup>69</sup> *Id.* at 1-2.

<sup>70</sup> *In re Munchee Inc.*, Securities Act Release No. 10445 (SEC Dec. 11, 2017),

<https://www.sec.gov/litigation/admin/2017/33-10445.pdf>.

<sup>71</sup> *Id.* at 3-7.

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.* at 5-7.

<sup>74</sup> William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, SEC (June 14, 2018),

<https://www.sec.gov/news/speech/speech-hinman-061418>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

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- purchasers are motivated by a financial return when purchasing the token; and
- persons or entities other than the promoter or sponsor exercise governance rights or influence.<sup>77</sup>

On April 3, 2019, the SEC’s Strategic Hub for Innovation and Financial Technology published a framework (the “SEC Framework”) for analyzing whether a digital asset is offered and sold as a security under the federal securities laws.<sup>78</sup> The SEC Framework consolidated into one document previous SEC staff guidance, positions, and statements as to how digital assets may be covered under the *Howey* test for investment contracts.

According to the SEC Framework, “[u]sually, the main issue in analyzing a digital asset under the *Howey* test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others.”<sup>79</sup> For this reason, the SEC Framework focused principally on these considerations, which are the third and fourth factors in the *Howey* test. The SEC Framework also introduced a new term, “active participant,” which is broadly defined to include participants in a digital asset network whose efforts may form the basis of a purchaser’s expectation of profits.<sup>80</sup>

The SEC Framework also emphasizes the SEC staff’s view that even if a token has partial utility at launch, under certain circumstances, the token might still be a security at launch if the digital asset’s functionality is still being developed or improved:

Even in cases where a digital asset can be used to purchase goods or services on a network, where that network’s or digital asset’s functionality is being developed or improved, there may be securities transactions if, among other factors, the following is present: the digital asset is offered or sold to purchasers at a discount to the value of the goods or services; the digital asset is offered or sold to purchasers in quantities that exceed reasonable use; and/or there are limited or no restrictions on reselling those digital assets, particularly where an [active participant] is continuing in its efforts to increase the value of the digital assets or has facilitated a secondary market.<sup>81</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Framework for “Investment Contract” Analysis of Digital Assets*, SEC, (Apr. 3, 2019), <https://www.sec.gov/files/dlt-framework.pdf>.

<sup>79</sup> *Id.* at 2.

<sup>80</sup> *Id.* at 3.

<sup>81</sup> *Id.* at 11.

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To date, SEC staff have applied the *Howey* test to digital assets in three “no-action” letters (the “SEC Staff No-Action Letters”).<sup>82</sup> In each of the SEC Staff No-Action Letters, SEC staff listed several facts that it found to be persuasive in determining that the digital assets involved were not securities. Of relevance is the weight that SEC staff gave to the following factors: (i) that the digital assets involved would be immediately usable; (ii) that the issuers would market the digital assets *exclusively* for their consumptive use; and (iii) that the issuers would build in restrictions on transfer or other price controls to limit the potential for purchasers to realize any capital appreciation.<sup>83</sup>

The SEC has also applied the securities laws to DeFi. In November 2018, the SEC settled charges against James Coburn for contributing to violations of Section 5 of the Exchange Act through his operation of a decentralized exchange—EtherDelta—which utilized a smart contract on the Ethereum network to allow buyers and sellers to trade tokens on a peer-to-peer basis.<sup>84</sup> The SEC concluded that EtherDelta traded in securities without first registering as an exchange or operating pursuant to an exemption from registration, in violation of the Exchange Act.<sup>85</sup> The SEC concluded that Coburn contributed to EtherDelta’s violations because he “exercised complete and total control over EtherDelta’s operations” and, as a result, he “should have known that his actions” would contribute to EtherDelta’s violations.<sup>86</sup> Ultimately, the SEC and Coburn entered into an agreement whereby Coburn agreed to disgorge \$313,000 and pay a \$75,000 penalty.

## **F. Federal Commodities Laws**

Transactions involving commodities are governed by the Commodity Exchange Act of 1936, as amended (the “CEA”), and regulations promulgated thereunder (collectively, “Commodities Laws”) by the CFTC. The CEA broadly defines the term “commodity” to encompass virtually all goods, services, and interests.<sup>87</sup>

The CFTC has supervisory authority over three types of “commodity interest” transactions and various market participants involved in those transactions:

- **Futures Contracts.** Futures contracts are contracts for the future delivery of a commodity. Generally, futures contracts must be offered on a regulated exchange

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<sup>82</sup> *TurnKey Jet, Inc.*, SEC Staff No-Action Letter (Apr. 3, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm>; *Pocketful of Quarters, Inc.*, SEC Staff No-Action Letter (July 25, 2019), <https://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1>; *IMVU, Inc.*, SEC Staff No-Action Letter (Nov. 17, 2020), <https://www.sec.gov/corpfin/imvu-111920-2a1>.

<sup>83</sup> *In re Zachary Coburn*, Exchange Act Release No. 84553 (SEC Nov. 8, 2018), <https://www.sec.gov/litigation/admin/2018/34-84553.pdf>.

<sup>84</sup> *Id.* at 4-5.

<sup>85</sup> *Id.* at 8-9.

<sup>86</sup> *Id.* at 9.

<sup>87</sup> 7 U.S.C. § 1a(9).

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platform, known as a designated contract market (“DCM”), and through a regulated broker, known as a futures commission merchant (“FCM”). Futures contracts may only be offered on a DCM regardless of whether the contracts are marketed to retail investors or more sophisticated investors, known as “eligible contract participants” (“ECPs”).

- **Swap Agreements.** The CEA broadly defines “swap” to include (i) an option of any kind<sup>88</sup> for the purchase or sale, or based on the value of, a financial or economic interest or property of any kind; (ii) a contract or transaction that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; and (iii) a contract that provides, on an executory basis, for the exchange of one or more payments based on the value of the commodity (or economic interests or property of any kind) and that transfers the financial risk associated with a future change in any such value without also conveying a current or future ownership interest in an asset or liability incorporating such financial risk.<sup>89</sup>

Transactions involving a counterparty that is not an ECP must be executed on a DCM. However, swaps involving ECPs may be executed over the counter in most circumstances or on a swap execution facility.

- **Retail Commodities Transactions.** The CFTC also has supervisory jurisdiction over retail commodities transactions that are not technically futures or swaps but which are (1) offered to retail investors, (2) involve “leverage, margin, or financing,” and (3) do not result in actual delivery of the underlying commodity within 28 days.<sup>90</sup> All retail commodities transactions must be offered on a DCM.

Finally, the CFTC also has *enforcement* jurisdiction over the spot market for commodities to prevent fraud and market manipulation that could have an adverse effect on the prices of commodities.<sup>91</sup>

Since 2015, the CFTC by public comment, enforcement posture, and civil advocacy has taken the position that “virtual currencies” constitute “commodity transactions” for purposes of

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<sup>88</sup> The CEA defines the term “option” as, “an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an ‘option’, ‘privilege’, ‘indemnity’, ‘bid’, ‘offer’, ‘put’, ‘call’, ‘advance guaranty’”, or ‘decline guaranty.’” 7 U.S.C. § 1a(36).

<sup>89</sup> 7 U.S.C. § 1a(47)(A).

<sup>90</sup> 7 U.S.C. § 2(c)(2)(D)(i).

<sup>91</sup> 7 U.S.C. § 9 (providing the CFTC with general anti-fraud and anti-manipulation enforcement authority relating to a “contract of sale of a commodity” in interstate commerce)

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the CEA.<sup>92</sup> The CFTC has interpreted the term “virtual currency” broadly, to encompass any digital representation of value that functions as a medium of exchange, and any other digital unit of account used as a form of currency.<sup>93</sup>

In September 2022, the CFTC commenced enforcement actions against persons the CFTC believed were responsible for illegal, off-exchange trading that occurred through the bZx protocol, a DeFi application, in violation of the CEA.<sup>94</sup> The CFTC announced a settlement with bZeroX LLC and two principals, who initially developed and controlled the protocol’s smart contracts before turning control of the protocol over to the bZx DAO (now called the Ooki DAO).<sup>95</sup> Additionally, the CFTC filed suit against the Ooki DAO, alleging that because the DAO was not incorporated it was as a general partnership that is amenable to suit.<sup>96</sup>

The CFTC alleges that the bZx protocol allowed individuals to engage in CEA-regulated margined or leveraged retail commodities transactions.<sup>97</sup> Even though the bZx protocol consisted of a series of smart contracts on the Ethereum network, the CFTC alleged that the persons in control of the protocol—first, bZeroX LLC and later the DAO—were responsible for ensuring that financial activities that occurred through the protocol were done in compliance with CEA.<sup>98</sup> Thus, because neither bZeroX LLC nor the Ooki DAO had registered with the CFTC in any capacity, they violated the CEA by unlawfully engaging in retail commodities transactions that could only be offered on a CFTC-registered DCM and acting as an unregistered FCM.<sup>99</sup> In addition, the CFTC alleged that by failing to implement procedures for verifying the identity of users of the bZx protocol, bZeroX LLC and the Ooki DAO violated CEA regulations requiring FCMs—whether or not registered with the CFTC—to comply with the BSA’s anti-money laundering requirements.<sup>100</sup>

## **G. U.S. Sanctions Laws**

Sanctions are legal restrictions issued by the United States that target countries, governments, regions, entities, and individuals.<sup>101</sup> Sanctions may impose asset freezes and other

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<sup>92</sup> *In re Coinflip, Inc.*, CFTC Docket No. 15-29, 2015 WL 5535736 (Sept. 17, 2015) (consent order).

<sup>93</sup> Retail Commodity Transactions Involving Certain Digital Assets, 85 Fed. Reg. 37734, (June 24, 2020) (to be codified at 17 C.F.R. pt. 1).

<sup>94</sup> Press Release, CFTC, CFTC Imposes \$250,000 Penalty Against bZeroX, LLC and its Founders and Charges Successor Ooki Dao for Offering Illegal, Off-Exchange Digital-Asset Trading, Registration Violations, and Failing To Comply with Bank Secrecy Act (Sep. 22, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8590-22> [hereinafter Ooki DAO Press Release]

<sup>95</sup> *In the Matter of: bZeroX*, CFTC Docket No. 22-31, 2022 WL 4597664 (consent order).

<sup>96</sup> *Sarcuni v. bZx DAO*, 3:22-cv-00618 (S.D. Cal. 2022).

<sup>97</sup> Ooki DAO Press Release, *supra* note 94.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Financial Sanctions Frequently Asked Questions*, at No. 1, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501> (last visited Nov. 11, 2022)

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financial prohibitions, controls, or requirements in order to advance national security or foreign policy objectives.<sup>102</sup>

The sanctions programs, which are administered by the U.S. Office of Foreign Assets Control (“OFAC”), are complex and range from targeted measures against individuals or entities designated for specific activities to comprehensive embargoes against entire countries or regions.<sup>103</sup> Some recent sanctions are “sectoral sanctions,” targeting individuals and entities associated with specific sectors of a foreign country’s economy.<sup>104</sup> Some sanctions designations, frequently referred to as “secondary sanctions,” target non-U.S. individuals and entities for their dealings with persons already subject to U.S. sanctions.<sup>105</sup>

OFAC sanctions generally prohibit “U.S. persons” from transacting with or providing services to (or facilitating a transaction with or the provision of services to) individuals or entities subject to U.S. sanctions. The definition of “U.S. person” varies across individual sanctions programs, but generally covers:

- U.S. citizens or legal permanent residents (wherever located);
- U.S. entities (including foreign branches); and
- Any person in the United States.<sup>106</sup>

Some sanctions programs also define the term to include foreign-organized entities owned or controlled by U.S. persons.<sup>107</sup> Certain programs also apply to foreign persons in possession of U.S.-origin goods.<sup>108</sup>

At a high level, U.S. persons are generally prohibited from the following activities:

- Transacting with or providing services to individuals or entities identified by OFAC as subject to U.S. sanctions. OFAC publishes a sanctions list that is publicly available on the OFAC website,<sup>109</sup> divided into a list of “Specially Designated Nationals and

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<sup>102</sup> *Id.*

<sup>103</sup> *Sanctions Compliance Guidance for the Virtual Currency Industry*, OFFICE OF FOREIGN ASSETS CONTROL (Oct. 2021), at 2-3, [https://home.treasury.gov/system/files/126/virtual\\_currency\\_guidance\\_brochure.pdf](https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf).

<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Economic Sanctions: Overview for the 117th Congress*, CONGRESSIONAL RESEARCH SERVICE (Jan. 15, 2021), <https://sgp.fas.org/crs/row/IF11730.pdf>.

<sup>106</sup> *Sanctions Compliance Guidance for the Virtual Currency Industry*, OFFICE OF FOREIGN ASSETS CONTROL (Oct. 2021), [https://home.treasury.gov/system/files/126/virtual\\_currency\\_guidance\\_brochure.pdf](https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> OFAC’s sanctions list is available here: *Sanctions List Search*, OFFICE OF FOREIGN ASSETS CONTROL, <https://sanctionssearch.ofac.treas.gov/> (last visited Nov. 11, 2022).

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Blocked Persons,” (“SDNs” and the “SDN List”)<sup>110</sup> and a consolidated list of all non-SDN sanctions (the “Consolidated List”).<sup>111</sup> These lists contain the names, known pseudonyms, and other identifying information of individuals, groups, and entities that have been *specifically* designated by the U.S. government as being subject to economic sanctions pursuant to one or more of the sanctions programs administered by OFAC.

- Transacting with or providing services to entities where one or more SDNs own, in the aggregate, more than 50% of the entity.<sup>112</sup>
- Transacting with or providing services to individuals or entities subject to U.S. blocking sanctions *but not listed on* an OFAC sanctions list.<sup>113</sup> For instance, U.S. persons are generally prohibited from transacting with a person that has acted, directly or indirectly, on behalf of the “Government of Venezuela,” even if that person has not been designated by OFAC as an SDN.<sup>114</sup>
- Transacting with entities owned, in the aggregate, by one or more individuals or entities subject to U.S. blocking sanctions *but not listed on* an OFAC sanctions list.<sup>115</sup>
- Transacting with individuals or entities ordinarily resident in a sanctioned region. OFAC’s current sanctioned regions are Iran, Cuba,<sup>116</sup> North Korea, Syria, the Crimea

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<sup>110</sup> *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> (last updated Nov. 9, 2022).

<sup>111</sup> Consolidated Sanctions List (Non-SDN Lists), U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-non-sdn-lists> (last updated Aug. 2, 2022).

<sup>112</sup> *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked*, U.S. DEP’T OF THE TREASURY (Aug. 13, 2014), [https://home.treasury.gov/system/files/126/licensing\\_guidance.pdf](https://home.treasury.gov/system/files/126/licensing_guidance.pdf).

<sup>113</sup> *See, e.g.*, Exec. Order No. 13884, 84 Fed. Reg. 152, (Aug. 5, 2019). (blocking the property of the “Government of Venezuela,” which the executive order defines as state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof . . . , any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly for or on behalf of, any of the foregoing, including as a member of the Maduro regime.”).

<sup>114</sup> *Frequently Asked Questions*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/680> (last visited Nov. 11, 2022) (“Please note that persons meeting the definition of Government of Venezuela and persons that are owned, directly or indirectly, 50 percent or more by the Government of Venezuela are blocked pursuant to E.O. 13884, regardless of whether the person appears on the Specially Designated Nationals and Blocked Persons list (SDN List), unless exempt or authorized by OFAC.”).

<sup>115</sup> *Frequently Asked Questions*, *supra* note 114; *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked*, *supra* note 112.

<sup>116</sup> The Cuban sanctions also apply Cuban nationals outside of Cuba unless certain conditions are met (e.g., the Cuban national establishes permanent residence outside of Cuba). *Frequently Asked Questions*, U.S. Dep’t of the Treasury, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/791> (last visited Nov. 11, 2022).

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region of Ukraine, and the so-called Donetsk People’s Republic and Luhansk People’s Republic regions of Ukraine.

In addition to generally prohibiting transactions with, and the provision of services to, individuals and entities subject to U.S. sanctions, certain sanctions programs require assets and accounts in which a sanctioned party has an interest be blocked—i.e., frozen—when such assets or accounts are located in the United States, are held by U.S. individuals or entities, or come into the possession or control of U.S. individuals and entities.<sup>117</sup>

Moreover, even if a U.S. person does not transact directly with a person subject to U.S. sanctions, U.S. persons may also violate U.S. sanctions laws if they approve or facilitate a transaction that a U.S. person would be prohibited from engaging in directly.<sup>118</sup>

U.S. sanctions operate on the basis of strict liability, i.e., a person or entity subject to U.S. jurisdiction may be held civilly liable for sanctions violations even if that person or entity did not know, or have reason to know, that it was engaging in a transaction prohibited under sanctions laws and regulations administered by OFAC.<sup>119</sup> Civil penalties can be higher than \$330,000 per violation or twice the amount of the violative transaction.<sup>120</sup>

The Office’s Framework for OFAC Compliance Commitments “strongly encourages” persons subject to U.S. jurisdiction to maintain a risk-based compliance program designed to mitigate potential sanctions violations.<sup>121</sup> The framework highlights what OFAC views as the five “essential components” of an appropriate sanctions program: (1) commitment by management to support a sanctions compliance program; (2) routine (or ongoing) assessments of potential sanctions risks; (3) the development and implementation of appropriate internal controls, as informed by the risk assessment, to “identify, interdict, escalate, report (as appropriate), and keep records” related to potential sanctions exposure; (4) a testing or audit function; and (5) an effective sanctions training program.<sup>122</sup> In determining the proper response to a sanctions violation, OFAC has stated that it will “consider favorably subject persons that had effective SCPs [sanctions compliance programs] at the time of an apparent violation.”<sup>123</sup>

OFAC has made clear that U.S. sanctions compliance obligations “apply equally to

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<sup>117</sup> *Office of Foreign Assets Control-Overview*, BSA/AML MANUAL, <https://bsaaml.ffiec.gov/manual/OfficeOfForeignAssetsControl/01> (last visited Nov. 11, 2022).

<sup>118</sup> *Sanctions Compliance Guidance for the Virtual Currency Industry*, OFFICE OF FOREIGN ASSETS CONTROL (Oct. 2021), [https://home.treasury.gov/system/files/126/virtual\\_currency\\_guidance\\_brochure.pdf](https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf).

<sup>119</sup> *Id.*

<sup>120</sup> 31 C.F.R. § Pt. 501, App. A § V(B)(2)(a)(v).

<sup>121</sup> *A Framework for OFAC Compliance Commitments*, OFFICE OF FOREIGN ASSETS CONTROL, [https://home.treasury.gov/system/files/126/framework\\_ofac\\_cc.pdf](https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf) (last visited (Nov. 11, 2022).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*



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transactions involving virtual currencies and those involving traditional fiat currencies,” noting that “the virtual currency industry including technology companies, exchangers, administrators, miners, wallet providers, and users, play[] an increasingly critical role in preventing sanctioned persons from exploiting virtual currencies to evade sanctions and undermine U.S. foreign policy and national security interests.”<sup>124</sup> In its detailed guidance to the virtual currency industry, OFAC highlighted what it termed “sanctions compliance best practices” for U.S. virtual currency industry participants to comply with U.S. sanctions.<sup>125</sup>

Additionally, OFAC has designated individuals and entities based upon connections to illicit activity involving digital assets, in many cases including on the SDN list entry various blockchain addresses as “Identifications.” For instance, in May 2022, OFAC imposed secondary sanctions on Blender.io, a virtual currency mixer that makes tracing bitcoin transactions more difficult, because Blender.io’s services helped North Korean hackers to launder the proceeds of cybercrimes.<sup>126</sup>

Most recently, in August 2022, OFAC sanctioned Tornado Cash, a virtual currency mixer that, like Blender.io, had been used by malicious actors, including North Korean hackers, to launder the proceeds of illicit cyber activities.<sup>127</sup> But unlike Blender.io, which was a centralized mixing service, Tornado Cash operated automatically and autonomously on the Ethereum network using smart contracts, creating uncertainty about what exactly OFAC sanctioned—i.e., the smart contract code or some unidentified group of persons that OFAC believes are Tornado Cash and control the smart contract’s code.<sup>128</sup> Following the designation, several lawsuits were filed challenging the legality of OFAC’s designation of Tornado Cash.<sup>129</sup> On November 8, 2022, OFAC rescinded its prior designation of Tornado Cash and redesignated Tornado Cash. According to OFAC, the delisting and redesignation was to add additional bases for designating Tornado Cash as an SDN.<sup>130</sup> In its press release, OFAC characterized Tornado Cash “as an *entity* that provides virtual currency mixing services through smart contracts that primarily operate on the Ethereum

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* For more details on OFAC’s recommendations, please see *OFAC Releases New Detailed Guidance for the Digital Currency Industry*, PERKINS COIE (Oct. 19, 2021) <https://www.perkinscoie.com/en/news-insights/ofac-releases-new-detailed-guidance-for-the-digital-currency-industry.html>.

<sup>126</sup> *U.S. Treasury Issues First-Ever Sanctions on a Virtual Currency Mixer, Targets DPRK Cyber Threats*, U.S. DEP’T OF THE TREASURY (May 6, 2022), <https://home.treasury.gov/news/press-releases/jy0768>.

<sup>127</sup> *U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash*, U.S. DEP’T OF THE TREASURY (Aug. 8, 2022), <https://home.treasury.gov/news/press-releases/jy0768>.

<sup>128</sup> For a discussion of the issue, please see *OFAC Takes Action Against Virtual Currency Tornado Cash in Novel Application of Sanctions Authorities | Virtual Currency Report*, PERKINS COIE (Aug. 31, 2022), <https://www.virtualcurrencyreport.com/2022/08/ofac-takes-action-against-virtual-currency-tornado-cash-in-novel-application-of-sanctions-authorities/>.

<sup>129</sup> *Coin Center v. Yellen*, 3:22-cv-20375 (N.D. Fla. 2022); *Van Loon v. U.S. Dept. of Treasury*, 6:22-cv-00920 (W.D. Tex. 2022).

<sup>130</sup> *Treasury Designates DPRK Weapons Representatives*, U.S. Dept. of Treasury (Nov. 8, 2022), <https://home.treasury.gov/news/press-releases/jy1087>.

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blockchain.”<sup>131</sup> The same day, OFAC clarified that it considers Tornado Cash to be an entity consisting of:

[I]ts founders and other associated developers, who together launched the Tornado Cash mixing service, developed new Tornado Cash mixing service features, created the Tornado Cash Decentralized Autonomous Organization (DAO), and actively promoted the platform’s popularity in an attempt to increase its user base; and (2) the Tornado Cash DAO, which is responsible for voting on and implementing new features created by the developers. Tornado Cash uses computer code known as “smart contracts” to implement its governance structure, provide mixing services, offer financial incentives for users, increase its user base, and facilitate the financial gain of its users and developers.<sup>132</sup>

In redesignating Tornado Cash, OFAC attempted to stress that it was designating the *unincorporated entity* Tornado Cash as an SDN and that the Tornado Cash *smart contracts* were the mechanism used by *the entity* Tornado Cash provided mixing services.<sup>133</sup>

#### **IV. EFFORTS OF THE TASK FORCE**

In line with our directive 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,<sup>134</sup> the Task Force’s mission has three components:

1. Develop best practices for attorneys representing clients on digital finance and digital currency matters and provide member education resources on those practices.
2. 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.
3. Promote the appropriate use of digital assets and Web3 resources to keep pace with the industry and expand global membership.

The Task Force has formed three subcommittees, each of which maps to a component of the Task Force’s mission. The Education Subcommittee’s focus is on developing programming

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<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Frequently Asked Questions*, OFFICE OF FOREIGN ASSETS CONTROL, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1095> (last visited Nov. 15, 2022).

<sup>133</sup> *Treasury Designates DPRK Weapons Representatives*, OFFICE OF FOREIGN ASSETS CONTROL (Nov. 8, 2022), <https://home.treasury.gov/news/press-releases/jy1087>.

<sup>134</sup> Task Force on Emerging Digital Finance and Currency, *supra* note 14.

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designed to help attorneys spot the legal and ethical issues that may arise in connection with blockchain-related representation and help attorneys engage appropriately and effectively. The Task Force’s Regulation and Legislation subcommittee will evaluate the legal and regulatory issues presented by the growth of the digital finance and digital currency industries in the state. Finally, the Blockchain, Web3, and Metaverse subcommittee will explore how Web3 technologies can be used to benefit NYSBA and its members.

## **V. CONCLUSIONS**

Blockchain technology has the potential to reshape how we transact by decreasing the need to trust centralized parties, which necessarily carries wide-ranging legal implications. Because New York State is home to the world’s largest financial center, NYSBA members have played and will continue to play key roles in shaping how the law applies to the emerging blockchain ecosystem. Through the accompanying resolutions, and in line with NYSBA’s mission,<sup>135</sup> the Task Force seeks to respond to the opportunities and challenges posed by blockchain technologies and advance NYSBA members’ and the public’s understanding of how the law applies and promote the appropriate use of the technology within the legal profession.

In keeping with these goals, the Task Force is working in the near term to develop specific recommendations that would potentially include: (i) NYSBA positions on existing and pending New York legislation, executive order and enforcement posture supporting rational regulation balancing consumer and environmental protection with encouragement of digital currency and digital finance business in the state; (ii) feasibility studies on initiatives to expand global interest, membership and access to NYSBA and its resources, including income-generating activities, by expanding NYSBA’s Web3 footprint and presence.

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<sup>135</sup> *About – New York State Bar Association, supra* note 13 (“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.”).



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #11

REQUESTED ACTION: Approval of resolution of Task Force on Notarization.

Attached are a resolution and two reports from the Task Force on Notarization – the first report on Notary Record Keeping Regulations, the second report on Remote Online Notarization (“RON”) Credentialing.

By way of background, a new law, NY Executive Law Section 135-c, authorizes notaries to perform electronic notarial acts by registering with the Department of State and complying with new rules. Notaries wishing to provide electronic notary services can register with the Department of State as of February 1, 2023. New regulations promulgated by the Department of State further require that all notaries keep a journal of each notarization for a decade, and mandate that notaries who perform their jobs online using communications software maintain audio and video records for ten years.

In response to these developments, the Task Force on Notarization was established to review Executive Law 130, Executive Law 135-c, 22 NYCRR 132, and future and proposed legislation, and to make recommendations concerning the effects of these laws and regulations, including client representation, associated costs and efficiency, and access to justice considerations.

The first report on the Notary Record Keeping Regulations recommends that:

- 1) Record keeping requirements for notarizations other than electronic notarizations have no statutory basis and should be repealed.
- 2) The record keeping requirements for notarizations other than electronic notarizations contained in the regulations do not advance the goal of deed fraud reduction and should be repealed.
- 3) The application of the record keeping and record retention regulations to attorneys acting in the regular course of the attorney’s business is superfluous, implicates attorney client confidentiality, and imposes burdensome record retention requirements.

4) If the regulations are not repealed, a notary public who is an attorney at law regularly admitted to practice in this State or an employee of such attorney acting in the regular course of the attorney's business should not be required to maintain records of notarizations other than electronic notarizations.

5) The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations.

The second report on the Remote Online Notarization ("RON") Credentialing recommends that:

- 1) The regulation should be amended so that an electronic notary must use a third-party provider licensed by the Secretary of State through a Self-Certification Model or an Application and Certification Model. The amended regulation will shift credentialing requirements away from the electronic notary to the third-party provider – simplifying the RON process. It will remove any confusion and doubt concerning compliance with the law, and promote the underlying purpose of NY Executive Law 135-c (to adopt societal advances and new technology).
- 2) The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations.

On March 2, 2023, the Executive Committee adopted a resolution approving both reports and recommendations.

The approval of the House of Delegates is now sought to adopt the March 2, 2023, resolution. House approval of the resolution will formalize the recommendations contained therein as standing policy of the Association.

The resolution reads as follows:

WHEREAS, Executive Law 130 and 135-c, and regulations from Secretary of State 19 NYCRR 182 have been recently promulgated regarding electronic and non-electronic notarizations;

WHEREAS, these new laws and regulations have a significant impact on notaries and attorneys;

WHEREAS, there is no statutory basis for the record keeping and retention requirement for non-electronic notarizations;

WHEREAS, the new laws and regulations are unduly broad and burdensome on notaries and attorneys;

WHEREAS, the new law requires that a licensed electronic notary select a Credential service provider who meets certain technical requirements;

WHEREAS, in many circumstances, the licensed electronic notary lacks sufficient knowledge to determine whether the technical requirements have actually been met; and

WHEREAS, there is no showing that the new laws and regulations will diminish concerns of fraud that the legislation was intended to address;

WHEREAS, the efficiency of attorney notaries will be impacted by the above resulting in increased costs to consumers,

NOW, THEREFORE, IT IS RESOLVED that the Executive Committee approves the Reports and Recommendations of the Task Force on Notarization.

AND IT IS FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

Notice of the reports was given to the Reports Group on Thursday, February 23, 2023. Comments were submitted by the Women in Law Section, the Erie County Bar Association, and member Richard Gutierrez, writing in his individual capacity.

The resolution will be presented by Task Force co-chairs Richard C. Lewis and Ellen G. Makofsky, together with members Jaime D. Lewis and Michael A. Markowitz.



NEW YORK STATE  
BAR ASSOCIATION

# Resolution and reports of the New York State Bar Association **Task Force on Notarization**

April 2023

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**  
**Resolution to Approve Reports and Recommendations of**  
**Task Force on Notarization**  
**Approved by the Executive Committee on March 2, 2023**

**WHEREAS**, Executive Law 130 and 135-c, and regulations from Secretary of State 19 NYCRR 182 have been recently promulgated regarding electronic and non-electronic notarizations;

**WHEREAS**, these new laws and regulations have a significant impact on notaries and attorneys;

**WHEREAS**, there is no statutory basis for the record keeping and retention requirement for non-electronic notarizations;

**WHEREAS**, the new laws and regulations are unduly broad and burdensome on notaries and attorneys;

**WHEREAS**, the new law requires that a licensed electronic notary select a Credential service provider who meets certain technical requirements;

**WHEREAS**, in many circumstances, the licensed electronic notary lacks sufficient knowledge to determine whether the technical requirements have actually been met; and

**WHEREAS**, there is no showing that the new laws and regulations will diminish concerns of fraud that the legislation was intended to address;

**WHEREAS**, the efficiency of attorney notaries will be impacted by the above resulting in increased costs to consumers,

**NOW, THEREFORE, IT IS RESOLVED** that the Executive Committee approves the Reports and Recommendations of the Task Force on Notarization.

**AND IT IS FURTHER RESOLVED** that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.





## **Report on Notary Regulations**

On January 25, 2023, the New York Department of State promulgated regulations purporting to implement New York’s new Electronic Notary legislation. However, these new regulations contained new record keeping requirements that have no basis in the enabling legislation, are not tailored to meet their goal, and create significant challenges for attorneys practicing in New York State.

### **Notary Record Keeping Regulations**

New regulations were released by the Department of State in January 2023 implementing a new electronic notarization process.<sup>1</sup> These electronic notarization regulations contained record keeping requirements for all New York notaries, effective January 25, 2023.

These new regulations contain §182.9 which requires notaries to maintain records for all notarial acts. Such records must be made contemporaneously with the notarial act and must include:

1. the date, approximate time, and type of notarial acts performed;
2. the name and address of any individuals for whom a notarial act was performed;
3. the number and type of notarial services provided;
4. the type of credential used to identify the principal;
5. the verification procedures used for any personal appearance before the notary; and
6. for electronic notarial acts, identification of the communication technology, certification authority, and verification providers used.

These records must be maintained for at least 10 years and must be “capable of being produced to the secretary of state and others as necessary in relation to the performance of the notary public’s obligations”<sup>2</sup> under the notary law.

### **Absence of Statutory Authority**

Notaries are governed by multiple sections of New York law.<sup>3</sup> A review of the Notary Public License Law reveals no statutory basis for a record keeping and retention requirement prior to the recent passage of the electronic notarization legislation. In fact, since 2015, the New York State legislature has repeatedly rejected efforts to statutorily impose notary record keeping requirements for even the more limited purpose of residential property transfers.<sup>4</sup>

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<sup>1</sup> See Notary Public License Law (January 2023),

([https://dos.ny.gov/system/files/documents/2023/01/notary-public-license-law\\_01.2023.pdf](https://dos.ny.gov/system/files/documents/2023/01/notary-public-license-law_01.2023.pdf)).

<sup>2</sup> See Notary Public License Law above page 15; §182.9 Recordkeeping and Reporting, page 18.

<sup>3</sup> See above.

<sup>4</sup> An Assembly bill and Senate companion have been introduced in the legislature every year since 2015, except this year when Senate companion legislation has not been introduced. The Senate versions have never reached a vote. The Assembly passed the legislation during the 2021-2022 (A4277A) session. The bill has been reintroduced for the 2023-2024 session (A329). Additionally, Senate bill S218, introduced as S904 in the previous legislative session, currently in the Senate Finance Committee, would in addition to record keeping requirements, impose a form colloquy asking the principal questions the answers to which the notary is required to record and retain. A previous version of this bill was introduced during the 2021-2022 legislative session as S9404.



In 2022, Executive Law §135-c was passed outlining the requirements and procedures to be followed for electronic notarization.<sup>5</sup> The legislation delineates conditions that must be met to engage in electronic notarization but does not modify existing requirements for in person notarizations. The new law also requires separate registration by those notaries who intend to engage in electronic notarization.

As it relates to retaining records, Exec Law §135-c(2)(b) requires as follows:

If video and audio conference technology has been used to ascertain a documents signer’s identity, the electronic notary shall keep a copy of the recording of the video and audio conference and a notation of the type of any other identification used. The recording shall be maintained for a period of at least 10 years from the date of transaction.

This statutory record keeping language applies only to electronic notary acts using electronic technology for signer identification purposes.

The Department of State was given express authority under the statute to promulgate regulations regarding an electronic notarial act conducted utilizing communication technology.<sup>6</sup> The unconsolidated law provisions implementing electronic notarization provided for “the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act....”<sup>7</sup> The legislature could have, but did not, provide for the promulgation of new regulations dealing with notarization other than electronic notarization. as was done, for example, with advertising by notaries public.<sup>8</sup> Pursuant to longstanding principles of statutory construction, when one or more things of a class are expressly mentioned, others of the same class are excluded. Since the notary statute expressly provides for record keeping and retention for electronic notarization, it excludes the same for in person notarization. This is further confirmed by the fact that the legislature has tried and failed to enact legislation in this regard even for the limited purpose of real property transfers.<sup>9</sup>

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<sup>5</sup> Full text of Executive Law §135-c Electronic Notarization - <https://casetext.com/statute/consolidated-laws-of-new-york/chapter-executive/article-6-department-of-state/section-135-c-effective-1312023-electronic-notarization>.

<sup>6</sup> See NY Executive Law §§135-c and 137-a (renumbered) Electronic Notarization, subdivision 2 (a) and §137-a subdivision 5(e).

<sup>7</sup> Chapter 767 Laws of 2021 §3 and Chapter 104 Laws 2022 §6.

<sup>8</sup> For comparison see NY Executive Law §135-b subdivision 6 providing that the secretary may promulgate rules and regulations governing the provisions dealing with advertising by notaries public.

<sup>9</sup> Nor does Executive Law §91 apply, which authorizes rules which “regulate and control the exercise of the powers of the department of state and the performance of the duties of officers, agents and other employees thereof.” See also *Campagna v. Shaffer*, 73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 (1989), where the Court of Appeals followed the principle in construing legislation that when one or more things are expressly mentioned others are excluded and found the Secretary of State exceeded the statutory prohibition on blockbusting by administratively limiting all broker-initiated solicitation, not just the illegal solicitation banned by the legislature.



### **Overly Broad to Address Deed Fraud**

There has been a significant amount of conversation in many circles recently about the need to protect against fraud in the conveyance of residential real property. Some have even referred to it as an epidemic.<sup>10</sup> While it is critical that systems be implemented to protect home-owners from deed fraud, these specific records and retention regulations do not advance that goal.

Prior to the records and retention requirements, notaries were required to sign their name to the deed and include their notary identification number. This makes it possible to identify the notary for all deed transfers. Keeping a log noting dates, times, locations, documents and identification for a decade, while burdensome, is not an obstacle for those using false identification or those who are simply bad actors. Additionally, with deed fraud as the main concern, if the record keeping and retention requirements are intended to be part of the solution, there is no need to apply the regulations to all notarial acts. The regulations should be more narrowly tailored applying just to the conveyance of real property by non-attorneys.

Deed fraud is a serious concern and should be addressed with targeted, intentional solutions to meet that goal. As drafted, these regulations apply far broader than necessary and are not actually tailored to achieve deed fraud reduction.

### **Issues Regarding Record Keeping Requirements for Attorneys as Notaries**

Attorneys, as officers of the court, should be exempt from these record-keeping requirements. The application of these regulations to attorneys and their employees is superfluous, encroaches on attorney client privilege, and imposes unduly burdensome record retention requirements.

Attorneys are subject to a framework of extensive fiduciary and ethical obligations to their clients, with disciplinary proceedings and oversight already built in.<sup>11</sup> These obligations continue in the role of notary for such clients. Therefore, adding to that the notary record keeping and retention requirements is unnecessary, and poses an additional administrative burden for all attorneys. Rural attorneys with limited support staff in particular will find it extremely difficult and costly to adhere to these new regulations. Even more concerning is the impact these record and retention rules will have on the already limited budgets of Legal Services programs who are often required to notarize documents for their clients.

The new Department of State regulations raise serious attorney client privilege issues. Attorneys and members of their staff will often notarize statements by clients which are privileged or contain privileged information. The requirement that the notary log be capable of being produced to the secretary of state and others as necessary in relation to the performance of the notary public's obligations presents serious issues in this respect.

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<sup>10</sup> See for example the December 2018 Report of the Grand Jury of the Supreme Court First Judicial District issued December 2018 calling residential deed fraud an epidemic affecting every county in the state. <https://www.manhattanda.org/wp-content/uploads/2018/12/Deed-Fraud-Grand-Jury-Report.pdf>.

<sup>11</sup> See New York Rules of Professional Conduct.



Current notary law reflects the need to treat attorneys differently, and attorneys should be exempt from these rules as well. For example, under Exec. Law §130(2), attorneys admitted to practice can be appointed as a notary without an examination. Additionally, a notary generally cannot act if they have a pecuniary interest in a matter. However, Exec. Law §135 allows an attorney who is a notary to act as such for their own client in respect of “any matter, claim, action or proceeding.”

### **Conclusions and Recommendations**

- 1) Record keeping requirements for notarizations other than electronic notarizations have no statutory basis and should be repealed.
  - 2) The record keeping requirements for notarizations other than electronic notarizations contained in the regulations do not advance the goal of deed fraud reduction and should be repealed.
  - 3) The application of the record keeping and record retention regulations to attorneys acting in the regular course of the attorney’s business is superfluous, implicates attorney client confidentiality, and imposes burdensome record retention requirements.
  - 4) If the regulations are not repealed, a notary public who is an attorney at law regularly admitted to practice in this State or an employee of such attorney acting in the regular course of the attorney’s business should not be required to maintain records of notarizations other than electronic notarizations.
  - 5) The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations.
- 

#### Task Force on Notarization

Richard C. Lewis, co-chair  
Ellen G. Makofsky, co-chair  
Gerard Antetomaso  
Megan Curinga  
Michael de Freitas  
David Goldfarb  
Jaime Dale Lewis, Main Drafter  
Michael Markowitz  
John Owens Jr.  
Lynn Poster-Zimmerman  
Michael A. Ross  
Joshua Werbeck  
Omid Zareh  
Thomas J. Richards, staff liaison



## Report on Remote Online Notarization Credentialing Regulations

New York, one of the last states to allow RON, places the burden to use required technology on the notary public instead of the third-party provider.

Specifically, as defined in rule [19 NYCRR 182.2](#), to perform a remote online notarization (RON), a licensed electronic notary must use a “Credential service provider” to provide “Identity proofing” through “Communication technology.” Pursuant to rule [19 NYCRR 182.4\(2\)](#), the electronic notary must “use only those vendors or providers who comply with the standards outlined in this Part and any communication or reporting relating to those standards as required by the secretary of state.” Pursuant to rule [19 NYCRR 182.6](#), the third-party provider must provide “*evidence to the online notary public* of the provider's ability to satisfy requirements set forth in this rule” (emphasis added).

New York’s regulatory requirements are technical and specific. For example, the third-party provider “must meet at a minimum, the Identity Assurance Level 2 standard as outlined in the Digital Identity Guidelines of the National Institute of Standards and Technology ... document SP 800-63-3, Revision 3, dated June 2017 and includes updates as of 03-02-2020 ...” (see, [Rule 182.7](#) for Identity Proofing).

How is an attorney – let alone a layperson – able to understand whether a third-party provider meets the minimum technology requirements set forth in the rules? It is an impossible task.

Most other states that enacted RON legislation require the third-party provider to be authorized by the secretary of state. The authorization procedure is either through “self-certification” or “application and certification” issued by the secretary of state. Self-certification is when a third-party provider is approved by filing a certification of compliance (see excerpts of Florida law attached in Appendix A). The application and certification model is when the third-party provider’s application is reviewed and approved by the secretary of state (see excerpts of Colorado and Wisconsin law attached in Appendix B).

In both models, the secretary of state provides a list of authorized third-party providers. By requiring RON use of an authorized third-party provider, the onus of complying with regulatory technology requirements shifts away from the notary public.

### Recommendation

The regulation should be amended so that an electronic notary must use a third-party provider licensed by the Secretary of State through a Self-Certification Model or an Application and Certification Model. The amended regulation will shift credentialing requirements away from the electronic notary to the third-party provider – simplifying the RON process. It will remove any confusion and doubt concerning compliance with the law, and promote the underlying



purpose of NY Executive Law 135-c (to adopt societal advances and new technology).<sup>1</sup>

The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations.

---

Task Force on Notarization

Richard C. Lewis, co-chair  
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Omid Zareh  
Thomas J. Richards, staff liaison

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<sup>1</sup> See, [2021 New York Senate Bill No. 1780, New York Two Hundred Forty-Fourth Legislative Session.](#)



## **Appendix A Self-Certification Model**

Florida is an example of a self-certification model. Self-certification is through a [form](#) filed with the secretary of state. Pursuant to Florida statute,

“A RON service provider must file a self-certification with the Department of State, on a form adopted by department rule, confirming that its audio-video communication technology and related processes, services, software, data storage, or other services provided to online notaries public for the purpose of directly facilitating their performance of online notarizations satisfy the requirements of this chapter and any rules adopted by the Department of State pursuant to this section. Each certification shall remain active for a period of 1 year after the date of filing. The Department of State must publish on its website a list of each [remote online notarization] service provider that has filed a self-certification, the date of filing of the self-certification, any secure repositories to which the [remote online notarization] service provider may have delegated its duties pursuant to [FS] s. 117.245(4) from January 1, 2022, and thereafter, and the effective dates of that delegation” ([FS 117.295\[4\]\[a\]](#)).

Pursuant to Florida’s administrative code,

“Within 30 days of the effective date of this rule, and annually thereafter, a RON service provider shall provide the Florida Department of State, a self-certification form confirming that its audio-video communication technology and related processes, services software, data storage, or other services provided to online notaries public for the performance of online notarization satisfy the requirements of Chapter 117, F.S., and any rules promulgated by the Florida Department of State pursuant to Section 117.295, F.S.” (FAC 1N-7.005[2][a]). Form Number DS-DOC-51 (“RON Service Provider: Self-Certification and Required Information”) must be used to report this information ([FAC 1N-7.005\[2\]\[d\]](#)).

“The RON service provider’s self-certification is effective for a period of 1 year after the date the RON service provider files it with the Department” ([FAC 1N-7.005\[2\]\[b\]](#)).



## **Appendix B**

### **Application and Certification Model**

Colorado is an example of an application and certification model. The third-party provider must submit an [application](#) and receive approval from the secretary of state before the provider can provide services to a Colorado remote notary public. The regulation outlines the criteria and standards for approving providers. Colorado’s regulatory language sets forth the following:

#### 5.3. Requirements for providers

##### 5.3.1 Provider Protocols

(a) The Colorado Secretary of State's Provider Protocols (December 1, 2020) are hereby incorporated by reference.

(1) Material incorporated by reference in the Notary Rules does not include later amendments or editions of the incorporated material.

(2) Copies of the material incorporated by reference may be obtained by contacting the Colorado Department of State, 1700 Broadway, Suite 550, Denver, CO 80290, (303) 894-2200. Copies are also available online at <https://www.sos.state.co.us/pubs/notary/home.html>

(b) All providers must meet the requirements of the Provider Protocols.

##### 5.3.2 Application

(a) A provider must submit the approved application form and receive approval from the Secretary of State before the provider can provide services to a Colorado remote notary public.

(b) The applicant must provide to the Secretary of State in its application:

(1) The certification required by section 24-21-514.5(11)(a), C.R.S.

(2) The following information:

(A) The names of all business entities and any of their affiliates that will have access to either personally identifying information and any non-personally identifying data gathered during the remote notarization process and procedures; and

(B) A copy of the data privacy policy provided to users, which clearly specifies the permissible uses for both personally identifying and non-personally identifying data.

(3) All data and technology specifics required in the application and set forth in the Provider Protocols under Rule 5.3.1.

(c) At the time of application, the applicant must be in Good Standing status as a business entity registered to do business in Colorado and must continue to





maintain that status while providing remote notarization services to Colorado remote notaries public.

(d) The Secretary of State may require an applicant to supplement its application with additional information, including an in-person demonstration or electronic demonstration of the applicant's system.

(e) The applicant must pay the required application fee.

#### 5.3.3 Criteria and standards for approval of remote notarization system providers.

(a) In order to be approved and maintain continuing eligibility, a remote notarization system provider must:

(1) Provide a remote notarization system that complies with the technical specifications of these rules and the standards, including data security and integrity requirements, set forth in the Secretary of State's Provider Protocols under Rule 5.3.1;

(2) Verify the authorization of a Colorado notary public to perform remote notarial acts before each remote notarization;

(3) Suspend the use of its remote notarization system for any remote notary public if the notary's underlying commission or the Secretary of State's approval of the notary public to perform remote notarizations has been denied, suspended, or revoked by the Secretary or when the notary has resigned; and

(4) Ensure that access to a remote notary public's electronic signature and seal is limited solely to the remote notary public and protected by the use of a password authentication, token authentication, biometric authentication, or other form of authentication that is described in the remote notarization system provider's application.

(5) Verify that a Colorado remote notary public has Active status with the Secretary of State's office at the time of each remote notarization.

<https://regulations.justia.com/states/colorado/1505/1505/rule-8-ccr-1505-11/section-8-ccr-1505-11-5/>.

Wisconsin is another example of an application and certification model. Pursuant to Wisconsin law, a third-party technology provider must meet certain standards to ensure that acts performed using their technologies will be accurate, authentic, adequately preserved, and resistant to tampering. The Wisconsin Department of Financial Institutions and the Remote Notary Council have established procedures to approve providers of communication technology for use by Wisconsin notaries when performing remote online notarial acts.

To become an approved communication technology provider, the provider must return a completed [application](#) to the Department of Financial Institutions, appear before the Remote



Notary Council to answer questions, and satisfy the Council that its communication technologies meet the standards for providers under Wisconsin law.

Wisconsin law sets forth the following:

[DFI-CCS 25.04](#). Providers of communication technology. (1) Remote notary council approval required. (a) Except as provided in sub. (1) (b) of this section, a provider of communication technology used to perform notarial acts for remotely located individuals must obtain the approval of the remote notary council before allowing its platform to be used by a notary public of this state to perform a notarial act for a remotely located individual.

(b) A provider that was provisionally approved by the department prior to the effective date of these rules must submit the application materials described in sub. (2) of this section no later than August 1, 2020. Such provider's approval remains effective until such time as the remote notary council denies the application under sub. (3) of this section, in whole or in part, or the approval is restricted or terminated under sub. (5) of this section.

(2) Requests for approval; contents. A provider of communication technology may request approval of the remote notary council by submitting to the department verified documentation or other evidence sufficient to detail:

(a) how the provider will ensure that notarial acts for remotely located individuals performed on the provider's platform by a notary public of this state comply the requirements of ss. [140.145](#) and [140.20](#), Stats., and this chapter;

(b) the proposed methods of performing a notarial act involving a remotely located individual using the provider's communication technology;

(c) the process or service used to verify the identity of a remotely located individual by a review of personal information from public or private data sources ("identity proofing");

(d) the means used to ensure that notarial acts for remotely located individuals are accurate, authentic, resistant to tampering, and tamper-evident;

(e) the means used to ensure that all parties using the communication technology are viewing the same record, and that all signatures, changes, and attachments to the record are made in real time;

(f) the means used to ensure that the communication technology is secure from hacking or interception;

(g) the means used to ensure that notarial acts for remotely located individuals are recorded and adequately preserved for a period of at least seven years after the recording is made;



- (h) the means used to ensure that notaries public are properly instructed and competent to perform notarial acts for remotely located individuals using the provider's communication technology;
  - (i) all jurisdictions in which the provider's communication technology has been approved or disapproved for the performance of notarial acts for remotely located individuals;
  - (j) the provider's experience and track record in utilizing the aforementioned means, processes, and procedures in other jurisdictions;
  - (k) whether the provider has been approved or disapproved for use by companies that provide insurance for transactions requiring notarized signatures, such as land transactions;
  - (L) any warning letters or complaints received or disciplinary actions taken against a provider in any other jurisdiction;
  - (m) any pending, threatened, or adjudicated lawsuits against the provider relating in any way to the performance of notarial acts using the provider's communication technology in any jurisdiction;
  - (n) whether the provider has and will maintain insurance coverage or other security for potential errors or omissions relating to the communication technology or provider's processes;
  - (o) any other such information that may be necessary or helpful to evaluate the provider's request for approval; and
  - (p) any other such information that may be requested by the department or the remote notary council to aid in evaluating the request for approval.
- (3) Requests for approval; procedure. (a) Once the department is satisfied that an application is bona fide and includes the information required in sub. (2), the department will forward the application materials to members of the remote notary council.
- (b) The remote notary council will place the application on its agenda for deliberation at one of its next two regularly scheduled meetings or at any interim special meeting it may deem necessary and appropriate. The department will notify the applicant of the time and date of the meeting.
  - (c) A representative of the applicant with knowledge of its processes and authority to make binding representations on its behalf must be available to participate in the meeting and respond to questions from remote notary council members. Unless otherwise specified by the remote notary council, the representative may participate by phone or other remote means.
  - (d) Upon consideration of the merits of the applicant and application, the remote notary council may approve the application, impose additional conditions or



limitations upon approval, deny the application, table the application for further deliberation at a subsequent meeting, or require the applicant to supplement the application with additional explanations, information or evidence of its ability to ensure compliance with state law.

(e) Upon approval of a provider's application, the department will add the provider to a list of approved providers of communication technology for notarial acts for remotely located individuals.

**From:** [Richard Gutierrez](mailto:Richard.Gutierrez@reportsgroup.com)  
**To:** [reportsgroup](mailto:reportsgroup.com)  
**Subject:** Fwd: New Regulations on Notarization  
**Date:** Wednesday, March 1, 2023 11:06:01 AM

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----- Forwarded message -----

**From:** **Richard Gutierrez** <[richlaw101@gmail.com](mailto:richlaw101@gmail.com)>  
**Date:** Wed, Mar 1, 2023 at 7:09 AM  
**Subject:** New Regulations on Notarization

Dear President Wallach,

In my individual capacity as a member of the Association, I write in support of the recommendations of the NYSBA Task Force on the modification of notary regulations enacted by NYS.

I believe the record keeping requirement is both burdensome and unnecessary. It is an onerous responsibility for attorneys in general and solo practitioners in particular, to be required to make and retain records for ten years, as a notary.

As a solo practitioner and notary for nearly 37 years, I have not had an issue with any of the documents I notarized. I can only speak for myself but I think the new regulations should create an exemption for attorneys.

In my role as Chair of the Committee on Professional Discipline, the notary regulations were discussed at our meeting on February 24, 2023.

Although this issue was on our Agenda for informational purposes only and therefore not voted on, some members believed the regulations should provide an exemption for attorneys. Again, the position taken in this email is solely mine.

Respectfully submitted,

Richard M. Gutierrez

--

**Richard M. Gutierrez**  
*Attorney at Law*  
**118-35 Queens Boulevard, Suite 1500**  
**Forest Hills, New York 11375**  
**(718) 520-0663**

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**Richard M. Gutierrez**  
*Attorney at Law*  
**118-35 Queens Boulevard, Suite 1500**

**Forest Hills, New York 11375**  
**(718) 520-0663**



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438 Main Street, Sixth Floor

Buffalo, New York 14202

Phone 716-852-8687

Fax 716-852-7641

mail@eriebar.org

[www.eriebar.org](http://www.eriebar.org)

February 28, 2023

*Via email*

Thomas J. Richards, Esq.  
Deputy General Counsel  
New York State Bar Association  
One Elk Street, Albany, NY 12207  
[TRICHARDS@NYSBA.ORG](mailto:TRICHARDS@NYSBA.ORG)

Dear Mr. Richards,

I attach correspondence in response to the request for comments regarding reports prepared for the NYSBA Task Force on Notarization. The attached letter authored by an attorney in Western New York captures substantial concerns of our real property lawyers regarding proposed changes to the laws governing notaries in New York State.

With regard to The Task Force on Notarization's inquiry on whether the BAEC has received any feedback from Assemblywoman Walker on the comments, we have not at this time.

Thank you for your work on this issue.

Very truly yours,

JILL K. BOND  
President

Attachment

cc: Timothy J. Graber, Vice President  
Anne M. Noble, Executive Director  
Glenn Speller, Real Property Law Committee Chair

**COOKE & STEFFAN**  
ATTORNEYS AT LAW  
13132 MAIN STREET  
ALDEN, NEW YORK 14004

BY APPOINTMENT:  
5127 WILLOWBROOK WEST  
CLARENCE, NY 14031

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THOMAS A. STEFFAN

TELEPHONE 716-937-9111  
FACSIMILE 716-937-4508

RICHARD T. COOKE  
1913-2008  
EDWIN F. STEFFAN  
1924-1995

February 17, 2023

Hon. Latrice M. Walker  
NYS Assembly  
400 Rockaway Avenue  
2<sup>nd</sup> floor  
Brooklyn, NY 11212

Re: Assembly Bill 00329  
Re Notaries and Residential Real Estate Transactions

Dear Assemblywoman Walker:

I wish to comment on the recently introduced bill no. 00329, regarding the maintenance of and filing of a notarial record on every residential real estate closing.

I am an attorney in the small town of Alden, NY, located about twenty miles east of Buffalo. I am a solo practitioner. I prepare deeds, mortgages, and other real instruments for residential real estate closings held mostly in Erie, Genesee and Wyoming Counties. I often travel twenty miles or more, one way, to record my closings.

I also take client signatures on my legal documents. As an attorney, I am also qualified as a notary public, and I renew my license every four years, as required by law.

The proposed law would require me to maintain a "Notarial Record", signed by both the residential seller and purchaser, for every home closing that I participate in. This would be very burdensome because I do over one hundred closings per year. The bill would also require the "record" to contain the signatures of both Seller and Purchaser, but our practice in Western New York has attorney representatives meeting for the closing, not the individual clients. The attorneys obtain the signature of their own respective clients, then meet to exchange documents and funds. The clients are not present at the closing, so it would be



impossible for one notary to obtain the signatures of both Seller and Purchaser on his or her notarial record.

The bill which you sponsor also requires the filing of the record with the County Clerk, within fourteen (14) days from the date of closing. Who is to pay the filing fee, if any? Why is the County Clerk held responsible to collect this information without any funding to implement the program? This bill would add unnecessary cost and time delay to every closing.

The County Clerk's function is to act to collect information which benefits the public interest. The County Clerk is the official clerk of the Courts, public institutions. Why are you asking the clerk to keep these records undisclosed to the public? Obviously, because they contain personal identification information of the signers. Would it not be better if the County Clerk was never asked to keep this information at all? What a waste of time and money for a public official to keep non-public information on residential real estate closings. For example, the Wyoming County Clerk has four (4) employees, and I assume that these employees would be overwhelmed by the additional record keeping burden.

In all of my thirty-five years of practice in Western New York I have never seen one case of fraudulent notary practice. Our closings are done by attorneys, not independent title companies. The attorneys have an Ethical Code which requires that they zealously and independently represent their clients, free from any conflict of interest. It is unrealistic to believe that they would jeopardize their license to practice law for a few dollars of notary fees, or to participate in a fraudulent deed recording scam.

The New York State Legislature and Governor this year have already made my solo law practice more expensive by requiring me to keep a notarial journal for ten years going forward for every notarization that I do. I am finding that most of my journal entries show that I am personally aware of the identity of my clients, having represented them previously, or having met them personally when we negotiated the residential real estate contract. There is no need for me to even ask for proof of their identification in 95% of my notarial transactions. I know them already, why should I ask them for their drivers license or social security card? There is an assumption made by the legislature that everyone in the state is practicing blind, meeting people in rushed situations and slapping notarizations on anything that comes in front of them in order to get a closer's fee. This is far from the truth here in Western New York. Thus, your bill is both unnecessary and would now require me to keep two (2) journal records for the same deed notarization. One for the ten (10) year limit for any record notarized, and the second for the seven (7) year limit for the real estate document notarized. What if I am notarizing a Power of Attorney that may be used on a Real Estate document at a later date. Which journal do I need to record that one in?

I understand that the problem of fraudulent notarization may be occurring in New York City or the five boroughs, where attorneys may not be attending closings, but only drafting the legal documents. If so, then your bill may be pertinent for local legislation only on a citywide basis, not for statewide practice. You are using a shotgun to kill a mouse.

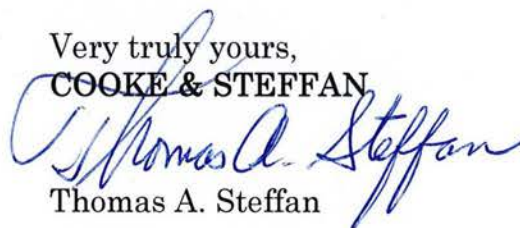
This bill is a consequence of the increasing cost of legal practice which results in attorneys using non-legal contractors to implement parts of the traditional home closing at a lower, apparently more competitive cost to the client. I believe that it is likely that "closers" and "contract notaries" are the source of the fraud problem. Perhaps a statewide bill is needed to prevent that practice, i.e., to require that all residential real estate documents must be notarized by attorneys or their employee paralegals only. This would do much to alleviate the problem without radically changing the practice for attorneys here in the Buffalo and Rochester area, zone 1 under the Title Insurance Rate Act, where attorneys are involved in the home closing process from start to finish.

I would very much appreciate your response that I could share with my fellow residential real estate law attorneys in Western New York.

Thank you for your attention herein.

Very truly yours,

COOKE & STEFFAN

A handwritten signature in blue ink that reads "Thomas A. Steffan". The signature is written in a cursive style with a large initial "T".

Thomas A. Steffan

tas

## Memorandum

To: Sheryl Galler, Esq. Chair of WILS  
From: Linda Redlisky, Esq.  
Date: March 1, 2023  
Re: Electronic Notarization Concerns

I have had the opportunity to review two proposed reports drafted by the Task Force on Notarization: first, the Report on Remote Online Notarization Credentialing Regulations (the "RON Report") and second, the Report on Notary Regulations (the "Notary Regs").

As to the RON Report, WILS agrees with the recommendations submitted by Task Force in its entirety. Specifically, the Women in Law Section prefers that the regulation is amended so that an electronic notary must use a third-party provider licensed by the Secretary of State through an Application and Certification Model (referenced in Appendix B). This model insures that the credentialing requirements required by 19 NYCRR 182.2. are shifted to the third-party provider. Moreover, the Secretary of State is responsible for authorizing third-party providers, assuring attorneys/notaries that the providers are in compliance. In this way, attorneys/notaries who seek to provide remote online notarization are shielded from liability for unwittingly using a provider that fails to meet the appropriate standards required by 19 NYCRR 182.2.

As to the Report of Notary Regulations, WILS' position as to the Conclusions and Recommendations is as follows:

- 1) Record keeping requirements for notarizations other than electronic notarizations have no statutory basis and should be repealed. AGREED
- 2) The record keeping requirements for notarizations other than electronic notarizations contained in the regulations do not advance the goal of deed fraud reduction and should be repealed. NO POSITION
- 3) The application of the record keeping and record retention regulations to attorneys acting in the regular course of the attorney's business is superfluous, implicates attorney client confidentiality, and imposes burdensome record retention requirements. AGREED
- 4) If the regulations are not repealed, a notary public who is an attorney at law regularly admitted to practice in this State or an employee of such attorney acting in the regular course of the attorney's business should not be required to maintain records of notarizations other than electronic notarizations. AGREED
- 5) The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations. AGREED



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: None, as the report is informational.

Steven Leventhal, co-chair of the Task Force on the Ethics of Local Public Sector Lawyering, 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. The mission statement is as follows:

The Task Force on the Ethics of Local Public Sector Lawyering will evaluate the applicable rules of professional responsibility, standards of conduct, related commentaries, and advisory opinions governing attorneys who practice in the public sector at the local level and will study, review, and make legal and policy recommendations relating to the unique ethical issues facing such attorneys. The work of the Task Force – which will be grounded in the practitioner’s perspective – will include the development of standards of best practices, including guidance on recusal, disclosure, conflicts of interest, and other matters of special interest to attorneys who represent smaller municipalities, who work in law firms specializing in the representation of local municipalities, also including solo and small firm practice settings who represent local governmental entities and attorneys who are employed as attorneys representing municipalities. The activities of the Task Force will include outreach and collaboration with bar groups, municipal groups, and other organizations including, but not limited to, the Albany Law School Government Law Center, the New York State Judicial Institute on Professionalism in the Law, the New York State Bar Association Committee on Standards of Attorney Conduct, the New York State Bar Association Local and State Government Law Section, the New York State School Attorneys Association, the New York State County Attorneys Association, and coordination, as appropriate, with related work being conducted in conjunction with the Executive Branch of the State of New York.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #13

REQUESTED ACTION: None, as the report is informational.

Committee on Membership co-chairs Clotelle Drakeford and Michelle Wildgrube will give an update on the Association's membership engagement and retention efforts, including membership renewal for the 2023 dues year and the Member Referral Program.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #14

REQUESTED ACTION: None, as the report is informational.

Carla M. Palumbo, president of the New York Bar Foundation, will update the House on the ongoing work and mission of The Foundation.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #15

REQUESTED ACTION: Three administrative items will be considered at the meeting.

1. Approval of the designation of delegates filed by the county and local bar associations for the 2023-2024 Association year.
2. Approval of the filed roster of the members of the House of Delegates for the 2023-2024 Association year.
3. Allyn Crawford, Elected Delegate, Thirteenth Judicial District, resigned from the House of Delegates in March. The Vice President and remaining elected delegates from the Thirteenth District have nominated Ellen Soren to fill the vacancy. A majority vote of the elected delegates in attendance at the meeting is required to fill the vacancy for the 2023-2024 term.

The report will be presented by President-Elect Richard C. Lewis, chair of the House of Delegates.

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF EXECUTIVE COMMITTEE MEETING  
NEW YORK HILTON MIDTOWN, NEW YORK, NEW YORK  
JANUARY 19, 2023**

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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, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Ronald C. Minkoff, Mark J. Moretti, Domenick Napoletano, Christopher R. Riano, Mirna M. Santiago, Nancy Sciocchetti, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Christopher Bopst, Samuel W. Buchbauer, M. Elizabeth Coreno, Hon. Mark C. Dillon, Clotelle L. Drakeford, Justin Ellis, Susan L. Harper, Shawndra G. Jones, Lillian M. Moy, Alan Rothstein, Richard J. Schager, Jr., Sheila E. Shea, Patricia J. Shevy, Dana V. Syracuse, Michelle H. Wildgrube

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Approval of minutes of meetings. The minutes of the November 4, November 15, and December 6, 2022, meetings were approved as distributed.
2. Consent calendar:
  - a. Approval of creation of award of Dispute Resolution Section.
  - b. Amendment of Bylaws of Entertainment, Arts, and Sports Law Section.

The consent calendar, consisting of the above items, was approved by voice vote.

3. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported on the 2022 operating budget, noting that through December 31, 2022, the Association's total revenue was \$18.6 million, a decrease of approximately \$293,000 from the previous year, and total expenses were \$18.3 million, an increase of approximately \$3.8 million over 2021, for a surplus of \$262,619, a decrease of approximately \$4.1 million compared to 2021. The report was received with thanks.
4. Report of Executive Director. Pamela McDevitt, Executive Director, updated the Executive Committee with respect to the administration and operations of the Association, including membership initiatives, staffing changes, and technology upgrades. The report was received with thanks.
5. Report of President. Ms. Levin Wallach highlighted the items contained in her written report, a copy of which is appended to these minutes.



6. Report and recommendations of LGBTQ Law Section. Samuel W. Buchbauer, a member of the LGBTQ Law Section, reviewed the Section’s report and resolution in support of the “New York State Unified Court System’s UCS Bench Card and Best Practices for Judges ‘Using LGBTQ+ Inclusive Language and Pronouns’.” After discussion, a was unanimously adopted to endorse the following resolution for favorable action by the House:

WHEREAS, judges have a duty to foster an environment free of bias, prejudice, and harassment.

WHEREAS, our profession must be vigilant in protecting the LGBTQ+ community, and especially transgender individuals, within the New York State Courts and require all judges to adhere to the Rules of Judicial conduct, the Bench Card both fosters a more welcoming, gender-inclusive space while simultaneously assisting judges in removing one form of bias from the administration of justice.

NOW, THEREFORE, IT IS RESOLVED, that the New York State Bar Association supports the respectful treatment of all persons in the courtroom; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the Rules of the Chief Administrative Judge that judges have a duty to foster an environment free of bias, prejudice, and harassment; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the use of LGBTQ+ inclusive language and pronouns; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the adoption of the “Using LGBTQ+ Inclusive Language and Pronouns” Bench Card;

FURTHER RESOLVED that the New York State Bar Association approves this report and the recommendations of the LGBTQ Law Section; and it is

FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

7. Report and recommendations of Committee on the New York State Constitution. Christopher Bopst, chair of the Committee on the New York State Constitution, and Alan Rothstein, chair of the Committee’s Subcommittee on the Lieutenant Governor, presented the Committee’s report entitled “Gubernatorial Selection in New York: Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability.” After discussion, a motion was unanimously adopted to endorse the report for favorable action by the House.

8. Reports and recommendations of Committee on Civil Practice Law and Rules.
  - A) CPLR 4013. Committee member Hon. Mark C. Dillon outlined an affirmative legislative proposal to amend CPLR § 4013 to permit the use of remote audio-visual technological means at judicial proceedings. After discussion, a motion was adopted to approve the proposal. Mr. Lewis abstained from the vote.
  - B) CPLR 4551. Committee member Justin Ellis reviewed an affirmative legislative proposal in support of a new CPLR § 4551 concerning when writings, objects, or other materials used to refresh the witness' recollection while testifying or before testifying must be produced to an adverse party. After discussion, a motion was adopted to approve the proposal. Mr. Lewis and Ms. Whittingham abstained from the vote.
  - C) Proposed Amendments to Uniform Rule for the Supreme Court and the County Court 202.12 on Preliminary Conferences to Promote Efficiency in Litigation. Committee member Richard J. Schager, Jr. presented on the committee's proposed amendment to Uniform Civil Rules for the Supreme Court and the County Court Rule 202.12 on preliminary conferences to promote efficiency in litigation. After discussion, a motion was adopted to approve the proposal. Mr. Lewis abstained from the vote.
9. Report of Task Force on Mental Health and Trauma Informed Representation. Sheila E. Shea, co-chair of the Task Force on Mental Health and Trauma Informed Representation, reported on the mission, composition, and goals of the Task Force. The report was received with thanks.
10. 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 ongoing work of the Strategic Planning Committee. The report was received with thanks.
11. Report of Committee on Attorney Wellbeing. M. Elizabeth Coreno, chair of the Committee on Attorney Wellbeing, updated the Executive Committee on the Association's attorney wellbeing programming and resources, and on activity within the Committee on Attorney Wellbeing since its establishment in January 2022. The report was received with thanks.
12. Report of Committee on Continuing Legal Education. Shawndra Jones, chair of the Committee on Continuing Legal Education, together with vice chair Patricia Shevy and associate executive director Kathy Suchocki, reviewed the Association's 2022 CLE programming and the 2023 schedule of CLE programming and Section meetings. The report was received with thanks.
13. Report and recommendations of Task Force on Racism, Social Equity, and the Law. Taa R. Grays and Lillian M. Moy, co-chairs of the Task Force on Racism, Social Equity, and the Law, outlined the Task Force's report and recommendations addressing legal,

regulatory, and societal structures currently affecting people of color in New York State. After discussion, a motion was adopted to endorse the report for favorable action by the House. Mr. Lewis abstained from the vote.

14. Report of Committee on Membership. Committee on Membership co-chairs Clotelle Drakeford and Michelle Wildgrube updated the Executive Committee on the Association's membership engagement and retention efforts, with focus on the ongoing membership renewal for the 2023 dues year. The report was received with thanks.
15. Report of Task Force on Emerging Digital Finance and Currency. Dana Syracuse, co-chair of the Task Force on Emerging Digital Finance and Currency, presented on the Task Force's ongoing work and programming. The report was received with thanks.
16. New Business.

- A) Mr. Brown raised a question as to the Association's response to the ongoing vacancy in the office of Chief Judge of the State of New York and the Court of Appeals. After discussion, a motion was duly carried to adopt the following resolution:

It is resolved that:

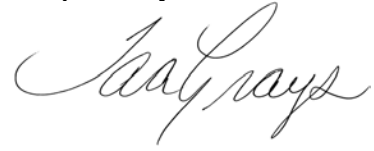
The New York State Bar Association Executive Committee approves the appointment of a Special Committee on the Selection of Judges for the Court of Appeals in response to concerns raised in recent weeks over the appointment of a chief judge. The committee will examine the selection process, including its history, and make recommendations to the Association.

The Executive Committee reaffirms that the rule of law and the independence of the judiciary are crucial to the administration of justice. It is of the utmost importance to public confidence that there is a fair process that allows the judiciary to operate independently and effectively.

Ms. Grays abstained from the vote.

- B) Ms. Levin Wallach advised on the establishment of the Working Group on Facial Recognition Technology and Access to Legal Representation, to be chaired by Mr. Napoletano.
17. Date and place of next meeting. The next meeting of the Executive Committee will take place on Friday, March 31, 2023, in person at the Bar Center in Albany, with an option for remote participation via Zoom.
  18. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Taa R. Grays".

Taa R. Grays  
Secretary

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF EXECUTIVE COMMITTEE MEETING  
REMOTE MEETING  
FEBRUARY 1, 2023**

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Present: Gregory K. Arenson, Simeon H. Baum, David Louis Cohen, Orin J. Cohen, Sarah E. Gold, LaMarr J. Jackson, Elena DeFio Kean, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Ronald S. Minkoff, Domenick Napoletano, Mirna M. Santiago, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Pauline Yeung-Ha

Guest: Margaret J. Finerty

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) Approval of Mission Statement of Working Group on Facial Recognition Technology and Access to Legal Representation
  - B) Disbandment of Special Committee on Association Structure and Operations

The consent calendar, consisting of the items above, was approved.

3. Support of ABA Resolution 501. Ms. Levin Wallach presented on ABA Resolution 501, which urges the American Bar Association to adopt the report of the ABA Criminal Justice Section's Women in Criminal Justice Task Force on ten principles to advance the goal of gender equity among employers, institutions, and people who are part of the criminal legal profession. After discussion, a motion was unanimously adopted that the New York State Bar Association support the Resolution at the ABA 2023 Midyear Meeting.
4. Support of ABA Resolution 603. Margaret J. Finerty, co-chair of the former Task Force on Mass Shootings and Assault Weapons and member of the ABA Standing Committee on Gun Violence, presented on ABA Resolution 603, which urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would make it unlawful for any person, other than law enforcement, to possess firearms on property owned, operated, or controlled by any public or private institute of higher education; and in states that do not make it unlawful for any person, other than law enforcement, to possess firearms on property owned, operated, or controlled by any public institute of higher education, authorize such institutions of higher education to restrict or regulate the concealed or open carry of firearms on their campuses. After discussion, a motion was adopted that the New York State Bar Association support the Resolution at the ABA 2023 Midyear Meeting. Ms. DeFio Kean and Mr. Lewis abstained from the vote.

5. Discussion on ABA Resolution 514. Ms. Levin Wallach presented ABA Resolution 514 concerning actions to condemn and eliminate antisemitism. No formal action was taken concerning the Resolution.
6. New Business. Messrs. Lewis and Napoletano reported on NY Executive Law Section 135-c, which authorizes notaries to perform electronic notarial acts by registering with the Department of State and complying with new rules, and regulations promulgated by the Department of State which require that all notaries keep a journal of each notarization for a decade, and mandate that notaries who perform their jobs online using communications software maintain audio and video records for ten years.
7. Date and place of next meeting. The next meeting of the Executive Committee will take place on Friday, March 31, 2023, in person at the Bar Center in Albany, with an option for remote participation via Zoom.
8. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Taa R. Grays".

Taa R. Grays  
Secretary

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF EXECUTIVE COMMITTEE MEETING  
REMOTE MEETING  
MARCH 2, 2023**

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Present: Gregory K. Arenson, T. Andrew Brown, David Louis Cohen, Sarah E. Gold, Sherry Levin Wallach, Richard C. Lewis, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Domenick Napoletano, Christopher R. Riano, Nancy Sciocchetti, Lauren E. Sharkey, Kathleen M. Sweet, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: David Goldfarb, Jaime D. Lewis, Ellen G. Makofsky

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order.
2. Report and recommendations of Task Force on Notarization. In his capacity as co-chair of the Task Force on Notarization, Mr. Lewis, together with Task Force co-chair Ellen G. Makofsky and members David Goldfarb, Jaime D. Lewis, and Mr. Markowitz, presented on the recommendations contained in the Task Force's two reports – the first report on notary record keeping regulations, and the second report on remote online notarization (“RON”) credentialing. After discussion, a motion was adopted to approve the following resolution:

WHEREAS, Executive Law 130 and 135-c, and regulations from Secretary of State 19 NYCRR 182 have been recently promulgated regarding electronic and non-electronic notarizations;

WHEREAS, these new laws and regulations have a significant impact on notaries and attorneys;

WHEREAS, there is no statutory basis for the record keeping and retention requirement for non-electronic notarizations;

WHEREAS, the new laws and regulations are unduly broad and burdensome on notaries and attorneys;

WHEREAS, the new law requires that a licensed electronic notary select a Credential service provider who meets certain technical requirements;

WHEREAS, in many circumstances, the licensed electronic notary lacks sufficient knowledge to determine whether the technical requirements have actually been met; and

WHEREAS, there is no showing that the new laws and regulations will diminish concerns of fraud that the legislation was intended to address;

WHEREAS, the efficiency of attorney notaries will be impacted by the above resulting in increased costs to consumers,

NOW, THEREFORE, IT IS RESOLVED that the Executive Committee approves the Reports and Recommendations of the Task Force on Notarization.

AND IT IS FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

3. Date and place of next meeting. The next meeting of the Executive Committee will take place on Friday, March 31, 2023, in person at the Bar Center in Albany, with an option for remote participation via Zoom.
4. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Taa R. Grays  
Secretary