NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
NOVEMBER/
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Substance Abuse and Mental Health Issues:

This is Us

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Personal and Professional Perspectives
Edited by Karen K. Peters

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The Equinox | Manchester, VT | May 3-5, 2019

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NYSBA

NEW YORK STATE BAR ASSOCIATION
Journal

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NOVEMBER/DECEMBER 2018 VOL. 90 | NO. 9

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by Karen K. Peters

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 The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $210 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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1 https://www.lifehappens.org/blog/2018-barometer-study/ via @lifehappens
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The Road Back

Lawyers Can and Must Lead the Way

We all have good days and bad days. Some days, life is good and everything seems to be going well. Others, we feel as if we can't get out from under a dark cloud of sadness and misfortune.

But what about when our own bad days are so difficult that they lead us into self-defeating and self-destructive behavior?

And what about when our entire country seems to be having a bad day – or a bad year?

At NYSBA's most recent House of Delegates meeting, I chose to jettison my planned remarks on recent association activities and accomplishments, and instead to reflect on events that had taken place in the previous couple of weeks:

In the span of 72 hours in America, 11 people were murdered in Pittsburgh because of their faith, while praying in their place of worship; 14 pipe bombs were sent to current and former public officials, including two former Presidents; and two African-Americans were targeted and murdered by a white supremacist at a grocery store in Kentucky, as the murderer told a white bystander that he was safe because "whites don't kill whites."

Weeks later, I am still struggling to make some sense of those horrific events. And I suspect that many of you feel the same way.

As attorneys, we've devoted our lives to the law, and to the idea that the United States is a nation of laws. We are dedicated to religious liberty, freedom of speech and all of the other rights that are enumerated in the Constitution.

That is, I believe, why I felt both horrified and heartbroken.

At a time like this, it may be all too easy to feel that there is little that any of us can do, as individuals, to make things better.

However, upon reflection, I submit to you that we attorneys, we members of this great profession, we have a vitally important role to play, a role that we must recognize and embrace.

Lawyers are problem solvers. People turn to us when they are confronted with all sorts of troubling situations – and we help them during those difficult circumstances.

We are peacemakers. We advocate for fairness and compromise.

Our analytical skills help us see multiple facets of the same story.

Our dedication to the rule of law and what it means to our society gives us the strength and commitment to find solutions where others may not see them.

We are more than mere advocates, we are leaders. We are leaders of our profession. We are leaders of our communities. We are leaders of our local bar associations. We are leaders in our places of worship.

I urge each of you – in your communities, your homes, your workplaces, your places of worship – to deliver a message of civility. Because civility is the very thread that binds the tapestry that is the rule of law.

We have all heard the phrase, "If you see something, say something." We need to do just that.

When we encounter someone speaking or acting with anger or incivility, we must have the strength – and the courage – to turn down the heat, to remind others that we are not enemies because we disagree about political matters.

I know it won't be easy.

But it has never been more important for us step up and lead. It has never been more important for us to be a part of the solution, to help heal our communities and our country.

It is fitting, then, that this issue of the *Journal* focuses on leadership that NYSBA members are providing in an area that many attorneys would rather not think or talk about: providing support and assistance to lawyers who are struggling with substance abuse and mental health issues.

While the *Journal* generally includes content focused on discussion and analysis of the law, many of this issue's most impactful articles are personal accounts of how far down people fell in their professional and personal lives – and how they came back.

My wife Cindy and I were overwhelmed when we attended NYSBA's annual Lawyer Assistance Program retreat at Silver Bay on Lake George. While I have long understood the devastating impact of substance abuse and had some awareness of the power and potential of 12-step programs, it was truly extraordinary to participate in these meetings and to hear the compelling and sometimes horrific stories of dramatic descent and remarkable rehabilitation.

We heard attorneys talk about how drinking or drug use led to losing their spouses, families, and law licenses. One person spoke of being asleep behind the steering wheel of his car and being awakened by a police officer, who noted that he was facing the wrong way on a busy highway – but continuing to drink and drive until, subsequently, he had a serious accident that sent him through his car's windshield. Another ended up engaged in a conspiracy to commit murder. Still another was addicted to heroin for two decades before finally turning his life around.

What is notable about these stories and others we heard is that these people ultimately got help and got their lives back on track. For some it took many years. Others may have relapsed one or more times before they succeeded, but in the end, they did succeed.

The bigger message behind these individuals' stories is truly inspiring to me: No matter how low you go, you can come back. The trip back can be arduous and painful. But there *is* a road back.

Our Lawyer Assistance Committee, Judicial Wellness Committee and Lawyer Assistance Program continue their extraordinary work in helping our struggling colleagues travel the road to recovery. In these troubled times, I am profoundly inspired and grateful for their commitment and hard work.

And, as I reflect on recent events in our country, the insights gained from the Lawyer Assistance Program events remind me that for our country, too, no matter how bad things get, there is a road back, and we lawyers can – and must – help lead the way.

MICHAEL MILLER can be reached at mmiller@nysba.org

Notice of Proposed Amendment to the Association Bylaws

At its Nov. 3, 2018 meeting, the House of Delegates subscribed to proposed Bylaws amendments as detailed below. Pursuant to Article XVII of the Association Bylaws, notice is hereby given that these amendments will be considered at the Jan. 18, 2019 meeting of the Association at the New York Hilton Midtown.

TEXT OF PROPOSED BYLAWS AMENDMENTS

VII. EXECUTIVE COMMITTEE

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

* * *

F. 1. Eight members-at-large who shall be ~~members of the House of Delegates or section or committee chairpersons~~ Active members of the Association at the time of selection~~, or who have served as members of the House of Delegates or section or committee chairpersons within three years preceding the time of such nomination~~.

* * *

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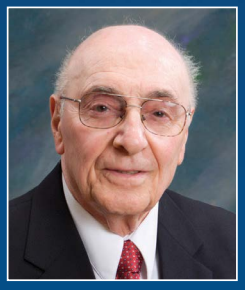

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Substance Abuse Health Issues: *This is Us*

By Karen K. Peters

This issue of the State Bar *Journal* is unlike any other. While two articles discuss clients who suffer from mental illness and substance abuse and programs that serve them, the balance of this issue is not about them – it is about us.

Too often we look at mentally ill or substance abusing clients or litigants as "them." But we shouldn't. The problems they face are not just theirs, they are ours too. Mental illness and substance abuse impacts our professional lives and our personal lives. In this ground-breaking issue, your colleagues Sallie Krauss, Tom Nicotera and Carl Landicino courageously share their personal stories of struggle and recovery with you.

My life in the law has taught me many lessons but the most valuable has been learning that the only thing we keep forever is that which we give away. I am truly grateful for the contributors who have given of themselves to bring understanding to others.

We are all quite familiar with routine flight procedures. You enter the airplane, find your assigned seat, safely store your items in the overhead bin and below the seat in front of you, and put on your seat belt. Before the plane ascends into the sky the flight attendant or a video message reminds you of the safety features of the aircraft and how to use them.

"Make sure to put your own oxygen mask on before helping others" you are told. As you listen, in your heart you may well think, "How can I take care of myself before my daughter who is sitting next to me?" Yet you accept the advice from the airline because you realize that you need to breathe in order to care for others. And you do.

As lawyers and judges you need to remain healthy in order to serve your clients and litigants. We all know full well the unique stressors lawyers and judges suffer such as isolation, the pressure to be impartial under challenging circumstances, the need to remain professional and courteous when others are behaving badly, and the sheer avalanche of work.

Judges strive to be fair and impartial, must often render decisions that conflict with their values, and remain ever open to public scrutiny.

Our stressors can manifest as sleep disturbances, temperament changes, physical ailments, alcoholism, substance abuse, or depression. Each of us must recognize and implement wellness strategies to address our stressors when they arise. While most lawyers and judges have adequate resources to address physical health challenges through the use of medical insurance coverage, physical illness often has psychological consequences that go unaddressed by health providers.

And while friends and family will express heartfelt sympathy and offer personal assistance if you break your leg while skiing or injure your back in an auto accident such attention and understanding disappears if you become addicted to the pain killers that were provided to you during your recovery.

The New York State Bar Association, through its Lawyer Assistance Program and Judicial Wellness Committee, provides confidential assistance to lawyers, judges and their family members, and formulates and recommends policies to assist lawyers and judges in dealing with treatable mental illnesses such as addiction and depression.

and Mental

Rehabilitation is promoted in an environment of care and concern buttressed by confidentiality guaranteed by legislation.

We are grateful for the leadership of Tom Schimmerling, chair of the Lawyers Assistance Program, and Jonah Triebwasser, chair of the Judicial Wellness Committee, and the decades of service members of those committees have provided.

Truly, we all need to put our own oxygen mask on before helping others. And we need to be ever mindful that when it comes to mental illness and substance abuse, there is no line between them and us.

Be it long distance running, yoga, golf, swimming, a gym workout, meditation or a relaxing walk in the woods, good physical and mental health are necessary to enable us to serve our life in the law. Embracing wellness will bring you a better professional and personal life, provide a guidepost to those you lead and make you a great leader in your own right.

You may not be familiar with the serenity prayer of Alcoholics Anonymous. Let me share it with you. It asks for the serenity to accept the things we cannot change, the courage to change the things we can, and the wisdom to know the difference. We can change the isolating culture that pervades substance abuse and mental illness among the bench and bar. We can encourage and achieve wellness for our clients and ourselves.

I applaud the New York State Bar Association and our contributors for the courage to change the things we can.

Doing Nothing Is Not an Option

Have important people in your life said your behavior has changed? Or you seem different?

Is it difficult to maintain a routine or stay on top of responsibilities?

Do you have trouble concentrating or remembering? Are you having difficulty managing your emotions, such as anger or sadness?

Are you missing appointments or appearances, or have you failed to return phone calls or emails?

Does your family have a history of alcoholism, substance abuse or depression? Do you drink or take drugs to deal with problems? Have you recently had more drinks or drugs than intended, or felt you should cut back or quit, but could not?

If you answered "yes" to any of these questions, you may benefit from calling the NYSBA Lawyer Assistance Program. You may be suffering from or slipping closer to alcoholism, addiction, or depression.

Left untreated, a mental health issue can put your practice and your life in harm's way.

If you or someone you know is having thoughts of suicide, call the National Suicide Prevention Hotline at 1-800-273-8255.

The Lawyer Assistance Program is dedicated to providing confidential, compassionate and competent assistance to attorneys, judges, and law students affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

You're not alone. There is hope.

Services are free. Call 1-800-255-0569
or visit www.nysba.org/lap.

Karen K. Peters is the former Chair of the New York State Bar Association's Committee on Judicial Wellness and has also served on the NYSBA Special Committee on Alcoholism and Drug Abuse and NYSBA's Special Committee on Procedures for Judicial Discipline. In 1979, she was selected as the first counsel for the newly created New York State Division of Alcoholism and Alcohol Abuse. Justice Peters' judicial career began in 1983 when she was elected an Ulster County Family Court Justice. In 1994 she was appointed to the Appellate Division, Third Department, by Governor Mario M. Cuomo, and in 2012 she was appointed Presiding Justice of that court by Governor Andrew M. Cuomo, becoming the first woman to serve in that capacity. She retired in 2017.

Becoming an Alcoholic in Private – Living in Recovery in Public

By Sarah L. Krauss

After years of drinking I stood on the cusp of losing all the gains I had made in my legal studies and chosen career in government service. With the assistance of friends and relatives already in recovery, my life took a better turn as I got sober and began a recovery process that has held me in good stead for more than 33 years. At a certain point in the recovery process, I came to the realization that staying anonymous in the legal community was not going to be very helpful to the lawyers and judges, the law students and their family members who might benefit from hearing a story of recovery as I had. This article is the story behind that process.

MY PATH FROM ADDICTION TO RECOVERY

Until that turning point, my life was on a steady decline. This decline began slowly and progressed insidiously. Over time, and probably without much notice, I began drinking more and more. At one time, I could drink with friends on a Friday night and maybe even on a Saturday night, but by Monday I would be back into my responsible mode. Then, slowly, the weekend drinking increased and began to creep into weeknights, and eventually I found myself drinking during the day, especially when my responsibilities – law school, studying, single parenting, and showing up for work – became overwhelming.

Sarah (Sallie) L. Krauss is an Outreach Coordinator for the NYSBA Lawyer Assistance Program, where she assists local bar associations in portions of the Second and Third Judicial Departments in presenting ethics education programs as well as provides monitoring of attorneys who are in the discipline process. A retired judge, she is a member of the NYSBA Lawyer Assistance Committee and the Judicial Wellness Committee and serves a vice-chair of the Brooklyn Bar Association's Lawyer Helping Lawyer Committee. Previously, Judge Krauss served as Chair of the American Bar Association's Commission on Lawyer Assistance Programs (CoLAP), 2011 to 2014, and also served as Chair of the Judicial Assistance Initiative (JAI), 2008 to 2011. During her tenure as Chair, the JAI published an ABA resource guide entitled *Judges Helping Judges: Resources and Education* in order to assist judges in finding help for themselves for mental health and addiction issues amongst the judiciary which might hinder successful careers.

I had married very young and had a child, but was determined to get an education and make something of my life. As young marriages often do, mine began to unravel and, curiously, while my marriage deteriorated, I found that I had a desire to achieve, in part because I knew that I would have to take care of myself and my young daughter on my own. As my marriage ended, I worked full time in the court system while attending law school at night. In the short span of five years, I had transformed myself from a young dependent housewife into a disciplined, motivated superwoman. I could do anything!

Regardless of my desire to achieve, I continued to drink, and subtly the drinking became a more important part of my days than I realized. I drank to relieve the stress of working, studying, class attendance, child care. The problems such drinking created seemed to pale in comparison to the story I told myself: I was a single working mother who planned to join a noble profession – I was going to be a lawyer, I was on the ladder up, a trailblazer, a woman on fire, a successful woman in the '70s.

For certain, my relationships with family and friends became strained and, as time wore on and the drinking took over more of my life, necessary relationships with family and employers were, to say the least, no longer cohesive and often chaotic.

People could not depend on me to show up in a responsible and timely manner. My work and studies began to show a steady decline. Like many with this problem, I was unaware of the damage drinking was doing to my life and relationships.

I found many reasons to blame circumstances and others for needing to drink – for relief, for relaxation, to reduce the stress and fear I was feeling. Through this false sense that I was all right and could handle the drinking and everything else, I couldn't see the toll my behavior was taking on my family or work responsibilities. It appeared at the time as if I were handling all these responsibilities well.

My life plans underwent a radical change owing to the end of a cherished relationship related to the excessive drinking and the perception that it was other people's fault that I was so unhappy. I graduated from law school and moved to a new city. I had a variety of legal jobs there, I made new friends, I had a new boyfriend and a renewed relationship with my daughter and, I had hoped, with my drinking. With the new situation, this time, I told myself, I would be able to control when and how much I drank.

When that didn't happen, I began to recognize that my drinking was out of control. At this point the only thing I thought about throughout the days at work, and nights partying or at home, was my next drink. As more people told me that I could have a problem with drinking, I stopped drinking in public, preferring to spend evenings alone in the privacy of my home where I could drink without facing the consequences of blackouts or unruly emotional outbursts. I felt safer there since I was afraid of where I might end up in a blackout.

By then, I was having a hard time focusing, making good decisions, getting to work on time, or even taking proper care of myself or anyone else . . . unable even to pay attention to my now young teenage daughter. The consequences of failed relationships and now unmanageable responsibilities piled up and became a mountain too high to climb. Unfortunately, this provided many reasons, although not rational ones, to continue drinking.

Increasingly, the shame and fear became overwhelming. Soon I began to have bouts of believing that I'd be better off dead. During my darkest hours of failed relationships, chaotic life circumstances and uncontrolled drinking, I did attempt to end my life. Fortunately, those attempts were not successful.

Friends began to talk to me about the excessive drinking and my erratic behaviors, offering suggestions for help. Seeing a psychiatrist, a psychologist and taking prescribed anti-depressants did not have any effect on the drinking. Many attempts at getting sober, stopping drinking for long periods but using other substances to "take the edge off", resulted in progressively more unmanageability in my life. After some improvement when I had first stopped drinking, the use of drugs began to take its toll and again I found myself in a morass of unpredictable chaos, my work and relationships began unraveling again.

But then, maybe because the consequences were too much to face, the guilt too much to bear, or death too frightening to stomach, I heard someone speak of recovery and it stirred something deep inside. Miraculously, I was able to not only hear the message but also to surrender to the possibility of sobriety and recovery. This pro-

vided the opportunity to change the destructive course I was on and opened up a whole new life to me. A period of detoxification and rehabilitation treatment followed this surrender and I began to walk a different path. This initial period of sobriety was followed by intensive years of attendance at support groups and a sustained period of sobriety while working with others both in and outside the legal profession.

MY ROLE AS A MESSENGER TO THE BAR

About 12 years into recovery I wrote my story for the *ABA Journal.* With that publication, I willingly surrendered my anonymity in order to assist my colleagues who were dealing with the disease of addiction. The decision to reveal the details about my own alcoholism and recovery was not an easy one. Some of the ramifications were not easy to deal with, but I do not regret my decision for one moment. After all, those who had the courage to tell their story had brought me to recovery and saved my life. How could I not do the same in hopes that I might help someone in return?

The extreme shame and stigma experienced by lawyers, judges, and law students created a critical urgency to put a face to the problem . . . my face. I was also acutely aware of the role a demanding profession played in this disease.

With the gift of hindsight, I share highlights of my journey as a messenger of recovery. Sharing serves to keep my sobriety strong and may influence those who are at that crossroad of revealing their condition or in the middle of a substance abuse experience and need a word of encouragement and hope.

In 1994, I became a commissioner with the ABA Commission on Lawyer Assistance Programs (CoLAP) through the encouragement of another attorney in long term recovery who was active in CoLAP. It was because of this commission appointment that I first publicly shared my story of addiction and recovery to a group of my peers.

I agreed to speak to a roomful of women bar leaders about CoLAP. It was a last-minute decision and I was left with little time to prepare. I quickly realized that sharing my story would ultimately be the best way to educate them about CoLAP's mission. I would have to reveal to them that I was an alcoholic. While this decision gave me pause, especially when I saw many of my New York State colleagues in the audience, I knew it was important to show them what a lawyer and a judge in recovery looked like: healthy and successful. Who better to deliver this message? I was one of them, a bar leader who had just completed a year as the vice president of the Women's Bar Association of the State of New York and had previously served as the president of my county women's bar association, but different, possibly, because I had overcome the challenge of active alcoholism and had remained in the legal profession and was now willing to talk about my struggles with this disease.

Following this presentation, I wrote my *ABA Journal* article. A few years later, I shared my story with the Board of Trustees of the Brooklyn Bar Association and participated in a mock intervention for New York Administrative Judges as well as the Executive Committee of the New York State Bar Association. All of this put my private story on public display but served a critical purpose of demonstrating that recovery works.

Since finding sobriety and then finding the courage to share my story of recovery with those in the legal profession, much has changed with regard to the universal message to legal professionals about these serious issues of addiction and the incidence of mental health issues in our profession. All lawyer assistance programs offer education on how to recognize and intervene when someone is impaired. These educational programs continue to be offered for free or for a very low cost on subjects related to mental illness, addiction, and lawyer well-being. The assistance that the state lawyers assistance programs offer is also free and confidential.

Personally, sobriety afforded me the privilege to serve for more than 17 years as a judge in the Civil, Criminal, Supreme, and Family Courts of New York City and the honor of serving on CoLAP as well as on state and local lawyers-helping-lawyers committees. My committee work on behalf of my colleagues became critical to my own well-being and gave me an opportunity to be on the cutting edge of lawyer assistance.

There are many courageous judges, lawyers, and law students among us who are not only in recovery but have also lent their time and energy to this effort, who have publicly acknowledged their struggles with addiction and mental health problems, and who have maintained their recovery while contributing their formidable skills and talents to the legal profession. The willingness to admit what has happened to us while continuing to demonstrate, through our own professional accomplishments, that a recovering attorney is a responsible member of the profession, as well as the willingness to volunteer to educate our colleagues, has done much not only to reduce the stigma of addiction and mental illness for judges, lawyers and law students, but more importantly, to get effective assistance to those who are suffering and dying every day from these very treatable illnesses.

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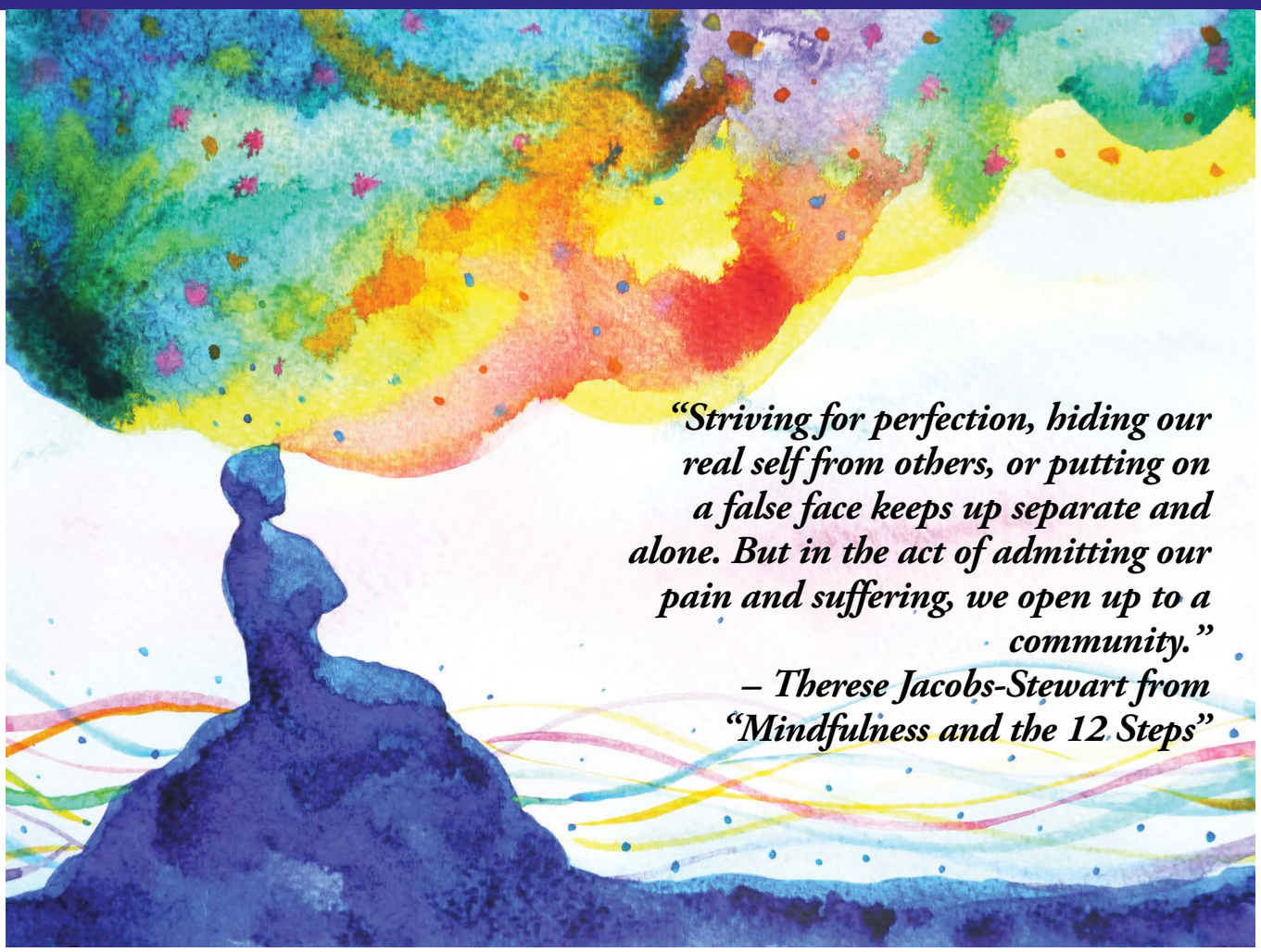
Never Alone: Addiction, Recovery

By Libby Coreno



Let me just say – I love lawyers. I love the passion, intelligence, tenacity, brilliance, skepticism, integrity, and verbosity (I could, of course, go on). It has been a tremendous privilege and pleasure for me to travel across New York in the last five years presenting lawyer training programs on mindfulness, meditation, empowerment, leadership and women's issues. Yet nothing has left such a lasting impression on me as my opportunities to present mindfulness and other techniques to lawyers in recovery – a community within our community. To be among lawyers who have faced addiction and made the choice to live clean and sober is to bear witness to that wondrous combination of humility, strength, wisdom, acceptance, compassion, and not a little bit of laughter.

For me, being in the rooms with lawyers in recovery is like coming home – hearing phrases like "one day at a time" and the serenity prayer (with its emphasis on strength, discernment and acceptance) is like being at my mom's kitchen table. My childhood home was filled with these messages and the library shelves were lined with books on recovery, empowerment, and wellness.

It was not until my early teens when I learned that the meeting my dad got up for each Saturday morning was

and Community

the weekly gathering of a 12-step group and was a cornerstone of his sobriety;[1] that the inspirational books were part of his recovery process; that when his phone rang, and he mouthed to my mom, "I have to take this," it was someone in real trouble on the other end.

It was not until my college years that I understood the power of addiction and the power of the fellowship that caused my dad to take phone calls day or night.

And it was not until my years as a young lawyer that I saw addiction take root in my friends, peers and colleagues. Whenever I have the opportunity to sit with a fellowship of recovering lawyers, it is always inspiring, uplifting, transformational – and beautifully familiar.

Yet even with my heightened sensitivity to the perils of addiction, I was enormously affected early in my career by the impact of alcohol on a colleague before we were even 30. I remember viscerally being a young attorney with all the pressures, deadlines, and expectations that entry into the profession carries. I found solace in my fellow young lawyers as we would commiserate in a form of negative bonding around the daily management of the toils of practice on the bottom rung. Sometimes that bonding was gathering after work or on the weekends with drinks but it was never anything over which I was particularly concerned. We each seemed to be appropriate, understood limits, and acted accordingly.

It was not until much later that I realized the reason I was not concerned – my friend's alcoholism had taken root away from the small group gatherings and was happening at home. Every single sign was present that he was struggling – decreased personal self-care, forgetfulness, timeliness, and questionable judgment. I knew he was a brilliant, dedicated young attorney but I felt voiceless and powerless to say the one thing that needed to be said – "I see you struggling and I want to help." It seems so incredibly simple to me now and I often wonder if things would have been different if I had found my courage to be the friend and colleague he deserved.

After my early experience, I decided that I would make every effort I could to help lawyers find ways to support and care for one another in the path to personal and professional wellbeing. I began to get involved with the New York State Lawyer Assistance Program and advocate strongly for an increased focus on overall attorney well-being – addiction, stress management, and mental health. As I began to learn all I could about how addiction and mental health issues uniquely affect lawyers, it became increasingly clear that education about the pressures of practice, the impacts on the individual, and maladaptive coping mechanisms was woefully lacking.

Author and lawyer Lisa F. Smith noted the following when discussing her life in recovery in her memoir *Girl Walks Out of a Bar:*

> Twenty-five years ago when I started practicing law [I was never] educated about . . . the risk that lawyers run of becoming alcoholics, and what you can do about it [and] that there is confidential help out there . . . It was news to me years later, when I found out there were lawyers assistance programs at the state bar level, at the national bar level, and at the city bar level, [made up] of lawyers who are there to help other lawyers who are in trouble. That should be something that lawyers learn about the same time they're learning where the library is and how to overnight a package to a client . . . One thing that is lacking . . . is a session on the fact that lawyers frequently run into mental health issues, depression, anxiety and then frequently this leads to substance abuse. Alcohol being far and away the number one.[2]

M. Elizabeth "Libby" Coreno, Esq., is a shareholder at Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., in Saratoga Springs, where she focuses on land development and zoning law. Libby brings a solution-oriented approach to a wide range of clients from individuals to regional businesses to Fortune 500 companies in the areas of commercial and real estate development matters. While she is often asked to speak on zoning, land use, and real estate topics, Libby also shares her personal passion for practice management, mindfulness, empowerment and creative problem-solving with her colleagues and other professionals in various workshops around NYS. Libby serves as Board Chair for Coesa, Inc., a lifelong learning, leadership and well-being retreat center in Saratoga Spa State Park, Chair of the Attorney Wellbeing Subcommittee for the NYSBA Law Practice Management Committee; Chair of the Lawyers Assistance Committee for the Saratoga County Bar Association, and Board Member for the Saratoga County Chamber's Leadership Saratoga program.

More recently, I have seen a shift toward greater awareness. I recall vividly the moment two years ago when I congratulated a recent law school graduate on her admission day at the Appellate Division. With a concerned and lowered voice, she asked, "I am excited, but I looked through the packet I was given, and it's full of helplines for depression, addiction, and suicide. Is there something I wasn't told?" While it may be the first she was hearing of the higher rates of substance abuse and mental health conditions, the data has been around for some time.

Anyone who asks for help receives it – no judgment, no questions asked.

Recently, a Hazelton Betty Ford study found that (1) 20.6 percent of lawyers screened positive for alcohol-dependent drinking (higher among men and younger attorneys); (2) 28 percent of lawyers suffer from depression (higher among men); (3) 19 percent of lawyers struggle with anxiety (higher among women); and (4) 23 percent of lawyers experience significant stress.[3]

At the NYSBA Annual Meeting in January, my co-presenter, Kerry Murray O'Hara, PysD and I laid out our premise that lawyers are predisposed to higher than average rates of addiction and other mental health issues as a result of "a perfect storm" of "certain traits which cause stress and burnout, then are trained into anticipatory anxiety (professional worriers) which is known to be suboptimal psychology, and then are potentially stigmatized and perceived as weak when the burden becomes too much.

Rather than seek professional help, many lawyers withdraw from peers, friends and family, or engage in 'maladaptive coping behaviors' such as self-medicating with alcohol and other substances. In essence, the contributing factors to a lawyer's unhappiness coupled with the resistance to seek help may lead to the higher than average levels of problem drinking and substance abuse according to the most recent research."[4]

In fact, the American Bar Association's 2017 Report of the National Task Force on Lawyer Wellbeing included the list of reasons why lawyers are so help-averse, including: "(1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture's negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules."[5]

As awareness grows and efforts are made to shift a help-resistant profession,[6] the time I spend with lawyers in recovery is incredibly refreshing, fulfilling and inspires me with such hope. Each and every lawyer I have met through Lawyer Assistance Programs, Lawyers Helping Lawyers or as Chair of the Saratoga County Bar Association's Lawyer Assistance Committee has taken the profound and courageous step in asking for help. Many will bravely tell their stories of the moment when they knew their lives had become unmanageable due to alcohol or drugs. They also will tell me about how they received help and about being welcomed into a community of fellowship from those who had walked the path to sobriety before them.

One lawyer shared with me that he was a senior litigation partner at a prestigious law firm but was terrified of the courtroom. He drank larger and larger amounts of alcohol to help him cope with the levels of anxiety that he experienced whenever he was prepping for or in trial. As he continued to rely on alcohol more and more, other areas of his life began to unravel – his health, his marriage, his relationship with his children, and his work. One Monday morning, he awoke to find that he had passed out reviewing deposition transcripts and forgot to set his alarm. He was foggy and disheveled and late for court. He began to feel pains in his chest as his mind raced to figure out how we was going to explain his tardiness, his appearance and his ill health to the judge and his client. On the way to the courthouse, he decided that he could not live another day as he had for the last several years. He contacted another lawyer he knew was in recovery and asked him what to do. His colleague drove to his home that evening and brought him to his first Alcoholics Anonymous meeting. He has been sober since that day and he tells me of how his life has shifted in unbelievable ways – as a happier self and professional.

Another lawyer shared with me that his journey of recovery had taught him to not take things personally and that has enabled to him to experience incidents in the courtroom in a completely different way. He said, "Prior to recovery, I was the maddest person in the courtroom and every ruling that didn't go my way was because the judge had it out for me. I was short-tempered and a bit of a hothead. I would drink after court to blow off the stress of the day, only to wake up the next day more tired and irritable. After entering into recovery, I learned that I didn't have to take everything so personally. I could go easier on myself."

Still another lawyer shared with me the impact on him from a colleague's recent suicide. For the better part of

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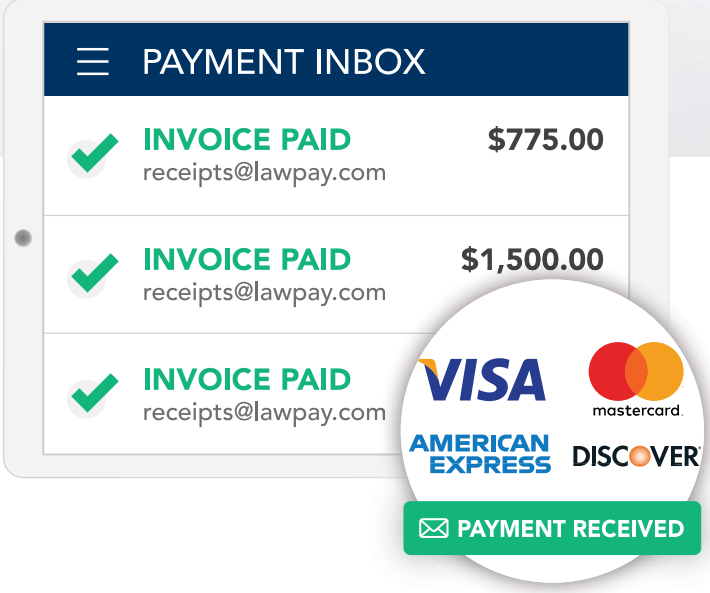

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two years, he had looked in on a lawyer he knew had been struggling with mental health and addiction issues. He had repeatedly facilitated and participated in interventions on her behalf with local health care professionals, her family, and others when things looked bleak. She had stabilized many times and he had great hopes for her continued success. He knew from his own family experience that each day was a challenge for his friend but that she continued to practice law and give tremendously to her community. And yet, the day came when he had to share with the legal community the news of her suicide. He remarked to me, "We don't do enough for each other. We all think we are the only one. We need to be good to each other and see that we all struggle and have challenges."

A few years ago, I had a dream come true when my dad and I co-presented "Mindfulness and the 12 Steps" at a weekend retreat for lawyers in recovery. It was easy for me to see that this "community within the legal community" is one of mutual respect, love and tolerance. Anyone who asks for help receives it – no judgment, no questions asked. I remarked to the group that they exemplify the key principles that create a sense of community, belonging and well-being – a template for a profession in need.

While I understand that recovery comes in many forms and that 12-step programs are but one path, I offer these stories as part of my personal journey and the journeys of those who have courageously shared their stories with me for this article.

As the Chair of the newly formed Attorney Wellbeing Committee for the NYSBA, it is my singular hope that we continue to support access to resources and assistance to lawyers struggling with addiction and mental health challenges in any form. We can also apply the core principles of community, belonging and well-being to the entire profession – taking lawyers from striving to thriving.

With those words in mind, I will offer one of my favorite quotes from the Persian poet, Rumi: "*There is a community of the spirit . . . open your hands if you want to be held*." If any of this writing speaks to you, please know that there is a community of the spirit with open hands stretched out to help. You are never, ever alone.

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1. For those who wonder about my father's anonymity in recovery, he has reviewed this article and given me permission to share the story. I am proud to say that he is Barry Levine, founder and Board President for the Capital District Recovery Center (CDRC) on Colvin Avenue in Albany which opened this year and has the mission "to provide a safe and accessible space for people seeking recovery from addictions by offering a one-stop location for 12-step recovery meetings, recovery supports, and programs for self-improvement, and spiritual growth." He has shared his recovery journey as part of the process to found and open CDRC – a journey which is fast approaching three decades. I am honored to serve as volunteer legal counsel to the Board of CDRC.

2. Olds, Dorri, *The Lawyer Setting the Bar for Recovery*, The Fix, June 8, 2016. https://www.thefix.com/lawyers-rate-high-alcoholism.

3. Krill, Patrick R. JD, LLM; Johnson, Ryan MA; Albert Linda MSSW. *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Journal of Addiction Medicine. Vol. 10, Issue 1, January/February 2016. (Additional statistics include: social anxiety (16.1 percent), attention deficit hyperactivity disorder (12.5 percent), panic disorder (8 percent), and bipolar disorder (2.4 percent), suicidal thought at one time in career (11.5 percent), self-injurious behaviors (2.9 percent), and prior suicide attempt (0.7 percent).

4. Coreno, Libby and O'Hara, Kerry, *Attorney Wellness: The Science of Stress and the Road to Well-Being*, NYSBA Journal, October 2018, Vol. 90, No. 8. (internal citations and quotation marks omitted).

5. The Path to Lawyer Wellbeing: Practical Recommendations for Positive Change. The Report of the National Task Force on Lawyer Wellbeing, American Bar Association, August 2017, p. 13.

6. Ciobanu, Terrell, *Out of the Darkness: Overcoming Depression Among Lawyers*, American Bar Association, GP Solo, March/April 2015, noting a 2004 study of lawyers recovering from mental illness determined that the two greatest factors in failing to seek treatment was the belief that "they could handle it on their own" and that discovery of treatment would stigmatizing to their reputation.

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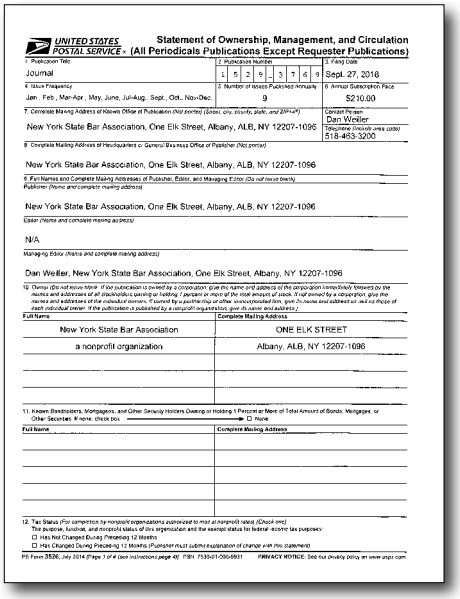

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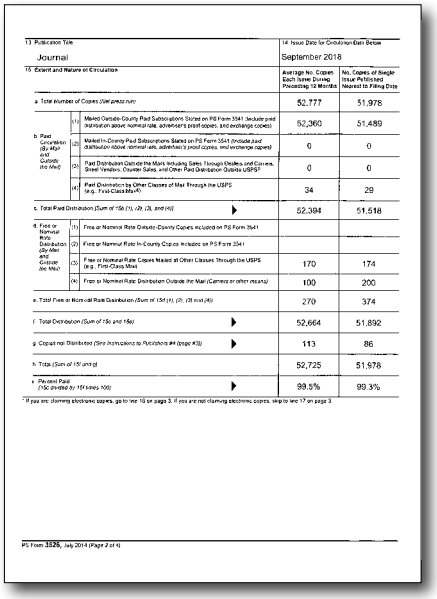

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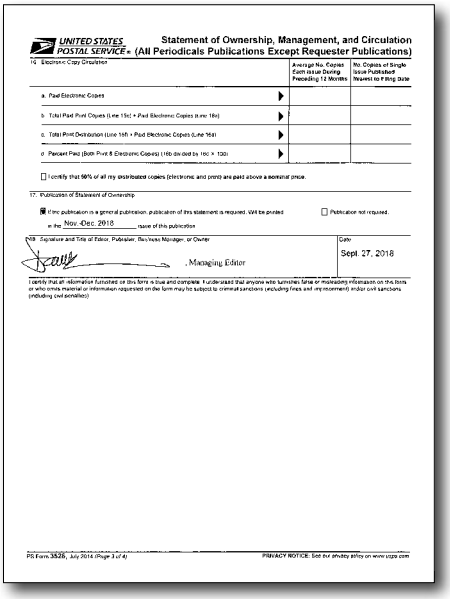

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Breakfast or a Bullet?

By Thomas Nicotera

The swath of devastation left in the wake of a suicide is hard to speak of, let alone truly grasp, but try we must. If such a discussion prompts one person to seek another way through their pain than to opt out of life, then the pain of writing and reading about surviving a loved one's suicide will be worth it.

I have been told that sharing the story below is a courageous act. Just recounting the tragic event of 1997 for this article made me sick for a brief time, but it needs to be said for both personal reasons and to help others. Just rereading this piece brings tears to my eyes and pain to my heart. Thank you for letting me share.

Thomas Nicotera, Esq. is a solo practitioner in Albany. He graduated from Salmon P. Chase College of Law in 1982 and was first admitted to practice in New York State in 1984. He served as examining counsel for Ticor/Title Guarantee title insurance company. He is a former Assistant Public Defender and also served as an assigned counsel and law guardian representing indigent clients. He has successfully tried a number of cases to jury verdicts. Tom is also a former in-house lobbyist for the Nurse Practitioner Association New York State. He is a member of the New York State Bar Association and serves as a member of the Lawyers Assistance Committee and the Committee on Professional Discipline, as well as a Co-Chair of the Capital District Lawyers Helping Lawyers Committee.
A special thank you to Pat Spataro for helping to shape this article by providing invaluable input and assistance.

BREAKFAST OR A BULLET? THANKFULLY, I CHOSE BREAKFAST...

Nothing I ever experienced in life or as a lawyer, either in practice or in law school, had prepared me for this. *Nothing*!

The alarm clock rang and I opened my eyes slowly to another dark, gray, flat day just like so many that had preceded this one. I asked myself today, like every day now because the pain is so great I felt for sure I couldn't bear it one more minute, "Should I have breakfast or a bullet?"

As lawyers, we are smart, in control, self-assured and able to find the answer to the problems our clients bring us. That's what lawyers are and do. I learned this early on and lived it. We don't get sick and we certainly don't or shouldn't allow ourselves to get as sick as I was.

How did I get here?

One morning there was a knock on my door and I opened it to find a nervous, uneasy State Trooper standing in front of me. I knew many State Troopers, but this was not the face of one I knew. He asked me to confirm my identity and then said, "Your son is dead" – at least that's how I remember it.

It was as if the world all around me just disappeared. I could hear a most forlorn, horrific hollow scream. That sound couldn't be coming from me but it was. And the whole world went monotone.

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

After all the formalities, services and acquaintances telling me how sorry they were for my loss, the quiet set in. After a couple of weeks I went back to my practice doing what I had done for so many years.

Or at least I thought I went back.

Every morning I went to my office but couldn't work. I went through the motions of going to court, talking with clients and colleagues. But in reality I was slowly sliding into an abyss of despair.

Eventually it came down to me sitting at my desk unable do anything. I couldn't even answer the telephone. It appeared to others that I was working but I accomplished very little. Friends and colleagues drifted away. Few said anything to me about my son's death. Almost none of my lawyer brethren even asked, "How are you?" On the rare occasion someone did I answered with a hollow "OK."

Thankfully one very close friend would come to my office and take me to lunch or just to "hang out" for a while. He would caringly listen to me ramble. At home I didn't talk about it. At work I couldn't talk about it.

I was, after all, a lawyer and we don't share our personal feelings or emotions. It is a practiced affect to remain visibly calm and unreactive to such things as the horrific details of a murder or a devastating testimony during a trial. We get so good at it we don't even know we do it. It can be our downfall.

My practice died a slow death. I was so depressed I couldn't even open the mail. Complaints came in. I had become incapable of dealing with anything.

I finally hit bottom and thankfully again did not choose the bullet. Instead I called my doctor to ask for help. He recommended a therapist. But by then it was only a matter of time until I would lose my law license, and then my wife and nearly everything else.

In therapy I learned that I had suffered from depression most of my life, which exacerbated the grief I felt in losing my son. I learned depression was a medical condition that could be treated. After several years of therapy I was finally able to hold more than a simple job. The journey of recovery has been a long, slow road.

Today I am a lawyer again and so very thankful to first having survived being a survivor, and then having a second chance to pursue my profession, which I am told makes my eyes shine when I speak of it.

Growing up I often heard people say that "something good always comes from something bad." I believed it as a kid and still believe it now, even after all I've been through. I know myself far better than I could have without this trauma, and I know for certain that when tragedy befalls someone I know I need to reach out. I need to not just ask, "How are you doing?" but I also need to take the time to listen and offer friendship and undeniable support. The more connected we can be to the survivor of suicide or other tragedy the harder it makes it for them to choose the bullet.

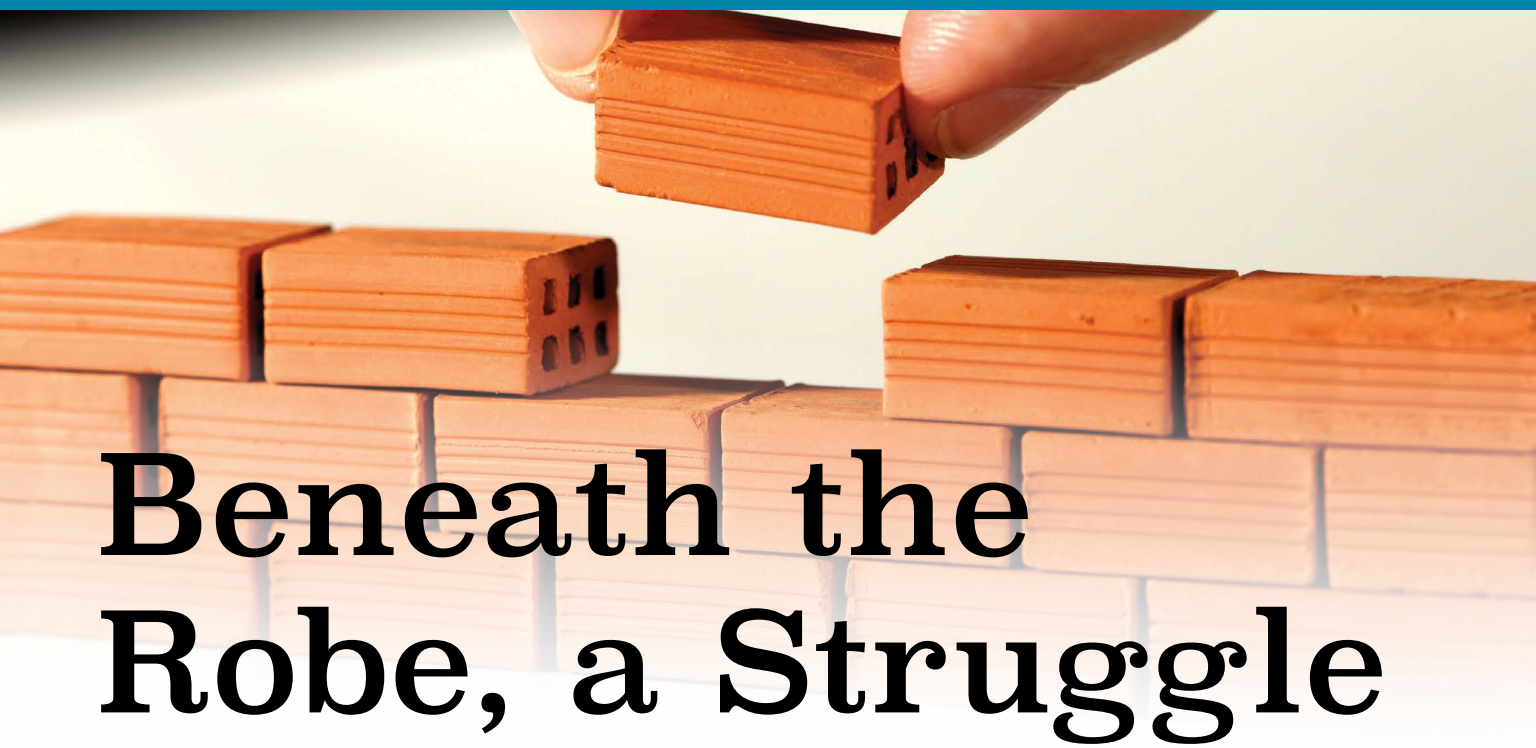
My practice died a slow death.
I was so depressed I couldn't even open the mail.
Complaints came in.
I had become incapable of dealing with anything.

Suicide . . . It makes us so uncomfortable very few people even want to say the word. But it happens, and the cost for those left behind can be immense without the help of caring friends and colleagues, especially those who have been there.

Thank you for reading this. I hope this article reminds lawyers that the high demands of practicing law or difficult life events can result in depression, anxiety, addiction and frustrations that challenge your ability to cope. There is hope and help, and it is just a phone call away.

If you need help, call the NYSBA Lawyer Assistance Program at 1-800-255-0569 or email lap@nysba.org.

I feared that I would be reported. I feared that I would lose my family, my reputation and my profession. I was certain that judges did not have such problems. We were not permitted to have such issues.



Beneath the Robe, a Struggle With Addiction

By Carl Landicino

An underlying, ever present, sense of anxiety. A feeling of unease. This is how I experienced my life as an alcoholic, prior to my recovery. I was tired of feeling that way. It was unsettling. I was exhausted by the condition. Notwithstanding a yearning to have a cessation of the restlessness, I was afraid to seek assistance for what I came to accept as my addiction. I was convinced that if I reached out for help my secret would be revealed, my life would be ruined and my career would be over. I would be removed from office, that office being Supreme Court Justice of the State of New York. I did not believe that I could speak to a professional in confidence. I feared that I would be reported. I feared that I would lose my family, my reputation and my profession. I was certain that judges did not have such problems. We were not permitted to have such issues.

My coping mechanism was to balance my certainty that I did not have a drinking problem with the belief that I could control my consumption on my own. My thinking was that I was experiencing a temporary condition. It would pass. It was the job. It was the family. After all I was functioning and I worked hard. My ability to abstain for periods of time also supported my conclusion that I was not an alcoholic.

Carl J. Landicino attended the University of Rochester, as a Wilson Scholar, and received his bachelor of arts degree in political science, *cum laude*, in 1987. He received his juris doctor degree in 1990 from St. John's University School of Law and was admitted to the New York State Bar (2nd Department) in 1991. After a career in private practice, he was elected justice of the Supreme Court (Second Judicial District) in November of 2011. He took office on January 1, 2012 and currently sits at the courthouse located at 360 Adams Street, Brooklyn, N.Y. Since taking office he has been assigned to a number of specialized parts and currently sits in a civil trial part. He is a member of the Brooklyn Bar Association, the Brooklyn Women's Bar, the Catholic Lawyers Guild (Kings County Chapter), the Nathan R. Sobel Inn of Court of Brooklyn, and the Brooklyn Brandeis Society. He is also past president and a current member of the Columbian Lawyers Association of Brooklyn.

I reminded myself that alcohol is legal. I am an adult. Everyone drinks. I was comforted by the notion that I was doing nothing wrong. I had no history of a drinking problem. Alcoholism seemed like more of an exaggeration of what I was experiencing than a reality. I knew what an alcoholic was. I was not one. In any event, even if it was something that needed to be addressed I would be able to accomplish it on my own. I had always been able to accomplish matters that I needed to, as long as I put my mind to it. This issue would be no different. I could control my use. Total abstinence seemed too extreme. It was not necessary. The thought that I would never drink again was unthinkable. My plan was to slow down. Manage it. Tomorrow usually seemed to be the best time to start. I convinced myself that I would be successful in my endeavor and remained certain that I could not reveal my underlying concern that I needed assistance to anyone. The objective reality was that the condition gradually increased. I did not recognize that progression. I was not able to successfully address my alcoholism on my own. I needed to accept that before I was able to seek help. In my case my list of alternatives became extremely short in a brief moment in time.

My actions ultimately forced me to acknowledge and address my alcoholism. In October 2012, during my drive home from a Judicial Conference in Saratoga Springs, N.Y., I was stopped in Colonie, N.Y., by an unmarked police vehicle for speeding and aggressive driving. The officer noticed alcohol on my breath. I was administered a number of field sobriety tests. I was arrested and handcuffed and my vehicle was towed from the scene at my expense. I was driven to the State Police station in Latham, N.Y. While at the police station I was fingerprinted. The officers were aware that I was a judge.

At the time of my arrest, and the ensuing months afterward, I believed that my world had irreparably crumbled. However, in reality and to my surprise it was the beginning of my life as an alcoholic in recovery. I did sense a feeling of relief. In some ways I knew the hiding and denial was over. I slowly began to accept the reality of my condition. Ironically it was my fear of disclosing my struggle that had made matters worse. I did almost lose my family. I did almost lose my job. I did spend tens of thousands of dollars as a result of my conduct.

My actions were the subject of articles/editorials in a number of newspapers, including the *New York Law Journal*. I was ashamed of myself. I was embarrassed. At first I was in denial. I still believed it was a temporary condition. My initial view was that I would educate myself and be cured. It was not easy for me to accept the fact that I was an alcoholic. I did not want to be an alcoholic. I did not want to talk about it openly with others. I was afraid that people would question my ability to function and my ability to reason. I told them I was fine.

I slowly began to understand that for me acceptance and openness were essential to my well-being. Humility and trust were required. I came to appreciate that for me the concept of cure was not applicable. I would become an alcoholic in recovery. I had to accept that I was an alcoholic. I was not alone. I could not move forward on my own. I had to acknowledge and embrace the fact that I required the assistance of others. My willingness to welcome assistance was not a weakness; it strengthened me.

Tomorrow usually seemed to be the best time to start.

Clearly, my recognition of my alcoholism and my willingness to accept various forms of assistance did not serve to excuse my behavior. Responsibility and punishment certainly followed. I pled guilty to driving while intoxicated, a misdemeanor (Vehicle and Traffic Law § 1192(3)), in satisfaction of all charges. My plea resulted in a period of mandatory courses, restricted driving, fines and costs, as well as attorney fees. I also retained the services of counsel in relation to ethical charges against me before the New York State Commission on Judicial Conduct. I consider myself fortunate. Although I was censured, which I am by no means proud of, I was not removed from office. I am ever grateful for that fact. The determination of the Commission contains a more detailed discussion of my conduct.[1] I am also comforted by the fact that my driving on that day did not result in a collision. Most important, I did not physically injure anyone.

In addition, I needed to start rebuilding relationships with family members that I had broken. Today I live one day at a time. I try to add a new brick every day. I am open to help. I try to be honest with myself. I know that assistance is always available. I am willing to discuss my alcoholism with my colleagues in a candid fashion. I have been embraced, never shunned. We discuss stress, anxiety and fatigue. The concept of wellness is alive and well. I have come to realize that for me, my fear of openly expressing my need for assistance was predicated on a myth I had created in my own mind; a blinding senseless notion. My acceptance, my humility, my willingness to accept the help of others and be honest and open about my alcoholism threw open a door to a new day. Not tomorrow, but today. It's true. That ability was available to me. I knocked and asked for assistance. It was not easy but it was simple.

1. *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Carl J. Landicino,* 2d Judicial District, Kings Co. Determination, Dec. 28, 2015, New York State Commission on Judicial Conduct.

Two Men Met in 1935 – and a Recovery Program Was Born

A Brief History of the Lawyer's Assistance Movement in New York State

By Dave Pfalzgraf

In 1935, two alcoholics, Bill Wilson, a New York stockbroker, and Bob Smith, an Ohio physician, met in Akron. When the meeting was over, it had become apparent to them that one alcoholic was uniquely able to carry the message of recovery to another alcoholic. That formula for success, which is the foundation of Alcoholics Anonymous, has remained true over the past eight decades, and it all began with that first alcoholic to whom the two men carried their message of hope – AA #3, Bill D., a member of the Ohio Bar.

As it happened, both Wilson and Smith had ties to the legal profession in interesting ways: Wilson had attended Brooklyn Law School and Smith's father was a prominent judge in Vermont.

All three men remained sober for the rest of their lives. Yet even as scores of lawyers found recovery in the years after 1935, there was no formal lawyer assistance movement until the late 1960s. And it began because of a con, when a young and successful California lawyer named Ted C. met a doctor and an insurance man over a few drinks in a bar. Together they contrived an auto accident case involving a fictitious sum of $347. A complaint was drawn, doctor's examination report prepared and the phony claim submitted to and paid by an insurance company. Ted was arrested, convicted of insurance fraud and grand theft, and sentenced to prison. He lost his license to practice law. While on a work furlough program in prison, an AA member and a recovered lawyer met with Ted almost every morning at a hideaway coffee shop where they had a recovery meeting. Their goodwill so impressed Ted that when his sentence was completed and he had regained his law license, he decided to start a new specialty group for lawyers and judges to share their recovery and act as a bridge into mainstream recovery meetings. This meeting in Los Angeles was the first strictly lawyer recovery group in the United States.

The movement took hold, and by 1975 had expanded beyond the boundaries of the United States. In that year, the Alcoholics Anonymous International Convention was held in Denver, Colorado. It was there that a number of lawyers from Canada and the United States met and the idea of forming an organization called "International Lawyers in Alcoholics Anonymous" was germinated. In the fall of 1975, the first meeting of ILAA was held in Niagara Falls, Canada. There were 22 lawyers present, 16 from Canada and six from the United States. Westchester lawyer Jack K. was present at that meeting and would go on to be the only lawyer to have attended all meetings of ILAA from 1975 through 2005.

In the spring of 1977, the *Christian Science Monitor* ran an article on Ted's lawyers' group in Southern California. The article was picked up by the *N.Y. Times*. A Syracuse lawyer, Frank A., read the *Times* article, called Ted and asked him if he was going to attend ILAA in Toronto, Canada in the fall of 1977. Ted said he would attend, and after the meeting he traveled to Westchester County with Jack K., where he met with Jack, Ray O'K. and other sober lawyers and, according to Ted, the second lawyer's

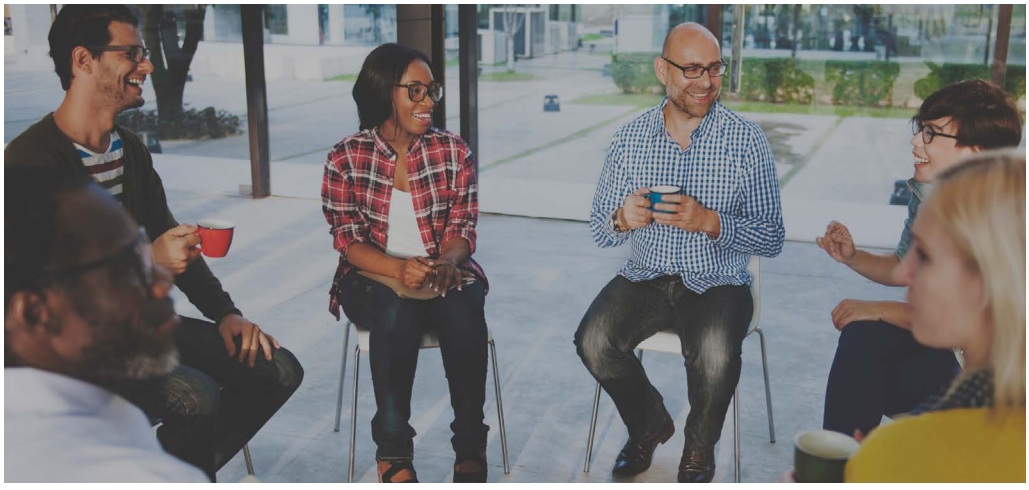
David R. Pfalzgraf, Esq., is of counsel to the firm Pfalzgraf Beinhauer & Menzies LLP in Buffalo. He is past President of the Bar Association of Erie County and past Chair of the that Association's Lawyers Helping Lawyers Committee, Committee for the Disabled and Committee for Professional Continuity and Responsibility. He is a past Chairman of the New York State Bar Association Committee on Lawyer Alcoholism and Drug Abuse, a committee upon which he has served since 1982. He received the committee's Franklin Gavin award in 2013. He is also a former member of the American Bar Association's Commission on Lawyer Assistance Programs, was a member of the Bellacosa Commission on Alcoholism and Substance Abuse in the Legal Commission and served for three years as Chairperson of the New York State Lawyers Assistance Trust. Mr. Pfalzgraf is also active in various community organizations.

group in the country was established. Ted and other lawyers with long-term recovery remind us that the lawyers' AA groups serve as a gateway to mainstream recovery groups. Such specialty groups are very useful, however, in that a lawyer in recovery can discuss practice problems that may not be appropriate to discuss at mainstream meetings, e.g., missed deadlines, angry clients, resentments against a judge or opponent.

In 1978, the then President of the New York State Bar Association (NYSBA), Hon. Robert P. Patterson, Jr., asked Ray O'Keefe if he would serve as Chairman of a new NYSBA committee, the Special Committee on Lawyer Alcoholism. Ray agreed and the committee became a standing committee of the Bar in 1980 under a new name, Committee on Lawyer Alcoholism and Drug Abuse. Ray wrote a letter to all of the 62 county bar associations in New York state urging each to form a similar local committee consisting mostly, but not exclusively in some venues, of sober lawyers in Alcoholics Anonymous. He asked for volunteers from the local committees to attend the NYSBA Committee meetings.

The first meeting of the state committee was held on June 30, 1979 at the Wings Club at the Biltmore Hotel in New York City. At the beginning, there was a three-year sobriety requirement to serve on Ray's committee.

In addition to Ray O'Keefe and his protégé, Jack Keegan, original members of the committee included John Byrne, Gus Ginnocchio, Frank Gavin, Judge Paul Kelley, Charles Scharf, Joe Schmitt and Bob Wall. Soon to follow were early members John Walsh, Charles Walker, III, Jim Sullivan, John Rinaldi, Phil Potter, Frank Armani, Gerry Canavan, John Hanna, Bruce Pettijohn, Dave Pfalzgraf, Ken Ackerman, Tom Costello, John Harder, Dean Fero, Hesper Jackson, Dave Pelland, Peter Morrow, Jim O'Brien and Gene O'Brien.



The first woman member of the committee was Judge Karen Peters, who was serving as counsel to the state Office of Alcohol and Substance Abuse Services (OASAS) in 1980. She was followed by early members Jemera Rone, Rosemary McGinn, Patricia Grant, Kathy Kettles-Russotti, Carol Hoffman, Sallie Krauss, Carol Lackenbach, Jean Miller and Peggy Popp-Murphy. Dr. Anne E. Geller from the Smithers Center served as medical consultant to the committee in the early years.

It was important to Ray O'Keefe that members of the committee be visible to members of the Bar's Executive Committee and House of Delegates and for that reason it has been the only NYSBA committee to meet at the same time as the Executive Committee and House of Delegates at the NYSBA summer meeting in Cooperstown. Ray would say that the bar leaders should be able to see that committee members, who were mostly recovered alcoholics, wore ties, ate with knives and forks, and laughed a lot.

Early annual reports to the President of the NYSBA included a description of many initiatives initially thought to be vital to committee work, including formation of subcommittees on public relations, cooperation with other bar committees and Sections, and providing speakers at local bar functions. In early years, a dollar was exchanged between the alcoholic lawyer and the assisting lawyer to assure confidentiality. A special subcommittee was formed to coordinate with the Professional Discipline Committee and Ethics Committee to amend the disciplinary rules with respect to privileged communications. A new Opinion 531 of the State Bar Ethics Committee provided that the reporting of unethical behavior of an addicted lawyer to the committee satisfied the ethical rule that requires lawyers to report to an authority authorized to act on alleged misconduct.

A vice-chair was appointed for each of the four Appellate Departments and contact was made with the Presiding Justices as well as with the grievance staff attorneys and the administrative justices in each judicial district to explain the purposes and resources of the committee. The committee chair coordinated with Bar leaders at the American Bar Association regarding formation of a similar committee on a national level. It was reported in 1980 that more than 40 lawyers had been rehabilitated from the disease of alcoholism and were engaged in active and productive law practices.

In 1983, the year a special issue of the NYSBA *Journal* was devoted to the issue of lawyer alcoholism, Ray O'Keefe moved to Miami, Florida to become a professor and Dean of Faculty at St. Thomas Law School and Jack

Keegan succeeded him as Chair of the state Committee. Jack served as Chair until 1990 when he assumed chairmanship of the ABA Commission on Impaired Attorneys (later called the Commission on Lawyer Assistance Programs). Jack was succeeded by Dave Pfalzgraf from Buffalo, Ken Ackerman from Syracuse, the late Bill Dugan from Staten Island, the late Gene O'Brien from Suffolk, Tim Foley from Old Forge/Utica, Chuck Beinhauer from Buffalo, Sallie Krauss from Brooklyn, Larry Zimmerman from Albany, Henry Kruman from Long Island, Gary Reing from Manhattan, Lisa Yeager from Buffalo, and current Chair Tom Schimmerling from Delphi.

By 1984 there was a local committee or contact person in 33 counties; Jack Keegan became vice-chair of the ABA initiative to form a national committee on lawyer alcoholism, and committee members began to reach out to the law schools in the state and make annual presentations to students. Each Committee on Character and Fitness was contacted and assistance offered in the admitting process where alcoholism or drug addiction was, or was suspected to be, part of the applicant's history. The committee prepared a pamphlet regarding its work and how to identify the diseases of alcoholism and drug addiction. The pamphlet contained resource phone numbers of committee members in each part of the state. Letters were sent to all alcohol rehabilitation centers in New York advising them of the existence of the committee and offering committee members as a resource for contact after discharge. Weekly lawyers' luncheon meetings were encouraged and established in metropolitan areas of the state. Most of these early initiatives have been carried on, augmented and expanded by subsequent committees.

It quickly became clear that confidentiality of communications to the LAP as well as to members of the Committee would be the keystone of all the committee's efforts.

In 1989, at the urging of Jack Keegan who had been in attendance at and inspired by the National Conference for Growth in Nashville, Tennessee, in 1988, NYSBA dedicated sufficient monies to hire a full-time Executive Director of its new and stand-alone Lawyer Assistance Program. It had become evident to Keegan that the problem of alcoholism and other drug addiction among the then 140,000 lawyers in New York State was far too pervasive and complex to be adequately served by a volunteer committee of lawyers. He knew that it was time for the state Bar to hire a full-time lawyer assistance professional who could work closely with the volunteer committee. A committee proposal for allocation of State Bar funds sufficient to hire and staff the office of the new Lawyer Assistance Program was approved by the executive committee of the NYSBA and the process of advertising for, screening and interviewing candidates began. Six applicants were interviewed and Ray Lopez was the last. His resume was extensive and impressive, detailing his educational background, work experiences, awards and commendations. When Jack asked Ray why he thought he was qualified to work with lawyers, Ray started his answer by saying: "I used to live in a box on the bowery." The State Bar folks were shocked. Jack, Ken and Dave smiled. They knew they had their man.

The Committee and the LAP have always had tremendous support from both the staff and the presidents of the State Bar over the years. John Yanas was president when funds were first allocated for Ray's position and the next three succeeding presidents, Angelo Cometa, Bob Ostertag and John Bracken, were all outspoken in their support of our efforts and gave great credibility to the efforts of the committee and the LAP. Past president Josh Pruzansky referred to the LAP as the "crown jewel" of the State Bar.

A number of significant things happened during Ray's first three years of stewardship. In 1992, Ray received the Peter Sweisgood award from the Suffolk County Bar Association. Peter Sweisgood was a priest who directed the Long Island Council on Alcoholism and he was very helpful in bringing many lawyers into recovery over the years. When the Sweisgood dinner was over, a priest approached Ray and suggested that perhaps he could facilitate a useful introduction. He explained that his brother-in-law was Joseph Bellacosa, an associate judge on the Court of Appeals. In large part because of that introduction, Ray and Dave Pfalzgraf got to meet with Court of Appeals Chief Judge Sol Wachtler and explain to him their vision for the LAP and assistance for lawyers and judges alike. The Chief Judge was very attentive and promised his support. Ray was then introduced to Justice Joseph Traficanti, chief administrative judge for the courts outside New York City, who pledged full support. Lopez and Pfalzgraf were invited to lunch with him and the administrative judges from each of the 12 judicial districts and by the time the luncheon was over, Ray had three referrals. The formal LAP was off and running and began to receive exposure and credibility within the Bar and the judiciary alike.

It quickly became clear that confidentiality of communications to the LAP as well as to members of the Committee would be the keystone of all the committee's efforts.

At that time, DR 1-103 (the so-called "snitch" rule) provided no privilege exception for communications to lawyer assistance personnel. Committee members (especially those who practiced downstate) were concerned

that they may be forced to testify as to their communications with those they tried to help and may be subjected to lawsuits for their assistance efforts. With the help of committee members and with the suggestions and guidance of NYSBA's Kathy Baxter and various relevant Bar committees, an amendment to DR 1-103 and a new § 499 of the Judiciary Law were drafted and presented to the Executive Committee and House of Delegates of the State Bar for approval. The new proposed Judiciary Law was then sponsored in both houses of the state legislature. The governor signed it into law.

It became apparent that it was important to educate disciplinary counsel on the services offered by the LAP and the Committee, and through the cooperation of Mark Ochs in the Third Department and chief counsel in the First Department, a model diversion/monitoring agreement was drafted and presented to each of the Appellate Departments. Ultimately the Second, Third and Fourth departments adopted some form of diversion and monitoring.

It also became apparent that there was a need to form a Judges Assistance Program with judicial volunteers who were members of the state committee. This program served as the forerunner to the Judges Assistance Program that was formalized and funded by the Office of Court Administration.

In 1999, Chief Judge Judith Kaye, after having attended the New York State Lawyer Assistance Program spring retreat and an open AA meeting on Saturday night at the Gideon Putnam Hotel in Saratoga Springs, New York, invited Ray Lopez, Eileen Travis, Ken Ackerman, Tim Foley and Dave Pfalzgraf to her chambers to discuss what steps she might take to enhance the services being offered to impaired lawyers in New York. On September 16, 1999 she announced the creation of the Commission on Alcohol and Drug Abuse in the Profession.

The Commission consisted of a group of 21 lawyers, judges and addiction professionals brought together to study the extent of the problem of alcohol and drug addiction among New York lawyers and judges. The Commission was charged to propose an action plan and long-range solution to the problem. Then Associate Judge of the Court of Appeals Joseph Bellacosa chaired the Commission, which was to become known as the "Bellacosa Commission." In 2001, the final report of the Commission proposed the creation of a statewide program to address substance abuse issues and make resources available to address such issues to be called the Lawyer Assistance Trust (LAT). Attorney Barbara Smith was hired to be executive director of the trust.

The LAT became a prime source of funds to be used by State and local committees to develop and promote their assistance programs through website development, posters, video presentations, CLE programs, volunteer training sessions and assistance for inpatient treatment for impaired attorneys. The LAT sponsored two major conferences: one on Alcoholism and Substance Abuse in Law Schools and a second on the effects of alcoholism and substance abuse on women attorneys. These programs drew national attention to New York and its cutting edge lawyer assistance initiatives. The LAT operated for 10 years at which time OCA budget cuts defunded the program.

Ray Lopez retired in 2005 but his stewardship lives on not only in his many innovations and achievements but also in the annual spring retreats that have remained one of the highlights of lawyer assistance activities and have found a home on Lake George at Silver Bay. In addition to Alcoholics Anonymous, Narcotics Anonymous and Alanon meetings, the weekend offers yoga and meditation gatherings, occasional CLE presentations on substance abuse issues and fellowship where one attendee can assure another "I know how you feel" and the road to recovery begins.

Ray O'Keefe died on January 22, 2006 and Jack Keegan died two weeks later on February 6, 2006. Ray was Jack's sponsor and they were the best of friends. Their impact on thousands of alcoholics and hundreds of lawyers will be their lasting legacies – not only for those they helped but also on the pyramid of service they helped to create.

How to Help Judges in Need of Help

By Paul Curtin

The running joke in the old commercials for Maytag washers and dryers is that the "Maytag repairman is the loneliest person of all" because no one ever calls. Now he can share his loneliness with those who staff "help lines" dedicated to judges experiencing problems with alcohol, drugs, mental health issues or other stress-related problems.

In both cases calls for help rarely happen.

In New York state, the Office of Court Administration has contracted with Work/Life to provide confidential information, referral and short-term counseling to judges and other employees. Unfortunately, most judges have no idea it exists and there is reluctance among those who might need its services, and are aware it exists, to use it.

The New York State Bar Association has had a Judicial Wellness Committee for more than six years that offers confidential referral and peer support to judges, but few judges have taken advantage of what it has to offer.

The Advisory Panel on Judicial Impairment set up by Chief Judge Judith Kaye concluded that if the focus is on judicial impairment it would always be viewed as "something for the other guy." A better way to approach the problem would be to focus on the inherent stress, isolation and pressure of being a judge. The recognition, familiarity and trust developed by providing assistance for the universal problems judges experience would make it more likely that judges experiencing impairment would be identified.

In order for this to be successful, two things have to happen:

1. There has to be an ongoing, personal presence to continually "market" the availability of this service. The work should include developing personal relationships with judges across the state, having regular formal and informal meetings with groups of judges, implementing "lunch and connect" gatherings of judges grouped by type of court, being available to assist judges going through difficult times, developing peer support groups composed of judges who have successfully addressed problems (i.e., alcoholism, cancer, family problems) and are willing to reach out to other judges, and attending the various District Wellness Events, Judicial Associations' meetings and Judicial Institute trainings.
2. There has to be Executive Level, Administrative and Supervisory Judges "buy in" to promote and support the project. Unless there is active and aggressive promotion these efforts will get lost among other competing priorities. Since most of the referrals for help come from these judges, it is important that the project wins and keeps their trust while viewing them as partners in helping judges.

How can this be done for a population and organization that has a tendency for constriction and restriction? Can a non-traditional approach work in an arena that fears negative publicity?

In both cases calls for help rarely happen.

Having a quality program is only the first step, and too often efforts end there. Unless the concept of "wellness" and judicial health is made a priority and viewed as a core competency, Judicial Wellness Programs might have to continue to share space with the Maytag repairman.

Paul Curtin is founder and President of Alcohol Services Inc. in Syracuse. He also works with the NYSBA Lawyers Assistance Program doing outreach and for the Office of Court Administration as a Special Projects Coordinator.

New York Courts Respond to the Opioid Epidemic

The New York State Unified Court System (UCS) has long played and continues to play a central role in the battle against drug addiction. From the opening of the state's first drug court in Rochester in 1995 to the launching of the first-in-the-nation Opioid Intervention Court (OIC) in Buffalo in October 2016, the state's judiciary has been committed to assisting New Yorkers to overcome drug addiction. A commitment that continues today under Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks.

Hon. Sherry Klein Heitler,
Justice of the Supreme Court, is Chief of the Office of Policy and Planning for the New York State Unified Court System.

In addition to the now 140 drug courts statewide,[1] the OIC provides immediate intervention, treatment, and medication for defendants who screen positive for being at risk of an opioid overdose or addiction.[2] The key elements of the grant-funded OIC incorporate research-based principles of therapeutic courts (including suspension of prosecution during the initial stabilization period), use of validated risk/need assessment tools,

immediate engagement in Medication Assisted Treatment (MAT), cognitive behavioral treatments, frequent judicial supervision, ongoing case management, and opportunities for continuing care.

In New York City, working with community stakeholders, the Bronx Opioid Avoidance and Recovery Court (OAR) was created to provide immediate linkage to treatment services for low level offenders at immediate risk of overdose. Efforts are underway to expand opioid courts in communities across New York State.

Recognizing that criminal behavior may also stem from a variety of underlying issues, the UCS opened other problem-solving courts, and today there are more than 400 specialty courts statewide. The UCS Office of Policy and Planning provides guidance and support to the Drug Treatment Courts, DWI Courts, Family Treatment Courts,[3] Human Trafficking Intervention Courts, Judicial Diversion Programs,[4] Mental Health Courts, Opioid Intervention Courts, Veterans' Treatment Courts, Domestic Violence and Integrated Domestic Violence Courts, and currently Adolescent Diversion Parts.[5] While the path to criminal behavior may vary greatly among participants of each of the courts, participants in all these courts commonly report extensive histories of trauma and current alcohol and/or substance abuse.

Family Treatment Courts have proven to be an effective strategy to reunite parents with children while providing for sustained treatment and recovery for parents. With grant funding, UCS has led a Statewide System Reform Project to integrate child welfare, substance abuse treatment, and Family Court systems.

The UCS promotes the use of validated assessment tools and evidence-based interventions in all problem-solving courts to improve outcomes. The Office of Policy and Planning conducts ongoing training for judges, court staff, and community partners including treatment providers, prosecutors, defense attorneys, probation officers, and law enforcement officials to share best practices, legal updates, and operational information. The UCS published a first-of-its-kind resource document on how to incorporate MAT into problem-solving courts and will continue to train judges and court personnel statewide on the efficacy of MAT.

Lives have been saved by the quick actions of court officers trained to administer naloxone, also known as "Narcan," a life-saving drug that can reverse the effects of an opioid overdose. The UCS Court Officer Academy has been approved by the state Department of Health to serve as an Opioid Overdose Prevention Center and is authorized by the New York state Division of Criminal Justice Services to train additional court personnel to administer naloxone.

The Treatment/Service Module (TSM) of the NYS Universal Case Management System was developed to support the operations of New York's problem-solving courts. Using the TSM, the UCS is incorporating the Risk-Need-Responsivity (RNR) model, that matches the intensity of an individual's treatment to their level of risk for reoffending and that tailors programming to gender, cultural, and developmental needs. The TSM incorporates several other validated risks and need assessment tools to guide supervision decisions and case management, improve outcomes for participants, reduce recidivism, and to ultimately improve community safety.

The Office of Policy and Planning also has a statewide initiative to train court staff and community partners in Moral Reconation Therapy (MRT), which is an evidence-based, cognitive-behavioral intervention designed to improve consequential thinking in treatment-resistant offenders to reduce recidivism.

Efforts are underway to expand opioid courts in communities across New York State.

In addition to referrals to behavioral health and community services, drug treatment services are also provided to participants in Human Trafficking Intervention Courts and Mental Health Courts. Often these individuals have substance use issues from using alcohol or drugs to cope with such underlying issues as mental illness, Post-Traumatic Stress Disorder or other trauma.

Everyone in the UCS remains committed to helping combat the devastating effects of the opioid epidemic and continues to innovate to strengthen communities and enhance public safety.

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1. N.Y. State Unified Court Sys., The Future of Drug Courts in New York State: A Strategic Plan 3–4 (Jan. 1, 2017), http://nyadtcp.org/assets/conference-materials/2017/The%20Future%20of%20Drug%20Courts%20in%20NY%20State%20A%20Strategic%20Plan.pdf.

2. Michael Canfield, *Buffalo Opens Nation's First Opiate Centered Court*, Buffalo L. J. (June 2, 2017), https://www.bizjournals.com/buffalo/news/2017/06/02/buffalo-opens-nation-s-first-opiate-centered-court.html.

3. Family treatment courts are specialized courts that "use a multidisciplinary, collaborative approach" to serve families that require substance use disorder treatment and are involved in the child welfare system. Children & Family Futures & Nat'l Drug Court Inst., Transitioning to a Family Centered Approach: Best Practices & Lessons Learned from Three Adult Drug Courts 5 (2017), https://www.ndci.org/wp-content/uploads/2016/05/Transitioning-to-a-Family-Centered-Approach.pdf.

4. Judicial Diversion Program for Certain Felony Offenders is codified in CPL Article 216 (McKinney 2017).

5. Once fully implemented on October 1, 2019, the "Raise the Age" legislation, found in A-3009c/S-2009c Part WWW, will render Adolescent Diversion Parts obsolete.

Mental Illness: A Prison Epidemic

Last year, a U.S. Bureau of Justice Statistics report offered a grim view of America's prisons and jails: they are filled with people who have current or past mental health problems, and they are not meeting the demand for treatment.[1] Half of the persons incarcerated in prisons and two-thirds of those in jails had either current "serious psychological distress" or a history of mental health problems. Yet only about a third of those reporting serious psychological distress was receiving treatment, according to the report.

The picture is not as grim in New York State. However, we do face profound mental health challenges in our state's prisons. Nearly 20 percent of the 50,000-plus persons incarcerated in our state's 54 correctional facilities receive mental health care.[2] It is not clear how many other inmates may need mental health care but are not receiving it. It is clear that many inmates arrive at prison with a documented history of mental illness, and others have psychological issues that were not previously diagnosed or treated. Some inmates with preexisting problems experience a downward spiral while in prison. In other cases, mental illness appears to arise during incarceration.

The use of solitary confinement as punishment for violating prison rules is particularly problematic. Prisoners are isolated in a special housing unit – that is, a small cell aptly called "the box" – for 22 hours a day, for a period of days, weeks or months. Not surprisingly, prisoners kept in the box can deteriorate psychologically. This is true for both individuals who were previously mentally healthy and for those with a history of mental illness. More than 40 percent of all suicides in New York prisons in 2014 and 2015 took place in solitary confinement, according to the Correctional Association of New York, based on data obtained from the state Office of Mental Health.

The origins of solitary confinement in the United States have been traced to a Philadelphia penitentiary in 1787.

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Back then, the belief was that if prisoners were left alone with their conscience, they would reflect on their bad deeds and reform themselves.[3] The thinking has certainly changed since then. One significant reform in New York State was a 2008 law that improved the confinement conditions and treatment of seriously mentally ill inmates.[4] As a result, now far fewer inmates with significant psychiatric issues face solitary confinement.

Problems remained, and in 2013, the State Bar's House of Delegates approved a Report of the Committee on Civil Rights, which concluded that long-term solitary confinement was harmful to prisoners and counterproductive to legitimate penological interests of prisons and public safety. The report called for a profound restriction in its use, stringent protocols, and a prohibition against imposing such confinement for more than 15 days. That time period was consistent with the Mandela Rules, adopted by the U.N. General Assembly in 2015, which provides that no person should be held in solitary confinement for more than 15 days.

While New York continues to exceed that period, our state has made real progress regarding the treatment of mentally ill inmates. There has been a dramatic expansion in mental health units and other resources at prisons,[5] as well as a reduction in the time spent in special housing units. More progress must be made. Thousands of prisoners with mental health issues do not fall within the definition of serious mental illness, they remain in the general population, and they may be subjected to long periods in solitary.

The above scenario at our state prisons presents a particularly daunting challenge to criminal defense appellate attorneys who are assigned to represent mentally ill clients serving prison sentences. The Rules of Professional Conduct offer generic guidance. Rule 1.14 states that, when clients have diminished capacity, attorneys should try to maintain conventional relationships to the extent reasonably possible. Perhaps easier said than done. It can be extremely challenging to determine how to most effectively and ethically communicate with, and represent, the mentally ill client.

Any attorney representing a client with diminished capacity faces complex issues regarding the client's ability to understand the litigation, goals, and strategies. When such a client is a criminal defendant and an inmate at a correc-

tional facility, those complexities are intensified. For one thing, the attorney-client relationship often takes place through letters, not in-person meetings. For another thing, too few attorneys know the value in having the client sign an appropriate release so that his or her mental health records can be obtained. Such records can provide invaluable insight into the client's mental condition. Another challenge is that incarcerated clients may convey distrust, hostility, and paranoia toward the assigned attorney.

But such attitude may not flow from mental illness or indicate irrationality. The client faces fundamental legal issues that could impact his or her life for years to come, and has endless time to obsess about the case. So it is quite understandable that he or she would not feel trusting and open toward an attorney who does not meet face-to-face, or even call, to discuss the case.

The answer seems simple – perhaps deceptively so. Just as other clients, the incarcerated client should have an opportunity to meet with his or her attorney. If anything, it is the mentally ill inmate who has a special need for an in-person meeting. By going to the prison, the attorney can show his or her commitment, gain the client's trust, and meaningfully discuss the case and risks posed by possible appellate strategies. The attorney can see not just the record or the issues, but the person, and can better understand the conditions of the prison and of the client's mental state.

Many appellate attorneys who do have in-person prison meetings report that they were stunned to find clients who were very disturbed mentally or had severe cognitive deficits – despite the absence of clear indications of such problems in the record on appeal. On the one hand, attorney-client meetings can help counsel identify issues to be pursued through appellate litigation, including by eliciting crucial new information to collaterally attack the conviction. On the other hand, through in-person meetings, counsel may be able to give clients a more nuanced understanding of why it makes sense to stipulate to withdraw the appeal and to gain their acceptance of such route. In addition, through meetings, counsel may discover ancillary problems that can, and should, be improved with effective advocacy. These may include health care, prison disciplinary determinations, and release from solitary confinement.

Whether or not the clients have mental health problems,[6] best practices call for visits to criminal defendants, unless not reasonably feasible. However, several forces work against such in-person meetings. Many institutional offices or individual assigned attorneys have historically lacked the time and resources to travel great distances to meet with clients at correctional facilities. Further, rules and practices have not encouraged attorneys to meet with their indigent criminal defendant clients – even in the cases in which assigned attorneys have deemed client meetings to be crucial to effective representation.

In the future, perhaps the situation will change. State funding is being dedicated to improving the quality of criminal defense representation. That includes the reduction of caseloads for attorneys providing mandated representation, resulting in more time available for any given case. Such new funding will supplement the funding historically provided by counties and the city of New York.[7] So a concern for the county fisc will not be a sound rationale for declining to compensate attorneys for meeting with indigent incarcerated clients. More intensive attorney training may also help. We can hope that a cultural shift will follow from the expanded governmental funding and from expanded attorney training that provides a vision for effective and humane representation of challenging clients.

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1. BJS, Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates 2011-12.

2. Such figures are revealed by State Office of Mental Health reports. We thank Karen Murtagh, Executive Director of Prisoners' Legal Services of New York, for information and insights provided for this article. PLSNY is a nonprofit that provides civil legal services to inmates and advocates for more a more humane prison conditions.

3. *See* Craig Haney & Mona Lynch, *Regulating Prisoners of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 NYU Rev L & Soc Change 477, 481-482 (1997).

4. 2008 N.Y. Laws, Ch. 1.

5. The state Department of Correctional and Community Services and the state Office of Mental Health have partnered in providing special programs for inmates with mental illness, as indicated by the brief description of program options provided here: http://www.op.nysed.gov/surveys/mhpsw/doccs-att6.pdf.

6. ILS Appellate Standards and Best Practices, Standard IX.

7. Executive Law § 832 (4).

An Annual Review Justice Legislation

The Commission on Prosecutorial Conduct, New Crimes, Expanded Penalties

By Barry Kamins

Forty-four years after New York State established a commission to oversee judges – and remove those found unfit for the bench – the state may soon establish a commission to oversee prosecutors, with the power to remove those deemed unfit for office. Or maybe not. First, there will be a court fight, with echoes of a 90-year-old ruling by Judge Cardozo, as prosecutors try to block the creation of a Commission on Prosecutorial Conduct (the "Commission"), which was the singular substantive criminal justice legislation enacted during 2018 legislative session. As the saying goes, stay tuned. This article contains an annual review of new legislation amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting Governor Andrew M. Cuomo's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

COMMISSION ON PROSECUTORIAL CONDUCT[1]

No legislative change in recent memory has engendered as much controversy, both before and after the governor signed it into law. The Commission, the first in the nation, was created, according to the governor's approval memorandum, to provide a forum in which the public can raise allegations that a prosecutor has violated his or her professional responsibilities and duty.

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The 11-member Commission is given the authority to investigate a complaint against any district attorney or assistant district attorney and to determine whether his or her conduct is unethical or unlawful. The Commission would have the authority to issue subpoenas, compel witnesses to testify under oath, confer immunity (with prior written notice to the appropriate district attorney), and require the production of records and evidence it deems relevant or material to its investigation.

The law, as originally enacted, requires the Chief Judge of the Court of Appeals to appoint three sitting judges to the Commission (one from the Appellate Division and two from other courts except the Court of Appeals); six other members are appointed by the legislature. The remaining two members are picked by the governor. However, as discussed below, the composition of the Commission will be changed by a chapter amendment.

At the conclusion of its investigation, the Commission can take a number of actions: determine that a prosecutor should be admonished or censured; recommend to the governor that a prosecutor be removed from office for cause; or forward its file to other entities or agencies, e.g., a grievance committee or district attorney's office, for "such action as may be deemed proper or necessary."

Should a prosecutor wish to appeal the Commission's findings, a review of the determination is made by the N.Y. Court of Appeals. After its review, the Court may accept or reject the determined sanctions, impose a different sanction or transmit the record to the governor and recommend that the prosecutor be removed from office.

New Law Contains Constitutional Defects

In his approval memorandum, the governor acknowledged that the law "suffers from several flaws that have been identified by the State's Office of the Attorney General." As a result, the governor and legislature agreed to amend the bill through a chapter amendment that will

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be approved at the beginning of the legislative session in January. The language of the amendment, if it has been drafted as yet, has not been made public.

The defects in the bill, as mentioned in the governor's approval memorandum, are constitutional in nature. Provisions of the bill would: (1) violate the separation of powers between the three branches of government; (2) impermissibly expand the role of the judiciary; and (3) undermine or interfere with the constitutional authority of state prosecutors.

As enacted, the bill is violative of the constitutional separation of powers. A majority of the Commission members are selected by the legislature; pursuant to the Constitution, prosecutors can only be disciplined or removed by the governor. Pursuant to the chapter amendment, the governor will select four Commission members as will the legislature; this change in the composition of the Commission is intended to cure the separation-of-powers defect.

A second flaw in the bill confers authority upon the judiciary that runs afoul of the Constitution. Under the new law, as written, the Chief Judge selects three sitting judges as members of the Commission. This impermissibly expands the powers given to the Chief Judge under the State Constitution. In addition, the three judges who would serve as members would be given an unconstitutional assignment of executive authority in their power to investigate a prosecutor's performance of official duties.

The chapter amendment will seek to cure these defects by authorizing the Chief Judge to select retired judges

to serve on the Commission. In addition, the review of the Commission's findings would be conducted by the Appellate Division rather than the Court of Appeals.

The third flaw, as identified by the governor's memorandum, relates to the interference with prosecutorial authority and independence. As written, the law would permit the Commission to investigate a prosecutor while a prosecution is pending. While the prosecutor can inform the Commission that the inquiry may interfere with the prosecutor's case, the Commission is not precluded from continuing its review. This provision may have a chilling effect upon the prosecutor's decision-making and impermissibly interfere with the independence of that office.

In addition, the law would make public all files provided by a prosecutor to the Commission, even while an active investigation is underway. The governor's memorandum points out that this potential exposure to victim and witnesses would be "immeasurable." The chapter amendment is designed to cure this defect but the governor's memorandum did not elaborate on the details.

Fate of the Commission Could Be in Jeopardy

The fate of the Commission remains an open question. The president of the State District Attorney's Association, David Soares, stated that "[t]here are no chapter amendments that can resurrect the constitutionally flawed document."[2] His group has announced that it will be filing a lawsuit to challenge the law.

An argument can be made that even with the anticipated changes in the chapter amendment, the law may still run afoul of constitutional provisions. Consider, for example, that the amendment will delegate to the Appellate Division a review of the Commission's findings. While that change eliminates the defect that existed with respect to the Court of Appeals, the law still requires justices on the Appellate Division to exercise executive and nonjudicial duties.

Ninety years ago, Chief Judge Benjamin N. Cardozo, writing for a unanimous Court of Appeals, held that it is unconstitutional for the legislature to delegate nonjudicial functions to the judiciary.[3] In *Richardson*, a proceeding was brought to remove the President of the Borough of Queens. Pursuant to a section of the Public Officers Law, the governor appointed a state Supreme Court justice to hear the charges and report his recommendations to the governor. In ordering the justice not to proceed, the Court of Appeals held that the legislature does not have the power to give a justice of the Supreme Court the "duties of a prosecutor in aid of the Executive."[4] Thus, it would be unconstitutional for the "Executive or Legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfilment of judicial duties."[5]

Under the new law, and the proposed chapter amendment, the justices of the Appellate Division would have the authority to review the findings of the Commission and possibly make recommendations with respect to the removal of a prosecutor. Pursuant to *Richardson*, one could argue that this is an unconstitutional delegation of nonjudicial and executive authority.

Although the law is effective January 1, 2019 and a chapter amendment will be enacted in early January, it remains to be seen when and if the Commission will become operational.

BILLS ADDRESSING CRIMINAL JUSTICE ISSUES

Aside from the legislation enacting the Commission, the legislature enacted a number of individual bills addressing criminal justice issues. Each year, the legislature enacts new crimes, amends the definition of existing crimes and increases the penalties of others – and this year was no exception.

In an effort to toughen human trafficking laws, the legislature enacted a new crime, Sex Trafficking of a Child, a class B felony.[6]

Although New York has enacted significant sex trafficking laws since 2007, the legislature has now taken steps to strengthen the law relating to victims of trafficking who are under the age of 18. Under the new law, a person is guilty of sex trafficking of a child when he or she, being 21 years old or more, intentionally advances or profits from the prostitution of a child less than 18 years old. Significantly, the prosecutor need no longer prove that the trafficker used force, fraud or coercion to commit the crime.

Knowledge by the defendant of the age of the child is not an element of the offense and it is not a defense that the defendant did not know the age of the child or believed such age to be greater than 18. The law also creates an affirmative defense to the new crime where such person's participation in the offense was a result of having been a victim of sex trafficking under New York or federal law. Thus, a sex trafficking victim will not be punished if he or she has been compelled by his or her trafficker to assume a role, such as answering phone calls, relaying messages or looking after younger sex trafficking victims, that he or she would not have assumed had he or she not been a sex trafficking victim.

A second new crime will protect individuals who hire caregivers for one's children. The new crime – Misrepresentation by, or on behalf of, a Caregiver for a Child or Children – will make it illegal to make a false written statement that misrepresents an applicant's background for employment as a caregiver.[7] The legislation defines "caregiver" as someone who provides 15 or more hours of care per week. It should be noted that the new crime

is an unclassified misdemeanor, providing for a term of imprisonment of up to six months in jail.

Under a new law, police officers can now be prosecuted for having sex with persons in their custody. Under the amendment, when a person is under arrest, in detention or otherwise in actual custody, that person is legally incapable of giving consent to sexual activity with a police officer.[8]

Merchants in barber shops, hair salons and beauty shops will benefit from an amendment to the Theft of Services law. The law currently protects certain business, e.g., restaurants, cable services, companies, hotels, electric companies, etc., but a person who leaves a barbershop or beauty salon without paying cannot be prosecuted for theft of services. Under the new law, that has now changed.[9]

The legislature has also responded to the dangers of hazing rituals at college fraternities in which serious injuries and deaths have occurred. Under an amendment to the hazing statutes, physical conduct and physical activities are prohibited during a person's initiation into these types of organizations.[10]

Finally, the crime of Coercion has been restructured. Currently, the crime is delineated as an A misdemeanor (2nd Degree) and D felony (1st Degree). Under the new legislation, the crime is delineated as an A misdemeanor (3rd Degree), E felony (2nd Degree) and D felony (1st Degree). A person is guilty of the new crime of Coercion in the Second Degree when he or she commits the crime of Coercion in the Third Degree and compels or induces a person to engage in sexual intercourse, oral sexual conduct or anal sexual conduct.[11]

A number of procedural changes were enacted in the last legislative session. In 2013, New York State implemented the Human Trafficking Intervention Court (HTIC) establishing 11 courts throughout the state – one for each of the five counties in New York City and six others around the state. Unlike drug courts, however, which were created to act as focal points for the drug caseloads for their respective counties, four of the six HTIC courts outside of New York City lack jurisdiction to hear cases that originate outside of the local criminal courts where they are physically situated.

In order to expand the jurisdiction of these courts – in Westchester, Erie, Monroe and Onondaga counties – new legislation permits the removal of prostitution cases pending in the local criminal court to another local criminal court in the same county or, with the consent of the prosecutor, to a human trafficking court in an adjourning county.[12]

Another amendment will permit town and village justices to preside over their courts outside their respective towns and villages for the limited purpose of presiding over an off-hours arraignment part established in another municipality located in the same county.[13]New legislation will affect the recovery of funds by a prosecutor prior to the filing of an accusatory instrument in a criminal case. The new law applies only to the five District Attorneys in New York City where a "pre-criminal proceeding settlement" has been reached.[14] After any injured parties have been appropriately compensated, the prosecutor will be able to retain a certain percentage of the funds in recognition that such monies were recovered as a result of the investigation undertaken by that office.

A new crime will make it illegal to make a false written statement that misrepresents an applicant's background for employment as a caregiver.

The new law creates a formula for the percentage of funds that can be retained by the prosecutor, beginning with 10 percent of the first $25 million and up to 1 percent in excess of $100 million. Monies retained by a prosecutor pursuant to this law must be used to enhance law enforcement efforts within New York State.

Victims of crimes will benefit from several new laws. For example, victims of sexual assaults will now be provided a copy of a Victim's Bill of Rights before the victim can be interviewed by the police or prosecution or given a physical examination.[15] These rights include the right to have a rape crisis representative present during the interview, the right to be notified by the prosecutor about the progress of the case and the right to decide whether to report the offense to the police.

In addition, sexual assault evidence kits must now be maintained for 20 years. Where the evidence is privileged, the custodian of the evidence cannot release the evidence to law enforcement without written consent from the victim.[16]

Other laws expand the reporting of certain crimes. Under current law, an incident of child abuse at a public school must be reported by school employees to school administrators who must, in turn, notify the child's parents. That requirement has now been expanded to private schools.[17] In addition, when a prosecution for a sex offense has commenced against a school employee (private or public), the prosecutor must notify the school superintendent or administrator; there is no requirement that the crime must have occurred in the school.[18]

Victims of domestic violence will benefit from a new law that expands the number of misdemeanors that, upon conviction, disqualify a defendant from possessing a firearm, rifle or shotgun.[19] Under this amendment,

the number of disqualifying offenses has increased from four to 13, although one offense, forcible touching (P.L. §130.52), is no longer a disqualifying offense. In addition, the statute utilizes a broader definition of "members of the same family or household" in order to disqualify a defendant from possessing a firearm after being convicted.

The statute also requires a court to ask a defendant who has been convicted of a felony or "serious offense" if he or she owns or possesses any firearms, rifles or shotguns and to order the immediate surrender of such weapons. Finally, upon issuing an Order of Protection or Temporary Order of Protection, a court is now authorized to order the surrender of firearms, rifles, or shotguns.

Battered women and children can now be reimbursed for shelter costs and crime scene cleanup costs.[20] In addition, victims of sex offenses will now be able to file a claim with the Crime Victim Board by filing official documents other than police reports; this will apply to victims of offenses under Article 130 and other specified crimes. This amendment reflects the understanding that many sex crime victims may not be emotionally ready to go to the police to report crimes of this nature.[21]

Victims of human trafficking will benefit from two other new laws. First, survivors of these crimes will be provided short-term and long-term safe house residential facilities, operated by not-for-profit agencies. A victim can be placed in these facilities even if he or she is involved in a proceeding which has not reached final disposition or is not even involved in a pending proceeding.[22] Second, hotels and motels will now be required to display informational cards, in plain view, describing services for human trafficking victims.[23]

Finally, a new law ensures that victims of crimes are reimbursed for appropriate burial expenses. The Office of Victim Services will now be permitted to make an award not exceeding $6,000 for the burial expenses of a victim who has died as a direct result of a crime. Should it be determined later that the victim contributed to the infliction of his or her injury, the award cannot be reduced by more than 50 percent.[24]

A new law will affect prisoners who have been denied parole because they have not completed a mandated program through no fault of their own. Such prisoners will be placed in the required program as soon as practicable.[25]

Other legislative changes have been enacted in miscellaneous statutes. For example, under state law a municipality may currently impose the following forms of punishment: a fine, forfeiture or a civil penalty. A new law adds community services as a permissible form of punishment.[26]

In addition, a new law allows for the use of medical marijuana as an alternative to opioids for pain management. A physician can now certify that a patient is eligible for medical marijuana if he or she suffers from "pain that degrades health and functional capability."[27]

Finally, the City Council has enacted two local laws that will impact significantly on the criminal justice community. First, inmates within New York City correctional facilities will be able to use telephone service without any cost.[28]

Second, under a new law, known as the Right to Know Act, police officers who engage in a variety of law enforcement activities must now identify themselves by providing pre-printed business cards with specific information (name, rank, shield number) and provide an explanation for such law enforcement activity. This will not be required when an officer is making an arrest, issuing a summons, or engaging in undercover activity or activity that subjects him or her to danger or a risk of physical injury.[29]

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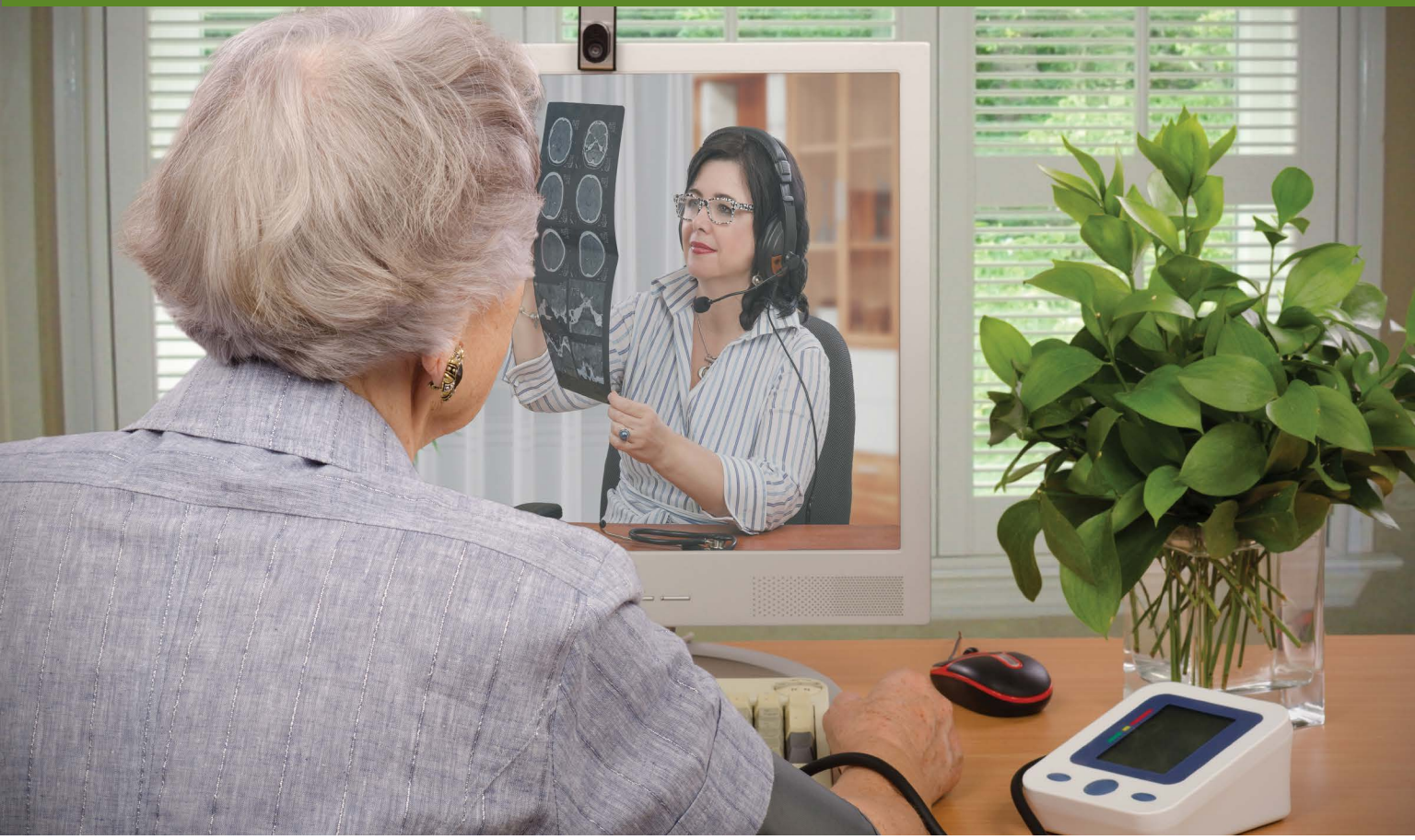
1. 2018 N.Y. Laws, Ch. 202 (Judiciary Law Article 15-A), eff. January 1, 2019.
2. Jesse McKinley, A New Panel Can Investigate Prosecutors. They Plan to Sue to Block It, *New York Times*, Aug. 23, 2018, www.nytimes.com/2018/08/23/nyregion/cuomo-prosecutors-oversight-commission.html.
3. *In re Richardson*, 247 N.Y. 401.
4. *Id* at 413.
5. *Id.* at 411.
6. 2018 N.Y. Laws, Ch. 189 (adding Penal Law § 230.34-a), eff. November 14, 2018.
7. 2018 N.Y. Laws, Ch. 195 (adding Penal Law § 260.35), eff. October 15, 2018.
8. 2018 N.Y. Laws, Ch. 55 (adding Penal Law § 130.05(3)(j)), eff. June 11, 2018.
9. 2018 N.Y. Laws, Ch. 275 (adding Penal Law § 165.15(12)), eff. December 24, 2018.
10. 2018 N.Y. Laws, Ch. 188 (amending Penal Law § 120.16 and 120.17), eff. August 15, 2018.
11. 2018 N.Y. Laws, Ch. 55 (adding Penal Law § 135.61), eff. November 1, 2018.
12. 2018 N.Y. Laws, Ch. 191 (adding Penal Law § 170.15(5)), eff. August 16, 2018.
13. 2018 N.Y. Laws, Ch. 231 (adding Uniform Justice Court Act 106(11)), eff. August 24, 2018).
14. 2018 N.Y. Laws, Ch. 55 (adding Article 95), eff. April 12, 2018.
15. S. 8977, awaiting the governor's signature.
16. 2018 N.Y. Laws, Ch. 57 (adding Public Health Law 2805-i), eff. April 12, 2018.
17. S. 7372, awaiting the governor's signature.
18. 2018 N.Y. Laws, Ch. 233 (amending Education Law 1126), eff. August 24, 2018.
19. 2018 N. Y. Laws, Ch. 295 (amending Executive Law
631), eff. October 31, 2018.
20. 2018 N.Y. Laws, Ch. 204 (amending Executive Law 631(12)), eff. February 18, 2019.
21. 2018 N.Y. Laws, Ch. 295 (amending Executive Law 631), eff. October 31, 2018.
22. 2018 N.Y. Laws, Ch. 238 (adding Social Services Law 438-aa(c) and (d)), eff. November 21, 2018.
23. 2018 N.Y. Laws, Ch. 190 (adding General Business Law 206-f), eff. October 14, 2018.
24. S 7992, awaiting the governor's signature.
25. 2018 N.Y. Laws, Ch. 26 (amending Executive Law 259-1), eff. December 18, 2018.
26. 2018 N.Y. Laws, Ch. 216 (amending Municipal Home Rule Law (10)(4)(b)), eff. August 24, 2018.
27. 2018 N.Y. Laws, Ch. 273 (Public Health Law 3360(7)(a)), eff. September 24, 2018.
28. Local Law Int. 144 (adding Administrative Code 9-154), eff. May 4, 2019.
29. Local Law No. 54 (adding Administrative Code 14-174), eff. October 19, 2018.

The Case for Telemedicine

How Telehealth Solutions Can Reduce Legal Risk While Improving Patient Access and Lowering Health Care Costs

By Katherine W. Dandy, Max G. Gaujean, Corey Scurlock, and Christian D. Becker



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The concept of telemedicine, which allows health care professionals to evaluate, diagnose and treat patients remotely using telecommunications technology, has been in practice since the 1960s, when it was driven in large part by the space and military sectors.[1] In the decades since, there have been remarkable and far-reaching advances in telemedicine. From video-conferencing with patients in remote locations to monitoring ICU patients from centralized command centers, telemedicine is increasing patient access, improving quality of care, and lowering health care costs. What is more, as discussed below, telemedicine has the additional benefit of reducing legal risk.

Despite proven benefits, the evolution of telemedicine continues to be a slow process. Although many hospitals and health care providers have taken the initiative and successfully embedded telemedicine into their patient care delivery models, as of August 2016, only 61 percent of health care institutions use some form of telehealth.[2] Significant barriers to expansion remain, including uncertainty regarding both license portability for physicians wishing to practice telemedicine across state lines and reimbursement for providing telemedicine services. Moreover, as is often the case with technological advance, the legal and regulatory landscapes struggle to keep up with the pace of innovation, further stalling progress. Telemedicine solutions are available now; the health care industry just needs to catch up. The well-documented shortage of primary care providers, which served as an impetus for implementing telemedicine in many hospitals,[3] will only become more dire as the population ages.[4]

In addition to discussing the risk-reducing potential of telemedicine, its current legal and regulatory landscape, as well as challenges to its development, this article sets forth important steps that must be taken in the legal, regulatory, and medical contexts to maximize the potential impact of telemedicine solutions.

WHAT IS TELEHEALTH?

Telehealth encompasses a broad variety of technologies and tactics to deliver virtual medicine, health, and education services.[5] Currently, there are four distinct categories of telehealth applications: live video, which involves real-time interaction between patients and providers using audiovisual telecommunications technology; store-and-forward, in which recorded health history is transmitted through a secure electronic communications system to a practitioner; mobile health, which involves health care and public health practice education supported by mobile communication devices (e.g., targeted text messages that promote healthy behavior or wide-scale alerts about disease outbreaks); and remote patient monitoring (RPM), in which personal health care and medical data are collected from an individual in one location via electronic communication technologies and transmitted to a provider in a different location for use in care and related support.

A compelling example of RPM can be seen in the many tele-Intensive Care Units currently operating throughout the country. In the typical tele-ICU, providers continuously monitor patients from a centralized command center. Bedside caregivers are supported and assisted by a multidisciplinary team of critical care physicians, nurses and data specialists with access to real-time physiologic data. Tele-ICUs have the ability to immediately alert on-site providers to potential issues and can provide valuable second opinions to local providers. Recent studies have confirmed that tele-ICUs can significantly improve quality of care while also lowering health care costs.[6]

TELEHEALTH REDUCES RISK OF MEDICAL ERROR

In addition to the proven cost savings and increased access and clinical care efficiency they provide, tele-ICUs also have the potential to significantly reduce risk through various mechanisms. A recent study by a large multistate, nonprofit health care system that implemented a tele-ICU program in 2006, covering 450 ICU beds across five states, found that the frequency of malpractice claims and incurred costs for critically ill adults were significantly lower at sites with a tele-ICU than at those without a tele-ICU.[7] Specifically, in looking at five years prior to implementation of a tele-ICU to one year after, claims costs dropped from an average of $6 million annually to less than $500,000, and the number of claims dropped to less than 50 percent of claims in prior years.[8]

A study of the Physician Insurers Association of America Data Sharing Project (DSP), the largest ongoing independent database of Medical Professional Liability claims, found that of the approximately 94,000 claims between 2004 and 2013, a mere 196 cases (0.2 percent) involved telemedicine,[9] with only 56 of these resulting in payment.[10]

According to the Agency for Healthcare Research and Quality, which is part of the U.S. Department of Health and Human Services, there are eight common root causes of medical error: communication problems (the most common cause of medical errors);[11] inadequate information flow (including problems that prevent the availability of critical information when needed to influence treatment decisions and timely and reliable communication of critical test results); human problems (relating to how standards of care, policies or procedures are followed, and may include sub-optimal documentation); patient-related issues (including incomplete patient assessment); organizational transfer of knowledge (relating to the level of knowledge needed by individuals to perform the tasks they are assigned); staffing patterns and workflow (which can cause errors when health care

providers are too busy because of inadequate staffing or when supervision is inadequate); technical failures (including device or equipment failure); and inadequate policies (poorly documented, non-existent, or clinically inadequate procedures).[12]

In the context of an ICU, problems in communication, particularly between physicians and nurses, are a frequent cause of human error.[13] The demanding, dynamic, and complex environment of the ICU can also pose challenges relating to distraction, burnout, and fatigue. Furthermore, in many ICUs, the nature of the physician's contact with each patient is intermittent, and as the number of patients the intensivist is responsible for supervising increases, further reducing the frequency of patient-provider contact, so does the risk of error. The key to reducing the risk of medical error in the ICU is "good communication and transfer of information . . . a complete, coherent, and updated knowledge base of the patient status requires a two-way information flow among team members."[14]

A tele-ICU is uniquely equipped to significantly reduce the risk of medical error in all of the above-described areas. First, the tele-ICU provides for constant, continuous exchange of patient information between the tele-ICU and the local caregivers. The tele-ICU's two-way audio and video connections allow its staff to speak directly with bedside physicians and nurses, as well as patients and their family members. Since most tele-ICUs operate in a 24-hour 7-day-a-week environment they are very useful in filling in gaps in which bedside providers may not be available to communicate with families, patients or other health care providers. The enhanced level of communication and continuous flow of information provided by the tele-ICU are important factors in reducing risk of medical error.

Second, the tele-ICU's sophisticated alerting and monitoring mechanisms integrate and prioritize multiple data points and various levels of clinical information to enable rapid treatment decisions. The e-ICU computer system is able to identify any trending pattern and alert the tele-ICU when the likelihood of an adverse event or deterioration of the patient's condition increases, and because the alerts go directly to the tele-ICU its staff can streamline workload for the bedside staff and enhance safety for the patient by identifying and filtering out false alarms. In this way, the focused, undistracted environment of the tele-ICU, combined with its technologically advanced software, can significantly reduce the risk of medical error from inadequate information flow, organizational transfer of knowledge, staffing patterns and workflow, and technical failures.

Third, tele-ICUs provide a built-in second opinion, which reinforces the capabilities of the bedside caregivers. In a study published earlier this year, the Mayo Clinic demonstrated the value of second opinions.[15] The study found that as many as 88 percent of patients who sought a second opinion obtained a new or refined diagnosis. Second opinions can lead to quicker access to lifesaving treatment, stop unnecessary treatments, reduce stress for patients and their loved ones, and prevent diagnostic error. Misdiagnosis or delayed diagnosis is a common basis for medical malpractice actions.

Importantly, the surveillance and support provided by the tele-ICU to the bedside physicians not only reduce risk of an adverse outcome, they also strengthen the ability of health care providers to establish that the standard of care has been met should a malpractice action be brought. For example, in cases against a hospital alleging failure to adequately monitor an ICU patient's condition, where the hospital includes telemedicine in-patient care, providers will be able to bolster their defense by showing that the local physician acted properly *and* that telemedicine was in place to continuously monitor the vital signs of ICU patients. In this regard, telemedicine support serves as an additional hurdle potential plaintiffs will have to overcome to prove departures from the standard of care. Hospitals and health care providers with telemedicine embedded in patient care would therefore be less vulnerable to frivolous malpractice cases. As such, malpractice carriers should reduce collective and individual insurance rates where telehealth solutions are in place.

THE LEGAL AND REGULATORY LANDSCAPE TODAY

Telemedicine is being encouraged and assisted by both state and federal government, as well as multiple medical associations, including the American Medical Association (AMA). At the federal level, the Department of Health and Human Services (HHS), largely through its Health Resources Services Administration (HRSA) and Office for the Advancement of Telehealth (OAT), has become increasingly involved in telehealth by administering telehealth grant programs (including a focus on licensure portability), providing technical assistance, developing telehealth policy initiatives to improve access to quality health services, and promoting knowledge exchange about "best telehealth practices."

In 2016, the AMA adopted new guidelines for ethical practice in telemedicine.[16] These guidelines advise physicians participating in telehealth/telemedicine to recognize the limitations of the relevant technologies and take appropriate steps to overcome such limitations, recognizing that a coordinated effort across the profession is necessary to achieve the promise – and to avoid the pitfalls – of telemedicine. For example, physicians practicing telemedicine must assure that appropriate protocols are in place to protect the security and integrity of patient information.

While the government is helping in many ways to stimulate the growth of telemedicine, there is currently no uniform legal approach to telehealth, which continues to be a major challenge to its progress. Telehealth implementation varies widely from state to state in terms of how much service providers will be reimbursed for delivering telehealth services, as well as what sort of parity (defined as "equivalent treatment of analogous services") is expected between in-person health services reimbursements versus telehealth reimbursements. Currently, 32 states and the District of Columbia have parity laws that cover private insurers and reimbursement for telehealth services.[17] However, many variations exist in how states and private insurers pay out reimbursements and what they cover. Twenty-three states and the District of Columbia have full parity, meaning coverage and reimbursement are comparable from in-person to telehealth servicers,[18] but almost 50 percent of the current state telehealth coverage laws lack parity language, meaning that reimbursement by health plans for telehealth services is not required to be at the same rate as what is paid for in-person services. Without parity, the incentive to provide telehealth services decreases and may be prohibitive in its adoption and usage.

On the federal level, Medicare reimburses for synchronous communications and does not cover any store-and-forward services or remote patient monitoring for chronic diseases, except in Alaska and Hawaii.[19] The federal government places numerous limitations on Medicare reimbursement for telehealth services, based on the location of the patient and provider, as well as the type of distant site facility.

In 2017 a bipartisan Congressional Telehealth Caucus was formed and two bills were relaunched in an effort to modernize how Medicare reimburses telehealth services and to expand coverage for Medicare beneficiaries. Both bills, the Medicare Telehealth Parity Act of 2017 (MTPA) and the Creating Opportunities Now for Necessary and Effective Care Technologies (CONNECT) for Health Act of 2017, are under consideration by Congress.[20] The Senate Finance Committee is also considering the proposed Creating High-Quality Results and Outcomes Necessary to Improve Chronic Care Act of 2017, which includes a section that would allow greater use of telehealth. In a press release, Representative Mike Thompson (D-Ca.) stated: "Telehealth saves lives and reduces costs; it's a win-win for both patients and providers."

LEGAL AND REGULATORY CHALLENGES FOR TELEHEALTH

Professional licensing for telemedicine providers is often cited as a barrier to the expanded use of telehealth and telemedicine. In one of the early cases addressing telemedicine, *Hagaseth v. Superior Court of California*, a California court asserted jurisdiction over a Colorado-licensed physician criminally charged with practicing without a license where the physician prescribed medication over the internet to a patient in California who then committed suicide.[21] This case demonstrates the complexity of telemedicine from a legal perspective and the importance of physician education regarding licensure requirements for practicing telemedicine across state lines.

Since *Hagaseth* was decided in 2007, there has been considerable progress in the area of cross-state licensing for the practice of telemedicine. That said, current licensure requirements for practicing telemedicine across state lines vary widely from state to state.[22] The majority of states still require a physician to be licensed in the state in which the patient is located. Nine state medical (or osteopathic) boards issue special licenses or certificates related to telehealth that could allow an out-of-state provider to render services via telemedicine in a state where they are not located or allow a clinician to provide services via telehealth in a state if certain conditions are met (such as agreeing that they will not open an office in that state).[23] Some states have laws that do not specifically address telehealth and/or telemedicine licensing but make allowances for contiguous states or for certain situations where a temporary license might be issued, provided the specific state's licensing conditions are met. The most common licensure exceptions include physician-to-physician consultations, public health services, medical emergencies ("good samaritan") or natural disasters.

While attempts at federal legislation to address the cross-state licensure barrier to telemedicine have not yet succeeded, the issue has been addressed by the Federation of State Medical Boards in the Interstate Medical Licensure Compact (ILMC), which is expected to help streamline the licensure process by offering a voluntary expedited pathway to licensure for qualified physicians who wish to practice in multiple states. Twenty-four states have enacted legislation to join the IMLC, and 31 state medical and osteopathic boards have endorsed it.

In addition to regulatory challenges, the move toward providing more telehealth-based services across state borders has raised legal concerns.[24] For example, while some malpractice liability policies cover multiple states, most specify that coverage is only available for claims occurring in a specific jurisdiction. A telehealth physician sued in a state other than the jurisdiction in which he or she is covered might find that no coverage is available. Providers also need to confirm that their policies include coverage for telemedicine.

OUR RECOMMENDATIONS

As more studies demonstrate increased quality of care and patient satisfaction, the institutional cost-savings, and the decrease in risk resulting from telemedicine, the health care industry should embrace it in multiple disciplines. Given provider shortages throughout the U.S., in both rural and urban areas, telemedicine has a unique capacity to increase and improve service to millions of

new patients. However, there are important steps that must be taken in the legal, regulatory and medical contexts, to maximize the impact potential of telemedicine:

- A uniform standard and/or a streamlined process to obtain medical licenses for physicians who practice telemedicine in multiple jurisdictions should be established;
- Congress should provide clarity on reimbursement rates so that providers understand which telemedicine services private and public insurance policies will reimburse;
- Medicare coverage of telehealth services, including RPM, should be expanded beyond rural areas;
- Universal parity laws should be enacted to reduce barriers to entry for hospital systems and providers to implement these services;
- Increased education regarding the resources available to support and encourage telemedicine development, including the existence of policies and protocols for telehealth, should be easily accessible to health care providers;
- All health care entities should explore the utility of forming or partnering with departments or centers for telemedicine, in order to increase access to central telemedicine expertise to clinicians and to take advantage of synergies in organization, implementation, coordination and support of telemedicine projects across the spectrum of care (similar to how information technology has evolved as an entity in modern medicine);
- Telemedicine needs to become an integral part of graduate and postgraduate medical education for doctors and nurses. Medical schools and nursing schools need to develop comprehensive curricula including lecture series, clinical clerkships and rotations. The next generation of health care providers needs to be well educated on how to incorporate telemedicine into their clinical practices;
- Research funding for telemedicine should increase, to advance the field by supporting important research on implementation, resource utilization, quality improvement and clinical outcomes;
- Health care providers should stay informed of pending legislative and regulatory developments in telehealth, especially those relating to reimbursement and license portability; and
- State legislatures should consider codifying a heightened standard of care in malpractice cases against health care providers with telemedicine in place.

CONCLUSION

Going forward, establishing a uniform standard for licensing physicians who practice telemedicine, as well as providing clarity on reimbursement rates and educating the health care industry regarding the many resources available to support and encourage telemedicine development, should go a long way toward growing and expanding a form of medicine that improves patient care and enhances the capabilities of providers, thereby reducing risk and significantly lowering health care costs. Given the capital investment that must be undertaken to implement telemedicine solutions, such as building a tele-ICU, any reduction in risk would add to the financial return on investment and further decrease barriers to implementation.

Our health care system is at a tipping point, and with a focus on unsustainable health care costs the potential savings that telemedicine promises may be the panacea that medical providers, politicians and consumers of health care need.

1. World Health Organization, Telemedicine: Opportunities and Developments in Member States: Report on the Second Global Survey on eHealth 2009.
2. August 12, 2016 U.S. Department of Health and Human Services Report to Congress, *E-health and Telemedicine*.
3. Angus D.C., Kelley M.A. Schmitz R.J., *et al.*, *Caring for the critically ill patient. Current and projected workforce requirements for care of the critically ill and patients with pulmonary disease: can we meet the requirements of an aging population?* JAMA 2000; 284: 2762-2770.
4. Bureau UC, The Next Four Decades: The Older Population in the United States: 2010 to 2050, http://www.censusgov/prod/2010pubs/p25-1138pdf 2010.
5. The term "telemedicine" is used when referring to traditional clinical diagnosis and monitoring that are delivered by technology. The term "telehealth" is now more commonly used, as it more broadly describes the wide range of diagnosis and management, education, and other related fields of health care.
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8. *Id.*
9. Murphy, *Telemedicine and MPL: The Story So Far,.* Inside Medical Liability Online, July 2015.
10. *Id.*
11. A study by the risk-management group Crico Strategies concluded that 30 percent of MPL claims from 2009-2013 involved some form of communication failure. *Malpractice Risks in Communication Failures*, Crico Strategies Annual Benchmarking Study (2015).
12. *Chapter 2: Efforts to Reduce Medical Errors: AHRQ's Response to Senate Committee on Appropriations Questions*, AHRQ's Patient Safety Initiative: Building Foundations, Reducing Risk, https://archive.ahrq.gov/research/findings/final-reports/pscongrpt/psini2.html.
13. Donchin, Gopher, *A look into the nature and causes of human errors in the intensive care unit,* BMJ Quality & Safety 2003; 12: 143-147.
14. *Id.*
15. Naessens, Sc.D, Journal of Evaluation of Clinical Practice, April 4, 2017.
16. Ethical Practice in Telemedicine, AMA, https://www.ama-assn.org/delivering-care/ethical-practice-telemedicine.
17. Yang, T., Health Policy Brief, August 15, 2016, available at http://www.healthaffairs.org.
18. *Id.*
19. *Id.*
20. On June 1, 2017, the MTPA (H.R. 2550) was referred to the House Subcommittee on Health. On May 30, 2017, the CONNECT for Health Act was referred to the Senate Committee on Finance.
21. *See Hageseth v. The Superior Court of San Mateo County*, 58 Cal. Rptr.3d 385 (Cal. Ct. App. 2007).
22. A detailed explanation of each state's current laws and reimbursement policies for telehealth can be found at www.cchpca.org.
23. Alabama, Louisiana, Maine, Minnesota, New Mexico, Ohio, Oregon, Tennessee (osteopathic board only), Texas.
24. Rogove H.J., McArthur D., Demaerschalk B.M., *et al.*, *Barriers to telemedicine: survey of current users in acute care units,* Telemedicine Journal and e-Health : An Official Journal of the American Telemedicine Association, 2012; 18: 48-53.

Working to Return Missing Client Funds

The October 2018 article by Matthew Flanagan, *Escrow Cleanup: Taking Care of the Money Left Behind*, provides an excellent review of the rules and procedures regarding the disposition and deposit of missing client funds pursuant to Rule 1.15(f).[1] Under the rule, an application can be made for a court order directing that unclaimed escrow funds or funds owed to a missing client be deposited with the Lawyers' Fund[2] for safeguarding and disbursement to the legal recipient of the money. The article also correctly reflects the Fund's standing policy to accept deposits of $1,000 or less, owed to any one client, without a court order to prevent the depletion of nominal deposits.

Mr. Flanagan's article points out: "A missing client who resurfaces years later should be able to make a claim with the Lawyers' Fund, although the manner in which he or she can do it is not entirely clear." (p.19). This article provides clarity as to those procedures.

Prior to making a deposit of missing client funds with the Lawyers' Fund, it is presumed that an attorney or firm has performed due diligence to locate the beneficiary of the escrow deposit. When a deposit is made with the Lawyers' Fund, and if court pleadings do not provide the same, we request the last known address of the client(s), and any other identifying information which may be useful in locating the missing client(s).

The Lawyers' Fund records the deposit, opens a file and actively searches for the missing client. If our search is successful, or if a law client surfaces and makes a refund request to the Fund, we require the client to provide satisfactory proof of identification, which usually includes a valid driver's license, current mailing address and notarized signature.

Often, deposits entrusted with the Lawyers' Fund involve funds owed to someone who is deceased. In that case, we require the client's estate fiduciary to request the refund, with supporting estate materials. Depending on the nature or age of the deposit, additional information may be requested.

Finally, if the underlying deposit was the subject of a civil entitlement dispute, we require a valid court order which resolves the dispute. If entitlement to a deposit is unclear, clients are required to provide clarification regarding entitlement to the escrow funds on deposit.

Once satisfactory identification and entitlement documentation have been submitted, refunds are promptly made with notice to the lawyer or law firm who made the initial deposit. To date, the Lawyers' Fund's staff has successfully located nearly 500 missing clients and returned over $1.5 million.

These court rules and sample pleadings pursuant to the rules can be found on the Fund's website at www.nylawfund.org in the Escrow and Ethics material section.

On behalf of the Trustees, I would like to express our gratitude to Mr. Flanagan and the NYSBA *Journal* for their reporting and review of this important and helpful court rule as well as the opportunity to clarify the procedures for restoring these funds to law clients.

Michael J. Knight Sr., **of Delmar, is the Executive Director and Counsel of the New York State Lawyers' Fund for Client Protection. He is a graduate of Niagara University (1987) and Albany Law School of Union University (1990).**

1. In 1994, at the recommendation of the Trustees of the New York Lawyers' Fund, the Court of Appeals enacted Rule 1.15(f) to prevent the escheat of law client escrow funds to the State that were unclaimed or owed to missing law clients as abandoned property.

2. Since 1982, the Lawyers' Fund for Client Protection has reimbursed over $208 million to nearly 8,700 eligible law clients who have suffered a loss of money due to dishonest conduct in the practice of law. The Lawyers' Fund is an independent trust, financed by a portion of the registration fees paid by lawyers in New York State. No tax dollars are used by the Lawyers' Fund.

NEW YORK STATE BAR ASSOCIATION
State Bar News

The International Section Hosts A Meeting of the Minds in Montreal

When Michael Met Sophia

By Joan Fucillo

NYSBA's International Section meeting in Montreal, Oct. 23–26, brought together men and women from the world's legal community, and featured a guest who is neither – Sophia the Robot.

Sophia's presence at Thursday's program, *AI – The Promise, the Peril and the Law*, enlivened the discussion among some of the world's top authorities on artificial intelligence about the utility and the future of AI in the legal profession.

NYSBA President Michael Miller got to "meet" Sophia, but prior obligations kept him from attending the AI panel. He did, however, attend the Wednesday plenaries, which made a deep impression.

Miller praised Section Chair William Schrag and Program Chairs Mark Rosenberg and Stéphanie Lapierre, saying how impressed he was with the quality of the programs and the panelists.

"The session on immigration law was a candid, high-end discussion that covered the very complex topic of business-related immigration as well as the more basic challenges faced in the current environment," Miller said.

The ethics portion, Miller said, contained "extremely valuable and entertaining" lessons on proper behavior in court, with examples from both sides of the bench. It followed the old adage: Lose the court, lose your case.

Sophia the Robot, left; NYSBA President Michael Miller, right

Miller cited a story from panelist Judge Loretta Preska, formerly chief judge, now senior judge, at the US District Court for the Southern District of NY. She shared one of her most memorable courtroom moments and the result: a public censure and three-month suspension from practice.

Reading from the Disciplinary Committee Decision in the case, Judge Preska described how during a telephone status conference in 1997, an attorney angrily accused her of "rampant corruption" and "sticking it to me," adding "I'm not rude to them [a reference to the Court's staff], I'm rude to you, because I think you deserve it. You are corrupt and you stink. That's my honest opinion, and I will tell you to your face."

Musing about the incident, Judge Preska said, "Calling me lazy or stupid is a matter of opinion. But to call me 'corrupt' must be based in fact."

"A lesson for us all," said Miller.

2018 NYSBA Partnership Conference Brings Civil Legal Services Community Together

Over 500 gathered at Albany Capital Center in October

By Brendan Kennedy

The New York State Bar Association (NYSBA) hosted the 2018 Legal Assistance Partnership Conference in Albany, NY last month, bringing together the civil legal services community at the premier civil legal services educational and networking conference in New York State.

The theme for this year's conference, *Uniting for Justice,* was evident throughout the 45 workshops covering a diverse range of legal topics including immigration, foreclosure, domestic violence, government benefits and housing.

Over 500 attendees came to the Albany Capital Center for the bi-annual conference, where they were able to earn continuing legal education credits and network with leaders of civil legal service organizations and private law firms.

The conference included the Denison Ray Civil Awards and Phil Dailey Award Dinner, which honors attorneys, directors, and nonprofits for extraordinary leadership and commitment to access to justice. NYSBA President Michael Miller, Court of Appeals Associate Judge Jenny Rivera, and New York State Assembly Member Harvey Epstein were the keynote speakers at the event.

The awards are named in memory of career legal activist Denison (Denny) Ray, who led legal services programs in New York and other states. The Civil Legal Services Staff Attorney Awards, which honors staff attorneys employed by nonprofit entities that provide free civil legal services to low-income clients, were presented to **Jennifer Metzger Kimura**, Staff Attorney, Legal Aid Bureau of Buffalo and **Mary Beth Conway**, Managing Attorney, Volunteer Legal Services Project of Monroe County. The Director Award, which honors a director of a civil legal services program, was presented to **Barbara Finkelstein**, Executive Director, Legal Services of the Hudson Valley.

(L-to-R) Edwina Martin, Mary Beth Conway, Barbara Finkelstein, Michael Miller, Jennifer Metzger Kimura, Deborah O'Shea, Sergio Jimenez

The Phil Dailey Award was created in 2016 in memory of Phil Dailey, a Paralegal at Legal Assistance of Western NY in Geneva, NY, who dedicated his career to the notion that the law must be applied uniformly to all people, regardless of their circumstances or their station in life. The award acknowledges the vital services of non-attorney staff who demonstrate an excellence and dedication to providing equal access to justice. It was presented to **Deborah O'Shea**, Pro Bono Coordinator, Onondaga County Bar Association.

4 questions and a closing argument

Member Spotlight with Hon. Randall T. Eng

Eng, former Presiding Justice, Appellate Division, Second Department, is Of Counsel at Meyer, Suozzi, English & Klein in Garden City, NY.

Who was your first mentor in the law?

I was a high school student when I first met Hon. Charles W. Froessel, then a judge of the Court of Appeals, who was a customer of our family's laundry and dry cleaning business, which was located near the Supreme Court in Queens.

He was a very kind and thoughtful man who had a wide variety of interests including the mentoring of youth. It was only natural that I came to speak with him about a career in the law, which I always found to be appealing.

Law was not a profession that young Asian-Americans gave much consideration to in the early 1960s. There were only a handful of Asian-American lawyers in the New York area and they were concentrated in Manhattan's Chinatown where their work consisted mainly of immigration law and small real estate transactions.

Despite well-meaning guidance to take up studies such as engineering or medicine, I persisted in looking toward the law where I thought one could truly make a difference, particularly in that period of great social change.

Upon graduation from law school, I had difficulty in finding a position in the private sector. Callbacks after interviews did not happen, and despair began to set in. Judge Froessel suggested that I try the public sector where there was more sensitivity to diversity issues.

Having an interest in criminal justice, I was fortunate to be appointed to the Queens County District Attorney's office in 1973 where I became the first Asian-American assistant district attorney in the history of New York State. I successively became the first Asian-American judge in this state, one of the first of two to be elected to the Supreme Court, the first administrative judge, and the first to be designated as presiding justice of the Appellate Division, Second Department. Now, in the next phase of my legal career, I have realized my ambition to be engaged in the private sector.

What is something most people don't know about you?

All my life, I have had a fascination with railroading and aviation, and have collected many books and photographs on both subjects. Although I never learned how to operate a train, I did become a licensed private pilot.

Most of my flying has been done at the local airport in Hilton Head, SC, where we have a condo. There is nothing more stress relieving than flying your own airplane over beautiful shorelines and beach communities. Needless to say, the airspace is much more open there, and the costs far lower than in the New York metropolitan area.

What do you find most rewarding about being an attorney?

Mentoring new attorneys and law students has always been personally rewarding for me, and I have had the privilege of working with many men and women of color, particularly Asian-Americans seeking guidance in advancing along both judicial and non-judicial career paths. It has been a great pleasure to have observed several of these persons advance into new areas of the profession and achieve goals and aspirations which they have set for themselves.

What was your favorite television show during your formative years?

While a high school student, one of my favorite programs was Perry Mason.

As I look back on the over 200 episodes of the show, I can only marvel at how Mason could master the representation of clients in such varied areas of the law as mergers and acquisitions, hostile takeovers, land use, mining rights, defamation, copyright infringement, matrimonial, personal injury, and admiralty, as well as criminal defense. He did so without associates or a file in sight, and only fleeting references to "the library."

Closing argument: Why should lawyers join NYSBA?

New York State Bar Association membership includes a broad cross section of the legal community from both the private and public sectors, including the judiciary.

In my experience in the administration of the courts, I have found that NYSBA is a voice that is heard by legislators and decision makers in the judiciary. Members have the opportunity to shape the message that is articulated by the legal community.

Membership also offers the privilege of working with outstanding leaders of the legal profession. During my term as presiding justice of the Second Department, I worked with a number of distinguished NYSBA presidents. All of the above are great reasons to become active members.

Lawyers Resource Directory

Medical Expert In Thoracic And Vascular Surgery, Non-Invasive Vascular Testing and Wound Care

I have practiced thoracic and vascular surgery since 1991. I maintain an active practice and am Medical Director of Champlain Valley Physicians Hospital Wound Center. I am certified by the American Board of Thoracic Surgery and am a Registered Physician in Vascular Interpretation.

I review for the New York State Office of Professional Medical Conduct and have had over ten years of experience in record review, determinations of standard of care, deposition and testimony in medical malpractice cases.

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Accelerating Talent

Grit and Growth Mindset Fuels Lawyers' Success Throughout Their Careers

By Alli Gerkman and Milana L. Hogan

In 2013, the American Bar Association Commission on Women in the Profession developed the Grit Project to educate women lawyers about the science behind the concepts of grit and growth mindset. Relying on existing work by Angela Duckworth on grit, Dr. Carol S. Dweck on growth mindset, and Milana Hogan on the effect of these concepts on the success of women in big law firms, the Commission created educational materials for use by lawyers and lawyer organizations across the country.

Starting in 2016, the Commission initiated research to understand the impact of grit and growth mindset on the success of female lawyers. "Grit" is defined as "perseverance and passion for long term goals" while "growth mindset" is defined as "the belief that one's most basic abilities can be developed through dedication and hard work – brains and talent are just the starting point." The growth mindset perspective creates a love of learning and a resilience that is essential for great accomplishment.[1] The findings from that research have important implications for the identification of appropriate measures of success for all seasoned attorneys.

Similarly, in 2015, IAALS, the Institute for the Advancement of the American Legal System, under the direction of Alli Gerkman, launched its Foundations for Practice project to determine which foundations (including legal skills, professional competencies and characteristics) made for successful lawyers. A major part of the project identified exactly what practicing lawyers believe new attorneys needed to be successful.

In this article, Hogan and Gerkman discuss the importance of grit and growth mindset for both seasoned and new lawyers, why grit and growth mindset are critical traits that are commonly shared by highly successful lawyers, whether they are newly entering the profession or in the midst of their career, and how the traits inherent in grit and growth mindset are among the Foundations for Practice that all lawyers need for success.

GRIT PROJECT RESEARCH

To gather data about the impact of grit and growth mindset on the success of female lawyers, a mixed methods approach incorporating both quantitative and qualitative research was used. Specifically: (1) an online survey distributed via email in September of 2015; (2) interviews with select respondents (who were chosen based on their reported grit and growth mindset scores and their performance on other success measures); and (3) letters from successful women lawyers describing the ways in which they had used these traits both in context and throughout the course of their careers. Using these three sources of data, it was possible to develop a nuanced understanding of how these traits impact success for lawyers practicing in a broad range of settings, including in law firms of all sizes, as solo practitioners, and in government, not-for-profits, and in-house. Ultimately, the project included a diverse group of close to 4,300 lawyers of all ages and geographies and in all stages of their careers – from the newest lawyers to the most seasoned and well-established practitioners.

MEASURING SUCCESS FOR SEASONED LAWYERS

An important part of the research design included identifying appropriate measures of success for the types of lawyers studied: law firm lawyers, solo practitioners, lawyers in government, lawyers working in non-profits, and lawyers working in-house. To do this, lawyers currently working in each of these capacities were surveyed and asked to describe the ways in which they evaluated their own success. In other words, they were asked to describe what success looked and felt like to them. As you can imagine, given that success is a broad, somewhat vague concept that can be quite subjective, there was a wide range of responses. Nevertheless, several key themes and patterns emerged from these conversations and ultimately revealed a subset of success measures for each group of lawyers.

For example, law firm lawyers tended to evaluate their success based on measures such as whether they were on partnership track, what they were told during annual performance reviews, and the nature of the work they received (high profile, complex matters vs. straightforward, low impact or routine matters), among other things. Solo practitioners had very different success measures that included how satisfied they were with the level of control they had over their work schedules, how satisfied they were with their current level of income, and whether they were able to accomplish their personal professional goals.

Alli Gerkman is Senior Director of IAALS, the Institute for the Advancement of the American Legal System, where she oversees IAALS' programmatic objectives and strategy, with expertise in legal education, the legal profession, and delivery of legal services. She leads IAALS' Foundations for Practice project to identify the foundations new lawyers need for success; to develop models of legal education that support those foundations; and to advance a culture of legal hiring that results in a better fit for the employee, the employer, and the client.

Dr. Milana L. Hogan is the Chief Legal Talent Officer at Sullivan & Cromwell LLP. In addition to her work at S&C, Dr. Hogan is the Chair-elect of the Professional Development Consortium and serves as the Co-chair of the American Bar Association Commission on Women in the Profession's Grit Project. Dr. Hogan recently published her first book, *Grit, The Secret to Advancement,* on the impact of grit and growth mindset on the success of women lawyers. She received her B.A. in Political Science from Brown University and she holds a Doctor of Education from the University of Pennsylvania. She lives in Connecticut with her husband, Phil, and their four young children (ages seven and under). LinkedIn: www.linkedin.com/in/dr-milana-hogan-ed-d-b3a2555/.

Armed with appropriate measures of success for each group of lawyers, it was possible to see how their grit scores and growth mindset orientations correlated, if at all, to each specific measure. Ultimately, the outcome was that demonstrations of grit and growth mindset orientations have a strong impact on success for female lawyers across all practice settings.

GRIT PROJECT FINDINGS: WHAT SUCCESSFUL LAWYERS HAVE IN COMMON

For lawyers in each of the practice settings studied there were several important ways in which grit and growth mindset influenced success. This article will focus on three.

First, for lawyers working in law firms, demonstrations of grit are closely related to the overall quality of work that a woman receives. The quality of her work was a self-reported measure (i.e., she – rather than a third party – determined whether the work was high quality, high profile and sufficiently complex and challenging). Quality of work was used as a measure of success because it is often an indicator of who is performing well within the firm. If the firm takes on a high visibility and high-stakes M&A deal, it is unlikely to assign the critical tasks associated with the deal to weak performers. Instead, it makes logical sense that the challenging elements would go to high performers who would be likely to deliver the best possible result to the client. Conversely, the less complex elements might go to solid but not exceptional performers, who could be relied upon to execute well on basic tasks. Successful lawyers tend to get the very best work, and working on complex and challenging matters helps them to build valuable experience, form meaningful connections with clients, and further their legal careers.

Second, a growth mindset orientation is strongly related to how well more-seasoned lawyers are compensated. Rather than relying on a fixed dollar amount, which can vary widely from firm to firm (i.e., lawyers earning top compensation at one firm may find themselves in the middle of the pack at another firm with higher per partner profits), the Grit Project relied upon a relative measure of compensation. Specifically, respondents were asked: "*Relative to your peers, is your total compensation above average, average, or below average?*" Growth mindset-oriented respondents were much more likely to select above average compensation than fixed mindset-oriented respondents. While there are many underlying factors that contribute to compensation determinations, and these may vary significantly from firm to firm, it seems that having a growth mindset suggests higher earnings. One possible theory for this is that growth mindset-oriented individuals tend to view setbacks as opportunities

for learning rather than as indicators of lack of ability or personal shortcomings. If you consider this in the context of client development, where seasoned lawyers are often tasked with generating new business for the firm (an undertaking with a statistically high failure rate), it makes logical sense that growth-minded individuals would be less likely to get discouraged when they were turned down and more likely to learn from their mistakes, make the necessary adjustments, and go at it again.

Third, for lawyers working in-house, their grit scores influence both the point at which they are brought into the decision-making process, as well as their tenure with the organization. For many in-house lawyers, being seen as a strategic partner (who is consulted early on in the decision-making process and well before major decisions are made) rather than simply an executor was a very important measure of success. Equally important – both from the perspective of the organization and the individual – was how long the lawyer stayed with the organization. A long tenure suggests a successful and satisfying experience on both sides.

As these three examples demonstrate, grit and growth mindset are critical traits that are commonly shared by highly successful lawyers. They matter both at the outset of one's career as lawyers are learning the critical skills they need to practice law, and at the sunset of one's career, when occupying positions of leadership and authority. Organizations would be well-served to focus on hiring candidates who demonstrate these characteristics as they are often predictive of both present and future success.

IAALS' FOUNDATIONS FOR PRACTICE STUDY

The work conducted by the Grit Project tells us that grit and growth mindsets are critical to the success of seasoned lawyers. Here, we will examine whether those traits may be valuable early in a lawyer's career as well.

IAALS launched Foundations for Practice because it believed that the question, "What do new lawyers need to be successful?" had to be answered, at least in significant part, by the profession itself – by lawyers who hired and worked with new lawyers, by lawyers who worked with clients, and by lawyers who had traveled the path from law student to new lawyer.

The drive to answer this question resulted in a survey that IAALS sent to lawyers in 37 states[2] and generated responses from more than 24,000[3] lawyers representing a diversity of practice settings, practice areas, geographic locations, and demographic details. In the first part of the survey, IAALS asked respondents to consider 147 "Foundations" for new lawyers. Respondents indicated whether each item was necessary in the short term, not necessary in the short term but must be acquired over time, advantageous but not necessary, or not relevant. In the second part of the survey, IAALS asked respondents to reflect on the Foundations they identified as necessary for lawyers and to indicate the types of experiences and accomplishments that would help them identify those Foundations in a prospective employee.[4]

Three key takeaways emerged. First, new lawyers require a blend of legal skills, professional competencies, and characteristics to be successful. Or, put another way, new lawyers must bring the whole package – they must be *whole lawyers*. Second, lawyers need some level of *character quotient*, including such qualities as integrity, work ethic, common sense, and resilience.[5] Third, experience matters in the effective development, education, and hiring of new lawyers. When asked how they could identify the important Foundations in prospective employees, respondents overwhelmingly selected experience-based options, notably legal employment, letters of recommendation from lawyers and judges, legal externships, other experiential education, life experience between college and law school, participation in a law school clinic, federal court clerkships, and state court clerkships.[6]

RELEVANCE OF GRIT AND GROWTH MINDSET FOR NEW LAWYERS

If grit and growth mindset are characteristics that are critical to developing highly effective and successful lawyers and leaders, should employers be looking for these characteristics when hiring new lawyers?

In short, the answer is yes, and not just for long-term payoff. Just as the Grit Project found that grit and growth mindset are critical to the success of seasoned lawyers, when looking at the study through the lens of grit and growth mindset, it would seem that they are important for new lawyers as well. This suggests that employers would be wise to identify and hire new lawyers who already exemplify these characteristics to capitalize on the short- and long-term gains that may result.

To understand how grit and growth mindset fared in the study, one must start with the definitions of grit and growth mindset that Hogan and her team used, which were defined above.

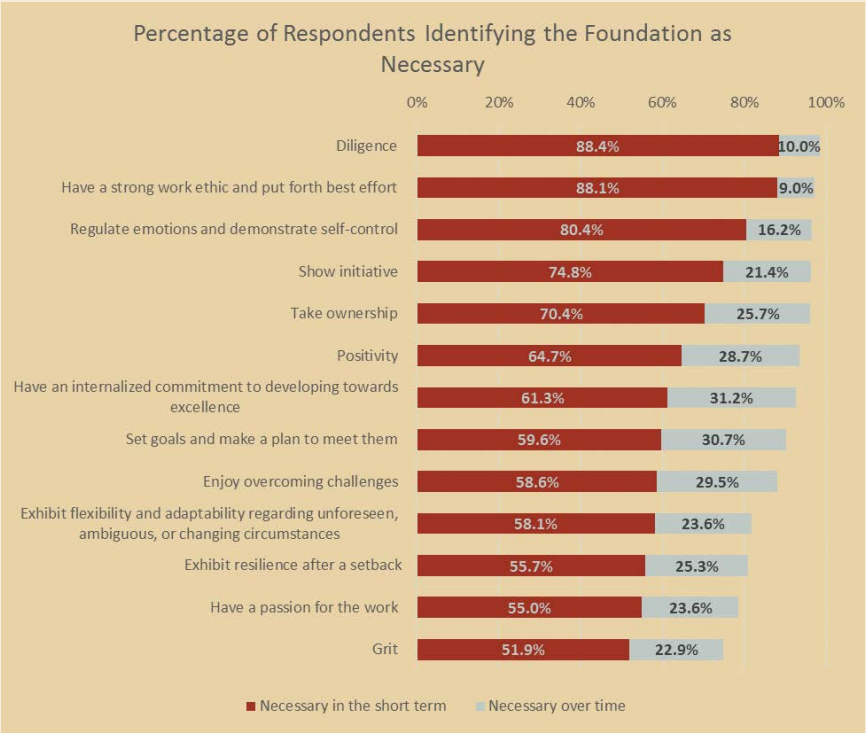
Then you can look at the list of 147 Foundations to see which, if any, feed into the concepts of grit and growth mindset. Thirteen Foundations in Table 1 were identified as supporting either grit or growth mindset ("Grit/Growth Foundations"), based on the definitions above.

Table 1: Foundations Relevant to Grit and Growth Mindset[7]

Foundation	Type	Grit	Growth Mindset
Diligence	Characteristic	✓	
Exhibit flexibility and adaptability regarding unforeseen, ambiguous, or changing circumstances	Characteristic	✓	
Exhibit resilience after a setback	Characteristic	✓	
Grit	Characteristic	✓	
Have a passion for the work	Characteristic	✓	
Regulate emotions and demonstrate self-control	Professional Competency	✓	
Set goals and make a plan to meet them	Professional Competency	✓	
Take ownership	Characteristic	✓	
Enjoy overcoming challenges	Characteristic		✓
Have an internalized commitment to developing toward excellence	Characteristic		✓
Have a strong work ethic and put forth best effort	Characteristic		✓
Positivity	Characteristic		✓
Show initiative	Characteristic		✓

The 13 Grit/Growth Foundations were each identified by at least 75 percent of respondents as necessary for lawyers, either in the short term or over time. *See Figure 1.* In fact, eight of the Grit/Growth Foundations were identified as necessary by more than 90 percent of respondents. These results suggest that Grit/Growth Foundations are important for new and seasoned lawyers alike, seemingly affirming the results of the Grit Project study.

Figure 1:



After identifying the Grit/Growth Foundations and confirming that survey respondents viewed them as necessary for all lawyers, the study looked at the percentage of respondents who indicated that those same Grit/Growth Foundations were necessary in new lawyers. Every Grit/Growth Foundation was identified as necessary in the short term – or, for new lawyers by more than 50 percent of respondents. Using the methodology IAALS employed in *The Whole Lawyer and the Character Quotient*,[8] this suggests that all 13 Grit/Growth Foundations are necessary in new lawyers. *See Figure 1.*

HIRING LAWYERS WITH GRIT AND GROWTH MINDSET

IAALS is now working with employers and law schools[9] to use Foundations for Practice and feedback from employers to develop learning outcomes and hiring tools employers can use to identify new lawyers who possess the desired Foundations. A key set of the Foundations included in those learning outcomes and hiring tools are the Foundations that support grit and growth mindset.

Given what we now know about grit and growth mindset, committing to hiring lawyers who possess them may be one of the best strategic moves a legal organization can make for its clients and its future. Employers have an opportunity to ensure that prospective candidates are being evaluated not only on traditional academic criteria, like grades and ranking of their law schools, but also the experiences that promote and suggest the candidate has developed grit and growth mindset. While this may require a shift in hiring priorities, training, and processes, it holds promise for legal organizations that want to build a deep bench of highly qualified new lawyers to groom as the organization's leaders of tomorrow.

1. Duckworth, A. L., Peterson, C., Matthews, M. D., & Kelly, D. R., *Grit: Perseverance and passion for long-term goals*, 92(6) J. of personality and Soc. Psychol. 1087–1101, 1087 (2007); Carol S. Dweck, *What is Mindset?*, Mindset.com, *available at* http://mindsetonline.com/whatisit/about/index.html (last visited June 7, 2018).

2. New York was a participating state.

3. 1,508 respondents indicated that their primary practice was in the state of New York.

4. Alli Gerkman & Logan Cornett, Foundations for Practice Survey, *available at* http://iaals.du.edu/sites/default/files/documents/publications/ffp_survey_paper_version.pdf.

5. Alli Gerkman & Logan Cornett, Foundations for Practice: the whole lawyer and the character quotient (2016), *available at* http://iaals.du.edu/educating-tomorrows-lawyers/publications/foundations-practice-whole-lawyer-and-character-quotient.

6. Alli Gerkman & Logan Cornett, Foundations for Practice: hiring the whole lawyer: experience matters (2017), *available at* http://iaals.du.edu/educating-tomorrows-lawyers/publications/foundations-practice-hiring-whole-lawyer-experience-matters.

7. This list was created for this article. It may not be inclusive of all Foundations relevant to grit and growth mindset. Additionally, some of these Foundations may be relevant to both grit and growth mindset which, interestingly, highlights the interdependent relationship between the two concepts.

8. Alli Gerkman & Logan Cornett, Foundations for Practice: the whole lawyer and the character quotient (2016), *available at* http://iaals.du.edu/educating-tomorrows-lawyers/publications/foundations-practice-whole-lawyer-and-character-quotient.

9. The four schools participating in this second phase of Foundations for Practice are Columbia Law School, University of Denver Sturm College of Law, Northwestern Pritzker School of Law, and Seattle University School of Law. Each school works with IAALS to identify a group of employers from their communities that they wish to engage in the project. At the conclusion of the second phase, IAALS will publish an account of this process, along with a set of learning outcomes and hiring rubrics that can be used as a starting point for similar discussions.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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TO THE FORUM:

I've been a litigation attorney for about seven years now, but recently a former colleague approached me with an opportunity to go in-house at his company. The offer is tempting because recent changes in my personal life have made the litigation grind difficult for me, and I feel like it's a perfect time in my career to shift gears. I've been at my current firm for about five years, and when I came onboard I signed an employment agreement that contained a non-compete clause. At the time, I was still a relatively young attorney and didn't think much of it. After pulling out the agreement and looking at it now, even though the restrictions seem reasonable in time and scope, I am starting to question whether the non-compete is enforceable at all. Are restrictive covenants contained in attorney employment contracts valid and enforceable? What about in my particular situation, where I am potentially going in-house and will not be "competing" against my old firm? If I ultimately decide that in-house life isn't for me and move to another law firm before the expiration of the non-compete, will I be able to reach out to my former clients and bring them to my new firm? What if I ultimately decide to leave the legal profession altogether?

While we're on the topic of restrictive covenants, I'm also curious about a confidentiality agreement that my colleague's company gave me to review before I officially start work as in-house counsel. As a condition of my employment at the company, I am required to sign a confidentiality agreement. The agreement prohibits me from using or disclosing information that the company deems or designates confidential, and these confidentiality obligations survive the termination of my employment with the company. If I eventually decide to return to litigation or go to another law firm, will I still be bound by these obligations? I'm afraid that it could limit my employment opportunities in the future. There is a carve-out in the agreement that says that it is subject to the applicable rules of professional conduct, but is that enough? How do the rules of professional conduct treat these types of agreements?

Sincerely,
Soon B. Inhouse

DEAR SOON B. INHOUSE:

Your instinct questioning your ethical obligations under the restrictive covenants in your employment agreement is correct. As lawyers, we should always be wary of contractual obligations to third parties that may inhibit our obligations to clients or affect our duties under the New York Rules of Professional Conduct (RPC). RPC 5.6(a)(1) tells us that "[a] lawyer shall not participate in offering or making: (1) a partnership, shareholder, operating, employment or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement…" "The main purposes of Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely." *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011), citing RPC 5.6 Comment [1] ("An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.") Restrictive covenant obligations on lawyers may have the practical effect of limiting available attorneys, thereby limiting a client's ability to choose the appropriate counsel and a lawyer's ability to accept new clients. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011); NYSBA Comm. on Prof'l Ethics, Op. 1151 (2018).

RPC 5.6(a)(1) prohibits even an objectively reasonable non-compete clause in any lawyer's partnership or employment agreement. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1499 (2016 ed.). This type of ethical rule is fascinating because it is almost unique to lawyers. *See id.* In almost every other line of work or business, as long as restrictive covenants are reasonable in time, geography and scope of

work, the restrictions will generally be permitted. *See id.* Put differently, traditional non-compete clauses, if permitted for lawyers, would make it difficult for a client to follow his or her lawyer if the lawyer moved to a different firm. *See id.* The ethics rules as written clearly emphasize a client's right to choose his or her representation.

Not only does RPC 5.6(a)(1) prohibit traditional non-compete clauses for lawyers, it also prohibits agreements that create financial disincentives for lawyers who take clients when they leave a firm. One important case addressing restrictions on a lawyer's ability to practice is *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989). In that case, the Court of Appeals, which interpreted the predecessor to RPC 5.6(a)(1), DR-2-108(A), while emphasizing the importance of a client's choice of counsel, held that a provision in the partnership agreement at issue, providing for a financial disincentive for a lawyer to compete against the firm after his departure, was an impermissible restriction on the practice of law and unenforceable as against public policy. *See Cohen*, 75 N.Y.2d at 96; *see also Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 380-81 (1993) ("[R]estrictions on the practice of law, which include 'financial disincentives' against competition as well as outright prohibitions, are objectionable primarily because they interfere with the client's choice of counsel: a clause that penalizes a competing attorney by requiring forfeiture of income could 'functionally and realistically discourage' a withdrawing partner from serving clients who might wish to be represented by that lawyer."), citing *Cohen*, 75 N.Y.2d at 98.

An employment contract that includes a restrictive covenant and a provision that specifically states that the restrictive covenant should only be enforced to the extent it is consistent with the lawyer's ethical obligations under Rule 5.6(a)(1) or any other applicable rule, however, would be generally acceptable. *See* NYSBA Comm. on Prof'l Ethics, Op. 1151 (2018). The NYSBA Committee on Professional Ethics recently opined that this type of carve-out or savings clause would "remove any doubt about whether the clause impermissibly impinges on the lawyer's right to practice law following the end of employment." *See id.*

A lawyer's obligations under RPC 5.6(a)(1) are applicable even when the employer engages a lawyer for a purpose other than the practice of law. *See id*. The distinction whether the engagement relates to the practice of law or not is of no consequence since those restrictions may still have the practical effect of limiting a client's ability to choose their counsel, and the lawyer's autonomy in accepting an engagement as counsel. *See id.* The language of RPC 5.6(a)(1) is intended to cover lawyers of every type and description. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1497. RPC 5.6(a)(1) does not, however, apply to agreements between a lawyer, or law firm, and a non-lawyer. *See id.* Lawyers and law firms are free to enter into non-compete agreements with other employees such as paralegals or assistants. *See id.*

While employed at a law firm, lawyers continue to have, at a minimum, a duty of loyalty to that firm, but, that said, RPC 5.6(a) prevents a law firm from restricting a lawyer's ability to reach out to clients and personnel after the termination of employment. *See id.* at 1500, citing Paul DeBenedetto, *Houston Firm Sues Ex-Associate for Trying to Poach Clients* (Law 360 Jun. 4, 2015.) Unlike states such as Virginia and Florida, there are no specific New York rules that address how a lawyer should advise their clients that they are departing a firm and moving to another firm. *See id.* While a lawyer is permitted to advise his or her clients of their departure from the firm, it should not be done in secret and it should be on notice to the firm. *See id.*, citing *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112 (1995).

The restrictive covenants in your current employment agreement appear to violate RPC 5.6(a)(1) based upon the presence of a "non-compete" provision, without a savings clause, which would prevent you from representing your current clients after your employment with the firm concludes. This is in direct contravention of the goals of RPC 5.6(a)(1) to allow clients to freely choose their legal representation and to allow attorneys to choose their clients. Despite the fact that you are planning to work as an in-house attorney at the moment, and have no plans to engage individual clients, the restrictive covenants in your employment contract should not prevent you from reaching out to your former clients at a later date in the event you elect to return to private practice.

You have also raised some important issues regarding the confidentiality agreement that your new employer has presented to you for execution. The first question we must address in reviewing the confidentiality provision is whether it defines the protected information more broadly than RPC 1.6(a). *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011). RPC 1.6(a) defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." RPC 1.6(a) notes that confidential information does not usually include "(i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

The continuing confidentiality obligations lawyers have to clients after the termination of their employment

though very broad are not unlimited. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011). RPC 1.9(c) addresses an attorney's duty of confidentiality after a current client becomes a former client. RPC 1.9(c) generally prohibits a lawyer from using or revealing confidential information of a former client, protected by RPC 1.6, without an expiration date. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 676-80, citing NYSBA Comm. on Prof'l Ethics, Op. 1032 (2014). RPC 1.9(c) is one of the most important provisions of the RPC because it imposes a continuing duty of confidentiality on lawyers even after the conclusion of the attorney-client relationship. *See id.* at 677.

If the proposed confidentiality agreement tries to protect more information than RPC 1.6(a) and RPC 1.9(c) require, any attempt by another attorney to enforce that confidentiality provision may be a violation of RPC 5.6(a)(1) because it may restrict the attorney's ability to practice law. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011); NYSBA Comm. on Prof'l Ethics, Op. 730 (2000) (The committee opined that a lawyer may not enter a settlement agreement that restricts his or her ability to practice law by prohibiting a lawyer from representing a client in cases where the attorney may use information not protected as a confidence under the Rules but covered by the settlement agreement.); *see also* New Jersey Advisory Comm. on Prof'l Ethics, Op. 708 (2006) (The committee opined that it may be reasonable for a corporation to request its lawyers to sign a confidentiality agreement as long as it does not seek to restrict the lawyer's ability to practice law or expand the nature of confidential information received by the in-house lawyer.) The NYSBA Committee on Professional Ethics has noted, however, that since the definition of "confidential information" under RPC 1.6 is very broad, most contractual confidentiality provisions do not exceed the scope of a lawyer's confidentiality obligations under the RPC. *See* NYSBA Comm. on Prof'l Ethics, Op. 858 (2011).

A savings clause stating that the confidentiality provision is subject to the applicable Rules of Professional Conduct is sufficient in this instance to protect your ethical obligations. This type of savings clause makes clear that to the extent any of the provisions of the proposed agreement appear to be narrower than the RPC, the savings clause keeps the agreement within the confines of the RPC and no further analysis under RPC 5.6 is necessary. *See id.*, citing Connecticut Bar Association Comm. on Prof'l Ethics, Informal Op. 02-05 (2002). As long as the confidentiality provision in your contract makes clear that the confidentiality obligations do not restrict the lawyer's right to practice law after the lawyer's termination, and does not expand the scope of the attorney's duty of confidentiality under the RPC, executing such an agreement would not interfere with your obligations under the RPC. Based upon the foregoing, we do not believe the type of confidentiality provision that you describe, with the applicable savings clause, violates your obligations under the RPC.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represent lenders in foreclosure actions and have access to a lot of information about real estate that is regularly advertised for sale to the public either through auctions or through short sales from borrowers in default. A few of my friends started buying distressed properties, doing some construction, and then flipping them for a profit. When they learned that I was dealing with properties in foreclosure every day, they started peppering me with questions about the properties and asking for tips on upcoming sales. My initial reaction was that I may not be permitted to disclose any information on the properties to my friends because it would be a violation of my confidentiality obligations to my clients. I know one of my clients likes to discuss the status of the properties in detail but then say, "That info is just between you and me. Just put the bare bones in the papers unless you think it is really necessary. Then you can feel free to use it."

But then I started to think about it more and I realized that the information that is most important to my friends, such as addresses, prices, and dates for auctions, is all in publicly filed court documents or is information that I talked about in open court and on the record. In other words, all the really important information is already available to the public. Does this clear me of any confidentiality issues permitting me to discuss the properties with my friends? What if I e-filed court documents with that information? While they haven't offered me any money yet, I suspect that if my friends acquire and flip a property I tell them about, they will give me a small portion of their profit as a thank you. Does this affect my ability to discuss the properties and can I accept such a gift?

Sincerely,
Luce Lips

Continued from Page 64

corresponding Bluebook rule for each example, allowing a reader to cross-reference the Bluebook.

In the next issue of the *Journal*, the Legal Writer will conclude this three-part series by discussing the Indigo Book, ALWD, and tips for using Lexis and Westlaw. It'll also include a chart showing the differences in several citation manuals.

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1. *The Bluebook: A Uniform System of Citation* (Colum L. Rev. Ass'n et al. eds, 20th ed. 2017).
2. Bluebook R10.3, at 102.
3. SupremeCourt.gov, "Information About Opinions," https://www.supremecourt.gov/opinions/info_opinions.aspx (last visited Aug 17, 2018).
4. *Id.* ("A number of these organizations provide on-line access to the bench opinions via the Internet within minutes after they are released by the Court.").
5. *Id.* ("Several days after an opinion is announced by the Court, it is printed in a 6" x 9" self-cover pamphlet called a "slip opinion." Each slip opinion consists of the majority or plurality opinion, any concurring or dissenting opinions, and the syllabus. It may contain corrections not appearing in the bench opinion.").
6. *Id.*
7. *Id.*
8. *Id.*
9. Bluebook T1, at 233.
10. New York Law Reporting Bureau, "Editorial Procedures," https://www.nycourts.gov/reporter/Edit.shtml (last visited Aug 29, 2018).
11. New York Law Reporting Bureau, "Editorial Procedures," https://www.nycourts.gov/reporter/Edit.shtml (last visited Aug 29, 2018).
12. Bluebook R10.4, at 104.
13. *Id.* R10.4, at 106.
14. *Id.* R10, at 106.
15. *Id.* Bluebook T1, at 279.
16. *Id.* Bluebook B10.2, at 16.
17. New York Law Reporting Bureau, "New York Official Reports: In the Courts," http://www.nycourts.gov/reporter/Cases.shtml (last visited July 25, 2018).
18. *Id.*
19. Bluebook R10.3, at 102.
20. *Id.* B10.1.3, at 13.
21. *See* Tanbook Rule 2.2(b)(1), at 18.
22. Bluebook B10 1.4, at 15.
23. *Id.* B12.1.2, at 19.
24. *Id.* R16.9, at 170.
25. *Id.* R8, at 91.
26. Richard A. Posner, *The Bluebook Blues*, 120 Yale L. Rev. 850, 852 (2011).
27. Susie Salmon, *Shedding the Uniform: Beyond a "Uniform System of Citation" to a More Efficient Fit*, 99 Marquette L. Rev. 763 (2016).
28. *Id.* at 793 ("In the face of all this criticism and competition, does not The Bluebook's continued dominance of the legal citation market demonstrate its superiority? In short: no.").
29. *Id.* at 765.
30. The Guide can be purchased for $10. Mail a check to St. John's University School of Law, Attn: Law Review, 8000 Utopia Parkway, Jamaica, NY 11439.
31. *New York Rules of Citation* 9 (St. John's L. Rev., 6th ed. 2011).
32. *Id.*

Collaborating Against the Competition: A 3L's View

No matter one's relation to the legal profession, law school's reputation as a mire of stress, anxiety, and competition is a familiar concept. Films such as *The Paper Chase* and *Legally Blonde* have popularized – if not firmly established – this idea, and anyone who has taken at least a single semester of legal education can attest to it.

As law students know and JDs can recall, the stress reaches its apex in the first year, the point at which many students feel the fate of their careers has been sealed. Three things, in particular, stand out about the first year's high stakes: employers have only first-year grades when deciding to give offers for second-year summer positions; coveted offers to join a school's law review are extended just after the first year; and, for many, clerkship searches begin (and sometimes end) as soon as first-year grades are released.

Looking back from where I sit in my third year, I recall tremendous frustration during the first semester as I weighed how my efforts at home and in the classroom might translate to my transcript. And, at the same time, I fumed over how they would be ultimately reduced to just a few hours of exam time. Most of all in that first year, it was unclear to me what to make of the zero-sum nature of law school grading and the employment search, two systems built on a competition with people you were told to treat as colleagues.

Over time, I and many others found that the answer to escaping this mire was to let the competition fade into the background. While there was no question that we were competing over the same clerkships, grades, and jobs, the reality was that we found greater and more frequent success when we worked together than when we worked apart. Relationships that began as small study groups to pore over the intricacies of consideration, learn the six covenants of title, and debate the coherency of Justice Kennedy's jurisprudence developed into long-lasting relationships that transitioned from helping me learn the law to helping me stay sane. What I didn't realize at the time, however, was that these two things were entirely complementary: managing my stress levels helped me to focus on learning the law, while building my understanding and confidence in the subject helped me manage my stress levels.

Navigating the law school experience has required not only learning how to deal with its intensely competitive nature, but also how and when to enter and exit it. Finding engaging activities that felt entirely removed from the law school bubble has helped to break up an experience that was often exhausting because of the way in which it tended to swallow every facet of life. So, in addition to some of the great attractions Charlottesville, Virginia, provides, my friends and I took on law school's latest trend: board games. While we've used them as a means of escapism, they've ironically ended up being a microcosm of the very thing from which we sought a reprieve. Aside from rulebooks that provide endless opportunity to implement principles of statutory interpretation, board games embody the two different models of the law school experience: sometimes we play games that pit us against one another, while at other times we play those that require us to collaborate to beat the game.

In some ways, it's strange that such a collaborative profession has given birth to such a competitive educational framework: despite the individualism promoted through legal education's design, it takes a team to win a trial or complete a deal. While law schools are unlikely to adopt less individualistic models going forward, I've found that students can still take more collaborationist approaches to the game. Finding ways to overcome the competition rather than focusing on overcoming the competitors has not only made it easier to succeed, but it's made it more enjoyable too. I've chosen to make best friends out of some of my competitors, and even if law school doesn't grade teams, I think I'll be the better lawyer for it.

Josh Lefebvre is a third-year law student at the University of Virginia School of Law. In 2013, he received his B.A. in English from Binghamton University – State University of New York.

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Cite-Seeing Part II: The Bluebook's New York Bloopers

Last month in this three-part series the *Legal Writer* discussed the New York Law Reports Style Manual, called the Tanbook, and gave some practical advice on the basics of citing. In this issue, the *Legal Writer* discusses Bluebook mistakes and how to fix them using the *St. John's Law Review's* New York Rules of Citation and the Tanbook, when submitting legal papers to a New York State court.

THE BLUEBOOK (20TH ED. 2017)

The Bluebook[1] is the correct resource for law journals, federal court, moot court briefs, and international materials. Despite the Bluebook's ever-increasing popularity, it fails miserably when it comes to New York citations. Every rule and example in the Bluebook violates how a practitioner, judge, or academic should cite New York authorities.

The Bluebook instructs readers to use unofficial reporters in citations.[2] This contradicts New York's CPLR 5529 (e), which provides that "New York decisions shall be cited from the official reports, if any. All other decisions shall be cited from the official reports, if any, and also from the National Reporter System if they are there reported." The Bluebook's rule also contradicts Rules of the Court of Appeals (22 N.Y.C.R.R.) §§ 500.1 [g], 510.1 [a]; Rules of the Appellate Division, First Department (22 N.Y.C.R.R.) § 600.10 (a) (1); and Rules of the Appellate Division, Fourth Department (22 N.Y.C.R.R.) § 1000.4 (f) (7).

New York courts require judges to cite New York's official reporters. The official reports contain the final version of decisions. The unofficial reports are published by West, a subsidiary of Thomson Reuters, and are organized by regions (Atlantic, North Eastern, North Western, Pacific, Southern, South Eastern, South Western). West also publishes specific reporters for New York (New York Supplement) and California (California Reporter).

The official reports are published or approved by the government. For example, the United States Reports (U.S.), published by the Reporter of Decisions, contains the United States Supreme Court opinions.[3] When Supreme Court decisions are first announced, they're made available to the public by the Supreme Court's Public Information Office. These "Bench Opinions" are picked up immediately by publishing companies.[4] A Slip Opinion is released a few days later, usually containing corrections and edits.[5] Before being published in the preliminary prints, "all of the materials . . . undergo an extensive editing and indexing process, and permanent page numbers are assigned that will carry over into the bound volume. Copies of the page proofs to be published in a preliminary print are sent to a commercial printing company under contract with the GPO [Government Publishing Office], and that company prints the pamphlets in accordance with the Court's specifications."[6] Once finalized, the opinion will appear in the bound volumes.[7]

There are two unofficial reporters for U.S. Supreme Court decisions. West publishes the Supreme Court Reporter (S. Ct). Lexis publishes the United States Supreme Court Reports, Lawyer's Edition (L. Ed., L. Ed. 2d). West and Lexis will publish a U.S. Supreme Court decision as soon as it's available from the Supreme Court's Public Information Office. Although the Supreme Court recognizes and allows these unofficial reports to publish their opinions, the Supreme Court website consistently cautions that "[o]nly the bound volumes of the United States Reports contain the final, official text of the opinions of the Supreme Court."[8] The Bluebook correctly tells users to cite the Official U.S. Reports for U.S. Supreme Court decisions.[9]

The New York State Law Reporting Bureau (LRB) goes through a similar process with New York opinions and "performs the most comprehensive and meticulous editing of any Reporter in the Nation."[10] New York opinions first appear in the New York Slip Opinion Service on the LRB's website. Then, the LRB, "[g]uided by the Style Manual [the Tanbook] . . . verif[ies] every citation — cases, statutes, legislative history, administrative regulations, periodicals, treatises, etc. — and every quotation, by comparing it to the original source."[11] Following this thorough edit, the opinions are considered officially published.

But private publishers, like West and Lexis, publish opinions as soon as they're available. Thus, critical differences

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appear in the official and unofficial reports. Attorneys might easily misquote if they use the unofficial reports. The Bluebook should remedy this issue by telling its users to use the official reporters when a state law requires it — as New York does. In the meantime, if using Westlaw, a quick click on the hyperlink "View New York Official Reports version" in the top left-hand corner of a case will ensure you're reading the most accurate source.

The Bluebook's advice also overlooks a central aspect of a citation's purpose: to tell the reader where the source can be found. Despite the Bluebook's instruction that "[e]very case citation must indicate which court decided the case,"[12] its rules obscure that information. For the Appellate Division, the Bluebook says cite the court as "N.Y. App. Div." and N.Y.S. or N.Y.S.2d. But this citation doesn't distinguish between appellate departments. New York practitioners must indicate which appellate department decided the case. Otherwise, a trial judge won't know whether the authority is binding. It's ironic, then, that the Bluebook directs students and lawyers to "[o]mit the jurisdiction and the court abbreviation if unambiguously conveyed by the reporter title." *Bluebook's Example: "DiLucia v. Mandelker*, 493 N.Y.S.2d 769 (App. Div. 1985) NOT *DiLucia v. Mandelker*, 493 N.Y.S.2d 769 (N.Y. App. Div. 1985)."[13] Unfortunately, neither citation conveys which appellate department reviewed this case. *Correct Example:* (*DiLucia v Mandelker*, 110 AD2d 260 [1st Dept 1985]).

The Bluebook gives similarly incorrect advice when it tells subscribers this: "Do not indicate the department or district in citing decisions of intermediate state courts unless that information is of particular relevance."[14] The example for that rule: *Shiffman v. Corsi*, 50 N.Y.S.2d 897 (Sup. Ct. 1944). But that's a Supreme Court, New York County, case, not one with a department or district. Besides, the department, district, or county is always relevant, for the same reasons a lawyer must always cite as relevant a federal circuit or district. Having different rules for state and federal courts demeans the state courts.

The Bluebook is confused about not just New York's Appellate Division and New York's trial courts. The Bluebook is also confused about New York's highest court. For the Court of Appeals, the Bluebook tells us to cite N.E. or N.E.2d.[15] Even when (now ancient) New York lawyers used hard copies of the reporters, they used the N.Y.S. reporter to cite the Court of Appeals. They almost never used the expensive and (for New Yorkers) mostly irrelevant N.E. reporter.

Besides, you shouldn't cite the unofficial reports. And if you do cite them, you'll need to add the New York abbreviation (N.Y.) in a case citation's parenthetical. There's no reason to add this extra information when you cite the N.Y. Official Reports; every New York practitioner knows that the New York Reports contain only New York cases. Thus, in "Short Form Citation," the Bluebook uses *Palsgraf* as an example: *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928) (Cardozo, J.), and then offers three short forms: *Palsgraf*, 162 N.E. at 100 OR 162 N.E. at 100 OR *Id.* at 100.[16] All these short-form citations are incorrect for New York: The Bluebook uses the unofficial reporter (N.E.) instead of the Official Reporter (N.Y.).

Correct Tanbook Example: (*Palsgraf v Long Is. RR.. Co.*, 248 NY 339 [1928]). Short Form: (*Palsgraf*, 248 NY at 342) OR (248 NY at 342) OR (*Id.* at 342). Note that the Tanbook's (correct) example is concise. The reporter (248 NY 339) tells the reader that the N.Y. Court of Appeals decided this case. Thus, only the year is necessary in the parenthetical.

Pre-internet, citing the wrong reporter could cost a party its case. On its website, the LRB lists several cases where the "courts point out [that] members of the bar who fail to cite to the Official Reports do so at their own peril."[17] For example, in *Disenhouse Assoc. v Mazzaferro* (135 Misc 2d 1135, 1137 n [Civ Ct, NY County 1987]), the LRB explains that "[t]he court note[d] that contrary to CPLR 5529 (e) petitioner has cited several cases to the unofficial reports only. Since, as should be made known to the Bar, only the Official Reports are available in the chambers of the Judges of the courts, the practice shouldn't be followed if counsel seeks to ease the court's task in reading briefs."[18] Judges now have access through Westlaw and Lexis to all reporters. But lawyers who use unofficial citations are still forcing judges to double-check their quotations and citations to ensure they're accurate.

The Bluebook also endorses parallel citations. It tells users that "many state rules require that citations to state court decisions include a citation to the official state reporter, *followed* by a parallel citation to a regional reporter."[19] In its section "Parallel Citation in State Court Documents," the Bluebook notes that "[l]ocal rules sometimes require citation of both the official state reporter and the unofficial regional or state-specific reporter. This is called parallel citation. Where a pincite is necessary, include one for each reporter citation. When the state or court is clear from the official reporter title, omit it from the date parenthetical." For this rule, the following is an example of the Bluebook's citation to the Court of Appeals: *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 537 N.E.2d 176, 540 N.Y.S.2d 1 (1989).[20] But New York courts don't need or want parallel citations, and the Official Reports won't publish them.[21] Using them in court documents is impractical. Parallel citations take up unnecessary space, especially when a judge will look only at the official citation.

In the Bluepages, which are directed to practicing lawyers, the Bluebook gives jurisdiction-specific citation

rules. The Bluepages list resources for New York practitioners: N.Y. Ct. App. R. 500.1(g), 510.1(a), New York Law Reports Style Manual (2012), and New York Rules of Citation (5th ed. 2005), published by the *St. John's Law Review*, and N.Y. C.P.L.R. 5529(e) (McKinney 2003). But the Bluebook itself ignores these sources.

Talking about the CPLR, New York's Civil Practice Law and Rules, the Bluebook will give you nothing but the blues. T1, at page 281, tells Bluebook adherents to cite the CPLR "statutory compilation" either N.Y. C.P.L.R <rule no.> (McKinney <year>) OR as N.Y. C.P.L.R <rule no.> (Consol. <year>). Leave aside that the CPLR is a set of rules, not statutes. The reality is that few now use the hard-bound volumes from the McKinney's Consolidated Laws of New York Annotated (West) or the New York Consolidated Laws Unannotated (LexisNexis); fewer still know how to find a volume's compilation date. Lawyers these days use internet sources like Westlaw, Lexis, and Bloomberg, and they're always current. And New York lawyers know that the CPLR — a New York lawyer's bread and butter — is from New York. When you cite "N.Y. C.P.L.R" to a New York judge, you're marked, by judge and adversary alike, as a Bluebook nerd who doesn't practice much in state court.

Once you recognize the incongruities in the Bluebook and the Tanbook, it's not hard to spot incorrect examples for New York in the Bluebook. *Bluebook Example: Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977). Again, this citation is incorrect because the reporter is wrong for New York. In Pending and Unreported Cases, the Bluebook again cites the New York Appellate Division incorrectly: *Kaye v. Trump*, No. 5128, slip op. at 1 (N.Y. App. Div. Jan. 29, 2009), http://www.nycourts.gov/reporter/3dseries/2009/2009_00452.htm.[22] In "State Statutes," the Bluebook instructs that "[f]or state statutes, cite an official code whenever possible." *Bluebook's Example:* N.Y. Bus. Corp. Law § 717 (McKinney 2000).[23] But the year 2000 for this 1989 statute is just a useless compilation date. The Bluebook also cites the *New York Law Journal* strangely. In "Periodical Materials" and Short Citation Forms, the Bluebook uses an example from the *New York Law Journal*: New York County Lawyers Association: Edwin M. Otterbourg To Represent the Association in House of Delegates of American Bar Association, 124 N.Y. L.J. 1221 (1950).[24] The Bluebook puts a space between the N.Y. and the L.J. and confusingly capitalizes the "to" in the title — contradicting its own Rule 8 about capitalizing prepositions in a title.[25] (Elsewhere, the Bluebook cites the *New York Law Journal* differently: *Mishra v. Grohman*, N.Y. L.J., Dec. 5, 1990, at 1 (D. Mass. Dec. 4. 1990) — at the same time not realizing that the *New York Law Journal* doesn't publish federal opinions from Massachusetts.)

Discrepancies like these have brought the Bluebook under scrutiny. In 2011, Judge Posner wrote a critique of the Bluebook, in which he opined that "[t]he Bluebook's subtitle — 'A Uniform System of Citation' — is a bid for monopoly."[26] In 2016, the *Marquette Law Review* published "Shedding the Uniform: Beyond a 'Uniform System of Citation' to a More Efficient Fit."[27] This article questions the cost of "uniformity" when the Bluebook citation system is not superior.[28] The author notes that the Bluebook "demonstrates how elite elements of legal academia and the legal profession have come to value conforming to the last, non-italicized period of a citation system . . . over serving clients."[29]

NEW YORK RULES OF CITATION: GO RED STORM!

Good lawyers should cite New York's Tanbook. If they feel attached to the Bluebook, they should at least learn how to use the Bluebook correctly for New York courts. A helpful resource in this area is the New York Rules of Citation, published by St. John's University School of Law's *Law Review*. The sixth edition, published in 2011, explains the Bluebook's deficiencies and tells lawyers, law students, and law journal editors how to correct them. The sixth edition, available for purchase through *St. John's Law Review*[30], adds additional examples of legislative and administrative materials.

The Rules of Citation notes that "[c]ontrary to rule 10.3(b) of The Bluebook . . . it is the policy of the *St. John's Law Review* to give as complete information as possible when citing New York authority."[31] The guide abides by four main rules: "(1) Where appropriate, the department, circuit, district, or county is included in the citation of all statewide courts; (2) The name of local government entity is included in the citation of all local courts; (3) The county is included in the citation of all New York City courts . . . (4) When a court consists of both trial and appellate parts, the appellate part is included in the citation."[32] The Rules of Citation provide the

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