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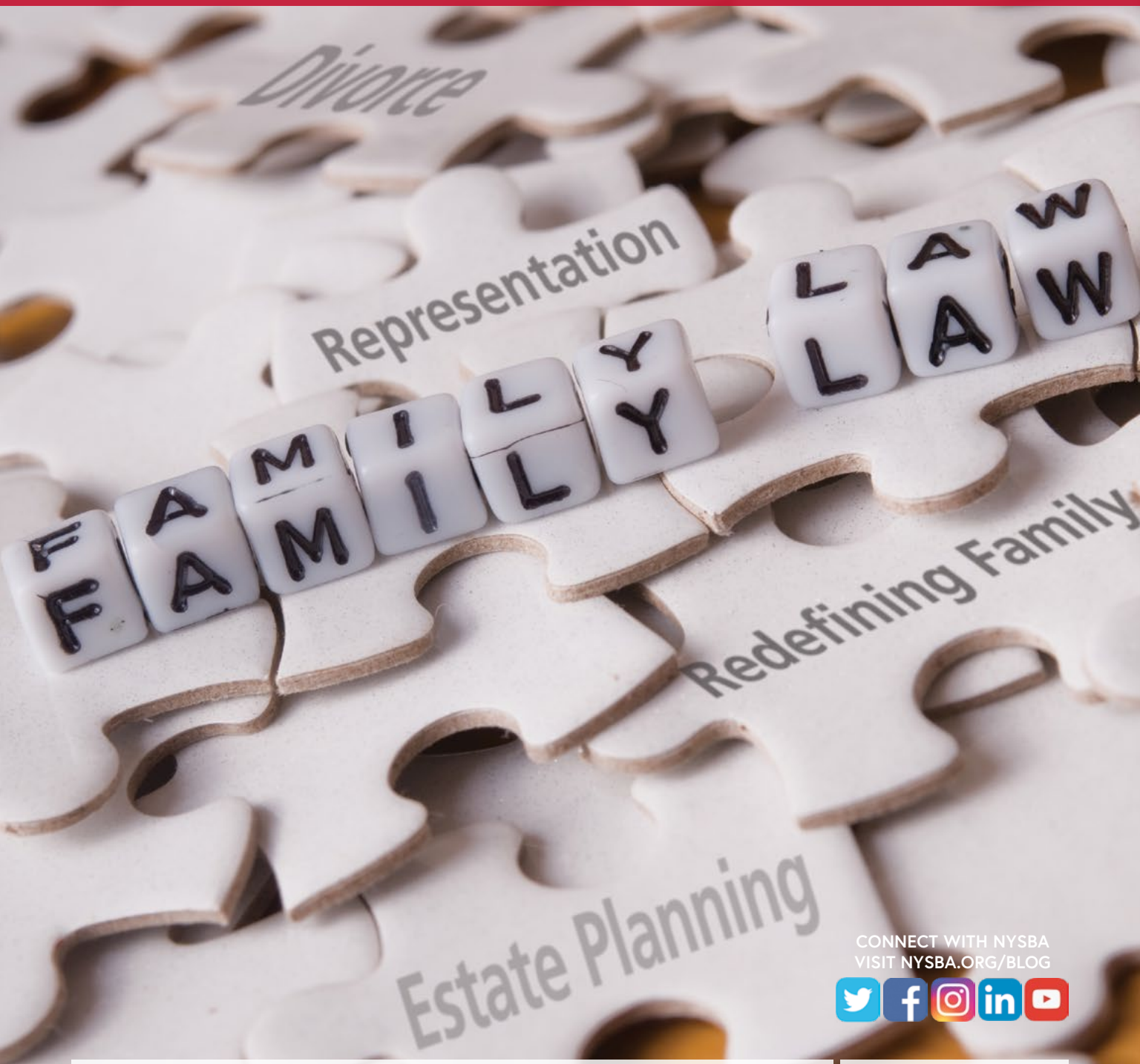

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Estate Planning to Protect Children of Divorce
BY VINCENT L. TEAHAN

Parental Representation
Redefining Family
Who Calls the Shots on Vaccines?
Uniform State Laws

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Contents

NEW YORK STATE BAR ASSOCIATION
Journal
APRIL 2019 VOL. 91 | NO. 3

In this issue:

Departments:

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Friday, May 10	Insurance Coverage Update 2019*
Monday, May 13	Starting a Solo Practice in New York
Friday, May 17	U.S. Immigration Law 2019
Monday, May 20	Disabilities in the Legal Profession
Friday, May 31	Anatomy of a Trust
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The Times That Try Our Souls . . . and Define Us for History

In a departure from my previous president's messages focusing on broad societal issues, I had drafted a message describing the New York State Bar Association's considerable advocacy activities. However, I awoke this morning to the news of yet another mass murder, this time in Christchurch, New Zealand, where at least 50 people were murdered and scores more injured, some critically, in a massacre at two packed mosques during Friday prayers. To add to the madness, the gunman, who is reportedly in his late 20s, live-streamed the carnage on social media and according to news reports, stated that there were so many people he didn't need to aim. So, instead of my message about NYSBA's advocacy, I feel compelled to share some thoughts in light of the horrific indiscriminate and brutal slaughter of those innocent worshippers.

Hate crimes have become so commonplace that we just say, "How awful," and then, in a short time, go on about our business, without considering the societal implications. There is a dangerous and malignant virus that does not discriminate and appears to be getting worse. Yesterday (March 15), 50 Muslim worshippers were massacred in Christchurch, New Zealand. Not long ago, 11 Jewish worshippers were slaughtered in Pittsburgh. Six Muslim worshippers were murdered in Quebec City. Nine African American worshippers were murdered in Charleston. Six Sikh worshippers were massacred in a Wisconsin temple.

Hate crimes are on the rise everywhere. Despite Justice Department data confirming the rise of white supremacy-fueled hate crimes, President Trump states that white nationalism is not a growing threat. In fact, commenting on the carnage in Charlottesville, our President failed once again to distinguish between hatemongers and those who stood against hate when he stated that there were "very fine people on both sides."

Are we so mesmerized – or turned off by – the psychodrama in American politics that we do not pay sufficient attention to what's happening to our values and the dangerous trends in our society? Is it possible that many are complacent because the economy appears to be strong, unemployment is relatively low, and 401k accounts are doing well? Perhaps as psychological self-defense, have we become hardened to the barrage of hate crimes and senseless violence that plagues us? It certainly seems that we pay little more than passing attention to them, just as we pay little attention to the decline of constitutional democracies around the globe. We ignore the vacuum created by America's retrenchment that began with the end of the Cold War and has accelerated with the current administration in Washington. And we do this all at democracy's peril. I believe that insensitivity to the profound danger of hate crimes, anti-Semitism, Islamophobia, white supremacy and anti-LGBT bias is related to the decline of social and constitutional norms.

It doesn't take a political scientist to recognize the growing threat here in America. Despite our President's assertions to the contrary, the evidence is overwhelming that white nationalism is growing, and that social media has greatly enhanced its viral nature. It also doesn't take a political scientist to recognize that as white nationalism has gained strength, so too has democracy's greatest enemy, authoritarianism.

As I have searched for answers, I have found myself reading again some of the source material for this great exper-

iment, our constitutional democracy. Thomas Paine's *The American Crisis,* a series of articles written during the Revolutionary War, are relevant today. George Washington found the first article, dated December 23, 1776, so inspiring that he had it read to his troops shortly after a series of retreats by Washington's revolutionary forces. It begins with the oft quoted words:

> These are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands by it now, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered . . .

These words are as relevant today as they were in 1776; these are indeed the times that try one's soul – these are no ordinary times.

In Paine's fourth article in the series, he begins with the observation that,

> Those who expect to reap the blessings of freedom must . . . undergo the fatigue of supporting it.

As I re-read those words recently, I was reminded of Andrew Jackson's *Farewell Address*, in which he admonished:

> But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing.

Jackson warned of the danger of complacency, that liberty can be lost, that it is neither eternal nor is it inviolable once achieved.

I have previously written about the dangers of irresponsible language and the general decline of civility. I have also discussed the coarsening of the public discourse and noted that many political and thought leaders over the years, including John McCain, Samuel Johnson, William Penn, George Washington, John F. Kennedy, and even Mike Pence, have written or spoken about the value and importance of civility. I have implored you – in your communities, your homes, your workplaces, your places of worship – to deliver a message of civility. As witnessed by current events, the absence of basic civility and respect is profoundly dangerous.

But what to do? Preaching the gospel of civility isn't enough. As Thomas Paine states in the fourth article in *The American Crisis*:

> . . . it is folly to argue against determined hardness; eloquence may strike the ear, and the language of sorrow draw forth the tear of compassion, but nothing can reach the heart that is steeled with prejudice.

Perhaps Paine is correct. However, maybe we can reach the minds of prejudiced people, even if we cannot reach their hearts. How our leaders conduct themselves matters, what they say matters. They can discourage people from acting upon prejudice rather than ignoring or encouraging division and prejudice.

Whether inspired by white supremacy, anti-Semitism, anti-Muslim bigotry, racism, or xenophobia – or a combination – hate crimes are increasing exponentially, both here in America and around the world. Those who argue that there is no relationship between the President's rhetoric and this alarming trend are simply burying their heads in the sand. In the Christchurch murderer's lengthy manifesto, he hailed Trump as "a symbol of renewed white identity and common purpose."

We members of this great and noble profession have a moral responsibility to advocate effectively and insist upon a commitment to minimum standards of decency. We must demand of all of our elected leaders that when there is intolerance or violations of social norms, they must denounce them in clear and unambiguous terms. From our elected leaders to our friends, neighbors and families, we must set the example by word and deed and accept nothing less than adherence to basic civility, common courtesy and respect.

I urge you to be a part of the solution by leading in your communities and spreading a message of civility and respect for the rule of law, the beating heart of our constitutional democracy. But more importantly, I urge you to use your considerable influence in your communities to demand that our political leaders speak out forcefully against intolerance whenever and wherever it appears, for the future of this constitutional democracy demands it.

MICHAEL MILLER can be reached at mmiller@nysba.org

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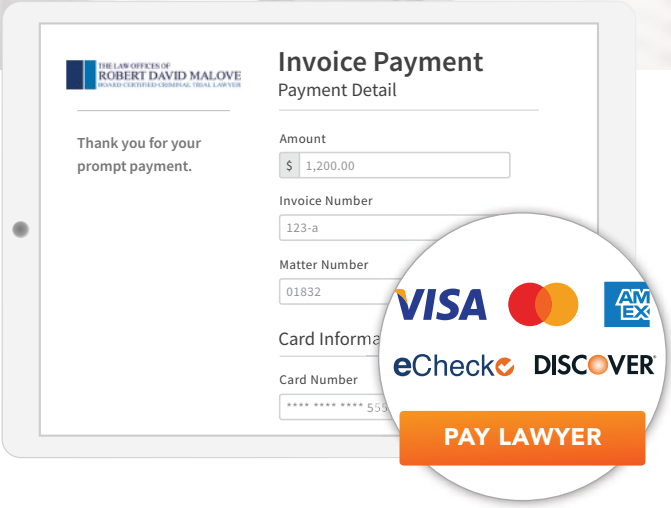

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Estate Planning to Protect Children of Divorce

by Vincent L. Teahan

INTRODUCTION

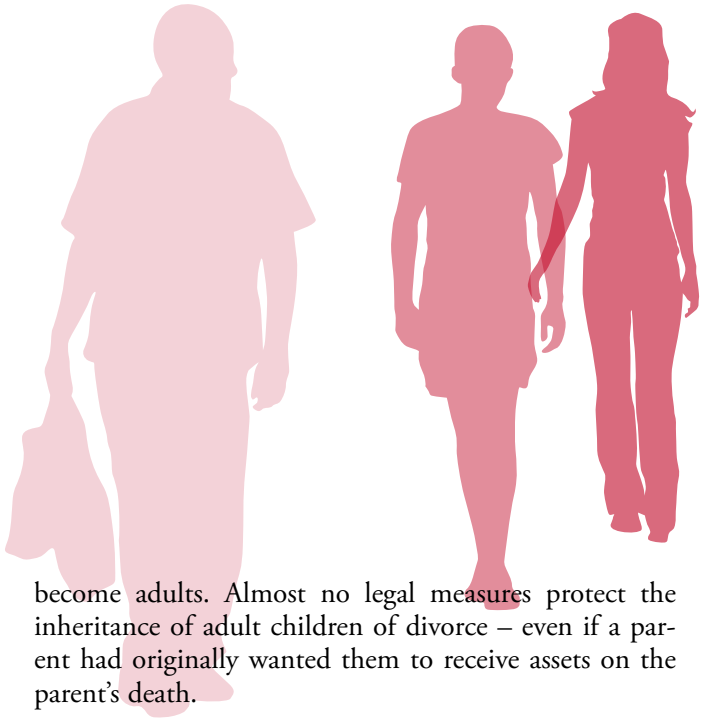
Upon the death of one or both parents, adult children of divorced parents all too often find that, despite expectations – and maybe assurances – they have inherited nothing, or very little. The parent (usually the father) may not have intended to disinherit his[1] adult child. The parent may have initially, years back, fully planned to leave assets to children from the first marriage.

What happened? And what can the legal profession do about it? As it turns out, there are specific steps attorneys, particularly those in the matrimonial and estate planning areas, can take to assist divorcing parents who wish to safeguard a future inheritance for their children despite their remarriage.

The impetus for this article comes from the increasing number of representations our office has handled that involve disinheritance problems of blended families. Typically, the prospective client is an adult child from the decedent's first marriage who comes to us after their parent or stepparent has died. The child has received little or nothing of an expected inheritance. We have found, in a number of cases, that there was little that we could do to improve the child's situation. As with many estate planning complications, such problems could have been easily dealt with before the parent's death. Afterward, however, it is often too late to find a cure for the disinherited client.

There is more than a little urgency here. The U.S. population is aging.[2] The rate of divorce has generally evened out in the United States. The major exception is in this aging population over 50 where the rate doubled between 1990 and 2010.[3] Not surprisingly, there is a concurrent rise in late-life remarriage.[4] The number of adult children impacted by these demographic changes is large and getting larger. Add that many in the younger generation are struggling to build wealth in the new globalized economy. More than ever in the past, family inheritance is key to maintaining their [childhood] standard of living. We are mindful that most families have little to leave children these days, particularly after the expenses of protracted old age. Still, millions of property owners are going to have trillions of dollars to bequeath over the next 20 to 30 years. The question of who is going to receive these bequests will become increasingly urgent.

Unintended disinheritance can often be traced back to the parent's failure to protect their adult children upon the parent's divorce or during remarriage. We distinguish adult children here from minors. Inheritances for minor children of divorcing parents are frequently protected by provisions in a separation agreement or divorce decree that require parents to make life insurance (or testamentary) provisions for children under age 21. However, these protections for children usually end when they become adults. Almost no legal measures protect the inheritance of adult children of divorce – even if a parent had originally wanted them to receive assets on the parent's death.



Under New York law (and that of many other states), children have no inheritance rights that a parent cannot defeat by executing a will, or other equivalent nontestamentary measures or property-holding devices like revocable trusts, joint accounts, life insurance or IRA designations.[5] By contrast, other legal systems, particularly in Civil Law, provide for forced heirship that gives children largely indefeasible legal rights upon the death of a parent.

A separation agreement can require a parent to leave assets to children of the first marriage. However, several factors may prevent this from happening. First, parental non-performance of legal inheritance obligations is often not enforced. This is especially likely because the children of the first marriage may not know about, or have access to, their parents' divorce documents. In addition, despite a divorce agreement stipulating inheritance to their children, legal and/or moral obligations to a new family (including a new spouse, children born of a second or subsequent marriage, and stepchildren of a new spouse) can gain precedence over the parent's previously strongly felt obligation to his children from his previous marriage. In some cases, disinheritance may result from incompetence or inattentiveness rather than malice on the part of a child's divorced parent. In other cases, a father's new partner may feel protective of her family over her husband's previous family.

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THE "TYPICAL" DIVORCE/REMARRIAGE PROBLEM

"Every unhappy family is unhappy in its own way," wrote Tolstoy, beginning *Anna Karenina* – where the main characters did not divorce. A lot fewer magazines would be sold, and websites clicked, if children could not complain about how they were abandoned by divorcing parents or mistreated by stepparents (especially stepmothers). There are frequently primal forces that can keep so-called "blended families" divided.[6] Questions concerning family inheritances confront divorced and re-coupled families with powerfully divisive forces.[7]

While we acknowledge that no situation is typical, the following fact pattern is commonly encountered by attorneys: A child's father and mother have divorced, and the child's father, sooner or later, has remarried a second wife who may (a) be younger (at times considerably so) than the child's father, (b) have children of her own from an earlier marriage (stepchildren) and/or (c) the father and new partner go on to have children together.

Marriages generally begin with the best of intentions. Perhaps because of this, property dispositions by spouses in these second (and third) marriages are often not specified in a pre-nuptial agreement. Over time, a second marriage can involve the increased mutual support obligations of the spouses toward each other. Property is titled in joint names. The designation of pension rights, by law, under the Retirement Equity Act of 1984,[8] beneficiary designations made on life insurance policies and other sometimes gradual shifts of property rights and asset ownership may combine to secure a stepparent with all of, or a substantial amount of, the assets that the child of the first marriage would consider the due inheritance of the "first family." The spouses in the second marriage often avoid the question of prior children, assuring each other that "Each of us will take care of the kids, and the other's kids, just like they are our kids."[9]

But later, due to all of the factors above, when the father of children from the first marriage dies, the second spouse/stepmother inherits all or nearly all of his substantial assets. If the deceased father was 80 on his death, and the second spouse/stepmother is 70, the deceased father's children could be 45 to 55 years old. In many cases such disinheritances occur at a time when adult children are paying their own children's (deceased dad's grandchildren's) college tuition, or encountering a "wake up" time for adult children to begin thinking about their own retirement. Nevertheless, in many cases, even when there were substantial assets, no inheritance passes to the child.

The relationship of the second spouse with her stepchildren, the children of her spouse's first marriage, is likely weaker than that with her own children. Her own children are also likely to be less established in life than her older stepchildren. Additionally, the second spouse may have sacrificed some of her career earning potential to care for the second spouse, and with this, may legitimately feel entitled to a measure of security. She may be worrying about how to finance her own impending old age – a significant problem when Americans are living longer and longer.[10] An impressive pot of money at age 65, not increased by earnings from employment or by capital appreciation, can dwindle substantially if the owner lives to be 95. Nursing home and end-of-life care expenses only worsen this problem.

Pre-nups are often experienced as an expression of lack of trust in the new relationship. We perhaps need to reframe pre-nups as basic protection for adult children of the first marriage.

Whatever the parent and stepparent's justifications, rationalizations and wishful thinking, the adult children of a parent's first marriage find themselves getting little or nothing on the death of their remarried parent, or on the later death of their stepparent.

NEW YORK PARENTS CAN DISINHERIT CHILDREN

A child of an intestate parent – even a remarried one – has the right to inherit in New York under the laws of descent and distribution.[11] Often, however, this inheritance right can get vastly diminished, usually by "asset drift" to the second spouse through non-probate property such as joint tenancy/tenancy by the entirety, pension designations (as discussed above under the Retirement Equity Act of 1984), IRA designations, and life insurance. The longer a second or subsequent marriage endures, the greater this potential asset drift occurs toward the second spouse (and her progeny), and away from the children of a prior marriage. As a result, the inheritance rights of an adult child all too often turn out to be virtually worthless.

LEGAL REMEDIES TO PREVENT DISINHERITANCE

Time-honored legal measures exist to secure children's rights in the estates of remarried parents, while providing a stepparent with lifetime use of property. This can often involve a parent's creation of a lifetime trust for a

surviving spouse, who is frequently the stepparent of the children of the first marriage. Prominent among these types of trusts used to protect children of a prior marriage was the so-called "QTIP trust,"[12] at least before the introduction of a much higher estate tax exemption reduced the need of the predeceasing spouse to obtain the marital deduction, but it can be any trust where the remainder is paid to the children (typically of a prior marriage) on the death of a stepparent.[13]

But while the child's remainder interest in any trust for a surviving stepparent has been secured, it's also a future interest – and may only be paid out to the child far into the future, given today's lifespans. Furthermore, the child of the first marriage must outlive the stepparent. In the interim, adult children of the first marriage cannot take effective steps to make use of their economic interest, as the remainder interest in the trust may be impossible to assign.[14] Even if legally assignable, it may only bring a paltry price. Often the children of the first marriage and the second spouse may not be that far apart in age: This may significantly reduce the present value (to children of marriage one) of the remainder interest of a trust. For example, if a 50-year-old child survives a recently deceased 80-year-old father, the present value of his or her remainder interest in a $1 million trust upon the death of his or her 70-year-old stepmother[15] is $641,240 – significantly less than the full value.

Again, even a secure trust remainder interest isn't something a child can trade for cash, especially if the trust contains a spendthrift provision preventing assignment of the principal (remainder) interest. This means that the adult child-remainderman can't realistically hope to pay his children's college tuition with a remainder interest in a trust created by his parent for his stepparent.

PREVENTATIVE STEPS

Divorcing or divorced parent's lawyers have a major role to play in keeping the children of the marriage from going down the subtly relentless path toward disinheritance. There are a number of specific steps lawyers can take here. These include:

Upon Divorce

Provisions That Protect Children: Protections may include the customary provisions negotiated to provide support until age 21, including life insurance or testamentary provisions that the parents are supposed to provide for minors. These agreements should also include provisions that will protect children *after* they become adults.

Effective Use of Life Insurance

First, let's discuss provisions that are frequently used to supply life insurance protection for children until age 21, or older, as a buttress to the divorcing parent's child support obligations. A typical clause may provide, as follows:

> **VI. Life Insurance**: The parties represent that they currently are the owners of the following life insurance:
>
> JOHN: Northwestern Mutual $ 500,000.00
>
> MARY: Northwestern Mutual $ 500,000.00
>
> The parties agree to maintain the above listed coverage or its equivalent, naming the children as beneficiaries and the other party as trustee until such time as the youngest child reaches the age of 21 and until all maintenance and child support obligations contained herein have been satisfied.
>
> Each party shall provide annual proof to the other that such insurance is in full force and effect, with all premiums paid up-to-date and no liens thereon, at least annually. Each party consents to the inclusion of a decretal paragraph or separate life insurance order being entered at or after the time the divorce decree is entered.
>
> In the event that either party shall fail to make the designations specified herein, the parties agree that their children shall have a claim against the decedent's estate in the amount that they would have received had this designation been properly carried through. The children shall additionally have a claim against the estate for any expenses incurred in order to effectuate this paragraph of the agreement.

This clause provides the children with some protection, through both mandatory, annual disclosure of premium payments and an enforcement mechanism (a claim against the estate of a non-compliant parent). But such protection can prove illusory if the parent seeking to protect the children does not insist on annual disclosure and the parent who is obligated to keep the policy in effect dies without having done so. While a claim would lie against the obligated parent's estate – for $500,000 in this case – what happens if there are insufficient assets in the obligated decedent's estate with which to pay the children? For example, the assets of the since-remarried parent might consist of a heavily mortgaged house (owned as tenant-by-the-entirety with the second spouse, a pension (statutorily creditor-proof) and life insurance (the proceeds and avails of which are exempt from creditors).[16] Under this scenario, the estate of the defaulting deceased parent may not have the assets with which to satisfy a judgment in favor of the disinherited children of the first marriage.

Additionally, the surviving parent must be able and willing to pursue enforcement because minor children are unlikely to know about the terms of their parents' divorce. (This raises the importance for lawyers to encourage divorcing parents to share the financial details of divorce agreements when children turn 21.)

I have encountered the fact pattern discussed above. The obligated parent dropped insurance coverage a few years before death, leaving nothing to the minor children of the first marriage.

Possible solutions:

1. When executing divorce agreements, insist that the policies are held by a third-party trustee. Because that trustee would have received notice that premiums were due, the defaulting obligated parent would not have been able to drop insurance coverage.
2. Alternatively, lawyers should require in the separation agreement that both divorcing parents receive notice of premiums due.

2. "Most Favored Nation" Clauses or Guaranteed Shares of Parent's Estate: Include provisions in separation agreements that stipulate that a parent shall treat children of the first marriage no less favorably than any child born thereafter. These provisions will apply to children even after attaining adulthood, as they will bind the divorced parent for his or her lifetime. These provisions should be drafted not only to cover a parent's will, but also to prevent him or her from avoiding his or her obligation through creation of testamentary substitutes including a funded revocable trust, which could undermine the children's estate interests. Again, lawyers need to encourage clients to make their children aware of such requirements so they can bring enforcement proceedings, if necessary.[17]

The "poorer spouse" should try to get such a provision included in a separation agreement to bind the richer spouse to take care of the children. Such a provision should cover any will, revocable trust, or other testamentary substitute that the richer spouse might try to use to try to defeat the provision requiring equality. Consider with your clients including in their separation agreement a provision under which the children of the marriage (upon attaining adulthood, if they are minors at the time of the parents' divorce) receive formal notice of their right to receive an inheritance/life insurance from a parent.

It should also be noted that unwritten promises to make will provisions may be well-meaning but are often legally worthless.[18]

Steps Lawyers Can Encourage After a Parent Divorces but Before Contemplated Remarriage

Lawyers have a role to play in educating clients to prevent accidental/inadvertent disinheritance by omission or "asset drift." Matrimonial and estate lawyers can begin educating clients about many of these moves at the time of divorce. Lawyers may want to consider educating mortgage and other financial professionals about the serious property consequences that can follow the signing of seemingly routine papers like bank signature cards, insurance beneficiary and transfer on death designations, and the like.

1. Protect Children by Not Remarrying: Divorced parents who want to protect property for their children and who have "significant others" should consider informal living arrangements instead of marriage. The social stigma formerly attached to cohabitation has been greatly reduced in recent years. Rates of cohabitation without marriage and "Living Apart Together" in a committed relationship are rising in the U.S., and are especially high in later-life recouplers.[19] Marriage still entails, among other things, an obligation of mutual support on the spouses.[20] This support obligation can, especially over time, jeopardize the assets of even well-off remarrying persons, particularly given the costs and risks of long stays in assisted living or nursing home facilities. Without remarriage, there are no such legal obligations in New York, at least.[21] Thus, persons considering remarriage should, in particular, consider the potential loss of assets to health care expenses of a second spouse (the stepparent of his children of a prior marriage).[22]

2. Encourage Remarrying Clients to Execute Prenuptial ("Pre-Nup") Agreements to Protect Children's Legacies: Few divorced parents execute prenuptial agreements before they remarry. One of the principal purposes in seeking a pre-nup is to avoid both New York's elective share right in a surviving spouse[23] and, to a lesser extent, the provisions to provide exempt property[24] for a surviving spouse. However, pre-nups might also serve as an

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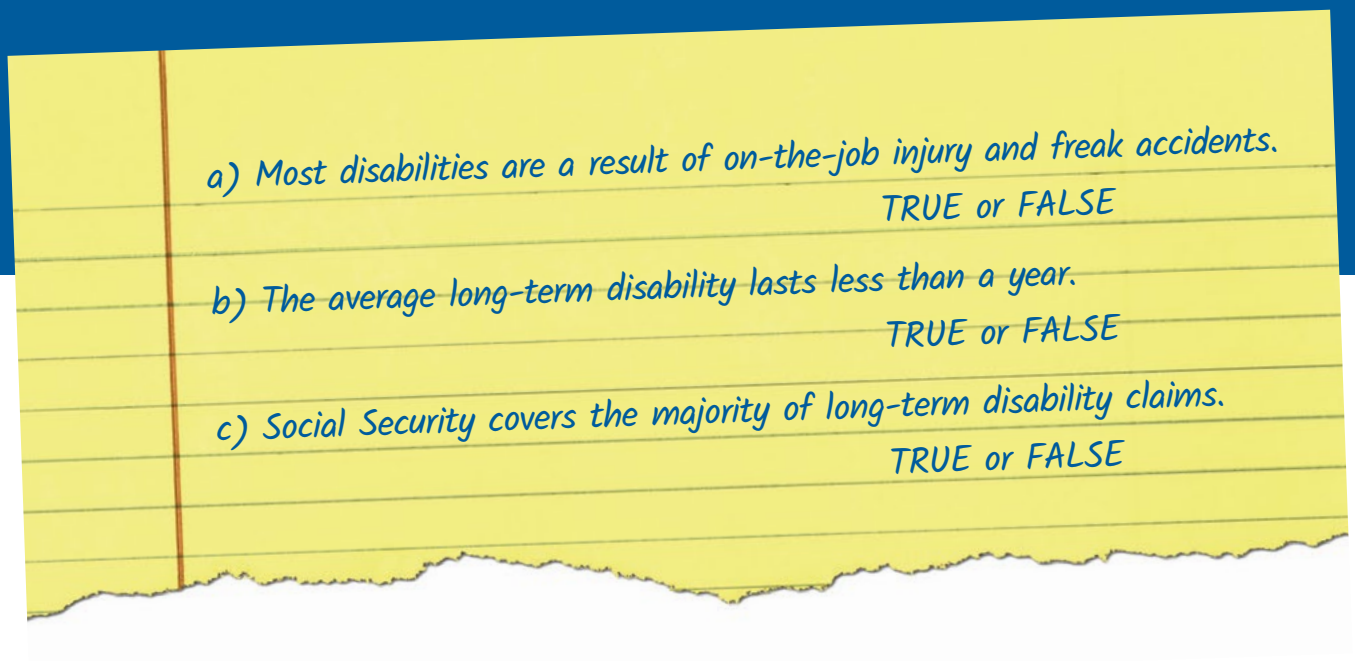

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a) Musculoskeletal disorders and illnesses such as heart attack, cancer, and diabetes cause the majority of long-term disabilities, not freak accidents or injuries.[1]
b) 64% of initial Social Security Disability claims applications were denied in 2018.[2]
c) The duration of the average long-term disability claim is nearly 3 years (34.6 months.)[3]

[1,2] https://disabilitycanhappen.org/disability-statistic/ updated March 2018
[3] https://disabilitycanhappen.org/overview/ viewed Feb 2019

*Contact the Administrator for current information including features, costs, eligibility, renewability, exclusions and limitations.

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opportunity to (a) send a signal that property is to be kept separate, and that joint tenancies with a right of survivorship, and tenancies by the entirety (both of which shunt property away from the children of a previous marriage) are to be avoided except where specified in the agreement, (b) set expectations about expenses, including the possible costs of insurance coverage on the remarried parent of children, (c) set expectations that the remarried parent plans to bequeath significant assets to children upon his or her death, so that those children do not have to await the death of their stepparent.

Pre-nups are often experienced as an expression of lack of trust in the new relationship. We perhaps need to reframe pre-nups as basic protection for adult children of the first marriage.

Planning Considerations to Protect Children for Parents Who Have Remarried

1. Post-nuptial (Post-Nup) Agreements should be considered to stabilize clients' property holding regimes, especially where the spouses both have children from previous marriages and have not previously executed an antenuptial agreement, but own significant nontestamentary property (such as real estate held as tenants by the entirety, pension rights, and the like). Otherwise, a stepparent, merely by surviving, could gain complete control over all jointly held real estate and be in a position to leave all such property to his or her own children, to the exclusion of the other parent's children. Post-nups can require the break-up of residential real estate held as tenants by the entirety, and its conveyance to separate trusts, designed to protect the interests of each spouse's respective family while permitting a surviving spouse to occupy the residence until its sale.

   It has been my experience that these agreements can be negotiated on an amicable basis. After all, they protect both spouses, and their children, from arbitrary distribution of property based on which spouse dies first. Additionally, it is important to educate clients that these agreements can be made to deal solely with estate rights. They don't have to get into ticklish matters like disposition of property in the event of divorce. Of course, post-nups varying the spousal right of election have to be formally executed.[25]

2. Waiver of Elective Share Rights After Pre-nup is Ripped Up. Some remarried couples consider themselves happy enough to want to cancel the agreement they executed. Despite the urge to rip up a pre-nup, there is no reason why the parties have to cancel the agreement in its entirety. For example, spouses who are secure in their second marriage can get rid of the uncomfortable provisions of an existing pre-nup that discuss property division and maintenance upon divorce, but still execute a new, limited agreement designed to waive the elective share and/or other estate rights of the parties under EPTL 5-1.1-A – often in return for alternate bequests that are less costly than payment of the elective share would be to the predeceasing spouse's estate.

3. Avoid Nontestamentary Property Regimes that undercut inheritance for children. Real estate brokers and mortgage lenders need to educate remarried parents about how to exercise care before creating any tenancy by the entirety, joint property account with rights of survivorship and other non-probate holding devices or beneficiary designations. A parent's lack of knowledge here – frequently fostered by non-lawyer "advisors" – can partially or completely undercut a parent's plan for his or her children from a first marriage. As pre-nups frequently contain a provision that allows the spouses to make provisions for each other that are more generous than those required under the agreement, remarried persons should exercise special care when, for example, a spouse or the spouses buy(s) valuable real estate after their marriage. Here, they would do well *not* to title the real estate such that the survivor will take all.

4. Purchase of Long-Term Care Policies by remarrying spouses to cover against loss of property to nursing homes, thus protecting a parent's assets for children. That said, these policies are expensive and not everyone can qualify to buy one.

5. A Hard Look at the "Time Value of Money" After Remarriage: The client may have married a second wife who is much younger than he and not have entered into any agreement with her as to the disposition of property. It is important to educate clients to understand that any bequests he might make to his children taking effect upon the death of their stepmother, may have little value to his children. Indeed, the problem goes beyond a low present value for children because the children may *never* receive bequests after the death of a stepparent, as they may predecease her. It does not make great economic sense for a 75-year-old child to inherit property upon the death of a 90-year-old stepmother.

6. Consider Buying Life Insurance. One solution to this problem of colliding imperatives (the client's need to take care of the spouse, while making reasonable provision for children of a first marriage) is through the purchase of life insurance, payable to children of the first marriage upon their parent's death. Life insurance is also not a "testamentary substitute" for purposes of the surviving spouse's elective share.[26] This means that 100 percent of the insurance proceeds can be paid to the children, even if there is a surviving spouse.

7. Use Trusts to Plan Bequests for Parents of Divorced Children: Well-off parents of a divorced child (who is the parent of the family's grandchildren) should consider leaving property in trust, rather than outright, for the divorced child – so that family property can be protected from leakage to stepfamilies. An outright bequest to a divorced child could ultimately produce an asset over which a remarried child's surviving spouse (who is not the parent of the family's grandchildren) will have an elective share claim. A trust for the remarried child renders this problem moot. A secondary benefit of this approach is the asset protection offered by fully discretionary "sprinkle" trusts. Such trusts are designed to be free of Medicaid reimbursement claims. Also, sprinkle trusts can allow the trustees to pay income and principal currently to grandchildren, besides the married child.

8. Encourage Former Spouses to Coordinate Estate Plans. It makes sense for the divorced parents of children/grandchildren to coordinate their estate plans, so they can agree, to the greatest extent possible, on provisions for children, appointment of trustees, etc. It helps if ex-spouses share information about their estate plans. Here, divorced and remarried parents can thereby avoid a worst-case situation where one ex-spouse leaves minimal bequests to children of the first marriage, because he or she thinks the other ex-spouse will take care of them.

CONCLUSION

Unfortunately, the estate planning problems of blended families are not receding. A 2013 study by the Pew Research Center that 67 percent of previously married 55-to-64-year-olds have been (or are) remarried. For Americans over age 64, the figure is 50 percent.[27]

As I have observed in practice, even sophisticated clients often have no knowledge of the legal effect remarriage and nonprobate transfers can have on future legacies to their children by a prior marriage. The increasing number of families that face these problems would do well to engage attorneys to help them sooner, rather than later, in dealing with the complex estate planning issues connected with remarriage. This could potentially avoid the legal expenses of a will contest of a disinherited child. Consistent with this, matrimonial attorneys in particular are in a good position to raise these questions early when a client is considering a divorce or a remarriage.

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1. Throughout this article I have deliberately chosen to use "he" as the generic pronoun for the spouse disinheriting children from an earlier marriage. Based on my professional experience, the problem explored in this article most often concerns fathers whose estate planning does not provide for children of first marriages.

2. Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060* 12 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

3. Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990–2010*, 67 Js. of Gerontology Series B: Psychol. Sci. & Soc. Sci, 731, 735. (Nov. 1, 2012) https://doi.org/10.1093/geronb/gbs089.

4. Susan L. Brown & I-Fen Lin, *Age Variation in the Remarriage Rate, 1990-2011*, National Center for Family & Marriage Research (2013), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-13-17.pdf.

5. There is also the small exemption available under the New York Estates Powers and Trusts Law 5-3.1 (EPTL) for children under age 21, where there is no surviving spouse. Most separation agreements/divorce decrees at least make provision for bequests to minor children of the marriage of divorcing couples if a parent dies leaving minor children. Again, the problem of inadvertent disinheritance predominantly arises with respect to adult children.

6. For the definitive work on family instability in America, see Andrew J. Cherlin, The Marriage-Go-Round: The State of Marriage and the Family in America Today (2009).

7. Patricia L. Papernow, Surviving and Thriving in Stepfamily Relationships: What Works and What Doesn't (2013); Patricia L. Papernow, *Therapy with Clients in Stepfamily Relationships: What Individual, Couple, Child, and Family Therapists Need to Know*, 57 Family Process 25 (2018).

8. "The Retirement Equity Act of 1984 (REA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to introduce mandatory spousal rights in pension plans so the choice of the form of benefit received from a pension plan was no longer solely the participant's choice. REA's legislative history shows that Congress viewed the marriage relationship as a partnership, and the retirement benefit resulting from that partnership as derived from the contributions of both partners. Before REA, the spouse of a plan participant had very few rights to share in that participant's pension benefit." IRM § 4.72.9.1.1(5) (2018), https://www.irs.gov/irm/part4/irm_04-072-009.

9. See Patricia L. Papernow, *Recoupling in Mid-Life and Beyond: From Love at Last to Not So Fast*, 57 Family Process, 51, 55 (2018) for a discussion on the difficulties that especially late-in-life stepparents face.

10. Colby & Ortman, *supra* note 2, supra.

11. EPTL 4-1.1(a).

12. "Under [pre-1982] law, the [estate tax] marital deduction was available only with respect to property passing outright to the spouse or in specified forms which gave the spouse control over the transferred property. Because the surviving spouse had to be given control over the property, the decedent could not insure that the spouse would subsequently pass the property to his children." Joint Committee on Taxation, General Explanation of the Economic Recovery Tax Act of 1981, 233 (Dec. 29, 1981).

13. QTIP "marital deduction trusts" are enabled by § 2056(b)(7) of the Internal Revenue Code of 1986, but non-marital and "credit shelter trusts created by the estate plan of a parent can also benefit the stepparent for life, with remainder to children of marriage of the first marriage.

14. Besides the statutory "spendthrift" protection for income interests under EPTL 7-1.5, trusts frequently provide that principal interests may also not be assigned. *See* Raymond C. Radigan, *Using New York Trusts for Asset Protection*, 4, https://cdn.ymaws.com/www.epcnyc.com/resource/resmgr/EPD_2015/New_Yorkers_Handout.pdf

15. The remainder value is $641,240, from IRS Publication 1457, Table S, using the applicable Federal Rate of 3.4% effective for October, 2018. (Note also that the remainder value for a 60-year-old stepmother is $513,920.) These IRS charts, while updated, still have not kept up with the remarkable increases in the life expectancy, particularly of well off, well-educated Americans. If you are a remainderman of a trust with a healthy 70-year-old stepparent as income beneficiary, you can plan on waiting a long, long time before you see the principal paid to you.

16. N.Y. Ins. Law § 3212(b)(1).

17. In *In re Wenzel*, the Appellate Division dealt with an attempt of a divorced father to avoid a Will provision (required by a Separation Agreement) to equalize the daughter of the first marriage with any later children. 85 A.D.3d 563, 564 (1st Dep't 2011). The Court enforced an equal division of the decedent's residuary estate. *Id.*

18. Under EPTL 13-2.1, any agreement or promise to make a testamentary provision is unenforceable unless it is in writing and subscribed by the person against whom it is to be enforced (though persons who actually provide services, especially care, can be compensated for same). EPTL 13-2.1.

19. Jacquelyn J. Benson, *Living Apart Together*, in The Social History of the American Family: An Encyclopedia 818–820 (Marilyn Coleman & Lawrence H. Ganong, eds. 2014); Susan L. Brown & Sayaka K. Shinohara, *Dating Relationships in Older Adulthood: A National Portrait*, 75 J. of Marriage & the Fam. 1194–1202 (2013).

20. N.Y. Fam. Ct. Act § 412.

21. Claims for "palimony" and to impose constructive trust can, however, apply in other states.

22. *See* Anthony J. Enea, Esq., *Are You Absolutely Sure You Want to Get Married/Re-Married?*, https://www.esslawfirm.com/Articles/Are-You-Absolutely-Sure-You-Want-to-Get-Married-Re-Married.shtml.

23. EPTL 5-1.1-A.

24. EPTL 5-3.1.

25. EPTL5-1.1-A(e)(2).

26. *In re Boyd*, 161 Misc. 2d 191, 197 (Surr. Ct., Nassau Co., 1994).

27. *See* Gretchen Livingston, *Chapter 2: The Demographics of Remarriage*, Pew Research Ctr. (Nov. 14, 2014), http://www.pewsocialtrends.org/2014/11/14/chapter-2-the-demographics-of-remarriage/.

Redefining Family in New York

By Lewis A. Silverman

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Our original social construct of family is that each child has two parents: a biological mother and a biological father. Permutations have been recognized, including stepparents, adoption, and single-parent households. But the concept of redefining "family" in New York has been evolving for at least 30 years, especially as the gay rights movement picked up steam and with the recognition that a same-sex couple could not produce a child who is the biological product of both partners.

Both the legislature and the courts have participated in this evolution. Statutes originally conceived in a "male/female" parenting universe have been revised to apply to

same-sex couples. The courts have generally focused on three separate issues, although the cases tend to overlap in the factual and legal analyses.

The issues are: (1) redefining the word "parent"; (2) the presumption of legitimacy; and (3) the concept of equitable estoppel.

THE EARLY CASES

Both the N.Y. Court of Appeals and the U.S. Supreme Court established certain constitutional principles regarding accepted biological parentage, recognizing the judicial preference given to parents and why it becomes important whether an individual who is not biologically related to the subject child can be defined in a legally recognized parental role. The seminal New York case, *Bennett v. Jeffreys*, established that "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances."[1] This guiding doctrine informs much of the subsequent case law. While this case involved the attempt by a biological mother to reclaim custody of her child, the doctrine was subsequently expanded to preserve the rights of a biological father as well.[2] Finally, the U.S. Supreme Court, in *Troxel v. Granville*, elevated the previously established liberty interest of a parent to state that "[t]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[3]

Standing to seek custody and visitation in New York is granted by statute, Domestic Relations Law § 70(a), which allows for proceedings brought by a "parent." In 1991, the Court of Appeals was asked to expand the definition of parent to include the same-sex former partner of the biological mother, who was seeking standing for visitation as a "de facto" parent or "parent by estoppel."

In *Alison D. v. Virginia M.*,[4] the partners planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing. The baby boy was given the non-biological partner's last name as his middle name. Both parties shared in all birthing expenses and, after the child's birth, continued to provide for his support. During the child's first two years, both jointly cared for and made decisions regarding the child. Nevertheless, after a falling out, the Court of Appeals was unwilling to look beyond biology to establish any parental rights, stating:

> It has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity. To allow the courts to award visitation – a limited form of custody – to a third person would necessarily impair the parents' right to custody and control.[5]

Despite several years of being recognized as a co-parent by both the biological parent and the child, the Court of Appeals was unwilling to apply any doctrine of existing law or extend legal principles to this person, now relegated to the status of legal stranger to this child.

The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and the relevant adult rises to the level of parenthood. The focus is and must be on the child.

The *per curiam* decision by the Court of Appeals brought a blistering dissent from Judge Judith Kaye. She noted that the Domestic Relations Law did not define the term "parent" at all:

> The majority insists, however, that, the word "parent" in this case can only be read to mean biological parent; the response "one fit parent" now forecloses all inquiry into the child's best interest, even in visitation proceedings. We have not previously taken such a hard line in these matters, but in the absence of express legislative direction have attempted to read otherwise undefined words of the statute so as to effectuate the legislative purposes. The Legislature has made plain an objective in section 70 to promote "the best interest of the child" and the child's "welfare and happiness."[6]

Judge Kaye's words would echo in the future, but it would be a quarter of a century before her dissent would become the basis of a new majority opinion.

While New York was unwilling to extend the definition of parent in custody and visitation cases, other doctrines were being used to sometimes grant legal status to a non-biological "parent." The first case arose in 1995 when the Court of Appeals sanctioned adoption by a same-sex, non-marital partner who was not biologically related to the subject child.[7]

A separate line of cases developed through the doctrine of equitable estoppel. Simply stated, equitable estoppel prohibits a legal or biological parent from denying legally established paternity where it would work to the child's detriment. The doctrine of equitable estoppel has developed over the years to either prohibit a biological father

from asserting paternity where he allowed another man to establish a parent-child relationship with the child, or to prohibit the mother from denying paternity to a non-biological father who had developed the same kind of relationship. The doctrine finds its foundation in Article 5 of Family Court Act § 518. In one case the court found that, although the husband was not the biological father of the child, the child was born during the marriage, the husband was named as the child's father on the birth certificate, he was held out as the father for seven years, he established a strong father-daughter relationship with the child, he supported the child financially throughout the marriage, and he was the only father figure in the child's life, all with the wife's acquiescence. It was held that the father established a prima facie case to equitably estop the mother from denying he had standing for custody and visitation, but remanded the matter for a further hearing on the best interests of the child. The court distinguished *Alison D.* by saying the issue of equitable estoppel was merely brushed upon by the gay cohabitant and not decided by the Court of Appeals.[8]

The Court of Appeals accepted the doctrine in *Shondel J. v. Mark D.*[9] A legally established father was equitably estopped from denying paternity despite a genetic marker test precluding him. The Court of Appeals noted that paternity by estoppel, which had its origins in case law, was now a public policy choice made by the legislature, Family Court Act §§ 418(a), 532(a). The Court further noted that the child was the party denominated by the legislature whose best interests must be considered and the potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated.

The contrast between the Court of Appeals decisions in *Alison D.* and *Shondel J.* could not be more dramatic. Emotional support by someone who wanted to be recognized as a mother was denied, but the need for financial support was clearly accepted even by someone who did not wish to be a father. Perhaps because of this disconnect, in 2010 the Court of Appeals was asked to reconsider its ruling in *Alison D.* In *Debra H. v. Janice R.*,[10] the Court of Appeals majority adhered to its previous determination and declined the invitation to overrule *Alison D*. or to extend the concept of equitable estoppel from paternity to custody cases and again deferred to the legislature to establish a different policy regarding who may seek custody other than a known biological parent. "The Legislature is the branch of government tasked with assessing whether section 70 still fulfills the needs of New Yorkers."[11] Despite its refusal to formulate new law on the definition of parent, the non-biological partner was successful, and, in a twist worthy of Agatha Christie, the Court of Appeals granted comity to the Vermont civil union that had existed between the women at the time the child was conceived and found that the Vermont statute gave the non-biological parent rights to custody and visitation. Three of the seven judges concurred in the result but would have overruled *Alison D.* outright.

The legislature accepted the challenge. In June 2011, the elected representatives forever altered the existing paradigm of family definition in New York by adopting the Marriage Equality Act,[12] which redefined marriage in New York to include same-sex couples.[13] The new law went further by stating:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.[14]

Family redefinition was even accepted by the U.S. Supreme Court. In *Obergefell v. Hodges*,[15] the court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. The ruling required all states to perform and recognize the marriages of same-sex couples on the same terms and conditions of opposite-sex couples.

BROOKE S.B.

Responding to this new public policy, trial courts struggled with the inconsistency of *Alison D.* with the new statute. In 2016, the Court of Appeals finally resolved the inconsistency by overruling *Alison D.* Citing *Shondel J.,* the Marriage Equality Act, and *Obergefell v. Hodges*, the court found *Alison D's "*foundational premise of heterosexual parenting and nonrecognition of same-sex couples . . . unsustainable."[16] Finally accepting the premise in Judge Kaye's *Alison D.* dissent, the Court recognized the "disproportionate hardship on the growing number of nontraditional families across our state."[17]

The Court held that Domestic Relations Law § 70 permits standing to a non-biological, non-adoptive parent where there is clear and convincing evidence that the couple jointly planned and explicitly agreed to the conception of the child with the intention of raising the child as co-parents.[18]

The facts of *Brooke S.B.* were clear: a deliberate agreement by the two women involved to conceive and raise a child together. Their plan was executed, and they lived together as a family for several years before the relationship deteriorated. The Court had no problem, at least on summary judgment motion, in finding standing by the non-biological partner to seek visitation as a parent. The facts of the companion case, *Estrellita A.,* brought in

the estoppel cases and tied the concept to standing. In that case, there was also an agreement to raise the child together, which was executed. When the relationship ended, the biological mother sought and received an order of child support from the partner. Thereafter, when the partner sought visitation, the mother challenged her standing. Both the trial court and the Appellate Division found that, having accepted the partner as a parent to receive child support, the mother was now judicially estopped from denying standing. The Court affirmed, extending standing rules for paternity and support to custody and visitation.

The holding of *Brooke S.B.* was specifically limited to situations where there was an explicit agreement regarding future children of the relationship. The Court declined to go further, leaving it to lower courts to flesh out the parameters of these issues. This left many unanswered questions. Among the issues still to be resolved are the following:

- Must the agreement be in writing? Must it be subscribed?
- Can the agreement be made orally?
- Must it be made prior to conception? Can it be made at any time prior to litigation?
- Must the sperm/egg donor sign any agreement to waive parental rights?
- Can an agreement be made by conduct?
- Does an order granting standing for custody and visitation justify an order of filiation/parentage?
- Will equitable estoppel apply, especially against the biological parent?
- Does the presumption of legitimacy (DRL § 24) provide automatic standing to a spouse, regardless of any other factor?
- Can *Brooke S.B.* be extended to heterosexual couples?
- Can a child have more than two parents?
- What is a parent-like relationship?
- Will a New York-defined family receive interstate and international recognition?

THE APPLICATION OF *BROOKE S.B.*

Courts since *Brooke S.B.* are wrestling with several issues. On a factual level, what are the elements of proof necessary to establish standing? On a legal level, most consider *Brooke S.B.* a starting point, but not the final word, in redefining family. The cases specifically interpreting *Brooke S.B.* have also intersected with the cases examining the doctrines of equitable estoppel and the presumption of legitimacy.

Although decided just prior to *Brooke S.B.,* one case analyzed the legal and contractual nature of the relationship to find a mutual consent. The parties first entered into a registered domestic partnership in California in 2004 and married there in 2008. There were two children involved in the litigation, one born during the domestic partnership and one born during the marriage (an older child was adopted by the other partner). Because of the legal nature of the relationship the non-biological partner was presumed to be the parent of both children. The record reflected that the parties made an informed, mutual decision to conceive the subject children via artificial insemination and to raise them together.[19]

Several cases have specifically applied the holding of *Brooke S.B.* to determine whether standing exists based on the facts presented to the trial judge. In one, the domestic partner, whose sister was the surrogate who gave birth to both subject children, established by clear and convincing evidence that he entered into a pre-conception agreement to conceive the children and raise them together as parents.[20] In another, the former partner established that the biological mother acted as if the non-biological partner was a parent and acknowledged to all, including the petitioner and the children, that she was essentially a parent, and the biological mother and the children benefited from this parent-like relationship on a daily basis for years.[21] In several others, however, standing was not established. In one, the parties had legally separated prior to the child's adoption, thereby effectively nullifying any agreement. Further, the mother considered the former partner as a "godmother" to the child; the court characterized her as a "dear friend."[22] In another case, the applicant did not contend that the child referred to her as his mother, and she was not listed as a parent on school records or legal documents. Most importantly, after the mother was diagnosed with terminal cancer, she executed a will providing that others be appointed the child's guardians.[23] Finally, in an application to a heterosexual couple, the putative father did not prove that he and the mother agreed to conceive and raise the child together, or that the mother consented to the post-conception creation of a parent-like relationship between appellant and the child, or that he took steps to establish a parental relationship with, or to provide support for, the child.[24]

Other cases have assessed standing essentially as a question of law, rather than being decided on contested facts. In one case, the trial court essentially gave the child a father and two mothers, as the child had been raised by all three in an unconventional family relationship. The trial court found shared custody by the father and both mothers was in the best interests of the child, granting a tri-custodial arrangement, calling it a logical evolution of *Brooke S.B.* and the Marriage Equality Act.[25] In another case the parties, two men married to each other and the

biological mother, agreed to a tri-party custody arrangement, although no formal contract was executed. Many decisions were made jointly, but disputes inevitably arose. The trial court granted the non-biological father standing for custody and visitation, but did not grant an order of parentage as no paternity petition was filed. The court further held that, pursuant to *Brooke S.B.*, a party may seek custody and visitation as a "parent" under Domestic Relations Law § 70(a) without a determination that he is a legal parent.[26] This case raises interesting possibilities. It has generally been understood that an Order of Support against a non-spouse requires either an acknowledgment of paternity or an Order of Filiation.[27]

While much, if not most, custody litigation will continue to involve a biological mother and a biological father, new rules of standing are resulting in an increase in litigants being considered a parent despite having no biological tie to the subject child.

The same assumption has applied in custody/visitation litigation. The Family Court Act makes no provision for an order of "maternity" for a same-sex female partner or for a second male partner to receive an Order of Filiation if there is already a biological father who has not abandoned the child. The Marriage Equality Act, however, directs that all gender specific language be considered neutral, where necessary. What this case opens up is that the concept of parentage for custody and visitation may differ from the concept for child support, or even that rights and liabilities as a parent may be asserted without the establishment of any biological or formal legal ties.[28] *Estrillita A.*, the companion case to *Brooke S.B.,* is one such situation.[29]

PRESUMPTION OF LEGITIMACY AND EQUITABLE ESTOPPEL

Domestic Relations Law § 24 states, in part: "A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage . . . is the legitimate child of both birth parents."[30] The First, Second and Third Departments have now ruled that this presumption applies to same-sex married couples, even though one spouse cannot biologically be a parent of the subject child. In the first case, the biological father was trying to surreptitiously consummate a second-parent adoption by a non-spouse without notice to his spouse, but the trial court and First Department found material misrepresentations of fact and granted comity to their British marriage, thereby giving rise to the presumption that the child, born during the marriage, was the legitimate child of both spouses.[31] In another case the biological father sought to establish paternity and visitation against the biological mother and her same-sex spouse. The Third Department held that the presumption of legitimacy applied, finding that if the presumption turns primarily on biology rather than legal status, it would violate the state's strong public policy in favor of legitimacy and the dictates of the Marriage Equality Act. [32] The Second Department came to the same conclusion in a case with similar facts.[33]

Domestic Relations Law § 73 provides for the legitimacy of children born by artificial insemination. The statute requires written consent by both spouses[34] and that the insemination is performed by a licensed physician. Parties who are not married or do not utilize the services of a licensed physician are not barred from parentage standing, but this statute cannot be the vehicle for it.[35]

The doctrine of equitable estoppel is an alternate method of establishing parentage. Codified in the paternity statutes, the ultimate determination is based on the best interests of the child.[36] Since *Brooke S.B.*, equitable estoppel has been used, in conjunction with the presumption of legitimacy, to deny an interloper from asserting rights against the legal spouse. In two of the cases which also discussed presumption of legitimacy, *Christopher YY. v. Jessica ZZ. and Nicole ZZ.*, and *Joseph O. v. Danielle B.*, the Appellate Divisions first established the presumption of legitimacy in favor of the same-sex spouse, and then used the doctrine of equitable estoppel to preclude a genetic marker test by the non-spouse interloper, who was nevertheless presumably the other biological parent. In another case involving a heterosexual couple, the court did not allow the mother to apply the doctrine of equitable estoppel where the biological father had consistently and diligently asserted his paternity, attempted to visit the hospital in time for the child's birth, attempted to support the child financially, and commenced proceedings and consistently appeared in court by telephone or in person as he was able. By contrast, both the mother and her male partner (who was permitted to execute an Acknowledgment of Paternity) made repeated efforts to frustrate the petitioner by keeping the child's whereabouts from the petitioner and frustrating his legal efforts, including not attending court appearances in person or by telephone.[37]

Perhaps a fitting conclusion to this discussion is *K.G. v. C.H.*,[38] which added a new layer to the Domestic Relations Law § 70 standing analysis pursuant to *Brooke S.B.*

The court found that any agreement had terminated prior to the adoption of the child in question, but the First Department went on to analyze the non-adoptive parent's standing pursuant to equitable estoppel, noting that equitable estoppel requires careful scrutiny of the child's relationship with the relevant adult and is ultimately based upon the best interest of the child. In the context of standing under DRL § 70, equitable estoppel concerns whether a child has a bonded and de facto relationship with a non-biological, non-adoptive adult. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and the relevant adult rises to the level of parenthood. The focus is and must be on the child. The discussion in this case ensures that the consequences and ramifications of *Brooke S.B.* will be litigated for many years to come.

CONCLUSION

The socially constructed definition of "family" in New York, two biological or adoptive parents of differing genders, has been in flux for decades. The Marriage Equality Act and the Court of Appeals decision in *Brooke S.B.* have accelerated this trend, transforming the definition of family to include new permutations and considerations. While much, if not most, custody litigation will continue to involve a biological mother and a biological father, new rules of standing are resulting in an increase in litigants being considered a parent despite having no biological tie to the subject child. This trend can only continue to evolve as courts and legislatures weigh in on our social developments and look, ultimately, to what will be in the best interest of our children.

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1. *Bennett v. Jeffreys*, 40 N.Y.2d 543, 544 (1976).
2. *In re Raquel Marie X.*, 76 N.Y.2d 387 (1990).
3. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).
4. *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).
5. *Id.* at 656.
6. *Id.* at 659.
7. *In re Jacob*, 86 N.Y.2d 651 (1995).
8. *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282 (2d Dep't 1998).
9. *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006).
10. *Debra H. v. Janice R.,* 14 N.Y.3d 576 (2010).
11. *Id.* at 597.
12. 2011 N.Y. Laws ch. 95.
13. N.Y. Dom. Rel. Law § 10-a.
14. *Id.*
15. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
16. *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016); *Estrellita A. v. Jennifer L.D.,* 28 N.Y.3d 1 (2016).
17. *Brooke S.B.*, 28 N.Y.3d at 25.
18. *Id.* at 27.
19. *Kelly S. v. Farah M.,* 139 A.D.3d 90 (2d Dep't 2016).
20. *Frank G. v. Renee P.-F,* 142 A.D.3d 928 (2d Dep't 2016).
21. *J.C. v. N.P.*, N.Y.L.J. 1202799690525, at *1 (Fam. Ct. 2017).
22. *K v. C*, 55 Misc. 3d 723 (2017), *aff'd, K.G. v. C.H.*, 2018 N.Y. Slip Op. 04683 (1st Dep't 2018) (The First Department did, however, remand to develop a better record on the issue of equitable estoppel).
23. *Garnys v. Westergaard*, 158 A.D.3d 762 (2d Dep't 2018).
24. *In re Jaylanisa M. A.,* 157 A.D.3d 497 (1st Dep't 2018).
25. *Dawn M. v. Michael M.*, 55 Misc. 3d 865 (Sup. Ct., Suffolk Co., 2017).
26. *In re Raymond T. v. Samantha G.*, 59 Misc. 3d 960 (Fam. Ct. 2018).
27. N.Y. Fam. Ct. Act §§ 418, 542, 545.
28. *A.F. v. K.H.*, 56 Misc. 3d 1109 (Fam. Ct. 2017), where the court decided that standing as a parent pursuant to DRL § 70 did justify the entry of an order of filiation/parentage.
29. One commentator has suggested that the various "pathways to parentage" are not equal; Eric Wrubel, *The Hierarchy of Parentage: The Evolving Concept of Family in New York,* N.Y.L.J. June 18, 2018, https://www.law.com/newyorklawjournal/2018/06/18/061918ny_wrubel/.
30. N.Y. Fam. Ct. Act § 417 mirrors this statute "for all purposes of this article [Family Court Act Article 4]."".
31. *In re Maria-Irene D.*, 153 A.D.3d 1203 (1st Dep't 2017).
32. *Christopher YY. v. Jessica ZZ.,,*159 A.D.3d 18 (3d Dep't 2018).
33. *Joseph O. v. Danielle B.,* 158 A.D.3d 767 (2d Dep't 2018).
34. The statute refers to husband and wife but, if read in conjunction with the Marriage Equality Act, a fair reading should include same-sex spouses.
35. *Kelly S. v. Farah M., supra* note 19. One should also be reminded that "[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable." N.Y. Dom. Rel. Law § 122. This does not mean that one cannot be declared a parent of a child born pursuant to such a contract, just that another pathway to parentage must be utilized. *In re Adoption of J.,* 59 Misc. 3d 937 (Fam. Ct. 2018).
36. *Shondel J. v. Mark D.*, N.Y.3d 320 (2006).
37. *Michael S. v. Sultana R.,* NY Slip Op. 05404 (1st Dep't 2018).
38. *Kelly S. v. Farah M.*, *supra* note 19. *K.G. v. C.H.*, A.D.3d, N.Y. Slip Op. 04683 (1st Dep't 2018).

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Parental Representation: On the Brink of Reform

By Angela Olivia Burton

INTRODUCTION

Almost 50 years ago, in the pioneering 1972 case of *In re Ella B.*,[1] the N.Y. Court of Appeals recognized a constitutional right to publicly funded counsel for parents in child welfare proceedings. Three years later, in 1975, an expansive parental right to such counsel was codified in the Family Court Act.[2]

In her 2018 State of Our Judiciary speech, Chief Judge Janet DiFiore pointed out that the quality of parental representation has suffered from systemic deficiencies such as "excessive attorney caseloads, inadequate training, and insufficient funding for support staff and services."[3] Beginning the long overdue journey toward reform, the Chief Judge created the Unified Court System's Commission on Parental Legal Representation as part of her Excellence Initiative, which focuses on improving efficiency, providing high-quality justice services to the public, and supporting the substantive work of judges.[4] Under the leadership of Karen K. Peters, recently retired Presiding Justice of the Appellate Division, Third Department and former Family Court Judge, the Commission is charged with developing a plan to ensure the delivery of high quality, cost-effective parental representation across the state.

The Commission held four public hearings in the fall of 2018 and reviewed voluminous written testimony. Although its mandate covers *all* legally required representation under Family Court Act § 262, the Commission determined that its initial report should focus on child welfare matters. In its Interim Report to Chief Judge DiFiore, released on February 26, 2019,[5] the Commission concluded that "decisive remedial action is needed most urgently" in child welfare cases, in which children can face unnecessary, prolonged, and sometimes permanent separation from their families by the state.

Pointing to an "ongoing crisis" in the delivery of child welfare parental representation, the Commission found that instances of "inadequate representation, delays in access to representation, and the outright denial of representation, are all too frequent." Declaring that "the longevity of the crisis validates our resolve that prompt action by the State is required to transform child welfare parental representation," the report urges "significant and swift State action to address systemic problems." The Commission plans to address how to improve all categories of legally mandated parental representation in its final report.

In her 2019 State of Our Judiciary speech,[6] Chief Judge DiFiore echoed the Commission's central finding, remarking that our current parental representation

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system often results "in inadequate legal services with harmful consequences for children and families and, ultimately, the communities we all live in and call home." The Commission's recommendations, characterized by the Chief Judge as "smart [and] informed," with "the potential to be transformative," are summarized below.

RECOMMENDATIONS OF THE COMMISSION

Give Parents Access to Counsel During a Child Protective Investigation and Well in Advance of the First Court Appearance

Parents who are financially able to hire counsel invariably do so when a child protective services agency initiates an investigation; generally, parents of limited means do not have access to legal representation during this critical stage of a child welfare proceeding. Moreover, in an alarming number of cases in which a child is removed from a parent at a first court appearance, the parent is not given constitutionally required legal representation. Giving parents representation "when it matters – before they appear in court," is important, the Commission said, to protect parents' constitutional rights, prevent unwarranted family separations, and "mitigate the disruption and trauma that accompanies State intervention into the family."[7] Timely parental access to counsel facilitates placement of the child with family members rather than strangers when out-of-home placement is deemed necessary; leads to more liberal visiting arrangements for the child and his or her family; and ensures that judges receive full and accurate information in the event a court case is initiated.

Establish a State Office of Family Representation

The Commission envisions that this office would have broad responsibilities, such as distributing state funding, developing performance and caseload standards, and coordinating training programs. The office would oversee a network of institutional offices and private contract attorneys with specialized skill and expertise in child welfare law and practice to ensure the delivery of client-centered, interdisciplinary, holistic parental representation throughout the state.

Implement Uniform Standards of Financial Eligibility for Publicly Funded Counsel

Although there are statewide standards for determining a person's financial eligibility for assigned counsel in criminal cases,[8] currently, no such standards exist for Family Court litigants. Testimony presented to the Commission demonstrated that eligibility practices vary dramatically from jurisdiction to jurisdiction, and even within the same courthouse in counties where there is more than one Family Court judge. The proposed Office of Family Representation would be responsible for developing standards for determining a potential Family Court litigant's financial eligibility for legally mandated representation. Those standards would apply in all Family Court proceedings, and would include a rebuttable presumption of eligibility in child welfare matters so that parents have immediate access to counsel at all critical stages of the proceeding.

Establish Maximum Caseload Standards for Parent Attorneys

Statewide caseload caps exist for attorneys who represent children[9] and indigent individuals in criminal cases,[10]

but not for parent attorneys. The Commission recommended that the state fund a study to determine appropriate maximum caseload standards for attorneys representing parents in all types of Family Court proceedings. In the interim, for attorneys representing parents in child welfare cases, the Commission recommended a caseload maximum of 50 to 60 clients per attorney. This range was endorsed by the American Bar Association in consultation with child welfare experts nationwide.

State Should Pay Costs of Parental Representation in Child Welfare Proceedings

Currently, all costs of providing parental representation fall to the counties under County Law Article 18-B. Pointing to a 2018 report and resolution adopted by the New York State Bar Association advocating for full state funding for parental representation,[11] the Commission noted that, in recent years, state funding and oversight have led to significant improvements in the delivery of criminal defense, while parental representation has been left behind. Because the "caliber of parental representation should not depend on the fiscal constraints, priorities, and political will of localities,"[12] the Commission recommended that the state assume full fiscal responsibility for child welfare parental representation. Recognizing that a significant investment would be required, the Commission suggested that the state's assumption of fiscal responsibility be phased in over a period of three to five years, with careful oversight and modifications for efficiency.

Increase Hourly Rates for Private Counsel to $150; Implement Periodic Review and Adjustment

The private lawyers appointed to represent indigent criminal defendants, as well as children and parents in Family Court, have not received an increase in compensation since 2004, when rates were fixed at $60 an hour for misdemeanors, and $75 per hour for felonies and representation of children and parents. The Commission's stance on the compensation rate is consistent with the position taken by the State Bar in a 2018 report and resolution.[13]

CONCLUSION

As the Chief Judge noted in her 2019 State of Our Judiciary remarks, implementing the Commission's initial recommendations "will not be an easy lift." But the Unified Court System is "fully committed to seeing them through," she declared, and will "carefully evaluate the complex policy and fiscal implications" of the recommendations, and "develop a preliminary plan for how we can work with our partners in government, the attorneys who practice in this area and all essential stakeholders to implement these critically important recommendations and overhaul our failing parental representation system."

LEGAL SERVICES CORPORATION
Notice of Availability of Grant Funds for Calendar Year 2020

The Legal Services Corporation (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2020. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal, will be available at http://www.lsc.gov/grants-grantee-resources/grantee-login during the week of April 8, 2019. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. On or around the week of March 11, 2019, LSC will publish the list of service areas for which grants are available and the service area descriptions at https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas. Applicants must file a Notice of Intent to Compete (NIC) and the grant proposal through LSC's online application system in order to participate in the grants process. The online application system will be available at https://lscgrants.lsc.gov/EasyGrants_Web_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login during the week of April 8, 2019.

Please visit https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov.

1. 30 N.Y.2d 352 (1972).
2. Family Court Act §§ 261, 262, and 1120.
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4. Chief Judge Janet DiFiore, *Going Paperless: The New York City Family Court*, N.Y. St. B. J. (March/April 2018), p. 10.
5. Commission on Parental Legal Representation, Interim Report to Chief Judge DiFiore, New York State Unified Court System (2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf (Interim Report).
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7. Interim Report, *supra* note 5, p. 16.
8. Office of Indigent Legal Services, Criteria And Procedures For Determining Assigned Counsel Eligibility: Final (April 2016), https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf.
9. 22 N.Y.C.R.R. § 127.5 (Workload of the attorney for the child).
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11. New York State Bar Association, Committee on Families and the Law, Memorandum in Support of State Funding for Mandated Parental Representation (January 2018), https://www.nysba.org/familylawreport/.
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Who Calls the Shots?

Parents and School Districts Clash Over Vaccinations

By Christian Nolan

A short time after Marina Williams moved to Orchard Park, her two daughters, aged 13 and 15, were sent home from school because their vaccinations were not up to date.

Williams claimed their religious beliefs prevented her daughters from getting the vaccinations as otherwise required by the school district. The district denied her petition for a religious exemption to the rule.

Williams then accused the Orchard Park School District of violating state law and sued them. In February, state Supreme Court Justice Mark Grisanti sided with the district. Williams' two daughters have remained out of school for several months.[1]

In March, amid a measles outbreak, a federal judge denied a temporary injunction that would have allowed 44 unvaccinated children to go back to the Chestnut Ridge school in Rockland County. Lawyers for two dozen unnamed parents and students filed a lawsuit against the Rockland County Health Department and its commissioner, challenging the order barring the children from school until they get their vaccinations.[2]

The outbreak there has mostly affected the Orthodox Jewish community in neighboring towns. Commissioner Patricia Schnabel Ruppert's order requires area schools to keep unvaccinated children from attending if vaccination rates are under 95 percent.

U.S. District Court Judge Vincent Briccetti in White Plains sided with Ruppert and the health department, ruling that the plaintiffs failed to prove that the public interest weighs in their favor.

"It's a tough situation and I feel bad about it . . . but I don't feel I have the authority to do this," Briccetti reportedly told the plaintiffs.

These are just two examples in New York of lawsuits stemming from the anti-vaccination movement, typically pitting parents against school districts. The controversy has garnered considerable attention in recent months as several measles outbreaks have swept across parts of the country.

For some families, even the parents themselves disagree on whether their children should be vaccinated.

In addition to those who oppose vaccinations for religious reasons, some parents blame vaccinations for health problems in children, such as autism. However, the medical community opines that the benefits of vaccinations to society far outweigh any risks and that the anti-vaccination movement is largely based on poor science and fear-mongering.

For some families, even the parents themselves disagree on whether their children should be vaccinated. In Michigan, Lori Matheson is in court with her ex-husband Michael Schmitt, as Schmitt wants their young child to be vaccinated and Matheson does not.[3]

Matheson, seeking an exemption for religious reasons, claims autoimmune disease runs in her family and believes vaccines can cause autism. Schmitt wants the court to order vaccinations for the child and does not believe religion has anything to do with his ex-wife's anti-vaccination stance.

Two years ago a Detroit mom, Rebecca Bredow, was jailed for a week and had her custody rights reduced for failing to comply with a court order to have her child vaccinated. Bredow and her ex-husband, James Horne, were in court over their dispute regarding vaccinations. In the past, Bredow had ignored other court orders from their divorce such as changing the child's school without Horne's consent.[4]

'GENUINE AND SINCERE'

In New York, Public Health Law § 2164 requires parents to vaccinate their children against serious diseases like measles, polio, chicken pox and whooping cough. New York Education Law § 914 requires schools to comply with that statute. Further, the immunization documents schools must receive from parents before admitting a child are set forth in Department of Health regulations. Most school districts have also adopted policies that reinforce these various laws and regulations.

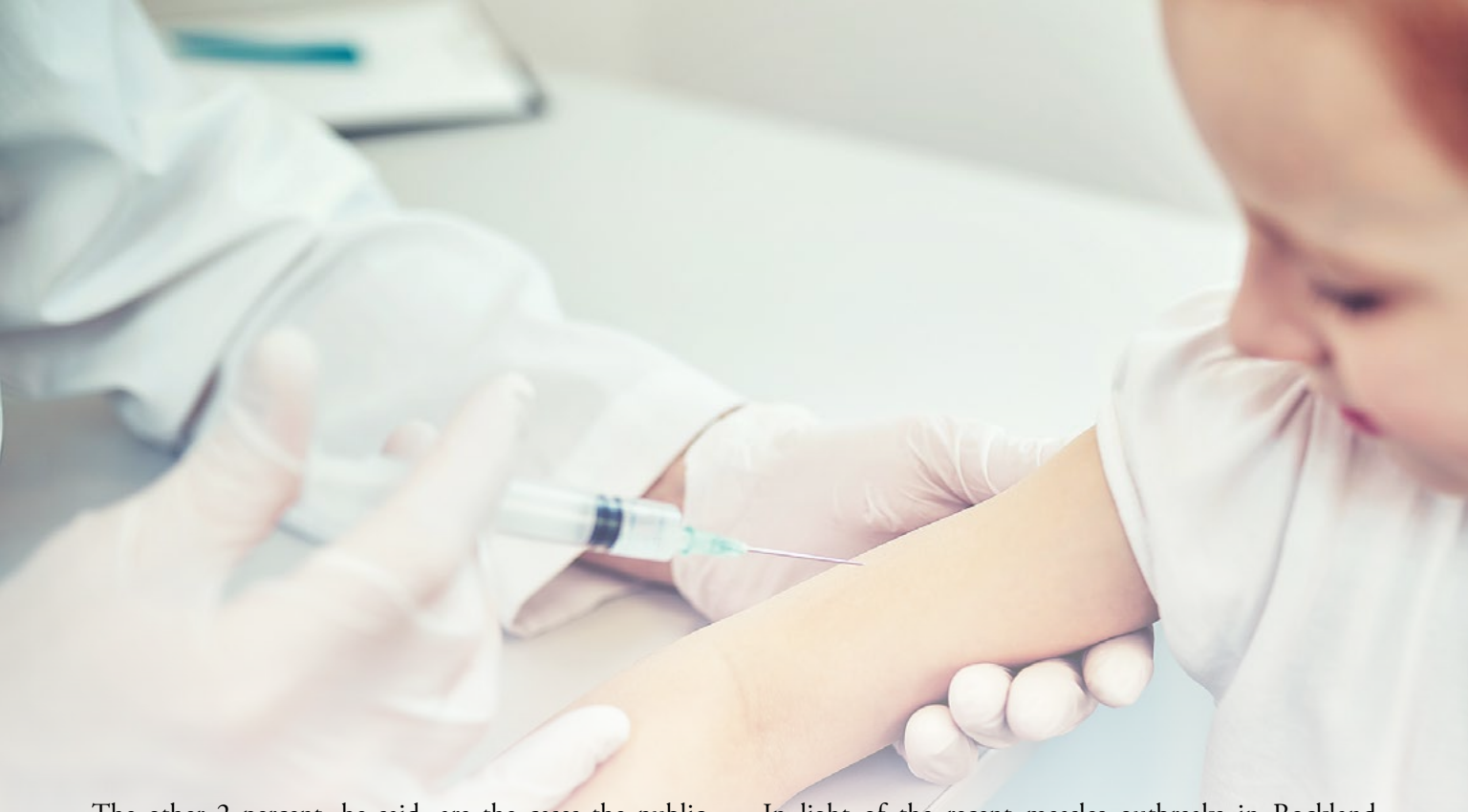
There are two exemptions from these laws. First, is a medical exemption because an immunization may be detrimental to the child's health, certified by a licensed physician. Second, the child's parents have a "genuine and sincere" religious belief preventing the vaccinations.

Candace J. Gomez, of Bond, Schoeneck & King in Garden City, has spent her career as an education lawyer representing public school districts, private schools, colleges and universities. She explained that school principals are ultimately responsible for deciding religious exemption requests. If parents object to having their children immunized, schools send a Request for Religious Exemption to Immunization Form for the parents to fill out. If the school has further questions after receiving the form back, they can request additional documentation from an authorized representative of the church, temple, or religious institution attended by the parents and schedule a meeting with the parents, among other options.

Gomez said the parent must be informed in writing of the approval or denial by the school principal. If the request is denied, a reason must be provided and then a parent may appeal the decision to the Commissioner of Education within a specified time period, which is generally 30 days.

"The school wins in most circumstances where a parent appeals to the commissioner based on a denied religious exemption because the parent has the burden of proof," said Gomez. "Although it may be difficult for a principal to determine whether a parent's religious belief is genuine and sincere, if the principal follows the proper procedures and does not make an arbitrary and capricious decision, then the commissioner will usually defer to the principal's judgment."

Charles C. Nicholas, of Chesney, Nicholas & Brower in Syosset, represents parents in vaccination disputes with school districts. Nicholas said about 98 percent of the cases that get challenged to the Commissioner of Education end there and do not go to court. He said the commissioner sometimes does rule in favor of the parents.



The other 2 percent, he said, are the cases the public typically hears about in the media.

Nicholas said that due to the recent measles outbreak, a lot of schools were sending out letters to parents saying they had changed their rules and were not accepting any religious exemptions with regard to vaccinations. Nicholas, on behalf of his clients, would then point out to the schools that they were breaking the law and the schools would soon return to following the proper laws and procedures.

CASE LAW AND LEGISLATION

The requirement that all children get vaccinated before going to school dates back to 1905 when the U.S. Supreme Court in *Jacobson v. Massachusetts*[5] upheld a Massachusetts law mandating vaccinations for smallpox. Then, in 1922, the court in *Zucht v. King*[6] relied on the Jacobson ruling to affirm a Texas law requiring vaccinations for school children.

New York Public Health Law § 2164 requiring all school children to be vaccinated was recently challenged in federal court and in 2015 the U.S. Court of Appeals for the Second Circuit upheld the law. In *Phillips v. City of New York*,[7] the parents had argued that the law violated their substantive due process rights, the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment.

Disagreeing with the parents, Judges Gerard Lynch, Denny Chin and Eastern District Judge Edward Korman, sitting by designation, upheld the decision of Eastern District Judge William Kuntz that deemed the law constitutional.[8]

In light of the recent measles outbreaks in Rockland County and Brooklyn, a pair of lawmakers in New York, Assemblywoman Patricia Fahy and state Sen. Liz Krueger, have proposed legislation that would allow any child 14 years of age or older to receive vaccinations without their parent's consent.

The bill proposal in March came just days after 18-year-old Ethan Lindenberger testified at a Congressional hearing that his anti-vaccination mother fell victim to online conspiracy theories. Once old enough to decide on his own, Lindenberger has been catching up on all the vaccines he never received as a child.

"God knows how I'm still alive," Lindenberger said in a Reddit post.

Other states have taken more drastic action, including California, which eliminated the religious exemption from their vaccination law in 2015 in light of measles outbreaks and declining vaccination rates. So far, a similar proposal in New York has not received any support from lawmakers.

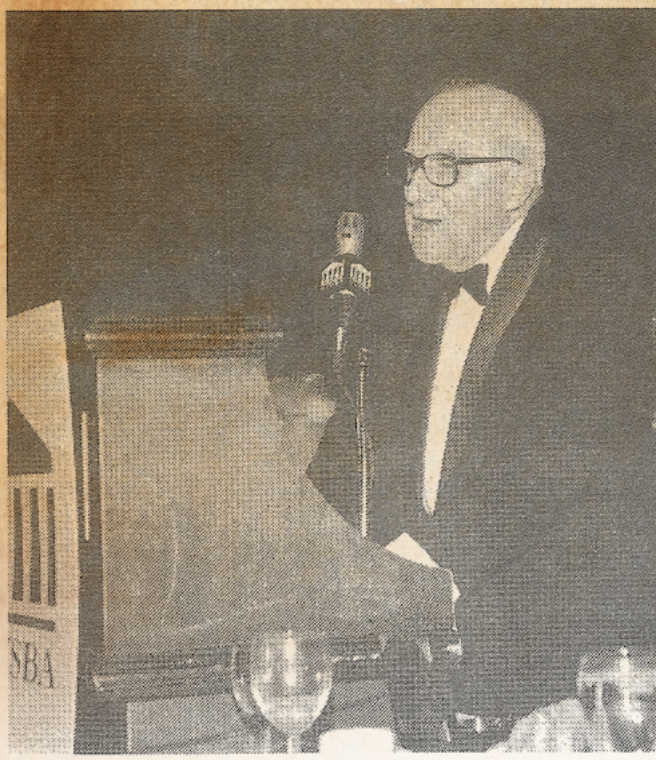
Nolan is NYSBA's senior writer.

1. https://www.wivb.com/news/local-news/judge-rules-in-favor-of-orchard-park-schools-in-case-of-unvaccinated-students/1784781859.
2. https://www.usatoday.com/story/news/nation/2019/03/12/measles-outbreak-unvaccinated-students-barred-rockland-county-school/3145739002/.
3. https://www.clickondetroit.com/news/michigan-anti-vaccination-case-due-back-in-court-for-motion-hearing
4. https://www.today.com/health/detroit-mom-jailed-refusing-court-order-vaccinate-child-t117126.
5. 197 U.S. 11 (1905).
6. 260 U.S. 174 (1922).
7. 775 F.3d 538 (2d Cir.), *cert. denied*, 136 S. Ct. 104 (2015).
8. *Id.*

Taking Politics Out of New York's Highest Court

By Andrew J. Green

March 1992



Brett Kavanaugh, Merrick Garland, Harriet Miers, Clarence Thomas, Robert Bork, Abe Fortas. All of these names evoke images of fierce political battles waged in support of, or in opposition to, their appointment to the U.S,. Supreme Court. Other battles will surely follow future nominees. But what about New York State's highest tribunal, the Court of Appeals? Why are nominees to this Court approved without the political rancor and divisiveness of Washington? There's a short answer to that question: The lasting influence of Mendes Hershman.

This article celebrates the life and memory of one of our very best, someone who for decades presided over some of our profession's most influential institutions. He did it unpretentiously and with the force of his personality, intellect and universally recognized sense of fairness.

Of his many contributions, his most significant legacy by far is helping to shape the way New York's most senior judges, including the Chief Judge and other judges of the Court of Appeals, are now selected by merit rather than politics. Almost 30 years after his passing, he should not be forgotten – not by his few contemporaries who remain with us, not by the generation of

115th Annual Meeting

Annual dinner festivities

The annual dinner, held during the annual meeting, was a time of awards, speeches, and a little humor thrown in as well. Mendes Hershman of Manhattan (at microphone, top photo), received the Association's 50-year award, as NYSBA President Robert L. Ostertag (at rear) and President-elect John P. Bracken looked on. Unfortunately, Hershman died shortly before the State Bar News went to press. Judge James L. Oakes (middle photo) received the NYSBA Gold Medal Award. Humor columnist and attorney Robert L. Steed entertained the crowd with anecdotes about and observations on lawyers and politicians.

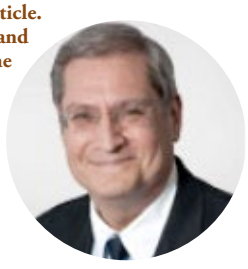
lawyers following him he so ably mentored, and most importantly, not by the current generation of lawyers for whom a role model based on decency, integrity, brilliance and impartiality should not be lost.

Many lawyers lament today that the practice of law has become a "business," where such qualities are no longer valued unless they can be used to obtain a monetary benefit. But law has always been a "business" at New York's heavily business-centric firms. Mendes grew up and practiced in the thick of that culture, proving that adherence to these principles in that environment and achievement of great success are not mutually exclusive. He held these qualities sacrosanct throughout his career to the delight and admiration of his colleagues, his clients, the judiciary, government leaders and Wall Street, and they demonstrated their approval and appreciation by bestowing on him an unprecedented number of important chairmanships and trusteeships. New York State governors and New York City mayors often relied on him to chair their special commissions. When their most important issues were in need of solutions both practical and creative, and free from claims of bias by special interest groups, community leaders and other politicians, they turned to Mendes.

Everyone who came into contact with him respected him as a brilliant lawyer, teacher, and spokesperson for our profession. At charity dinners, the line of well-wishers at his table on the ballroom floor usually exceeded the line of well-wishers for the honoree at the dais. Several legendary New York lawyers freely volunteer how they owe their careers to Mendes. He opened doors for them that would otherwise have been closed at the start of their careers. He delighted in it and expected nothing in return. For Mendes, just helping those he thought exceptional, personally and professionally, was sufficient.

His reputation for fairness was so highly regarded that during the negotiation of a master lease covering a New

Andrew J. Green is a former partner at Jones Day. He had the privilege of working closely with Mendes Hershman when he was a young partner and Mr. Hershman was a Senior Partner at Rosenman & Colin. He is a former Chair of the New York City Bar Association's Real Estate Subcommittee on Commercial Leasing, and has guest lectured at New York University's Schack Institute of Real Estate, Baruch College's Zicklin School of Business, and Mr. Hershman's Real Estate Finance course at Fordham Law School. Mr. Green would like to thank Norman L. Greene, a partner at Schoeman Updike Kaufman & Gerber, and Richard B. Long for their contributions to this article. Mr. Greene was a former partner of Mendes and consulted with him extensively as Chair of the Uniform State Law Committee of the New York City Bar Association. Mr. Greene and Mr. Long are Commissioners on the New York Uniform Law Commission where Mr. Long served with Mr. Hershman for more than a decade. His companion piece on the Commission can be found in this issue.



York City office tower, his client and the opposing party requested a dispute resolution mechanism unlike any seen in the ordinary realm of contract negotiations. They asked for an arbitration provision, but with one astounding feature. There would be only one arbitrator, and it would be Mendes, even though he was counsel to one of the parties. Neither party was lacking in experience or sophistication – quite the opposite. Their motivation was to save legal fees in the event of a dispute, and to avoid what they perceived as the potential for unfairness by application of New York's parol evidence rule. On the latter point, they wanted the lease to be governed by what they intended, not what might have been unintentionally drafted into the lease by the lawyers. They felt these goals could be accomplished with Mendes as the sole arbitrator. He knew what the parties intended because he was a participant in the negotiations, and knowing he had that knowledge, they trusted him to be fair to both sides, irrespective of any considerations that might influence others to act with bias.

This dispute resolution mechanism was the perfect counter to the real estate clients' two most common complaints about dealing with lawyers – unnecessary legal fees and overly complicated drafting which did not accurately reflect their intentions. At that lofty level of legal practice and business acumen, trust was primary, and sensitivity to conflict of interest issues secondary. They knew the arbitration clause could be unwound as a gentlemen's understanding at any time either insisted. But they also knew that if it was unwound, they would lose the benefits they were hoping it would achieve – benefits that only existed in the special, wonderful and truly unique world that was Mendes Hershman.

Mendes was born in Allentown, Pennsylvania in 1912 and entered New York University at 13. He was elected to Phi Beta Kappa at 16 and was a graduate of Harvard Law School at 20. His first job was in the legal department of New York Life where he rose to general counsel. After reaching retirement age at 65 he became a senior partner at Rosenman & Colin, now known as Katten Muchin Rosenman, where he remained until his death in 1992.

Along the way, he held an extraordinary number of prestigious positions, including sole author of the Official Codification Notes to the New York State Insurance Law; Trustee of New York University; Trustee of Phi Beta Kappa; Trustee of HIAS; Trustees of ORT; Board of Editors of the *New York Law Journal*; Chair of the Executive Committee of the Association of the Bar of the City of New York; Chair of the American Bar Association Section on Business Law; Chair of the New York State Bar Association Section on Corporation, Banking and Business Law; Chair of the Legal Advisory Board to the New York Stock Exchange; and Chair of the New York delegation to the National Conference of Commissioners on Uniform State Laws, currently known as the Uniform Law Commission. Mendes also chaired many commissions and committees reporting directly to many New York governors and mayors, including the Mayor's Committee on the Judiciary and its screening panels for the selection of city judges. This is only a partial list, and as remarkable as his accomplishments were, he never exhibited any hint of ego or self-importance.

By all accounts of those who knew him best, he most enjoyed his leadership role with the New York delegation of Uniform Law Commissioners, a position he held for 13 years from 1979 until his death in 1992, a remarkable testament to how he was revered by the legal community. Mendes' position and the positions of the other Commissioners are by appointment by the Governor. In a speech four months before he died, Mendes pointed out that distinguished past members of the National Conference where he represented New York, included such extraordinary jurists as Supreme Court Chief Justice Rehnquist; Justices Black, Brandeis, Rutledge and Souter; Law School Deans Pound, Prosser and Wigmore; Law Professor Williston; and a great number of judges of the highest state courts. How fitting that Mendes' name is among theirs.

Mendes enjoyed being a leader and peer among the Conference's many luminaries, but he mostly enjoyed the drafting, refining and bringing new uniform laws into existence in a collaborative ratification process involving 50 state delegations.

Mendes enjoyed being a leader and peer among the Conference's many luminaries, but he mostly enjoyed the drafting, refining and bringing new uniform laws into existence in a collaborative ratification process involving 50 state delegations. He especially enjoyed this process in the field of commercial law, his specialty. Regarding the importance of the Uniform Laws Commissions to this area of the law he said: "Commercial law is the most important forum for uniformity because [so many] commercial transactions go over state lines [while] other acts are public policy judgments . . . If we did not have uniform laws, we would have much more federal legis-

lation [and] I don't know that Congress acts in a more intelligent way than the National Conference."

He perhaps had his greatest exposure to many attorneys around the country as the perennial chair of the American Law Institute's real estate programs. All of the numerous top lawyers in their fields he recruited for the programs' panels have their own special stories about interacting with Mendes – stories they never seem to tire of repeating. The beautiful locations he chose for the programs, coincidentally, always seemed to be close to a great golf course, to most everyone's delight but no one's surprise.

However, nowhere was his influence and stature more significantly felt than by his long tenure as chair of the New York State Commission on Judicial Nominations. Mendes became the chair of the Commission in 1982, five years after it was created. He remained the chair of the Commission by the request of all relevant parties continuously until he passed away at 80. An astounding 10-year run that might have gone even longer had his passing not robbed us of a few more years of his leadership. The Commission's groundbreaking significance for the judiciary of New York cannot be overstated, as it shifted for the first time the selection process of New York's most senior judges, including the Chief Judge of the Court of Appeals, from a politically based electoral process to a merit-based committee process. When it came to selecting the chair of arguably the most important New York State governing body in our profession, everyone wanted Mendes as long as he was able. And the reasons were obvious. He commanded the total confidence of his peers for fairness, impartiality, competence, judgment, legal intellect, and most elusive of all, the uncanny ability to forecast how judicial talent might evolve and grow over long periods of time. Two other traits everyone associated with him, wisdom and affability, made him the perfect choice year after year.

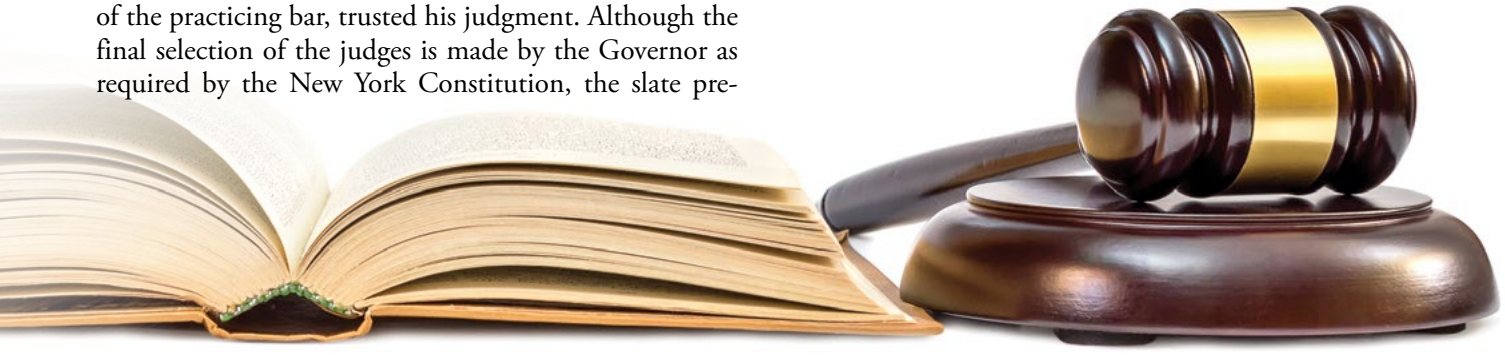
A tenure as long as his, as chair of such a politically charged and legally consequential Commission, was not the norm at that time. He retained the position not because of professional ties, political ties or business ties, even though he had plenty of all three, but because everyone on both sides of the political aisle, governors and mayors from both parties and the diverse members of the practicing bar, trusted his judgment. Although the final selection of the judges is made by the Governor as required by the New York Constitution, the slate prepared by the Commission assured then as it does now that only the best and most qualified will be selected.

Mendes was known to say that before the Commission on Judicial Nominations was established, judges were selected "for them," the politicians, in a political process. But after the Commission was established, and under his leadership, judges were selected "for the people," by merit, in a rigorous committee process. He would go on to say, with just a hint of pride and a wry smile, that the judicial legacies of judges selected in the past "for them," where political influence could dominate, were often like footprints in the sand at the shore, slowly washing away with the tide. But the judicial legacies of judges chosen "for the people" by the Commission's arduous and thorough merit-based screening process, would be studied, cited and endure long into the future.

If Thomas Jefferson, James Monroe and the other framers had only known Mendes, perhaps the U.S. Constitution's Articles on the Judiciary would have been written differently, along the lines of the Commission on Judicial Nominations that Mendes shaped and guided in its critical early years. And then, whether viewed from the left or right, by a Democrat or Republican, unfortunate aspects of our most recent U.S. Supreme Court confirmation might have been averted.

In 2015, 23 years after his death, the American Bar Association established a prestigious, annual student writing competition in his honor and memory called the Mendes Hershman Student Writing Contest. The magic of his name on the prize will begin a new, posthumous legacy for him, one filled with distinguished legal articles and essays written by students who become our distinguished jurists of the future. Perhaps some will become Chief Judge of New York selected by Mendes' New York Commission, or chief justice of another state selected by a Commission modeled after the one pioneered by Mendes.

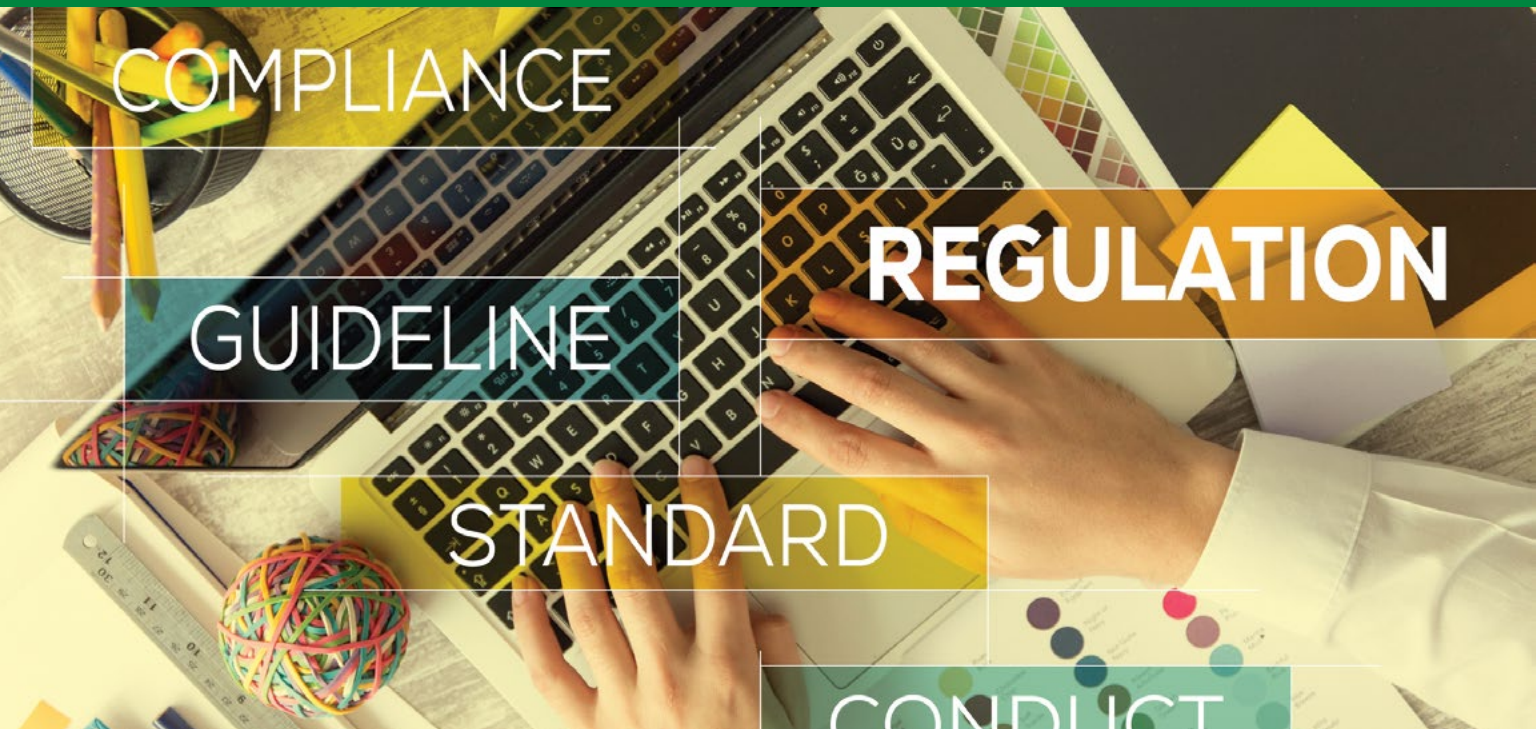
Throughout the article Mendes is referred to by his first name only, because that was how he was known to everyone, endearingly and often reverentially. When you heard that name in a conversation without its last, there was never any doubt they were talking about Mr. Mendes Hershman.



Uniform State Laws: Where Do They Come From and Why Do They Matter?

By Richard B. Long

Richard B. Long (rlong@cglawoffices.com) is of counsel to the Binghamton law firm, Coughlin & Gerhart and former Chair of New York's Commission on Uniform Laws. He is a life member of the Uniform Law Conference; a member of the New York State Bar Association for more than 60 years; a former Chair of the NYSBA Trial Lawyers Section; and a member of the Advisory Committee on Civil Practice of the Office of Court Administration. He is a fellow of the American College of Trial Lawyers, and a graduate of Cornell University and Cornell Law School. Mr. Long would like to thank fellow New York Uniform State Law Commissioners Mark Glaser, Justin Vigdor, Sandra Stern and Norman Greene for their assistance in writing this article.



New York is no stranger to uniform state laws. Indeed, New York adopted its first Uniform Act more than 120 years ago – the Uniform Negotiable Instruments Law – in 1897. Since then, New York has enacted more than 78 Uniform Acts, including the landmark Uniform Commercial Code and, in recent years, the Uniform Interstate Family Support Act, the Uniform Principal and Income Act, the Uniform Athlete Agents Act, the Uniform Interstate Depositions and Discovery Act, the Uniform Fiduciary Access to Digital Assets Act, the Uniform Unsworn Foreign Declarations Act, and the Uniform TOD Securities Registration Act.

Still, with all those Uniform Acts on the books in New York, some attorneys may be wondering: Just what are Uniform State Laws, where do they come from, and why do they matter?

Uniform laws are the product of the Uniform Law Commission (ULC), established in 1892, which was known until 2008 as the National Conference of Commissioners on Uniform State Laws (NCCUSL). New York is a charter member of the ULC, as it was one of the seven original founding states that gathered for its first annual meeting at the Grand Union Hotel in Saratoga Springs, New York. A New Yorker, Henry R. Beekman, of New York City, served as the ULC's first president from 1892 to 1894.

The ULC was created by state governments to be a body of commissioners that would examine state law and determine whether there were areas of law in which uniformity among the states would produce significant benefits to the public with non-partisan, carefully considered, and well-drafted legislation. The ULC would then draft uniform and model acts and deliver them to the states for consideration. During the last 127 years, the ULC's work has brought consistency, clarity, and stability to state statutory law with such pivotal contributions to state law as the aforementioned Uniform Commercial Code (in conjunction with the American Law Institute), enacted by 49 states by 1967 and for the past 20 years undergoing extensive modernization and revision, the Uniform Gift to Minors Act, the Uniform Declaratory Judgments Act, and the Uniform Anatomical Gifts Act.

The ULC's greatest asset is its commissioners: more than 300 dedicated men and women. Notable past commissioners have included U.S. Supreme Court Justices Brandeis, Rutledge, Rehnquist and Souter and N.Y. Court of Appeals Judge Francis Bergan.

The ULC is currently made up, in nearly equal numbers, of commissioners from four areas of jurisprudence: federal and state jurists; educators, including law school deans and professors; state legislators; and attorneys in private practice. Commissioners donate their time and expertise to the ULC without pay, as a pro bono service. Most states, including New York, do reimburse commissioners for their travel expenses.

Uniform law commissioners, all of whom must be lawyers, are appointed in various manners, in numbers from three to 14, by every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

New York's Commission on Uniform State Laws consists of five practicing attorneys, each of whom was appointed by the governor. New York's current commissioners are: Mark F. Glaser of Albany, Chair; Norman L. Greene of New York City; Richard B. Long of Binghamton; Sandra S. Stern of New York City; and Justin L. Vigdor of Rochester.

The procedures followed by the ULC insure meticulous consideration of each uniform or model act. The ULC convenes as a legislative body once a year, meeting for seven days in July or August. All commissioners are required to attend. In the interim period between annual meetings, drafting committees composed of commissioners, ABA advisors, and observers from interested organizations, meet to prepare working drafts of Acts that are to be considered at the next annual summer meeting. Input from the observers is critical to the drafting process to make sure that the concerns of those most affected by the acts are considered. At each annual meeting, new Acts proposed by the drafting committees are read and debated, usually line by line. Each Act is considered for a substantial period, seldom less than two years, before it is finally voted on by the assembled Commissioners and approved by a majority of states. No Act becomes officially recognized as a Uniform Act until it has been reviewed by the American Bar Association and the ULC is satisfied that it is ready for consideration by the legislators of every state. Work on large-scale projects, such as the referenced revisions to the Uniform Commercial Code, may take many years to complete.

The ULC receives the predominant portion of its financial support from state appropriations. In return, the ULC, through its commissioners, provides the states with the assurance that their state's considerations are included in the drafting process, and uniform state laws are approved on subjects where uniformity is desirable and practical, and thereafter providing supporting efforts as the states seek to enact completed acts. Thus, each ULC Commissioner has the responsibility to attend the annual meeting, to ensure that their states are aware of the importance of the uniform laws adopted by the ULC, and to provide the states with the necessary information on each law to justify its enactment by the state. The ULC also works in association with the Uniform Law Conferences of Canada and Mexico, with the American Bar Association (which is asked to approve its Acts), with several joint editorial boards, and with the American Indian Tribes and Nations.

Contemporary issues are frequently being addressed by the ULC, as illustrated by several Uniform Acts currently in the drafting process or recently approved. These include consideration of the Electronic Wills Act; the Highly Automated Vehicles Act; the Tort Law Relating to Drones Act; and, approved in 2017, the Uniform Regulation of Virtual-Currency Act, and, in 2018, the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act. Each of these Acts is now, or will upon completion, be worthy of consideration by New York.

The ULC's greatest asset is its commissioners: more than 300 dedicated men and women.

In 2018, seven Uniform Acts were introduced in the New York State Legislature and are expected to be reintroduced in the 2019 legislative session. They are: Uniform Employee and Student Online Privacy Protection Act; the Uniform Voidable Transactions Act; Uniform Collateral Consequences of Conviction Act; Uniform Electronic Recordation of Custodial Interrogations Act; Uniform Trade Secrets Act; Uniform Mediation Act; and Uniform Real Property Transfer on Death Act. In addition, a bill calling for a study relating to the enactment of the Uniform Electronic Legal Material Act has also been introduced.

Here is a brief summary of each of these Acts:

Uniform Employee and Student Online Privacy Protection Act (UESOPPA)

Most individuals today have online accounts of some type. Generally, when someone asks for access to login information, an individual is free to say no. This often is less true if the inquirer is a potential employer or an educational institution, as they will often demand access to social media and other password information as part of the application process. This Act addresses and limits both employers' access to employees' or prospective employees' social media and other online accounts accessed via username and password, as well as educational institutions' access to students' or prospective students' similar accounts.

Uniform Voidable Transactions Act (UVTA)

This Act replaces the current Fraudulent Transfers law, removing the word "fraud," which was never a necessary element of a claim under that law; adds a choice-of-laws rule for claims under the Act; deletes the special definition of "insolvency" applicable to partnerships; clarifies several defenses available to a transferee or obligee; adds a new section which provides that each "protected series" of a series organization is to be treated as a person for purposes of the Act; and makes other clarifying changes to the law.

Uniform Collateral Consequences of Conviction Act (UCCCA)

This Act improves the understanding of the penalties that attach when an individual is convicted of an offense and, in appropriate circumstances, offers a mechanism to provide partial relief from those penalties. Individuals must be advised of all of the particular collateral consequences that are associated with the offense for which they are charged, at or before arraignment as well as at time of sentencing and at time of release. The need for the defense attorney to provide clear and impartial descriptions of the options available to the party prior to deciding upon the proper course of action is stressed throughout the Act.

Uniform Electronic Recordation of Custodial Interrogations Act (UERCOIA)

This Act requires law enforcement to electronically record the entirety of an interrogation that occurs in custody. By requiring law enforcement to electronically record custodial interrogations, the Act promotes truth finding and judicial efficiency, and further protects the rights of both law enforcement and individuals under investigation. The Act contains a number of important exceptions to recording – for example, when recordings are unfeasible, would endanger confidential informants, or when a defendant refuses to cooperate with the recording process.

Uniform Trade Secrets Act (UTSA)

This Act, already adopted in 50 jurisdictions, is a comprehensive codification of the law of trade secrets protection, incorporating major common law principles while filling gaps left by the courts. The term "trade secret" is precisely defined, and the rights and remedies of businesses are clarified. Since litigation over trade secrets frequently involves parties from more than one state, adoption of UTSA will eliminate the confusion of which state law to apply and discourage "forum shopping."

Uniform Mediation Act (UMA)

Mediation fosters the early resolution of disputes. During the past 30 years, the use of mediation has become an integral and growing part of the processes of dispute resolution in the courts, public agencies and community dispute resolution programs. This Act, which promotes candor by maintaining the parties' and the mediators' expectations regarding confidentiality, sets forth privileges against disclosure of communications, waivers and exceptions to those privileges, and disclosure of potential conflicts of interest by the mediator. The Act prohibits, with specified exceptions, what is said during mediation from being used in later legal proceedings.

Uniform Real Property Transfer on Death Act (URPTODA)

This Act provides an asset-specific mechanism for non-probate transfer by allowing an owner to pass property to a beneficiary at the owner's death simply, directly, and without probate, by executing and recording a TOD deed. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property, and the owner retains full power to transfer, encumber, or revoke the TOD deed.

Several other Uniform Acts, recently promulgated by the ULC, are also worthy of consideration. They are:

Uniform Unsworn Declarations Act (UUDA)

In New York only a select group of professionals – attorneys, physicians, osteopaths, and dentists – may use an affirmation declared to be true under penalty of perjury in a civil action (CPLR R. 2106a). All other persons, except in situations where they are outside of the continental United States (CPLR R.2106b), must swear to the truth of a declaration by use of an affidavit, sworn to in the presence of a notary public. This Act amends CPLR 2106 to provide that all persons, whether they are within or outside of the country, may declare the truth of a declaration in a civil action or proceeding by affirming under penalty of perjury that the declaration is true. This will provide a very useful alternative when shortness of time or lack of availability makes it difficult or impossible to find a notary.

Uniform Revised Athlete Agents Act (URAAA)

New York and 42 other jurisdictions have already enacted the Uniform Athlete Agents Act of 2000. That Act governs relations among student athletes, athlete agents, and educational institutions, protecting the interests of student athletes and academic institutions by regulating the activities of athlete agents. The Revised Act makes numerous improvements to the original act, including expanding the definition of "athlete agent" and "student athlete," providing for reciprocal registration between states, adding new requirements to the signing of an agency contract, and expanding notification requirements.

Uniform Trust Code (UTC)

This Act provides a comprehensive model for codifying the law on trusts. Amended by the ULC in 2010, the Act clarifies, with respect to trusts, what constitutes an "insurable interest" for purposes of insurance law, while at the same time allowing for the transfer of interest in insurance as property. Personal life insurance trusts are a key component of most modern estate plans, and trust and estate planners create them routinely.

Uniform Criminal Records Accuracy Act (UCRAA)

This Act is designed to improve the accuracy of criminal records, commonly called a rap sheet, that are frequently used in determining the eligibility of a person for employment, housing, credit, and licensing, in addition to law enforcement purposes. The Act imposes duties on government law enforcement agencies and courts that collect, store, and use criminal history records, to ensure the accuracy of the information contained in the rap sheet. The Act provides individuals with the right to see and correct errors in their rap sheet and a mechanism for minimizing the possibility of a false arrest for a person whose name is confused with a person who is the actual subject of criminal history record information.

Uniform Electronic Legal Material Act (UELMA)

This Act provides a technology-neutral, outcomes-based approach to ensuring that online state legal material deemed official will be preserved and permanently available to the public in unaltered form. It also furthers state policies of accountability and transparency in providing legal material to the public. The Act requires that official legal material in electronic form, including the state constitution, session laws, codified laws and agency regulations be authenticated, preserved, and accessible for use by the public. Legislation introduced in New York calls for a study to determine how this important proposal should be implemented in the state.

Enactment of each of the foregoing Acts will greatly benefit the citizens of New York. No single state can replicate the thoughtful, non-political and deliberative process that has produced them. Each of these acts has great merit and is worthy of consideration by New York State.

Further information on these or any other Uniform Acts, or further information on the Uniform Law Commission, can be found at the ULC's website at www.uniformlaws.org. In addition, New York's Commissioners are a valuable resource for the legislature and the Executive branch. The Commissioners look forward to continuing to provide the information and background necessary for the enactment of these many important uniform laws.

Small Town, Big Impact on Law

By Milton A. Tingling

There is a small town in northern Westchester County that has had a disproportionate effect on law in the Appellate Division, Second Department, and in the state, but no one can complain. The town is Yorktown, a bedroom community of roughly 35,000 persons. The town's impact is felt through its two former town justices, Hon. Jeffrey A. Cohen and Hon. Mark C. Dillon.

They were each elected to the town bench in the late 1980s, where they served together for a decade, pursuant to town law that each town in New York elect two residents as judges to four-year terms. They ran in different years and each was elected and re-elected.

Milton A. Tingling is the County Clerk in New York County and a former Justice of the New York State Supreme Court.

Judge Cohen remained on the Yorktown bench for 17 years while Judge Dillon served there approximately 10 years. Each separately rose to the Westchester County Court, then to the Supreme Court in the Ninth Judicial District, and then to the Appellate Division, Second Department, where they have now served together for eight years.

The parallel careers of these judges seem contradictory and truly unique. They belong to different political parties. One is Jewish, the other Catholic. One spent three years as a Westchester Assistant District Attorney and was then a personal injury litigator in the state and federal courts. The other began as a Westchester County Legal Aid Attorney trying felony trials and then together with a law partner opened a general private practice in White Plains concentrating in real estate, condo-coop law and criminal law. One is a Mets fan, the other, the Yankees; one the Giants, the other the Jets. In so many respects opposite ends of the spectrum but uniquely elected and re-elected in Yorktown, and both to this day remain not only colleagues but also close personal friends.

Yes, when the two judges first served together on the town bench they brought with them their different perspectives but saw eye to eye on most every local issue. Working together for almost a decade, they expanded a community service program for first-time non-violent youthful offenders, were the first town justices in Westchester to create a mediation program alternative to small claims and civil trials, increased the number of court sessions to keep pace with volume, and each year jointly published a "State of the Court" message to the residents of the town. Politics in Yorktown is known even today to be contentious, but those two Town Justices – Dillon and Cohen – were even cross-endorsed once by the other's political party in alternating years to assure their continuation on the bench. It had not happened in Yorktown before, or since. These days it is rare to find such cooperation and friendship across the bench or the "aisle" from members of different parties. In this case opposites indeed attract. But that was just the beginning.

Both judges followed career paths to Westchester County Court and then the New York State Supreme Court. Their Supreme Court time was primarily in Westchester, but each temporarily handled one-year assignments or *ad hoc* trials in neighboring counties such as Rockland, Orange and Dutchess. Then, remarkably, each went to the Appellate Division, Dillon by appointment of Governor Pataki and several years later Cohen by appointment of Governor Paterson, where they once again began working together, this time on Second Department appeals with far greater reach and impact than their earlier work at the local court level. The Second Department handles 65 percent of all appeals in New York State and its jurisdiction spans from Suffolk to Orange counties, which consists of half the population of the State of New York. Dillon and Cohen are thus a substantive force on the entire New York State Appellate Bench.

Justice Dillon, the former criminal prosecutor, was a member of the panel with Justices Rei Rivera, Gabriel Krausman, and Anita Florio that ordered a new trial for Martin Tankleff after Tankleff had served 19 years in prison for murder despite what many people believe to be new evidence of Tankleff's actual innocence.[1] Dillon

wrote two companion opinions in 2008, *Chowdbury v. Rodriguez*[2] and *Ortega v. Puccia*[3] that clarified the different standards of proof for liability of landowners and contractors under Labor Law 200 that are routinely cited and followed today, and *Firmes v. Chase Manhattan Automotive Finance*[4] and *Kihl v. Pfeffer*,[5] which collectively established the different evidentiary standards required for parties' entitlement to collateral source hearings under CPLR 4545 and at the hearings themselves.

Justice Cohen says of Justice Dillon, "He's a judge's judge! A conservative intellectual with an easy-going manner always respectful to bench and bar."

After being appointed to the Appellate Division for just a few months, Justice Cohen, joined by Justice Robert J. Miller, dissented in *Yatauro v. Mangano*.[6] In *Yatauro*, duly elected members of the Nassau County Legislature brought an Article 78 petition seeking declaratory and injunctive relief in their challenge to the immediate implementation of a redistricting plan that would affect the voting rights of thousands. Justices Cohen and Miller, with whom the Court of Appeals soon thereafter unanimously agreed, held that Nassau County Charter required a three-step process toward implementation of the redistricting plan and that, although the adoption of a local law was the first step in that process, it did not operate to alter the legislative district boundaries for the then-upcoming 2011 general election.

More recently, in *People v. McCullum*, Justice Cohen, who was a member of a panel with Justices John M. Leventhal, Sylvia O'Hinds-Radix, and Francesca E. Connolly, opined that an occupant of a leasehold, after a warrant of eviction has been issued does not retain the protections of the Fourth Amendment to the U.S. Constitution when a New York City Marshal tenders "legal possession" of the leasehold to the landlord without a physical eviction.[7] This case has been granted leave by the Court of Appeals.[8]

In *In re Hei Ting C.* ,[9] Justice Cohen, joined by Justices Randall Eng, Mark Dillon and Plummer Lott, opined that a child does not become dependent on a juvenile court within the meaning of 8 U.S.C. § 1101(a)(27)(J)(i), governing eligibility for special immigrant juvenile status (SIJS), when one of the child's parents files a petition for child support upon which the Family Court enters an order of support.

Dillon describes Cohen as "someone with a radar for fairness, is known for his affable demeanor on and off the bench, while also always staying within the confines of the law."

The two jurists have had their share of challenging trial-level caseloads before ascending to the Appellate Division. Justice Cohen presided over a Sex Offense Part in Westchester County for almost three years, and Justice Dillon served for two years in Westchester's Matrimonial Part. During Gail Prudenti's tenure as Presiding Justice of the Appellate Division, Second Department, each jurist volunteered time during their summers to try to settle cases out of department, with both Dillon and Cohen serving in New York County.

Free time is in short supply for the Appellate Division justices, but is used productively. Justice Cohen uses some of it as a founding member and President of the Justice Brandeis Law Society of the Ninth Judicial District for more than a decade, and as an active grandfather of four. Despite turning 70 this year he continues to serve on another court – the racquetball court – on a regular basis. His two children and their spouses – two dental specialists and two attorneys – and all four grandchildren reside in Yorktown, another rarity in itself. Justice Cohen has also authored several *New York Law Journal* articles as well as co-authored an article published in the *Hofstra Law Review* together with the late Justice Thomas A. Dickerson and Justice Cheryl E. Chambers.

Justice Dillon has been President of the Westchester-Putnam Chapter of the Fordham Law Alumni Association, serves on Fordham's national alumni board, is an adjunct professor there of New York Practice, has published in the last decade several law review articles and a book of legal history, and has a lifetime dedication to long-distance running.

Additionally, both Justices Dillon and Cohen have lectured before several bar associations in New York state in their "free time."

It is indeed doubtful that any town in New York State has ever produced two local judges who, after serving together in a justice court, followed similar career paths to the Appellate Division. It is highly doubtful that it will ever happen again.

And not unlike "RBG" and the late Antonin Scalia on the U.S. Supreme Court for years, although ideologically they may differ their bond of friendship has remained strong while serving on the same bench together after close to 20 years. It is a sign of somethings that is lacking in today's government and politics – that officeholders from across different aisles can work together constructively for the constituents they serve.

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1. 49 A.D.3d 160.
2. 57 A.D.3d 121.
3. 57 A.D.3d 54.
4. 50 A.D.3d 18.
5. 47 A.D.3d 154.
6. 87 A.D.3d 582 (2d Dep't 2011), *rev'd*, 17 N.Y.3d 420 (2011).
7. 159 A.D.3d 8, 10 (2d Dep't 2018).
8. 31 N.Y.3d 1150.
9. 109 A.D.3d 100 (2d Dep't 2013).

How to Ensure That Hate Has No Home in New York State

By Dash Radosti

New York has been rocked by a series of hate crimes in the past year – by some estimates a nearly 30 percent increase from the prior year. At the same time, New York has some of the strongest civil and human rights laws in the nation, laws that can be used in powerful ways to ensure that hate has no home in this state. So why aren't these laws helping to reduce, or at least stem, the ranks of hate crime perpetrators? Unfortunately, after careful legal research, it appears that these laws are significantly underutilized by the private bar in civil litigation, although there are welcome signs that more victims and

Dash Radosti is a student at St. John's University School of Law, attending as the Barbara and Richard Powers Scholar. Before embarking on a legal career, he was a community organizer who led several local and national political campaigns and initiatives. He was also elected to serve a two-year term on the Bergen County Committee, representing Fort Lee, New Jersey, where he advocated for social justice, economic fairness, and police reform on the state and local level. He also serves as a first lieutenant in the U.S. Army as a reservist with the New York Army National Guard. He earned a Bachelor of Arts in interdisciplinary public policy from American University.

their attorneys are invoking New York's strong state and city protections to hold hate crime perpetrators, and the organizations that enable them, accountable, including those who ply the internet.

For now, though, NYPD statistics show that hate crime is up across the board, with homosexuals, Jews, and black Americans as the most frequent targets. While the police have vowed to respond forcefully, most hate crime perpetrators are never brought to justice. Even when the criminal system does work, the victim, as in many criminal cases, becomes an afterthought. Critically, hate crime prosecutions seldom get to the root of the matter.

While they may hold a low-level perpetrator accountable, they often fail to stop the institutions and organizations that may enable such hateful behavior, even though New York has a long and proud history of strong laws that protect civil and human rights. These include the New York Human Rights Law (NYHRL), the Bias Related Violence and Intimidation Act (CVR 79-N), the Hate Crimes Act of 2000 (Penal Law 485), and Section 11 of the New York State Constitution, which guarantees equal protection. Additionally, New York City's Human Rights Law affords additional protections against discrimination that occurs within the five boroughs.

The Bias Related Violence and Intimidation Act, codified under CVR 79-N, creates a civil cause of action for "intentionally select[ing] a person or property for harm . . . in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation." This law also permits the collection of reasonable attorney fees. Both state and federal courts in New York have interpreted these provisions broadly.

Attorneys often invoke NYHRL in the context of housing and employment discrimination. It is important to remember, however, that the 46-page law encompasses many additional forms of discrimination. The law's legislative findings reveal NYHRL's broad scope with the legislature writing that the purpose of the law is to "[provide] equal opportunity to enjoy a full and productive life."[1] Biased based violence precludes this outcome.

The NYHRL's strong protections in public accommodations "must be liberally construed to accomplish the purposes of the [New York Human Right's Law]." *Andrews v. Blick Art Materials, LLC*[2] may provide a cause of action when hate crime perpetrators interfere with the broad right to use public accommodations. Additionally, the NYHRL has a provision that allows for damages against those that "aid, abet, incite, compel or coerce" discriminatory acts banned under the law.[3] Combining both the "liberally construed" public accommodations protections with the "aiding and abetting" clause could yield another powerful protection against those who perpetrate hate crimes. Another benefit of the NYHRL is that it covers a wide range of classes not covered under other laws, such as domestic violence survivors, veterans, and military members.

NYCHRL covers acts that occur inside New York City. The NYCHRL "afford protections greater than the State HRL . . . . and [thus the] city's HRL should be construed broadly in favor of discrimination plaintiffs . . . [as much as] reasonably possible."[4]

The NYCHRL, in the context of hate crimes, has better protections than the state law for two primary reasons. First, the NYCHRL allows for attorney fees and punitive damages while the NYSHRL allows for attorney fees, but only permits punitive damages for housing discrimination. The NYCHRL also has an entire chapter devoted to "discriminatory harassment" and provides a private cause of action against anybody who by "force or threat of force, knowingly injure, intimidate or interfere with, oppress, or threaten any other person . . . . in the free right or

enjoyment of any right or privilege."[5] Surprisingly, however, victims invoke this provision relatively rarely, and even then, usually within the context of alleged police/prosecutorial misconduct. However, a 2017 legal memo published by the New York City Bar Association's Justice Center convincingly writes that courts should apply the provisions of the state's Hate Crime Act[6] as a starting point (but not exclusive framework) for what constitutes discriminatory harassment under the NYCHRL. This approach would be similar to other states like California and Massachusetts.

The landmark 1996 N.Y. Court of Appeals case, *Brown v. State of New York,* held that the equal protection clause of the N.Y. State Constitution[7] contains an implied private cause of action and is self-executing. While *Brown* was an action in the Court of Claims against the state itself, the language of the state equal protection clause explicitly bans discrimination by any "person, corporation, institution, or by the state." Thus, it would be reasonable, under the *Brown* rationale, to extend the holding of this decision to individuals and organizations that perpetrate hate crimes and allow a cause of action directly under the state constitution. Further, the *Brown* court also codified the procedures for determining when there is an implied cause of action (largely relying on Restatement (second) 874A of Torts). Applying that restatement, along with the *Brown* decision, there is likely an implied cause of action for any violation arising from the Hate Crimes Act.[8]

All of these laws can be used to hold individual perpetrators accountable. However, their true power comes when victims invoke them to fight back against institutions that aid, abet, enable, and incite bias based crime and harassment.

As Professors Koenig and Rustad pointed out in their 2007 article in the *American Behavioral Scientist*, "Hate Torts," federal civil rights laws have been effective at halting organizations that promote hateful behavior.

For example, in 1988, a white supremacist mob savagely beat an Ethiopian bus driver, Mulugeta Seraw, to death in Portland, Oregon. The victim's father, with the help of the Southern Poverty Law Center, sued the white supremacist organization, the White Aryan Resistance (WAR), seeking to hold them vicariously responsible for his son's death. A jury entered a $12 million judgment against WAR.[9] In satisfying the judgment, WAR suffered a blow from which it never fully recovered. The organization's assets were sold and its activities, as a result, were greatly curtailed. The organization's leader, Tom Metzger, had to sell his house, declare bankruptcy, and go on welfare to satisfy the judgment.

Similarly, security guards outside the White Aryan Nation's Idaho compound shot at a Native American woman and her young son as they drove by, causing the car to careen into a ditch. The woman, with the help of the Southern Poverty Law Center, sued. A jury awarded the woman $6.3 million[10] and held the organization and its leadership jointly and severally liable. As a result, the White Aryan Nation filed for bankruptcy, and had to sell all its personal and real property. A tech entrepreneur purchased some of the organization's property at auction and turned it into a human rights museum and study center.

It is important to note that these victories all arose under federal civil rights laws or the common law. These provide *less* protections than New York laws.

Fortunately, it seems that some alleged hate crime victims in New York have already begun utilizing the strong state and city protections.

Recently, practitioners of Falun Gong sued the Chinese Anti-Cult World Wide Alliance (CACWA) in the Eastern District of New York.[11] The plaintiffs allege, inter alia, that the defendants systemically conspired to violently harass, intimidate, and assault Falun Gong practitioners with the coordination of the Chinese government.

This case demonstrates the power of New York's human and civil rights laws. In April, after some discussion, Judge Weinstein dismissed the federal claims arising under 42 U.S.C. § 1985(3) (known as the Klu Klux Klan Act, which allows for a private cause of action for a conspiracy to violate civil rights) on summary judgment. However, in the same opinion, Judge Weinstein spent three sentences addressing the cause of action arising under the New York Civil Rights Law and promptly referred the matter to a jury. Without New York's strong state laws against discrimination, the plaintiff's recourse would be significantly diminished.

These cases illustrate the power of using New York law to hold hateful organizations accountable, with possibly devasting consequences to the offending parties. These laws have broad language and the courts have liberally interpreted them. It is plausible that the scope of these laws could further expand the meaning of both "public accommodations" as well as "aiding and abetting" to encompass parties that turn a blind eye, or otherwise enable, hateful actors.

Last year, the Second Department, in *Ananiadis v. Mediterranean Gyros Products Inc.*, held that a jury could find personal liability for a supervisor, under the "aiding and abetting" clauses of both the city and state human rights laws. The court specifically opined that a jury need only conclude that the supervisor "failed to take remedial action."

Extrapolating that logic, it is possible that a court could hold (or at least allow a jury to decide) any private institution liable if it "failed to take remedial action" to prevent biased-based violence. For example, if a bar knows that violent racists frequent its establishment, but fails to take

remedial action, there may be a colorable claim under the "aiding and abetting" clause of both the state and city human rights laws. This may extend liability, even if the actual violators were not employees or members of the private institution. (Note, this would not succeed against a website that hosts third-party content because it would be preempted by 47 U.S.C. § 230.)

While such situations may already be covered under the common law, there are key advantages to invoking the applicable human/civil rights law. First, these laws allow the collection of reasonable attorney fees, where the common law generally does not. In New York City, punitive damages are available as well. Perhaps most compelling is the strong message it sends offending parties. It is one thing to be sued for negligence or premise liabilities. It is another to be branded as a human or civil rights violator in the court of public opinion.

As mentioned above, a federal court in the Eastern District of New York held as a matter of first impression in *Andrews v. Blick Art Materials, LLC,* the internet is a "public accommodation." Although that case dealt with the disability aspect of the NYHRL, it raises an interesting point. If somebody threatens, harasses or intimidates another because of a protective characteristic (and crosses the line from constitutionally protected speech into threats or menacing behavior), could that raise a valid claim under the NYHRL, the NYCHRL, the N.Y. Bias Related Violence and Intimidation Act, or the equal protection clause of the state constitution? It does not seem that this issue has been raised yet. However, given the expansive interpretation of these laws and strong legislative intent, it seems like a plausible argument. This may help courts in new activities that the law has sometimes struggled to address, like cyber-bullying and revenge porn, if plaintiffs can prove there was a discriminatory motivation behind the behavior.

There are likely many other innovative ways to utilize New York's expansive laws against hate crime and human rights violations. As technology progresses and bad actors get more creative, we will likely see additional changes in the interpretations of these important laws.

We must all do our part to ensure that New York is a welcoming and tolerant place for all people. As members of the bar, we have both a special power, and responsibility, to ensure that the strong protections granted by the legislature, and our state constitution are enforced. By taking advantage of the state and city's human and civil rights laws, the private bar can ensure that hate truly has no home in New York.

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1. NYHRL § 290(3).
2. 268 F. Supp. 3d 381 (E.D.N.Y. 2017) quoting *Cahill v. Rosa,* 89 N.Y.2d 14 (1996) (holding that websites, as a matter of first impression, were "public accommodations" under the NYHRL).
3. NYHRL § 296(6).
4. *Baldwin v. Bank of America,* 42 Misc.3d 1203(A) (Kings Co., Sup. Ct. 2013) quoting *Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881 (2013).
5. NYC § 8-603.
6. N.Y. Penal Law 485.
7. Art. 1 §11.
8. N.Y. Penal Law 485.
9. *Berhanu v. Metzger.*
10. *Keenan v. Aryan Nation.*
11. *Zhang Jingrong v. Chinese Anti-Cult World Alliance*, 311 F. Supp. 3d 514 (E.D.N.Y. 2018).

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THE NEW YORK BAR FOUNDATION
Advancing Justice and Fostering the Rule of Law

NYSBA: A Strong and Relevant Voice

By Michael Miller

The New York State Bar Association is the most important and influential voluntary state bar association in the nation. We speak for the legal profession on issues ranging from access to justice to attorney professionalism.

NYSBA is a voice like no other. Local bars are important and have a meaningful role, but when there are unfair regulations proposed, inappropriate laws, violations of civil liberties, discriminatory practices, there is no stronger, more effective, more persuasive voice than ours.

Over the past year, we have continued our extraordinary advocacy in New York, Washington, D.C. and at the American Bar Association (ABA). Ours is a preeminent voice lobbying for justice, covering a wide range of topics, advocating for improvements to the justice system and the people it serves, and on other issues of importance to lawyers. The overarching theme of our work is always fairness and equality under the law, especially for those who are less privileged.

Our advocacy takes many forms. NYSBA Sections, committees and task forces issue thoughtful reports and, based upon those reports, our House of Delegates adopts the policy positions for the association. From time to time, we submit our reports to the ABA's House of Delegates and, depending on the issue, to members of Congress and the President, or to New York State legislators and the Governor. From time to time, we submit proposed legislation.

Additionally, each year NYSBA leaders meet with key committee chairs and other legislative leaders in Albany and Washington to urge support for NYSBA's legislative agenda and to ensure that NYSBA's voice remains strong and effective. Traveling the corridors of power is always exciting and humbling, for these are the same halls where some of America's greatest leaders have walked.

NYSBA's legislative lobby team is comprised of government relations staff and volunteer leaders, including the president, president-elect, president-elect designee and the chairs of NYSBA's Committee on Federal Legislative Priorities, Hilary F. Jochmans, and NYSBA's Committee on State Legislative Policy, Sandra Rivera.

To maximize our efforts when lobbying, whether in Albany or Washington, we typically separate into two groups, so that we are able to share our concerns with as many legislative leaders as possible. Because we are a nonpartisan advocacy group, we meet with members from both sides of the aisle and have generated support for our positions from members of both political parties.

These meetings give us the opportunity to forge and enhance relationships so that we are also able to remind elected officials that NYSBA, through our Sections and committees, is a valuable nonpartisan resource for legal analysis. It's a win-win: NYSBA is able to assist our government leaders, and our Section and committee members have the opportunity to make meaningful contributions and be relevant to the legislative process.

These periodic lobbying trips are important opportunities to expand NYSBA's reach. They provide NYSBA with opportunities to advocate positions directly with decision-makers and the staff members upon whom they rely. The meetings afford the opportunity to develop relationships with the people who shape national and state policy on issues of keen importance to our association, our members and our profession.

NYSBA's advocacy efforts also include providing testimony to commissions and legislative committees, sending letters to legislators and their staff and e-blasts to members, and supporting these efforts with a range of communications and media outreach strategies.

Michael Miller is president of the New York State Bar Association.

Congressman José Serrano, second from left, with, from left, NYSBA President-elect designate Scott Karson, Executive Director Pam McDevitt and President Michael Miller.

There are both long-term issues on which we are deeply committed, such as court reorganization in New York and preserving and enhancing funding for the Legal Services Corporation (LSC) nationally, as well as immediate priorities, like opposition this year to the Governor's proposed increase in the biennial attorney registration fee and reform of New York's overly complicated power of attorney law.

The budget recently advanced by the Trump administration would completely eliminate funding for the Legal Services Corporation (LSC), the largest funding mechanism in the nation for civil legal aid for low-income Americans. Local legal aid offices like the Legal Aid Society of Mid-New York in Utica provide critically important legal services to low- and middle-income families and individuals across Central New York and rely upon funding from LSC. Cuts to LSC would be devastating to communities across New York State. It is heartening to note that all of the representatives we met with recently, Republican and Democrat alike, recognized the importance of providing funding for legal services.

During my term as president, we have advocated on many issues, including:

- The government shutdown and its impact on federal courts;
- Due process for immigration asylum seekers;
- Criminal justice reform in New York regarding discovery and bail;
- Reform of New York's power of attorney law;
- Protecting the primacy of New York's tort laws from federal legislation;
- Comprehensive federal criminal record sealing;
- Our International Section's Latin American Council Ethics Guidelines;
- Ensuring attorney-client privilege to lawyer referral services;
- NYSBA's pro bono initiative to ensure the safety and well-being of migrant children detained at facilities in New York State;
- Issues regarding violation of constitutional norms, the independence of the judiciary and the apolitical administration of justice; and
- Violations of international norms and the rule of law, both in the U.S. and in Poland, Hungary and the Philippines.

At the past two successive meetings of the American Bar Association's House of Delegates, NYSBA resolutions were unanimously adopted. The first was a collaboration with the New York City Bar Association calling for hurricane-ravaged Puerto Rico to be exempted from the anachronistic and outdated Merchant Marine Act of 1920, known as the Jones Act, which causes goods shipped to Puerto Rico from the U.S. to be unnecessarily costly. Most recently, our resolution condemning government shutdowns and their impact was adopted.

NYSBA is currently collaborating with the New York County Lawyers Association to advocate for the adoption of best practice guidelines for online providers of legal documents by the ABA House of Delegates and has developed a working group of representatives from various ABA entities and stakeholders.

Personal outreach to legislators, technology shortcuts that help our members contact their elected representative quickly and easily, opinion pieces in prominent news media, and active social media are all important tools NYSBA employs to maintain its powerful voice of concern and to advocate for those things that help define us.

It a source of great pride to me that a consistent theme of our advocacy is about making certain those who need lawyers get them, so that bad things don't happen to people because they couldn't afford legal representation.

Yes, NYSBA advocates on issues of concern to our members, but we also do more than that, for we are more than just a trade association. We seek to protect and preserve the independence of the judiciary, to enhance the administration of justice and to ensure equal access to justice for all. It is our advocacy for these noble causes that is a source of our credibility. We stand as the guardians of our precious civil liberties and the rule of law. Our voice is strong, relevant and effective.

Court Reform Gains Momentum

By Christian Nolan

Long championed by the New York State Bar Association, momentum is growing for court reform in New York.

In her State of the Judiciary Address in February, Chief Judge Janet DiFiore prioritized restructuring the state court system. During the speech, she noted how closely the recommendations in NYSBA's 2017 report by the Committee on the New York State Constitution paralleled the judicial branch's proposals.

Further, state Senate Judiciary Committee Chair Brad Hoylman said he is considering holding hearings on court reform and Assembly Judiciary Committee Chair Jeffrey Dinowitz has acknowledged that court reform needs to finally be discussed by the Legislature.

Further building the momentum, the *New York Law Journal* on March 8 published an op-ed by NYSBA President Michael Miller and President-elect Hank Greenberg with the headline "It's Time to Fix NY's Broken Court System."

"It is universally acknowledged that New York has an overly complex, unduly costly and unnecessarily inefficient court structure," wrote Miller and Greenberg. "Despite being called the Unified Court System, it is anything but. There are 11 different trial courts and multiple levels of appellate courts, far more than any other state in the nation. In fact, California, a state with approximately double the population of New York, has only one trial level court."

The article goes on to discuss NYSBA's recommendations "to bring the state's judicial structure into the 21st century," as outlined in the 2017 report. The leaders also said they would embrace the opportunity to present the recommendations to lawmakers.

Recommendations include: consolidating New York's trial courts into two levels – a Supreme Court, which would have original jurisdiction over most cases around the state, including criminal, civil, family and probate matters, and a District Court, which would handle housing and minor criminal and civil matters.

Also, NYSBA proposes the creation of a Fifth Judicial Department. An 1894 amendment to the state constitution barred the Legislature from adding more departments beyond the existing four that make up the Unified Court System. As a result, there is no way to address the major population changes that have occurred since.

The report found that in 2015, the Second Department in Brooklyn handled 11,600 appeals, compared with the 6,340 in the other three departments combined. The creation of a Fifth Department would help relieve this caseload in the Second Department.

NYSBA also recommends reforming the process by which judges are selected in New York. For instance, judges of the Court of Appeals, Appellate Divisions of the Supreme Court, the Court of Claims and New York City Criminal and Family Court are all appointed. Meanwhile, judges of the Supreme Court, County Courts, Surrogate's Court, Family Court outside New York City, District Courts, New York City Civil Court, and many of the justices in towns and villages outside New York City are all elected.

NYSBA supports a plan to provide a commission-based selection of nominees that would be confirmed by an appropriate legislative body. Similar to the method for the selection of judges for the Court of Appeals, this process would allow the appointing authorities to focus on the competence, temperament and integrity of those seeking to become judges.

The report further recommended reforming the cap on Supreme Court justices. The state constitution allows the Legislature to increase the number of Supreme Court justices just once every 10 years but cannot exceed one justice per 50,000 people in any judicial district.

Due to the heavy caseload experienced by the Supreme Court, especially in the First and Second Departments, acting Supreme Court justices are designated from the Court of Claims and other courts as a cap work-around in order to mitigate case management problems. NYSBA proposes allowing lawmakers to establish the sufficient number of justices necessary to meet the needs of litigants in New York courts.

NYSBA's report – *The Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts* – can be found at: http://www.nysba.org/judiciaryreport2017/

President-Elect Henry Greenberg to Deliver Charles Evans Hughes Memorial Lecture on April 18

By Brendan Kennedy

Henry M. Greenberg, president-elect of the New York State Bar Association and shareholder at Greenberg Traurig LLP, will deliver the 55th Charles Evans Hughes Memorial Lecture on April 18 in New York City.

The lecture, entitled "*Charles Evans Hughes & The Role of New York's Organized Bar at a Time of Crisis for the Rule of Law*," is hosted by the New York County Lawyers Association (NYCLA) with introductory remarks by former Associate Judge of the Court of Appeals Hon. Carmen Beauchamp Ciparick.

Established in 1948 by NYCLA, the lecture series honors Hon. Charles Evans Hughes, former NYSBA President in 1917 and 1918 and NYCLA President from 1919 to 1921. Hughes served as New York's 36th Governor (1907–1910), U.S. Secretary of State (1921–1925) and Supreme Court Chief Justice (1930-1941).

Greenberg is the first NYSBA president to deliver the Charles Evans Hughes Memorial Lecture since President Whitney North Seymour in 1970 and joins an exclusive group of legal scholars who have given past lectures including, former U.S. Attorneys General, federal and state Court of Appeals Judges, and U.S. Attorneys.

Past lecturers have included:

- Robert A. Katzmann, Chief Judge of the United States Court of Appeals for the Second Circuit
- Hon. Judith S. Kaye, former Chief Judge of the State of New York and Chief Judge of the Court of Appeals
- Hon. Jonathan Lippman, former Chief Judge of the State of New York and Chief Judge of the Court of Appeals
- Hon. Lawrence H. Cooke, former Chief Judge of the State of New York and Chief Judge of the Court of Appeals
- Loretta E. Lynch, the 83rd Attorney General of the United States
- Preet Bharara, former U.S. Attorney, Southern District of New York
- Hon. Henry J. Friendly, former Chief Judge of the United States Court of Appeals for the Second Circuit

Greenberg is president-elect of the New York State Bar Association and shareholder at Greenberg Traurig LLP

The 55th Charles Evans Hughes Memorial Lecture will be delivered Thursday, April 18 at 6 p.m., at the NYCLA Home of Law, 14 Vesey Street, Manhattan. There is no charge to attend the event, but advance registration is required. For registration information, visit www.nycla.org

7 questions and a closing argument

Member Spotlight with Lillian Moy

Moy is executive director of the Legal Aid Society of Northeastern New York. She lives in Albany.

What do you find most rewarding about being an attorney?

When I was a Legal Aid staff attorney and represented clients, it was great to resolve problems and help clients live better lives with stable housing, with a steady income or, finally, in safety. That experience has helped me in all of the work that has followed: managing and supervising others, leading a large legal services agency, training other lawyers in diversity and cultural competence. This skill set has helped me in spotting issues, problem resolution, and awareness of the legal liabilities and responsibilities in the work. It has helped me to succeed.

What do you find most challenging about being an attorney?

Over the years, there have been many challenges. First, gaining and maintaining competency is key. Lately I am thinking about the abilities of attorneys to respond well to clients of different cultures. Is this a skill that can be taught and learned? I believe it is, and can be, and I want to contribute even more to help people learn that skill. In addition, I'm challenged by the role of technology in the practice of law. As a Legal Aid director, I understand that using technology to deliver services more efficiently and effectively is crucial. Figuring out the correct technology for the majority of low-income people is a challenge, and motivating lawyers of any age to use technology to deliver legal services is also a challenge.

Did another lawyer mentor you or advise you on your career path?

Many lawyers have mentored me but the person I think of most often is an African-American woman named Lillian Johnson, the director of Community Legal Services in Phoenix, Arizona. I have been following Lillian around for years and am proud to be known as "the other Lillian." She has helped me to handle the special challenges of being a woman of color and an executive director in the Legal Aid world. She helps me to think clearly and resolve problems effectively. Lillian always responds to situations in a new way, despite her many years in legal services.

What do you think that most people misunderstand about lawyers and the legal system?

I think most people believe that all lawyers are in this profession to make a lot of money, and that all lawyers make a lot of money. Neither is true. Many attorneys choose to practice in an area of law that is not necessarily fiscally rewarding. The opportunity to help many individuals in a solo or small practice, or in a legal service practice, is attractive to many. I wish all people would understand that public interest lawyers are "real lawyers."

What is your passion outside of work and the law?

Yoga! The union of mind, body and spirit that I strive for in practicing yoga contributes to my wellness and to my ability to continue doing very demanding work. I wish that many more people would explore yoga and other efforts at more mindful living and lawyering.

What is your dream vacation?

My dream vacation is to return to India on another yoga-based, spiritual journey. I had never been to Asia before and my trip to India in 2018 was quite formative. It was restoring, challenging, energizing and beautiful. I dream of returning to India as soon as possible.

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

I would love to have dinner with Charles Hamilton Houston, who used the separate-but-equal doctrine in *Plessy v. Ferguson* to undermine the Jim Crow laws of the era. He laid the groundwork for *Brown v. Board of Education* and developed the arguments against racially restrictive covenants on real property. I would love for him to have been my mentor and wonder sometimes if I had chosen the path of civil rights litigation whether I might still be practicing law in the traditional sense. I would like to discuss with him the long view on the results that the law can achieve and the use of the law as a tool for gaining equal rights for all. I would like to discuss today's civil rights issues such as voter suppression, the school-to-prison pipeline, and full rights for LGBT people.

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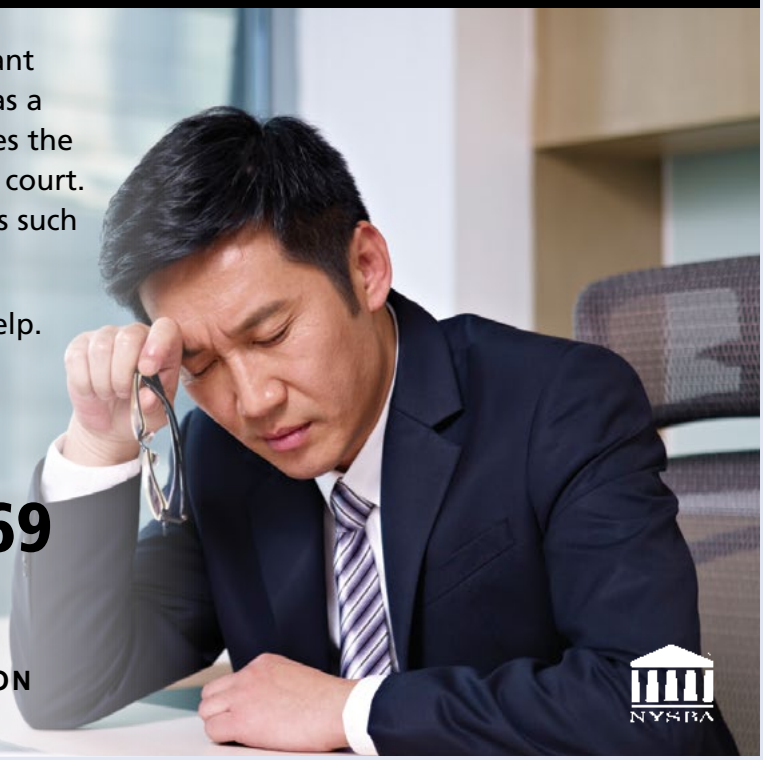

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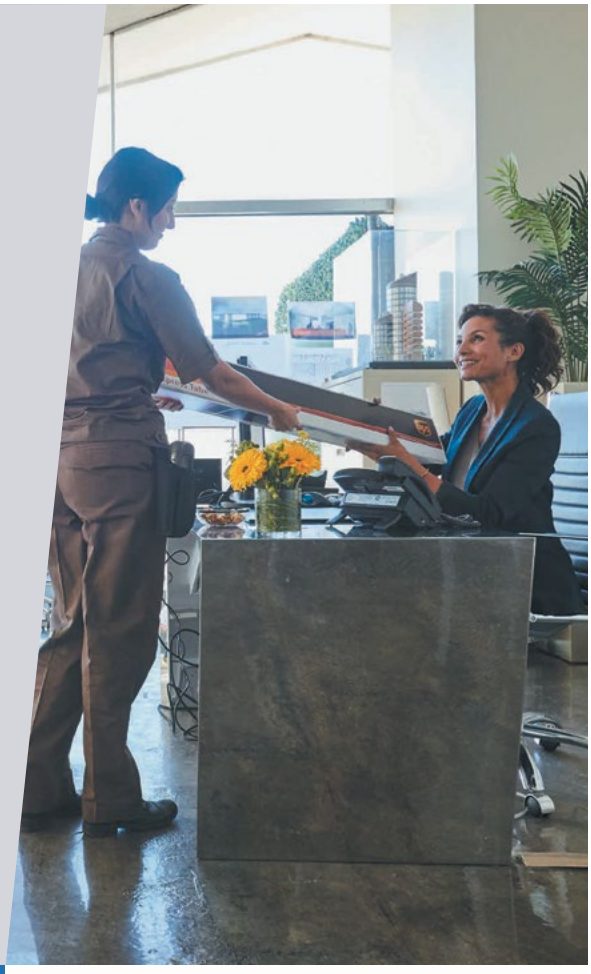

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Promoting Civil Rights for the Disabled: N.Y. Can Take the Lead

By Leonard Duboff and Lisa Ferris

Although technology has changed the world for everyone in the last several decades, it has been nothing short of revolutionary for people with vision loss. The personal computer, along with the digitization of data and the world wide web, have arguably had more of an impact on living conditions for the blind than the advent of braille or the development of guide dog training.

But as groundbreaking as the new technology is, obstacles remain. This technology is available only when organizations prioritize accessibility and convert paperwork and digital materials to accessible formats. The legal field is, unfortunately, lagging in its adoption of accessibility standards.

To be sure, technology has greatly enhanced the lives of the blind and deaf.

Not that long ago, we had to depend on volunteer readers and charity libraries to access print information. There were often long waitlists for books and magazines, and we had to rely on the kindness and schedules of others to help read our mail and fill out forms.

The consequences of this inefficiency were sometimes dire for the blind and visually impaired. We lagged behind in knowledge and lost networking opportunities; we lost all confidentiality with respect to our medical, legal and financial records. We signed legal documents we couldn't read when there was no help available. We had to trust frenzied counter employees to fill out important forms and hope that they did it correctly. We missed important deadlines.

Now, through accessible digital technology, the blind, deafblind and visually impaired have the potential to access everything in real time, independently and without having their options filtered through others.

With services like "My Chart" for medical records and online banking, we now have independent, 24-hour access to our own confidential information. Online fillable forms and legal digital form services like "DocuSign" allow us to ensure the accuracy of our information and to read and fully understand the legal documents that we sign. When the world of paper is made digitally accessible, we gain access to the same civil rights others have come to expect for themselves.

Even so, the legal field is lagging behind.

For example, many government agencies still do a large portion of their work via paper forms and mailed letters. Many attorneys expect blind people to sign wills, contracts, deeds, custody and divorce papers and other documents that they have never read and can never refer to.

Digitizing print is not enough. Digitization has to be done in a way that meets the Web Content Accessibility Guidelines (WCAG). The World Wide Web Consortium, which is the organization that develops international standards for the internet, developed these guidelines to ensure that screen-reading software can process digital information. The guidelines also set accessibility standards for users who are deaf, cognitively disabled, or who have mobility disabilities.

Here, too, the legal field is behind. Many legal organizations and practices have websites that are not in compliance, and have application and form processing procedures that use either inaccessible digital forms or paper formats that do not allow for private, accurate and independent access by clients with vision impairments.

Lawyers and other members of the legal profession should be sure that the written word is presented as text or as a readable pdf, not a scanned image. Forms cannot simply be scanned and attached to an email, but need to be made into either accessible fillable pdfs or web-based html forms.

WCAG may take a bit of a learning curve to get used to, but these guidelines are not difficult or expensive to implement. Resources for web and app designers to learn the standards are free and readily available online, and after some study, these standards will soon become second nature. Consultants are also available to assist with accessibility.

When incorporated and prioritized throughout all stages of a project (rather than as an afterthought), universally accessible websites do not cost any more money to make and take no more time to develop than any other website. Besides, it's the law in many jurisdictions.

Lawsuits relating to website accessibility have sharply increased. A number of courts have held that websites and web-based services are subject to the Americans with Disabilities Act (ADA). Other courts have, however, held that they are subject to the ADA only when there is a connection, or nexus, between the website and a brick-and-mortar location. Section 508 of the Rehabilitation Act has integrated WCAG guidelines as a standard of accessibility, requiring federal agencies to make their electronic information accessible to people with disabilities.

Advocacy groups like the National Association of the Deaf (NAD) and National Federation of the Blind (NFB) continue to pass resolutions and work on stronger, more specific legislation that will require accessible digital media to be made available as a reasonable accommodation to print media and paperwork, and that all digital media be accessible to people with disabilities.

Like nearly all accommodations for people with disabilities, WCAG guidelines benefit everyone, not just the disabled. Digital forms mean that clerks are free from having to enter handwritten data and guess at illegible handwriting that may cause errors and delays. Digital legal forms mean that signatures can be procured and documents distributed in minutes rather than days. Less paper waste benefits the environment and saves money.

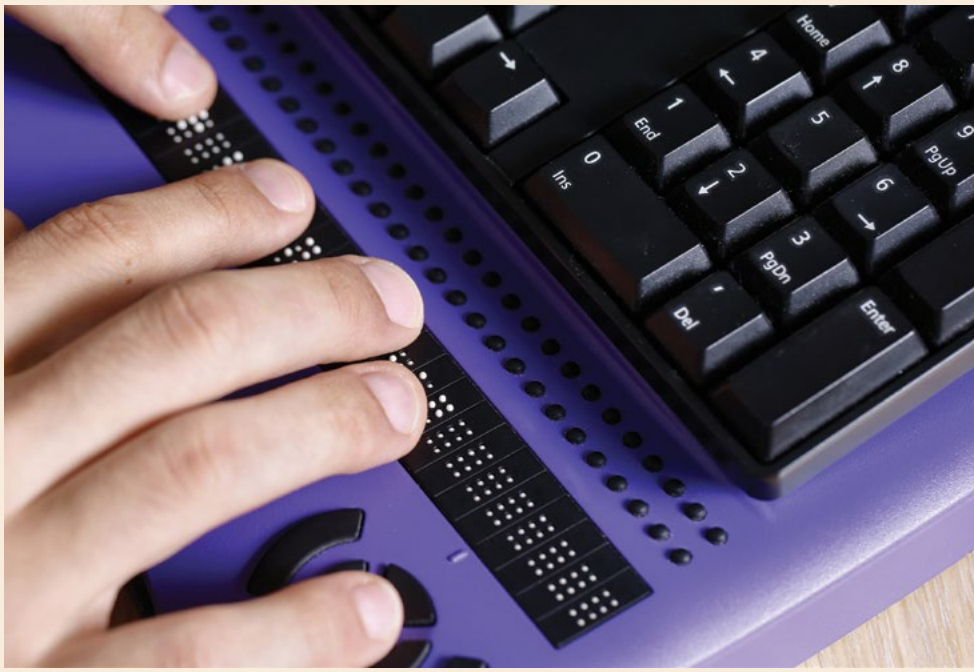
Accessible websites and apps are neater and more organized for web and app designers and developers. They are more easily searched and accessed by search engines and are easier to modify. Universal design benefits all. There is no downside. It just takes commitment.

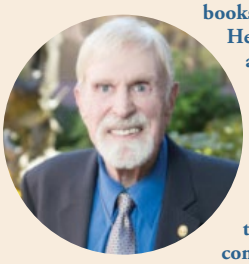
So, New York attorneys: will you take the lead? Will you commit to making your media, services and other activities accessible to all of the print disabled lawyers, paralegals, law professors and law students out there? Will you promote digital accessibility as a best practice standard for all the New York State Bar and all its members?

Three steps to get you started:

1. Perform an "accessibility assessment" to determine how compliant your organization is with ADA and other applicable laws. There are online tools, as well as consultants, available to help with this.
2. Create a plan to bring your policies and environment up to code. Make sure in the future, digital accessibility is prioritized from the start of everything you do.
3. Test your digital presence and digital processes (i.e., online intake forms and legal documents) with actual people with disabilities who use assistive technology. Don't assume that you won't ever deal with a disabled client; it could be that you haven't in the past because of your organization's inaccessibility.

Two good websites to help you get started are www.w3.org/WAI/ and https://www.biggerlawfirm.com/digital-accessibility-for-law-firms/.





Leonard DuBoff is author of more than 30 books on business and intellectual property law. He has also written numerous scholarly articles and he is a frequent contributor to this publication as well. He was a law professor for almost a quarter of a century, first teaching at Stanford Law School, Lewis & Clark Law School and the Hastings College of Civil Advocacy. He is pioneer of the field of art law. He is the managing principal of the DuBoff Law Group, PC which focuses on complex business and intellectual property.

Lisa Ferris, with partner Niklas Petersson, founded Miles Access Skills Training (MAST), which teaches and promotes the use of technology and alternative skills to people with disabilities, as well as consulting with organizations that want to become more accessible. They are Deafblind and blind, respectively, which they feel is an asset in their line of work. When not working, they enjoy spending time outdoors with their guide dogs and 3 children. Find more information about MAST at blindmast.com.

5 Ways to Know if You Are a Data Security Risk

By John Kogan

When we help law firms implement security programs, we take the expected technical measures: we plug up holes in the network, apply encryption where necessary, install monitoring solutions, and so on.

But the most important aspect of any security program, user training and awareness, is also the one that is hardest to control with any degree of certainty. Because it's not the tech that's putting your firm most at risk—it's you.

If you study trends among data breaches, you will notice that human error causes a large proportion. This is not to say you should feel bad about yourself and your trusting nature. Scammers and hackers are scarily smooth these days (it's not for no reason that 2018 is being referred to as the year of the scam[1]).

Here are some way to know if you are putting your client's data at risk.

1. YOU ARE QUICK TO CLICK ON HYPERLINKS.

Avoid clicking on links in emails, especially if they are from an unknown sender or sent without context. A good way to verify links before clicking is to hover your mouse over them. Do they lead where they purport to? Check carefully for tricky typos like "arnazon.com."

If you do click on a link, never enter sensitive information into the window that opens.

2. YOU WANT TO BE EXTRA HELPFUL BY EMAIL AND ON THE PHONE.

Say you get an email from a partner of your firm: they are stranded abroad, have lost their wallet, and need your help immediately. It's natural that your first instinct would be to help, but think twice.

Even if the email does seem to be from someone you know, be on guard if it seems out of character. Watch out for odd spelling and grammar, threats of negative consequences, and requests for fund transfers. If it seems weird, it probably is.

By extension, be careful when someone calls you requesting information about you or a colleague.[2] These kinds of scams are called social engineering, and they are remarkably effective.

3. YOU LOSE YOUR GADGETS AND DON'T DISPOSE OF THEM PROPERLY.[3]

Are you the type to leave your cellphone and credit card behind at restaurants, or forget your laptop in a cab? I can relate.

Aside from causing headaches, such slip-ups can also lead to major breaches if your lost items end up in ill-meaning hands.

To avoid worst case scenarios, make sure everything is encrypted and, at the least, password-protected. Your phone should have a pin or a forensic safeguard, such as fingerprint scanning or facial recognition. Your laptop should be encrypted with a solution such as Microsoft Windows's BitLocker.

4. YOU USE THE SAME PASSWORD FOR EVERYTHING.

I know, it's become so difficult to remember all our passwords. Still, do try to avoid repeating them, and definitely, do not write them on a post-it note that you stick to your computer monitor. If one of your accounts is breached, the rest of your accounts with the same password will be at risk as well.

We recommend using a password manager such as Roboform, which creates complex and unique passwords and remembers them for you. Browsers such as Google Chrome are also starting to offer complex password management now.

John Kogan, Chief Information Security Officer at Kraft Kennedy, is the Director of Managed Services, with a special focus on cybersecurity. His team provides ongoing support, monitoring, and technology planning to organizations. He has an extensive background in IT and business developed over 35 years of working in financial services, consulting, and Fortune 100 corporations.

Also, consider multifactor authentication. If someone does get a hold of your password and tries to enter it on an unfamiliar computer, they will not be able to log in without a second verifying step, such as a prompt on your cell phone.

5. YOU HAVE LOCAL ADMINISTRATOR RIGHTS ON YOUR COMPUTER.

This is common at small firms. Having administrator rights means that you are able to make big changes on your work computer, such as installing new programs. While it may be convenient, it is also dangerous, as it makes it easy for malware and hackers to access your firm's core systems. Your IT department or provider should be the only one with administrator privileges.

1. Will Yakowicz, *The 3 Biggest Phishing Scams of 2018*, Inc.com, July 6, 2018, https://www.inc.com/will-yakowicz/biggest-email-phishing-scams-2018.html.

2. *A Hacker Shows How You Can Take Over Someone's Online Account in Minutes Using Nothing But a Phone*, Business Insider, Feb. 25, 2016, https://www.businessinsider.com/hacker-social-engineer-2016-2.

3. *Security Alert: BleedingBit Affects Cisco, Meraki, Aruba Access Points*, Kraft Kennedy, Nov. 14, 2018, https://www.kraftkennedy.com/security-alert-bleedingbit-affects-cisco-meraki-aruba-access-points/.

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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.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

DEAR FORUM:

I am a judge who is old enough to remember practicing law without a computer. I have done a reasonable job of keeping abreast of recent technology, but it is a running joke in our house that my kids think I need help finding the power button on my laptop. I recently joined a social media site to keep up with photos of my grandchildren and have been connecting with some colleagues I have worked with over the years. I have been cautious with whom I connect, but as I connect with more friends in the legal community, I have been receiving more and more "friend" requests from people whose names I recognize from the courthouse or bar association events, but I am not sure I would consider them a "friend." One attorney I connected with asked me to subscribe to her blog on an area of law that she knows is of interest to me and asked if she could interview me for a podcast about my experiences as a practitioner and judge. At first I thought these "connections" were no different from any other attorney networking, but then I started to think about whether anyone could misconstrue this as inappropriate or as a violation of my ethical duties. Should I be concerned that by engaging in social media, I am violating any ethics rules since I know that many of my online "friends" could appear before me in a case?

In one circumstance that I am particularly embarrassed about, I accidentally accepted a "friend" request and next thing I know, I am getting messages from a litigant in a case I was hearing. I quickly "unfriended" the person once I realized what happened, but I am worried that this could have a significant impact on the case. I know I need to disclose to the attorneys on the case that the communication occurred, but is this a situation where I should automatically recuse myself since I actively accepted the friend request?

There are so many new social media platforms that are showing up in court cases, it is hard to keep up with them all. I noticed recently that some attorneys appear to be using social media platforms as a means of gathering evidence for their cases while others appear to be advising their clients on how to restrict public access to their social media accounts during discovery. Do you have any advice for a social media newbie as to where to draw some lines in how attorneys use social media within the bounds of their ethical obligations?

Very truly yours,
Justice Online

DEAR JUSTICE ONLINE:

The rapid expansion of social media can create potentially sticky situations for judges. New York's Rules Governing Judicial Conduct, 22 N.Y.C.R.R. Part 100 (the "Rules"), set forth the relevant guidelines and obligations that judges must consider when using social media. Judges should be particularly mindful of Rule 100.2, which provides that a judge must always strive to avoid impropriety and the appearance of impropriety. Obviously, judges should not post anything to their social media accounts that could potentially violate the Rules such as an offer of legal advice or comments on a matter before their court. *See* 22 N.Y.C.R.R. §§ 100.3(B) (8), 100.4(G). That is a an easy one, but the quasi-public nature of social media and its associated privacy concerns can raise a host of unique issues that are often difficult to answer and may not have been specifically contemplated by the Rules.

Subscribing to Attorney's Blog and Participating in a Podcast

Important ethical considerations arise when judges subscribe to legal blogs or participate in podcast interviews. The New York State Advisory Committee on Judicial Ethics (the "Committee") recently observed that "the question is not whether a judge may participate in blog posts, podcasts, social media or the like, but how he/she does so." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 18-126 (2018).

In response to your question whether you can accept your attorney connection's request for a podcast interview, the

Committee has advised that a fact-intensive inquiry is required before the question can be answered. *See id.* Specific factors considered by the Committee include: (1) whether the judge is compensated for participation, (2) whether the material is accessible to the public, (3) whether the podcast host/sponsor appears before the judge, and (4) whether the podcast host is sponsored by a private law firm. *See id.* For full-time judges, the "key factor" is whether the podcast is sponsored by a private law firm. *See id.* The decision whether to participate in the interview should therefore turn on a careful analysis of these factors, giving particular weight to whether the your attorney connection's podcast is hosted or sponsored by a law firm or otherwise closely connected to the for-profit practice of law.

When asked about private law firm blogs that require registration and the subscriber's consent to receive the firm's marketing materials as a condition of the subscription, the Committee advised judges to refrain from subscribing to such blogs because a judge's subscription "could convey the impression that such chosen law firms are in a special position to influence the judge or his/her colleagues." *See id.* Where this is the case, the Committee has stated that a judge's use of a private email address to subscribe to the blog would not sufficiently eliminate the appearance of impropriety. *See id.* The Committee also advised that a judge in a specialized court should not remain on an email list prepared by a one-sided legal services group where the list is not generally available to the public or the bar. *See id.*, citing N.Y. Adv. Comm. on Jud. Ethics, Op. 15-148 (2015). The Committee recently expressed that it "presume[s] a for-profit law firm which prepares and distributes [material] to the public on its website and elsewhere does so for commercial reasons, i.e. primarily for marketing or promotional purposes." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 18-126 (2018). Based on these opinions, and perhaps charting the safest course for you, it is probably best that you refrain from subscribing to the blog and avoid the risk that your subscription might be misunderstood. *See id.* As the Committee noted, however, visiting a law firm's blog online, without subscribing or registering, would avoid all of these concerns. *See id.*

"Friending" Potential Litigants on Social Media

Turning to whether you can become Facebook "friends" with those who may appear in your court, the simple answer is yes. The Committee has opined that it "cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 08-176 (2009). In fact, the Committee has even suggested that the "mere status" of a Facebook friendship with an *actual litigant*, "without more, is an insufficient basis to require recusal." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 13-39 (2013). As recently noted by the Florida Supreme Court, with the notable exceptions of California, Connecticut, Massachusetts, and Oklahoma, this is the "clear majority position." *See Law Offices of Herssein and Herssein, P.A. v. U.S. Automobile Assn.*, No. 3D17–1421 (Fl. Sup. Ct. Nov. 15, 2018). In those jurisdictions following the minority view, a Facebook "friendship" between a judge and a litigant "standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct." *Id.*

Where a judge is Facebook "friends" with an actual litigant, there are additional ethical concerns that arise, particularly New York's rules governing judicial conduct that require that judges avoid impropriety and the appearance of impropriety in all of their activities. *See* 22 N.Y.C.R.R. § 100.2. As stated by the Committee, in those situations judges must consider whether the presence of the online connection "alone or in combination with other facts, rise[s] to the level of a 'close social relationship' requiring disclosure and/or recusal." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 08-176 (2009).

As you indicate, the nature of the actual relationship that you have with your Facebook "friends" likely varies widely from acquaintances to close personal friends. Such is the case with many Facebook users. Therefore, if one of your Facebook "friends" becomes an actual litigant in your court, whether you must recuse yourself will be based on the particular Facebook "friend" who may be involved. If you believe the Facebook "friend" is a mere acquaintance, and would not create so much as the appearance of impropriety, in our opinion, recusal would not be required.

Receiving Social Media Communications from a Party

With respect to the *ex parte* communications that you reviewed from a party, we believe that you correctly decided to disclose the communication to all parties involved in the matter. Generally, "if a judge reviews a substantive *ex parte* communication, it must ordinarily be disclosed to all parties." *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 17-53 (2017) (citations omitted); 22 N.Y.C.R.R. § 100.3(B)(6).

Whether you must now recuse yourself is a more complicated question. As with any other case, recusal is mandated if a judge has reason to believe that his or her impartiality might reasonably be questioned, including if disclosure of an *ex parte* communication would likely erode public confidence in the judiciary. *See* NY Adv. Comm. on Jud. Ethics, Op. 17-53 (2017) (*citing* 22 N.Y.C.R.R. § 100.3(E)(1)). Recusal is also required if the communication leads to some personal bias by the judge, or provides the judge with knowledge of a disputed evidentiary fact. See 22 N.Y.C.R.R. § 100.3(E)(1)(a)(i). In other cases, however, recusal will generally be left to the sole discretion of the judge. *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 17-53 (2017).

Since you have told us that your acceptance of the Facebook "friend" request was inadvertent, it appears likely that disclosing the communication would not result in your impartiality being reasonably questioned, or otherwise erode the public confidence in the judiciary. Therefore, it is advisable that your decision for whether to recuse yourself be guided by the actual substance of the communication, and your determination of whether it could potentially influence your decision in the case. Regardless of your eventual decision, the Committee has recommended that judges faced with similar circumstances write a memorandum to the file documenting the bases for any decision of whether or not to recuse in the event the decision is later questioned. *See* N.Y. Adv. Comm. on Jud. Ethics, Op. 13-39 (2013).

Using Social Media to Obtain Discovery

Given that many people use social media to document significant life events, it is not surprising that many attorneys use Facebook and other forms of social media in an attempt to obtain relevant discovery in a matter. Luckily, some bright line guidelines exist.

For example, it is largely accepted that an attorney representing a client in litigation may access and obtain information from an adverse or third party's social media page, for use in the litigation, so long as that information is accessible to the entire public. *See* NYSBA Comm. on Prof'l Ethics, Op. 843 (2010); New York County Lawyers Association (NYCLA) Prof'l Ethics Comm., Op. 745 (2013). Under those circumstances, the attorney would not run afoul of any ethical rules because accessing an entirely public social media website is "conceptually no different from reading a magazine article or purchasing a book written by that adverse party." NYCLA Prof'l Ethics Comm., Op. 745 (2013); *see* NYSBA Comm. on Prof'l Ethics, Op. 843 (2010) ("Obtaining information about a party available in a [social media] profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription service such as Nexis or Factiva, and that is plainly permitted.").

The catch is that the analysis will change where a person's social media information is not completely accessible to the general public. In those circumstances, gaining access invariably requires an affirmative request by the person seeking to gain access – such as a "friend request" on Facebook – and an acceptance by the person that owns the social media account. Two important ethical considerations arise as a result.

First, because the request to gain access is a form of communication, the attorney cannot make the request when he or she knows that the owner of the social media account is represented. *See* NYCLA Prof'l Ethics Comm., Op. 750 (2017); RPC 4.2 (prohibiting lawyer from communicating with a represented party about the subject of a representation.). As with all communications with represented persons, "the lawyer seeking access must first contact the lawyer representing the party or witness to seek permission." NYCLA Prof'l Ethics Comm., Op. 750 (2017). The prohibition against contacting jurors also means that an attorney may not request access to a juror's social media information. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014); RPC 3.5(a)(4) (a lawyer shall not communicate with a member of the jury venire before or during trial unless authorized to do so by law or court order).

Second, even where the request to gain access to social media information would otherwise be permissible, the NYCLA Professional Ethics Committee has found that when making the request, the attorney must simultaneously inform the social media account holder of the lawyer's role in the relevant litigation and the reason for making the request, as the failure to do so constitutes a misrepresentation by omission. *See* NYCLA Prof'l Ethics Comm., Op. 750 (2017). Where the social media platform does not allow requesting parties to simultaneously communicate a message, such as Snapchat, the attorney may not request access. *See* NYCLA Prof'l Ethics Comm., Op. 750 (2017). Finally, it should be obvious that the attorney may not make an end-run around these obligations by causing a third person to make the

request. We addressed this, as well as other related social media issues, in a prior Forum that may also be helpful to you. *See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2013, Vol. 85, No. 5.

Advising a Client to Restrict Public Access to His or Her Social Media Account

It is also generally considered permissible for an attorney to advise a client to restrict public access to social media accounts. The NYCLA Professional Ethics Committee has advised that there "is no ethical bar" to counseling clients to prohibit or restrict public access to their social media accounts; attorneys are permitted tell a client to "tak[e] down" particular information posted to their social media accounts that may be harmful in litigation. *See* NYCLA Prof'l Ethics Comm., Op. 745 (2013). Under both circumstances, however, attorneys must be mindful of state and federal laws, which generally require parties to preserve potentially relevant evidence, and prohibit the destruction and spoliation of that potential evidence. *See id.*, *citing VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93. A.D.3d 33 (1st Dep't 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data."). These rules are no less relevant when it comes to information contained on a litigant's social media account (or information that was previously contained in a social media account). While such information may implicate privacy concerns, it remains discoverable so long as there is a sufficient showing by the party seeking disclosure. *See Forman v. Henkin*, 30 N.Y.3d 656, 664 (2018) (holding that when evaluating discovery demands involving social media accounts, "courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found" as well as balance "the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder").

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am negotiating with an adversary over the terms of a complicated contract that has gone through numerous revisions. My adversary and I have been exchanging redlined Word documents and PDFs showing the edits. When you move the cursor over the edits, the program identifies who made the changes and the date and time of the edits. This has been helpful to both sides because there have been so many revisions and sometimes it is difficult to remember who made each edit. Sometimes I add comments to my client in the document when I send proposed edits for her review. Before I send it back to my adversary, however, I always make sure to remove my comments to my client.

In the last draft I received from my adversary, it included a tiny note bubble that I clicked on because I thought the comment was intended for me. But when I opened it, I discovered the comment was my adversary's comment to *his* client. I am sure it wasn't for me since it said, "They'll never go for this sentence and I don't think we should push back if they strike it." I realized from the metadata in the edits that the sentence at issue was added by the adversary client, not the attorney. I am not sure what to do. My adversary was right; I wouldn't have gone for it and I am definitely going to strike that sentence in the next version. Do I have an obligation to tell my adversary that I saw his comment? I don't want this to derail all of the time and work we spent negotiating this contract and I really don't think the comment had any impact on me because I certainly would have rejected the proposal. Even if I do tell my adversary about the comment, what happens if I discover other metadata that is beneficial to my client? Am I permitted to review and use information I obtain from the metadata in the document?

This got me thinking about all of the information that gets embedded in documents that we are exchanging with adversaries. Although I am pretty familiar with the information that is embedded in the documents, these programs are adding new features all the time and there is probably some information that is embedded that isn't even on my radar. What are my obligations to my client when it comes to eliminating the metadata in documents I send to an adversary? In litigation discovery, are there any bright line rules as to what metadata I can use in documents produced by my adversary or what I should be removing before sending to an adversary?

Sincerely,
B. Hinds Sedock

A Recent Law School Graduate Looks at 55

When I was in high school, I took advantage of a pilot "law concentration" program. I had it all worked out – I would go on to college and then attend law school and go on to be a real-life Perry Mason. However, as fate would have it, that plan didn't exactly work out.

Do you remember when you were very young, and people would ask you, "What do you want to be when you grow up?" For me, the answer was always "a lawyer," except when I flirted with the idea of being an astronaut – but that was in 1969, right after the USA's historic moon landing, when everyone wanted to be an astronaut.

I started off OK and completed my bachelor's degree in 1988; but then took a 30-year detour. I put my childhood goals on permanent hold and got on with making a living and eventually pursued a civil service career in information technology. I liked my job, but I always wondered "what if" I had pursued my original plan instead.

I divorced after a lengthy marriage and then remarried, and shared my long-abandoned dream of being a lawyer with my new wife. She strongly encouraged – insisted, really – that I take the LSAT. Much to my own surprise, I scored well enough to gain admission to Albany Law School and win a generous scholarship.

My wife and closest friends were incredibly supportive of my decision to return to school. Others not so much. The naysayers told me, "You don't have enough time left to build a law career," or, my personal favorite, "You are too old! Why are you doing this in your 50s?"

But I'm a stubborn cuss and was determined to prove the naysayers wrong. I was always a good student, and though friends warned me that law school was demanding, I had never backed down from a challenge in my life. I changed my work schedule to enable me to attend full time and, at the tender age of 51, I began my legal studies.

My classmates were all young enough to be my kids. I remember wondering what in the name of Sam Hill am I going to have in common with *them*. However, some classmates invited me to join their study group. Those study group relationships quickly blossomed into true friendships as we persevered through our 1L year, which seemed to pass in an eye-blink. Without those bonds of friendship, law school would have been far more daunting than it was. I was encouraged, knowing I wasn't alone, and even the challenges I faced as a non-traditional student were surmountable.

Work-school balance was a constant challenge. I often arrived at my desk before my co-workers. I came and went from my job to attend classes. I returned to complete any remaining work assignments, frequently finding myself in the office long after everyone else had gone. Some co-workers even forgot I was still employed there!

My social life effectively ended. When I wasn't working, I was in class, studying or writing some class assignment. I was giddy, I was stressed – I nearly drove my wife to drink – but together, we soldiered on.

Albany Law offers several "in practice" classes and working on real cases with real people got me jazzed. The research, the trial work, the plea negotiations, even the paperwork – I loved it all! I appeared on the record under an order of practice with the public defender's office. I appeared in family court and in night court for the people with the district attorney's office. I even won a few cases and had the time of my life!

Two and a half years later, my J.D. is complete. I spent a semester in Rome, and sat for the bar exam. And it still seems surreal. Being a non-traditional student was exhilarating and exasperating and even exhausting. I sometimes questioned whether I truly wanted to start a new career practicing law, spending interminable hours analyzing legal issues, and drafting arguments when most of my contemporaries were drafting retirement plans.

The answer is emphatically – yes!

The steadfast support of my amazing wife and of my closest friends was invaluable. However, in addition to the law, I learned who is in my life for the long-haul and who is there just for the moment. I learned the importance of ignoring the negativity from those telling me it could not be done. I learned it isn't too late to pursue my childhood dreams.

To other older folks considering law school, let me share what one of my mentors told me about the Greek philosopher Democritus who, at 82, began to study Latin. When asked why he started so late in life. Democritus replied, "Eight-two is the youngest age I have left." By comparison, 54 isn't that old at all.

Andrew Gelbman was born in 1965 and grew up in Commack, NY. He received a B.A. from the University at Albany (1988) and a J.D. from Albany Law School (2018). He has been an Information Technology Specialist for the New York State Department of Health since 2006. He resides with his wife in Schenectady. LinkedIn: www.linkedin.com/in/andrewgelbman/.

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Thoughts on Legal Writing from the Greatest of Them All: Irving Younger — Part II

In the last issue of the *Journal*, the *Legal Writer* covered Irving Younger's insights on the mechanics of legal writing. This column examines his insights on legal-writing style.

NO MORE UGLY LEGAL PROSE

In legal writing, language is your medium to express ideas.[1] No matter your objective, a good command of language is necessary to communicate effectively. For Professor Younger, mastery of language went hand in hand with clarity of thought.[2] He gave the following advice to encourage clear thinking and hence clear writing:

- Before beginning any piece of legal writing, ask this: "What do I wish to say?"[3] This question ensures that clarity and concision will guide the language you choose.
- Rewrite.[4] Your first draft isn't your final draft. Continue looking for ways to improve your vocabulary and syntax until you achieve clarity.

BAD WRITING = BAD THINKING

Bad writing comes from bad thinking. One sees bad thinking from bad writing, Professor Younger flagged three "verbal cues"[5] that show when a lawyer isn't thinking clearly:

- Asides.[6] You might feel an urge to qualify your sentence with a statement like "It is obvious that. . . ." Instead, make your point obvious by explaining why it's so. This will remove the need for empty statements.
- Babble.[7] Professor Younger defined "babble" as the "specialized lingo of a trade or profession other than the law."[8] Words in the context of a profession don't serve the same purpose outside that profession. Banish babble. Think of substitute terms.
- Quasi-malapropisms.[9] Professor Younger described them as "a ridiculous confusion of words similar in sound but different in meaning."[10] Consider the difference between an "uninterested" and a "disinterested" witness.[11] The former isn't interested in the proceedings. The latter is impartial about the proceedings.

THE RIGHT WORD

Don't use words interchangeably.[12] Two words may share the same meaning, but their sound and placement will affect the flow of your prose. Professor Younger offered two rules when choosing between words:

- Prefer the Anglo-Saxon word to the Latin word.[13] The Anglo-Saxon word is usually the "short rather than long, plain rather than ornate, simple rather than complex."[14] For example, use "do" instead of "perform."[15] Reserve Latin for when you don't have an English equivalent.
- Avoid old expressions that pair words together — like "agree and covenant" or "understood and agreed." Two words are redundant; one will do.

Vogue Words Are Choking Our Prose

Use standard vocabulary instead of new words or phrases. Standard language is commonly accepted and easily understood. Professor Younger identified five types of "vogue words"[16] to avoid:

- Words that show emotion, not meaning.[17] Professor Younger explained that "antiwar" means that a person dislikes war.[18] But people both peaceful and violent might say they're "antiwar." Avoid words that express a feeling; and use words to express your meaning instead.
- Words that disguise meaning.[19] Say what you mean, even if your reader might resist. Masking your meaning behind flowery prose won't help you. The bolder you are, the more persuasive you'll be.
- Words with a new meaning.[20] As language changes over time, words take on new meanings. As Professor Younger pointed out more than 30 years ago, "gay" has multiple meanings that'll create confusion with its original meaning.[21]

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- Words that boost your image.[22] Professor Younger felt it was "poor style" and "morally repulsive" for people to express their own sensitivity through word choice.[23] Disliking euphemisms, he preferred "poor" to "underprivileged" and "old" to "senior citizen."[24]
- Words on everyone's tongue.[25] Question the use of words suddenly adopted by the general public. Check a dictionary if you have any doubt about a word's use or meaning. Professor Younger referred to a statement "outlining the parameters of the judicial function." That statement likely means outlining the "limits of the judicial function."[26] A quick look in a dictionary will tell you that the writer mistook "parameter" for "perimeter."[27]
- Read.[31] Pay attention to how writing rhythmically increases the persuasive force of writing. Professor Younger suggested reviewing the works of Jonathan Swift, William Hazlitt, and Walter Bagehot.[32]

THE LESSON OF THE BUNGLER

Don't be a bad writer. But read bad writing to see what you should avoid. Professor Younger examined a piece of bad writing to share four tips to improve your writing:

- Be succinct.[33] Brief and plain language is better than long and fancy language.
- Go easy on metaphors until you know what to do with them.[34] Metaphors consist of analogies between two ideas. Professor Younger quoted from Shakespeare an example of a powerful metaphor: "All the world's a stage, and all the men and women merely players." He then quoted from an unnamed jurist: "Each of the foregoing items proves itself to be nothing more than a constituent part of a composite house of cards."[35] Omit altogether metaphors improperly used.
- Use words suited to the occasion.[36] Simple language is suitable for everyday use. You might use grand expressions now and then, for important events or the occasional celebration.
- Anchor language to your ideas.[37] Consider the following: "[T]he case law does not tune in with such a farfetched doctrine."[38] Can you see the incom-

RHYTHM: PROSE IN MOTION

Good prose requires movement through rhythm.[28] Language is a form of music. Poetry is an example of lyrical writing. Legal writing can also have rhythm. Because Professor Younger associated rhythm so closely with writing style,[29] he didn't offer strict rules to improve your phrasing. Instead, he advised honing your ear in two ways for rhythmic writing:

- Write carefully.[30] Rephrase, move, and re-sort your sentences into writing that demands a reader's attention. Apply Professor Younger's rules set out in Part I of this series.

plete idea behind the statement? One can't know what the writer means by "tune in."

THE BIG BLOW-UP

Superlatives express exaggerated admiration of a person or thing.[39] Superlatives come in the form of an adjective or adverb — like "superb," "incredible," or "masterpiece."[40] Superlatives add little meaning to a statement. There's little difference but exaggeration between "good legal writing is difficult" and "good legal writing is incredibly difficult." Professor Younger recommended five steps to control exaggerated language:

- Not everything must be assigned some kind of value.[41] The strongest analysis is based on merit, not verbal inflation.
- Avoid exaggerated enthusiasm.[42] Words like "great" or "wonderful" should be reserved for occasions that are truly so.
- Express your gratification in measured terms.[43] Often, one adjective or adverb, at most, will make your point.
- Practice understatement.[44] Understatement is more effective than overstatement.
- Don't express approval of a judge's opinion to that judge directly.[45] Reliance on the citation alone is sufficient to show approval.

ART OF LEARNED HAND

Reading good and bad writing examples identifies the best features of strong legal writing.[46] After comparing a 1940 Judge Learned Hand opinion[47] to a 1940 Third Circuit opinion,[48] Professor Younger identified four virtues of Judge Hand's persuasive writing:

- Directness.[49] State your facts simply. Explain events chronologically, if you can. Try using one sentence each to explain the issue and the relief sought.
- Clarity.[50] A reader should exert little effort to follow your writing. Use topic sentences and a brief roadmap to prepare a reader for the analysis that'll follow.
- Simplicity of vocabulary.[51] Your writing will lose its power if a reader guesses your meaning.
- Modesty.[52] Be honest and reserved in your writing. Professor Younger explained it best: "[P]ersuasive legal writing should be like a triple-dry martini — colorless but powerful."[53]

CONCLUSION

Professor Younger's insights will benefit legal writers in every context. Not all his views have stood the test of time. He wasn't an advocate of gender-neutral writing, for example.[54] But Professor Younger's thoughts on legal writing reflect a genius we shall emulate.

The *Legal Writer* will continue with its series on what we can learn from the great writing teachers — lawyers and non-lawyers.

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1. Irving Younger, *No More Ugly Legal Prose*, A.B.A. J., Jan. 1986, at 140, 140.
2. *Id.*
3. *Id.*
4. *Id.*
5. Irving Younger, *Bad Writing = Bad Thinking*, A.B.A. J., Jan. 1987, at 90, 90.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Irving Younger, *The Right Word*, A.B.A. J., July 1986, at 76, 76.
13. *Id.*
14. *Id.*
15. *Id.*
16. Irving Younger, *Vogue Words Are Choking Our Prose*, A.B.A. J., Aug. 1986, at 82, 82.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 83.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. Irving Younger, *Rhythm: Prose in Motion*, A.B.A. J., Nov. 1986, at 96, 96.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. Irving Younger, *The Lesson of the Bungler*, A.B.A. J., Feb. 1987, at 117, 117.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Superlative*, Merriam-Webster, https://www.merriam-webster.com/dictionary/superlative (last visited Jan. 18, 2019).
40. Irving Younger, *The Big Blow-Up*, A.B.A. J., Dec. 1987, at 120, 120.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. Irving Younger, *Art of Learned Hand*, A.B.A. J., March 1987, at 96, 96.
47. *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940).
48. *Kirincich v. Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940).
49. Younger, *supra* note 46, at 96.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. Irving Younger, *English language is Sex-Neutral*, A.B.A. J., June 1986, at 89.

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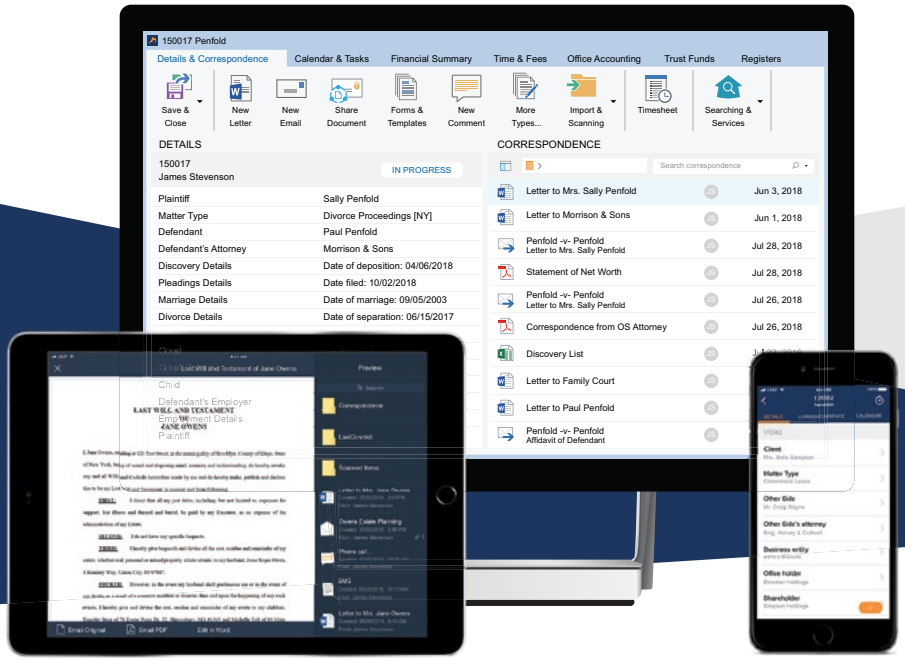

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