NEW YORK STATE BAR ASSOCIATION
Journal
NOVEMBER/DECEMBER 2017
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Alexa, Siri, Bixby, Google's Assistant, and Cortana Testifying in Court

Novel Use of Emerging Technology in Litigation

by Robert D. Lang and Lenore E. Benessere

Also in this Issue

Aging & Longevity Law
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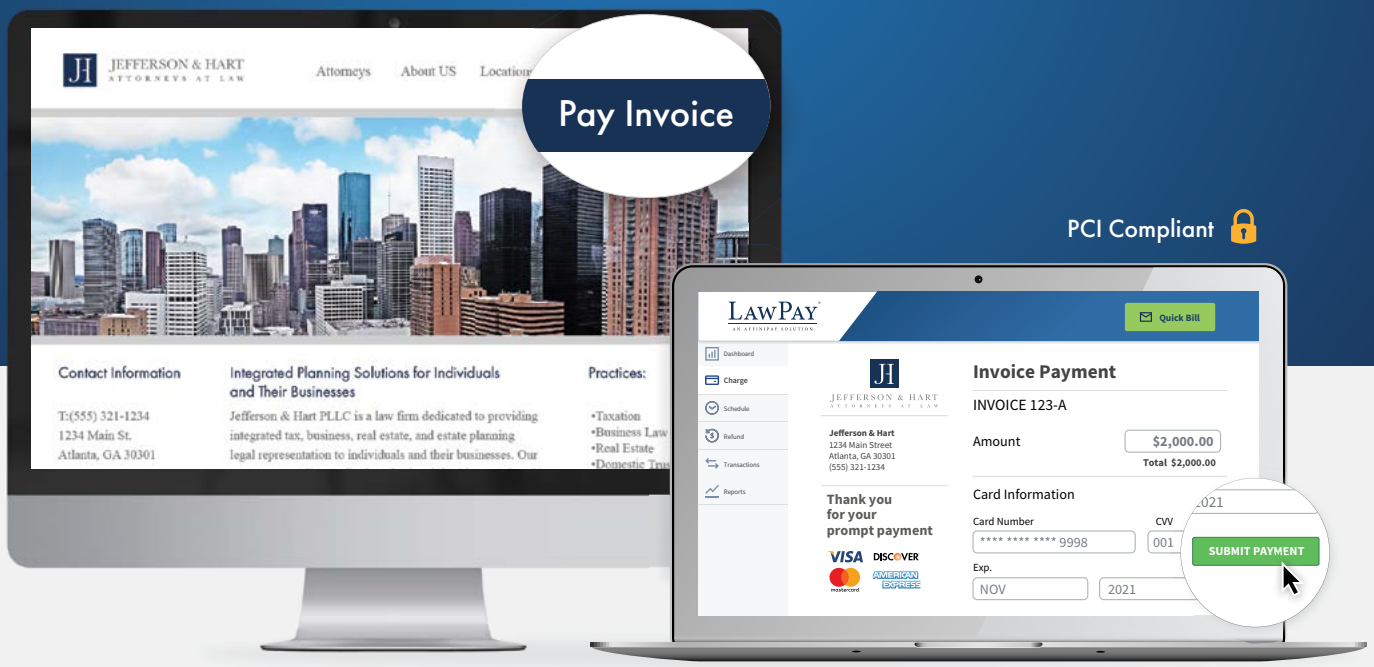

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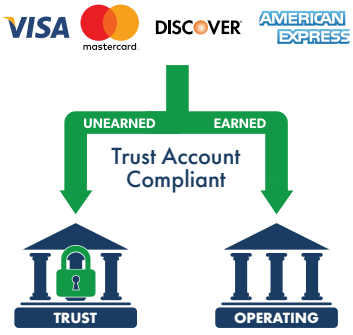

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PRESIDENT'S MESSAGE

SHARON STERN GERSTMAN

#MeToo

During the month of October, dozens of Facebook posts appeared in my newsfeed with #MeToo in the header. The first few of these included the "instructions" that if you had ever been the victim of sexual harassment to post #MeToo and to cut and paste the instructions. Since cutting and pasting is not easy on my iPhone, I did what many others did: I just posted #MeToo.

After a while, everyone knew what the message meant.

My Facebook "friends" are a wide variety of those with whom I have crossed paths. Some are lawyers, some knitters, some tennis players, some bridge players, and some old high school friends. Some of my male friends were surprised at how many of us had posted. I was not surprised. While we come from all walks of life, we posters all had something in common: We all had worked within a male-dominated industry at some point in our lives.

Ask any woman lawyer, journalist, actress, politician, etc. if she has been sexually harassed at any time, and the answer almost certainly will be "yes." We might not be willing to give you the particulars, but it has happened to almost all of us. It may have been many years ago, when we were younger and more vulnerable (and some would say more attractive). We probably did not report it or even talk about it then, but we are talking about it now.

For me, it was a fairly large number of mostly inappropriate remarks and touching. One such remark came from a supervisor who told me that I could find the reference books at "bazoom" level. Another came from a supervisor who pointed out a co-worker and me (both pregnant) to a room full of people with the remark, "Look what I did." One judge hugged me inappropriately and asked me, "Does Danny know how lucky he is?" I don't think a single one of these men thought he was guilty of sexual harassment. After all, any of these behaviors alone probably does not rise to the legal definition of "Quid Pro Quo" or "Hostile Environment," as set out in New York's Executive Law §§ 290 *et seq.* But they are uncomfortable and demeaning and have obviously stayed with me.

There have been very public accusations which have resulted in public firings and shamings: Harvey Weinstein, Bill O'Reilly, Roy Price, Bill Cosby, Mark Halperin, to name a few. None of these was a surprise to others in their industries. As Tom Hanks said in an interview, "There has always been the concept of the casting couch."[1] We are hearing reports of very large settlements in some of these cases. One can only guess what Bill O'Reilly did to Lis Wiehl to cause a $32 million settlement. We will never know, because there was a non-disclosure agreement.

Non-disclosure has always been at the heart of why this persists. Corporations close ranks and make it unbearable for the women who report the problems. It took incredible fortitude for the women of the Eveleth Taconite Company in Minnesota to bring the first sexual harassment class-action lawsuit in the United States in 1988. The movie *North Country*, based upon the lawsuit, gives a fair account of what women who report harassment are likely to face. Even after the corporation was found liable and the case referred to a referee for damages, the women's travail was not over. The Special Master called them "histrionic" and published details about their private lives in his 416-page report; the average award was $10,000. After the Eighth Circuit reversed the judgment, the case settled and the 15 awardees received $3.5 million.

For decades, law professors Joanna Grossman of Southern Methodist University and Deborah Rhode of Stanford have been advocating for changes to the law and the workplace to address the problem of sexual harassment.

> Women who are considering making a formal complaint should be realistic about the financial, psychological, and reputational cost of pursuing it. Defendants typically

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> have deeper pockets than victims, and the price of hiring a lawyer is often prohibitive. To be sure, attorneys specializing in harassment cases are often willing to work on a contingent fee....But unless damages and the likelihood of recovery are substantial, few lawyers will want to take the case. Employment discrimination cases have the lowest win rate for plaintiffs of any civil cause of action. And in sexual harassment cases it is the complainant as much as the harasser who is on trial.[2]

Now, they have published in *Harvard Business Review*[3] a primer for victims to follow. The primer covers what the victim can hope to achieve, keeping a diary, telling friends and family, how to report to the employer, the pros and cons of hiring a lawyer, and the considerations of going public. Still, the authors recognize that the law often does not provide remedies and that most victims will not seek redress:

> They wait to see whether the behavior will stop on its own, or they keep silent because they fear that reporting will be futile or that the harasser will retaliate. Rather than filing internal or external complaints, harassment targets tend to resort to informal and nonconfrontational remedies. They vent, cope, laugh it off, treat it as some kind of less threatening misunderstanding, or simply try to get on with their jobs (and lives). They may blame themselves, pretend it is not happening, or fall into self-destructive behaviors like eating disorders or drinking problems.[4]

We all know what Anita Hill endured at the hands of an all-male Senate judiciary committee, who asked her why she hadn't spoken up before and why she endured Clarence Thomas's behavior. In her words, "They were exhibiting the exact kind of behavior that keeps people from coming forward."[5] While many belittled or chose not to believe the harassment she endured, her testimony awakened many to the truth about sexual harassment and its pervasiveness.

As Anita Hill's experience reminds us, law offices are not immune from the pervasiveness of sexual harassment[6] or other forms of gender-based discrimination. There has been an increase of lawsuits against law firms, large and small, by attorneys who recognize the need to stand up for women's access to positions of power. The Report of the Commercial and Federal Litigation Section, which was adopted by the House of Delegates on November 4, 2017, reflects both the sad statistics of how women attorneys are left behind when it comes to arguing or trying a case in court and the hope that a concerted effort by judges and law firms can ensure that women have a front and center position in litigation.

Two things are clear: (1) The truth of a corrected version of Donald Trump's famous "Access Hollywood" statement: "When you're a star [or the employer], they [feel powerless to do anything but] let you do it. You can do anything." (2) There is strength when large numbers of women are willing to come forward, and the possibility of change. ■

1. PBS News Hour, October 23, 2017.
2. Grossman and Rhodes, *Understanding Your Legal Options if You've Been Sexually Harassed*, Harvard Business Review, June 22, 2017.
3. *Id*.
4. *Id*.
5. NPR "All Things Considered," October 27, 2017.
6. The American Lawyer, *Sexual Harassment Is Thriving in Big Law*, July 11, 2017.

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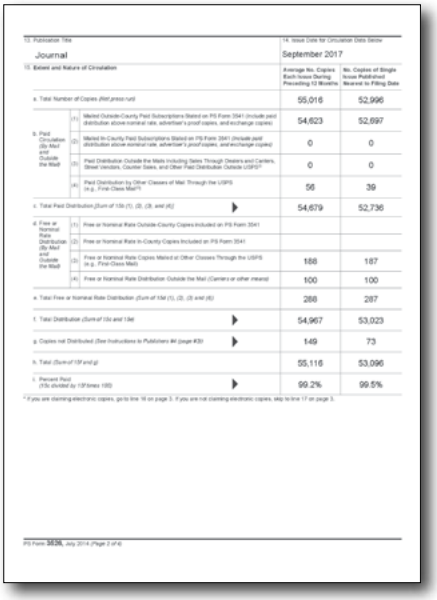

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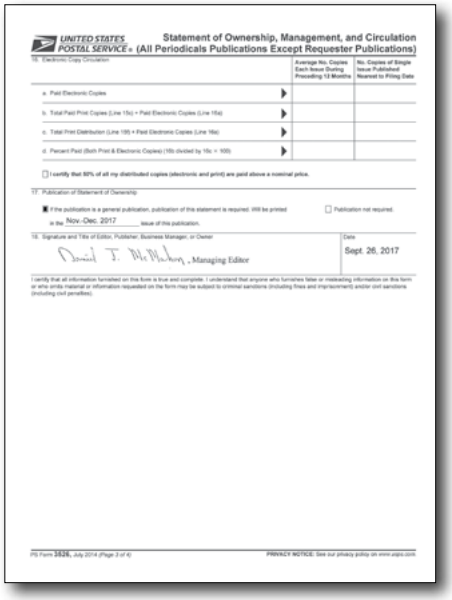

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Novel Use of Emerging Technology in Litigation

by Robert D. Lang and Lenore E. Benessere

Nearly 100 years ago, when Judge Cardozo famously commented, "law never is, but is always about to be,"[1] he could not have anticipated the concept of "virtual assistants" like Amazon's Alexa, Apple's Siri, Google's Assistant, Microsoft's Cortana, or Samsung's Bixby. Yet, his quote perfectly sums up the new frontier in law as more and more people integrate speech recognition technology into their everyday lives.

Although "speech recognition" may sound like a lofty term, it simply refers to what most of us do daily, when we use our voices to ask our phones to dial our friends, our cars for directions, and our speakers to play our favorite songs. Speech recognition is "the ability to speak naturally and contextually with a computer system in order to execute commands or dictate language."[2] Technology rivals are hard at work creating irresistible versions of easy-to-use devices with which we can talk and have questions answered.[3] For the most part, this technology has become so good that a simple command, or "wake word" ("Alexa?!"), allows us to ask our virtual assistants a host of questions from what is today's weather to who was the fifth President of the United States.[4]

Amazon, maker of the Echo (Alexa), a hands-free speaker you control with your voice, touts that the Alexa Voice Service, which is integrated into the Echo, is "always getting smarter."[5] When you interact with Alexa, she streams audio to the cloud. Amazon's Terms of Use for the Echo duly notifies users that "Alexa processes and retains your Alexa Interactions, such as your voice inputs, music playlists, and your Alexa to-do and shopping lists, in the cloud to provide and improve our services."[6]

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For most people, their virtual assistants' ability to always be listening for their "wake words" is helpful. When we are driving, this allows us to complete tasks hands-free, avoiding distractions, as well as moving violations. While we are making breakfast in the morning, contemplating getting to work or to court on time, we can ask Alexa how long the morning commute will take. Alexa also allows us to use voice commands to turn on the light while walking into a dark room, without having to search for the light switch.

Many large tech companies believe that voice commands and intelligent assistants will beme the primary ways in which people interact with technology, possibly even more significant than touch screens and keyboards.[7] Voice control has rapidly evolved from a quirky and interesting technology, to a "must have" capability in new devices.[8] Virtual assistants are being adopted seamlessly into our day-to-day lives and they are very much here to stay.[9] Microsoft reports that Cortana, launched in 2014, now has 145 million users and has handled 18 billion tasks.[10] Apple claims it has reached 2 billion Siri interactions each week, with 41.4 million currently active users estimated by this coming January.[11]

This "space age" technology sounds great. However, if you believe that all artificial intelligence designed to serve us can do us no harm, just consider any number of science-fiction movies, which now seem more real than fiction, where humans are nearly done in by artificial intelligence machines, which were created with the intent of serving, not harming, us.[12]

Defense attorneys are among those lawyers who should consider how they can use virtual assistants' recordings to shed light not only on how accidents occur, but also to challenge plaintiffs' personal injury claims. The recent Arkansas trial of James Bates for the murder of his friend, Victor Collins, who was found dead, floating face-up in Mr. Bates' bathtub, sparks debate regarding the first issue: can Alexa actually record a murder or, in the personal injury context, an accident?[13] In *Bates*, the prosecution asked Amazon to disclose recordings from Mr. Bates' Amazon Echo.[14] Amazon refused, citing privacy concerns.[15] Ultimately the issue went unresolved, without addressing Amazon's position regarding privacy concerns, when Mr. Bates voluntarily turned over the recordings.[16]

While the *Bates* case does not resolve the constitutional issue of whether Amazon may use the First Amendment's protection of free speech to refuse to disclose the recordings gathered by our Amazon Echoes, it does highlight the fact that users have access to their recordings and, therefore, can willingly disclose them. Amazon's Alexa App keeps a history of the voice commands that follow the wake word ("Alexa!"). Specifically, in response to a user's question, "Can I review what I have asked Alexa?", Amazon states "Yes, you can review voice interactions with Alexa by visiting History in Settings in the Alexa App. Your interactions are grouped by question or request. Tap an entry to see more detail, provide feedback, or listen to audio sent to the Cloud for that entry by tapping the play icon."[17]

We also know that Alexa can record events, such as a crime or an accident, because the Echo is equipped with seven microphones that use beam-forming technology and enhanced noise cancellation. Alexa also has a camera, though it is off until a user activates it by asking Alexa or using the Echo Look App to take a photo, video, or use live preview. Alexa's evidentiary value can also be found in the circumstantial evidence she can provide regarding a plaintiff's day-to-day life, which can assist defense attorneys preparing for depositions and trial. Questions and commands from parties to their virtual assistants can provide valuable information regarding the places parties have visited since the alleged accident, their hobbies, and activities in which they are involved.

For example, by knowing that plaintiffs have asked their virtual assistants about the commute times to a certain office building, or their requests for Alexa to hail an Uber for them, defense counsel can ask more targeted questions during depositions, including whether plaintiffs have worked since the accident or have traveled or gone on vacation. The value of these records can be immeasurable, given the wide array of commands to "virtual assistants," including giving definitions of new terms and phrases ("Siri, what is meant by 'Big Data'?"); playing music ("Alexa, play songs by the Judybats"); assisting in recreation ("Siri, where can I play court tennis in the United States?"); ("Alexa, how can I play golf at High Ridge Country Club?"); answering any number and variety of factual questions ("Siri, for which projects has Sciame Construction won awards?"); ("Alexa, which famous people are named 'Oona'?"); ("Cortana, how do I apply for a Fulbright Scholarship in The Netherlands?"); ("Bixby, what were the 'moral imperatives' in 'Real Genius'?"); ("Siri, who are the leading female poets in New York City?"); ("Google, which movie directors live in Brooklyn?"); ("Bixby, when did the Beach Boys record, 'I Get Around'?"); ("Siri, who is Phil Ochs?"); ("Cortana, how did Holly Golightly in 'Breakfast at Tiffany's' support herself financially?"); going to events ("Bixby, where is the Songwriters Hall of Fame located?"); and securing prices for travel ("Alexa, ask Kayak how much it costs to fly from New York to Easter Island."). Virtual assistants can also set up timers and alarms, thereby providing defense counsel with valuable information regarding when a person gets up in the morning and their appointments during the day. Alexa can even be used to begin a workout ("Alexa, ask Random Workout to pick a workout."), which can be significant in those cases where plaintiffs claim to have sustained substantial physical limitations as a result of an accident.

It cannot be overstated how valuable this information can be to gain insight into a plaintiff's everyday activi-

ties, which is often the essential element of most personal injury claims. Defense attorneys know that, when it suits plaintiff's interests, plaintiffs often do not provide a wealth of information regarding their past day-to-day activities. Armed with a compendium of plaintiffs' virtual assistants' searches, however, defense counsel can refresh plaintiffs' recollections regarding what people did on a certain day, even whether plaintiffs tried to call 911 for help,[18] thereby leading to more effective and meaningful questioning. This may be especially helpful if plaintiffs are trying to conceal their actual lifestyles. Like Facebook photos from a vacation, Alexa can be used to expose those plaintiffs who fail to testify truthfully and candidly regarding their injuries and ability to carry on activities of daily life.

and after an accident, with some plaintiffs testifying that they used to run a 5K every weekend and now run "less," "not as much" or "not at all." Plaintiffs have been known to respond with limited or vague answers to these probing questions at depositions. Now, however, the raw data from these devices can provide information that defense counsel can analyze to accurately determine plaintiffs' actual fitness levels before and after an accident. Defense experts can also use this definitive information from plaintiff's virtual assistants to construct a baseline from which they can assess a plaintiff's physical changes, pre and post-accident.

Using the discovery process to obtain data from plaintiffs' Alexa or Cortana will most certainly be met with opposition from plaintiffs' counsel, on the grounds

Alexa can be used to expose those plaintiffs who fail to testify truthfully and candidly regarding their injuries and ability to carry on activities of daily life.

The other side of the coin is that those plaintiffs who are ethically challenged can conceivably use their virtual assistance strategically, for example, by asking Alexa for information which would tend to validate their false narratives. For example, someone who is basically physically fine but nevertheless eyeing a potential personal injury suit as a result of an accident may be tempted to ask, "Alexa, add knee brace, cervical collar and Aleve to my shopping list." – personalized "fake news," if you will. As it is, this past July, British Security Researcher Mark Barnes warned of a technique that can be used to install malware on Amazon Echo that would silently stream audio from the hacked device to a faraway server, in essence, tapping the Echo.[19] Since AI assistants can provide a "real time" autobiography, with malware that autobiographical information can be read by those who were never intended to have access to that private information. Forewarned is forearmed.

Amazon Echo is not the only piece of technology that has the ability to alter the way we practice by collecting valuable information. Other smart devices, including the pedometer feature on our iPhones and Fitbits, can also provide valuable information regarding a person's fitness level, including the number of steps a person takes and when they take them. This data, like other documentary evidence, is likely to be more accurate and informative than deposition testimony, which was taken only after a preparation session with an attorney and relies on a person's memories of events that may have occurred years before the deposition. Opposing counsel devote considerable time and effort to obtain definitive answers from plaintiffs, pinning down physical fitness regimes before

of privacy and prejudice. That opposition will continue until the law begins to develop parameters regarding this type of discovery. However, since those who turn on virtual assistants presumably know, or should know, how they work, they should not be heard later to complain when the devices perform as advertised. One self-help solution is to unplug AI assistants when we do not want Siri or Alexa to overhear and record what is being said in their presence, something most people have not been doing.[20] Keeping virtual assistants un-plugged, unless or until needed, or taking the precaution of un-plugging the virtual assistant when engaging in intended confidential conversations, may become common practice, if not also good common sense.[21]

The situation becomes more problematic when it involves guests in someone's home who do not realize they are being recorded.[22] Upon entering a person's house or apartment, are we now expected to ask whether their virtual assistant is on, listening to and recording every word we say? Expectations of privacy therefore now change. As attorneys bring these issues before the courts, judges will weigh the right to a proper defense for defendants against the important right to privacy of plaintiffs. In doing so, courts will determine whether plaintiffs have true expectations of privacy regarding the data and recordings of their smart devices when they have put their physical conditions at issue in personal injury litigation. Simply put, why should the information collected by virtual assistants be treated any differently in discovery than the information contained in personal diaries or cell phone data? To state the proposition is to reject it.

Attorneys who understand the potentially valuable information these devices can provide to our clients should begin to question adversaries about them during discovery and be ready to defend their own witnesses for cross-examination when called upon to testify. When appropriate, counsel should also seek rulings on disclosure of this information if opposing counsel object to providing it. Significantly, Amazon Echo users can delete their voice recordings, which are stored in the History section of the Alexa App. Some plaintiffs, with or without advice of counsel, may therefore log on to Amazon.com/myx, find their Echo, and delete old voice recordings.[23] Deletions can also be made on Google's Assistant.[24] Knowing this, it will be prudent for defense counsel to serve opposing parties with a demand at the beginning of litigation for the preservation of evidence, requesting plaintiffs to retain that information in the Cloud and not to dispose of any recordings in the History section of the Alexa App, a fair *quid pro quo* for demands by plaintiffs for the preservation of any CCTV believed to have captured an accident, often served at or prior to the commencement of a lawsuit. To obtain that information, authorizations directed to Amazon, Apple, Google, Microsoft and Samsung should also be requested, in order to access important data from Alexa, Siri, Google's Assistant, Cortana and Bixby, respectively.

Moreover, the evidentiary value of this newly available information extends well beyond casualty litigation, to any area of law where liability hinges on proof of what someone said or knows and when they said it or knew it, thereby encompassing all practice areas. For just one example, information from virtual assistants will be valuable to attorneys handling securities fraud and insider trading cases, as Alexa can be the "fly on the wall," overhearing conversations regarding which stock to buy or sell and when. Attorneys litigating sexual harassment or Title VII immigration cases that look to the context surrounding what was said behind business decisions will be able to benefit heavily from this technology, which provides unvarnished insight into what was previously disputed "he said/she said" conversations. Trademark, copyright and patent attorneys, piecing together the origination of ideas, may also find useful the data that virtual assistants can now make readily available.

Information from digital assistants is not limited to the United States and now has direct application to cases and litigants worldwide. Just this past October, Yandex, the largest search engine in Russia, often referred to as the Russian equivalent of Google, introduced Alice, its first conversational, intelligent assistant.[25] This new girl in town is touted to be the most capable Russian language assistant of its kind.[26] Accordingly, the search for information acquired by virtual assistants will soon be across borders, in any country where AI assistants are located.

As Kyle Rees cautioned Sarah Connor in the first "Terminator" movie, "Listen and understand. That terminator is out there. It can't be bargained with. It can't be reasoned with. It doesn't feel pity, or remorse, or fear." So, too, are digital personal assistants, who can and will record our every statement, which can later be used as evidence by lawyers who understand and make full use of this new technology. [27] The next generation of artificial intelligence platforms may provide attorneys access to even more information which previously was assumed to be private and non-discoverable.

The evidentiary value of this newly available information extends well beyond casualty litigation, to any area of law where liability hinges on proof of what someone said or knows and when they said it or knew it, thereby encompassing all practice areas.

Whether in the board room, the living room, the proverbial "smoke filled room" or the office, the defense of "plausible deniability," used conveniently when confronted with previously hard to prove facts, will now be less successful in avoiding disclosure of what actually took place. If, during conversations intended to be secret, Siri, Alexa, Google's Assistant or Cortana are present in the room, unobtrusively sitting on a table, bookshelf or mantel, silently listening to and recording all that is being said, it will be far harder for the participants in that meeting to later deny what was said, when and by whom.

Remembering Judge Cardozo's remark that "law never is, but is always about to be," and Chief Justice John Roberts' comment this past July that "advancing technology poses one of the biggest challenges for the Supreme Court,"[28] forward thinking attorneys should not shy away from putting these issues before the court, as attorneys and judges (perhaps with the help of AI devices) together grapple with this new technology, directly applicable in today's world, both real and virtual. We are now at the start of an era in which previously unavailable data can be accessed, become discoverable and later be introduced into evidence. Attorneys who fail to recognize this will be left behind. ■

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15. Sauer, *A Murder Case Tests Alexa's Devotion to Your Privacy*, Wired (February 28, 2017).

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17. *Amazon, Alexa and Alexa Device FAQs*, https://www.amazon.com/gp/help/customer/display.html?nodeId=201602230.

18. Graham, *"Alexa, Call 911" Won't Work. Here's What Will*, USA Today (July 19, 2017).

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21. In reaching to turn off virtual assistants, some may have flashbacks to any number of science-fiction books and movies, such as *2001: A Space Odyssey* by Arthur C. Clarke and Stanley Kubrick, where the artificial intelligence device resists and actively defends itself when people seek to turn it off. Our advice: notwithstanding your fears, summon your courage and turn off your virtual assistants when you do not want them listening to and recording what you are saying.

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25. Tyrsina, *Cortana Gets New Competition from Alice, Courtesy of Yandex*, Windows Report (October 14, 2017).

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27. Wadel, *The Privacy Problem with Digital Assistance*, The Atlantic (May 24, 2016).

28. Perry, *In Overseas Remarks, Roberts Says Technology Poses Challenge for Courts*, NY Law Journal (July 26, 2017).

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"Expand the Zone?"

Introduction

In *Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*,[1] the Court of Appeals held it was error to preclude an affidavit submitted in opposition to a summary judgment motion:

> While a party may not create a feigned issue of fact to defeat summary judgment (citation omitted), contrary to plaintiff's assertion here, the affidavit of the attorney who represented plaintiff did not flatly contradict his prior deposition testimony. Therefore, the affidavit should have been considered in opposition to plaintiff's motion.[2]

However, the Court clearly sanctioned trial courts' preclusion of an affidavit that did "flatly contradict" the affiant's deposition testimony. It is noteworthy that the only case cited by the Court in that portion of its opinion concerned the continuous representation doctrine, which was at issue in *Red Zone*.[3]

Last month's column posed the following questions in the wake of *Red Zone*:

> What impact, if any, does *Red Zone* have on CPLR 3116(a) *errata* sheets? Does *Red Zone* lay down a black-letter rule barring all subsequent affidavit testimony that "flatly contradict[s]" prior deposition testimony? And does *Red Zone* intrude upon the jury's role of evaluating credibility?

Each question is addressed, *below*, but first, two trial hypotheticals to highlight why *Red Zone*, and the deposition correction and "feigned" or "tailored" cases that preceded it, are problematic.

Could This Ever Happen?

First hypothetical: A defendant elects not to move for summary judgment, or is prevented from doing so because it failed to timely make its motion under *Brill*, and the case proceeds to trial.

At trial, on direct examination the plaintiff testifies as to a critical issue in the case in a manner which "flatly contradicts" the testimony previously given at deposition.

Defense counsel, rather than waiting for cross-examination, stands up and objects at the conclusion of the direct testimony, asking the court to disregard the "new" testimony as "feigned" and "tailored" to avoid the consequences of the prior deposition testimony, asking that the court strike the "new" testimony from the record and, with plaintiff's "new" testimony stricken, asking for a directed verdict.

Does anyone believe there is a legal basis for the court to sustain the objection and grant the requested relief? [Pause for each reader to conclude that the only possible answer is "of course not."]. Yet this is the functional equivalent of what happens when a court, on summary judgment, precludes the post-deposition affidavit as "feigned" or "tailored" because it "flatly contradicts" the deposition testimony.

Second hypothetical: A plaintiff again testifies on direct examination in a manner which "flatly contradicts" the testimony previously given at deposition. On cross examination defense counsel, after setting the scene with a reading of plaintiff's deposition testimony, asks the plaintiff, "Sir/Ma'am, why did you change your answer today from the answer given at your deposition two years ago?" The plaintiff testifies, "Because I was nervous when I gave my deposition" (the same reason which the Second Department held was not a valid reason as a matter of law in *Ashford*[4]), and defense counsel now moves to strike the testimony, citing *Ashford* (and *Torres*[5] for good measure).

Does anyone believe there is a legal basis for the court to sustain objection? See above. Yet this is the functional equivalent of what happens when a court, on summary judgment, precludes the deponent's deposition corrections because it does not like the reason given for making the change.

Does *Red Zone* Apply to Deposition Corrections?

By parity of reasoning, a strong argument can be made that the holding of *Red Zone* should apply to deposition *errata* sheets. After all, is there any meaningful difference between a deposition "correction" that flatly contradicts deposition testimony and a post-deposition affidavit by the deponent that does precisely the same thing?

They are, for all practical purposes, one and the same; therefore, drawing a distinction between them would require some considerable contortions. Unless, of course, the statutory language of CPLR 3116(a) was read to mean what it says, *to wit*, that "any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them."[6]

In making its recommendation that a 60-day time limit be imposed for the making of deposition corrections, the Advisory Committee on Civil Practice made clear that it understood the statutory language to mean what it said:

> The Committee recommends the amendment of CPLR 3116(a) to require that a deponent make any changes he or she wishes to make to the transcript within sixty days from the date the deposition is submitted to the witness.
>
> * * *
>
> Nothing in section one of this proposal is intended to preclude a witness from testifying differently at a later date or to relieve a party of its duty of correcting incorrect or missing disclosure responses under CPLR 3101(h).[7]

Nonetheless, I believe *Red Zone* will be cited in support of precluding timely submitted deposition *errata* sheets.

Does *Red Zone* Bar All Affidavit Testimony That "Flatly Contradicts"?

Does *Red Zone* establish a black-letter rule that where the affidavit does, in fact, "flatly contradict" the deposition testimony, it must, in all cases, be precluded?

Unlikely. There are certainly myriad reasons why a witness would offer an affidavit flatly contradicting prior deposition on a critical issue but, at the same time, offer a reason for making the change that does not suggest the change is feigned, but rather is genuine. Case law prior to *Red Zone* allows for changed testimony when accompanied by a reason for making the change:

> Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, "creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (citations omitted).[8]

For example, a witness may testify at deposition, truthfully and based upon her recollection at that time, that she did not consider sending a patient (now the plaintiff) to a specialist. Post-deposition, records from the specialist are exchanged documenting precisely that referral.[9] The records do two things: first, they serve as the basis for the witness refreshing her recollection and, second, provide independent proof that the change is not feigned. The witness now submits an affidavit "flatly contradicting" her deposition testimony explaining that her recollection was refreshed by the records.

Would a court reject the affidavit as feigned? Not likely, as cases like *Telfeyan* refer to the change being made without explanation. But would its acceptance be based solely upon the fortuitous circumstance that there is independent proof supporting the change, or would it be accepted if the explanation was that, "after refreshing [her] recollection about case, [s]he now recalled" that she sent the patient to a specialist?

So, does the *Red Zone* rule apply only where there is no independent proof to support the reason proffered for making the change? And is that fair? Fodder for a future column.

Does *Red Zone* Intrude on the Role of the Jury?

Prior, longstanding, Court of Appeals authority suggests it does.

The Court of Appeals hit this issue head on over 100 years ago in *Walters v. Syracuse R. T. R. Co.*:[10]

> All we mean to say is that the credibility and the weight to be given to the plaintiff's testimony should have been determined by the jury. It is not a very unusual thing for this court to feel constrained to affirm judgments in such cases where large recoveries have been had upon testimony quite as incredible as that of the plaintiff in this case. Moreover, it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and when it is apparent that it was done to meet the decision on appeal the temptation to hold that the second story was false is almost irresistible. Yet, in just such cases this court has held that the changes and contradictions in the plaintiff's testimony, the motives for the same and the truth of the last version is a matter for the consideration of the jury. (Citation omitted).
>
> If this court is to be consistent with the position taken in that case and in many other cases of like character, we cannot hold as matter of law, that there was no proof in this case to sustain the plaintiff's cause of action. It often happens that science and common knowledge may be invoked for the purposes of demonstrating that a particular statement in regard to some particular accident must be absolutely false; in such cases the question is

> for the court; but in cases of doubt we think it is wiser and better to remit such controversies to the proper tribunal for settling facts and ascertaining where the truth lies, rather than assume the power to determine the facts ourselves. This is an old rule, and while like all other rules it may work hardship or injustice in a particular case, it is wiser to adhere to it. (Emphasis added).

Walters cited its seminal decision in *McDonald v. Metropolitan S.R. Co.*:[11]

> The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law. If a court of review having power to examine the facts is dissatisfied with a verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover. (Emphasis added).

In 2012, the Court of Appeals made it crystal clear that a court, on summary judgment, is not to make credibility determinations:

> It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact.[12]

While *Red Zone* did not cite authority for its holding, in *dicta*[13] in a 1968 four to three decision, the Court of Appeals held:

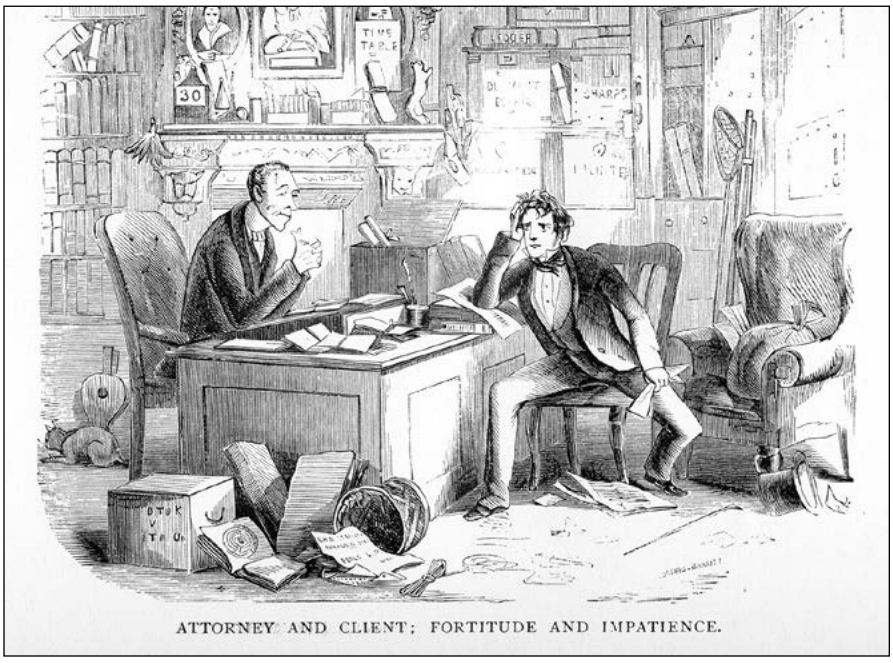
> The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned.[14] Applying the holding in *Walters*, a feigned issue can only be one where "science and common knowledge may be invoked for the purposes of demonstrating that [the] particular statement in regard to some particular accident must be absolutely false."[15]

When a court precludes an affidavit as feigned which is not "demonstra[bly]" "absolutely false," doesn't that run afoul of *Walters*? Further fodder.

Conclusion

To date, only one appellate case has cited *Red Zone*,[16] and held that because the witness was not asked the specific question the answer to which was the subject of the post-deposition affidavit, the affidavit was therefore properly considered by the court. A thoroughly non-controversial holding. It remains to be seen how *Red Zone* will play out in the scenarios outlined above, plus the many that have not been anticipated. In the interim, counsel will undoubtedly make every effort to expand the zone of *Red Zone*.

In the interim between this column and the next, Christmas, *et al.*, will have come and gone and a new year will have been rung in. Enjoy the holidays, and come back for a visit in 2018. ■



ATTORNEY AND CLIENT; FORTITUDE AND IMPATIENCE.

1. 27 N.Y.3d 1048 (2016).
2. *Id.*
3. *Grace v. Law*, 24 N.Y.3d 203 (2014).
4. *Ashford v. Tannenhauser*, 108 A.D.3d 735 (2d Dep't 2013).
5. *Torres v. Bd. of Educ. of City of New York*, 137 A.D.3d 1256 (2d Dep't 2016).
6. CPLR 3116(a).
7. 1996 Recommendations of Advisory Committee on Civil Practice.
8. *Telfeyan v. City of New York*, 40 A.D.3d 372 (1st Dep't 2007).
9. If your response is that it is farfetched that this scenario would ever arise, particularly in a medical malpractice action where defense counsel generally have access to records early on and very carefully prepare their witnesses, all I can say is, based upon my experience, "stuff" happens.
10. 178 N.Y. 50 (1904).
11. 167 N.Y. 66 (1901).
12. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).
13. The court considered the affidavits in question and determined they presented questions of fact.
14. *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441 (1968).
15. 178 N.Y. 50 (1904).
16. *Cox v. McCormick Farms*, 144 A.D.3d 1533 (4th Dep't 2016).

Trump v. the NFL

Can the Players Sue the President? The Answer Isn't So Simple

By Mark A. Konkel and Diana R. Hamar

A few Sundays ago, Terry Bradshaw, the Hall of Fame quarterback, used his platform as the long-time co-host of the television program *Fox NFL Sunday* to address the growing controversy over some NFL players choosing to kneel during the playing of the national anthem, to protest racial injustice. Putting aside his usual jocular persona for a moment, he turned to the camera and sternly asked whether President Trump, who has exhorted NFL team owners to fire any "son of a bitch" who "disrespects our flag and county," understands the First Amendment's free speech protections. It's a good question, and it leads directly to another one: If the President is violating the players' civil rights, can they sue him?

The answers aren't as simple as they might seem. While free speech rights are indeed at the center of this controversy, so are other factors – government speech rights, employer rights, labor contract language. What follows is a point-counterpoint discussion of all of these factors. The purpose is not to take sides in this debate but to bring clarity to it by casting light on the legal issues involved. Much of the legal information that follows is based on our blog called LABORDAYS.

POINT: "It's possible that we've become so accustomed to the unaccustomed with President Trump that we miss what, at least from a Constitutional perspective, was happening: the President, speaking as the President (in other words, a high-level mouthpiece of the federal government) was 1) demanding that private employers fire employees on the basis of political expression; 2) urging citizens to boycott private businesses that do not fire employees who engage in political expression; and 3) undoubtedly impacting the professional viability for

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those employees who have chosen to engage in government-condemned political expression."[1]

COUNTERPOINT: Under what is known as the Government Speech Doctrine (*Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005)), "the government is free to promote a particular viewpoint – a right freely exercised by President Trump. Boiled down, the doctrine simply means that the government is allowed to have an opinion" and to express that opinion.[2]

POINT: But the players also have a right to express their opinion by engaging in a protest. The U.S. Supreme Court has held that flag burning[3] – a much more severe form of protest than taking a knee during the national anthem – is a protected form of political speech. So why can't the players who take a knee sue the government for interfering with their First Amendment rights?

COUNTERPOINT: "The federal government is largely protected from suit under the doctrine of sovereign immunity. The Federal Tort Claims Act (FTCA) is a limited waiver on sovereign immunity and allows citizens to pursue some tort claims against the government. 28 U.S.C. Section 1346(b)(1). However, the FTCA expressly excludes from its scope claims for most intentional torts including claims for 'interference with contract rights.' 28 U.S.C. Section 2680(h). Although 'interference with contract rights' is not defined under the FTCA, federal courts have broadly interpreted the exclusion. *Art Metal-USA, Inc. v. U.S.*, 753 F.2d 1151 (D.C. Cir. 1985). Therefore, claims that would arguably be applicable here, such as a claim for tortious interference with business relations, would be barred under the FTCA."[4]

POINT: But the President is attempting to silence speech by telling employers to fire somebody if they continue to protest. So while these players might not be able to sue the government under employment law, "they may well have claims that the government violated their First Amendment rights when it used its authority to attempt to silence them."[5]

COUNTERPOINT: That would depend on whether President Trump was in fact invoking his government authority, or just expressing a viewpoint when he exhorted owners to fire certain players. To date there has been no executive order or other official action by the President, although he has continued to press the issue through repeated Tweets. In a world where Trump does announce policy on Twitter and arguably uses it as a mouthpiece for government business, however, it is not clear whether his tweets amount to an exercise of governmental authority.

POINT: A player's professional and financial future could be damaged by Trump's attempt to silence him, giving him cause to sue the government.

COUNTERPOINT: Initially, there was little evidence that any player who has engaged in these protests has suffered financial repercussions as a result of Trump's tirade. The one player who seemed to have been impacted is former San Francisco 49ers quarterback Colin Kaepernick, who started the sideline protests. He has since lost his job and has yet to find another NFL team to sign him, but all this took place before Trump began his attacks on the protestors, so it would be difficult for a player to make a case that "but for" Trump's remarks he would have had a lucrative career. More recently, however, the owner of the Dallas Cowboys bowed to Trump's pressure and said he would sideline any player who kneels during the National Anthem.

Even if the immediate issue is resolved outside the courtroom with all parties in agreement, it would behoove player attorneys to pay special attention to employment contract language.

POINT: Trump has also urged fans and consumers to boycott NFL games as a way to force owners to fire players who take a knee. That is a clear and blatant attempt to silence the players who continue to protest.

COUNTERPOINT: There is some precedent on this, but not involving a call for a boycott. Instead, it is the opposite – a direct attempt by a Trump aide, Kellyanne Conway, who went on a television program and urged people to buy Ivanka Trump's merchandise. That led the Republican chairman of the House Oversight Committee to criticize Ms. Conway for abusing her public position and to ask the U.S. Office of Government Ethics to investigate whether disciplinary action should be taken. The office concluded that discipline was warranted but the White House said Ms. Conway would not be punished – thus leaving the ethical issue unresolved[6] and with it the issue of whether Trump abused his office by attempting to inflict financial harm on a private industry.

POINT: If players face a high hurdle suing the White House, they could have more success going after team owners who fire them, depending on the terms of their contract. They could also file a discrimination claim with the Equal Employment Opportunity Commission on the grounds they were discriminated against for protesting about racial injustice.[7]

COUNTERPOINT: "Under the First Amendment, the government can't ban speech except in very narrow circumstances. But that limitation only binds the govern-

ment; for the most part, private employers could tell employees what not to say (or, at least doing so doesn't implicate a Constitutional right)."[8] Thus, for example, an owner can establish a dress code for workers and discipline those employees who violate it. And it is hard to imagine any employer allowing workers to burn the American flag on the job, despite the Supreme Court ruling upholding the right to engage in such protest. While taking a knee is much less extreme than setting the flag on fire, a team owner could nonetheless follow the lead of Cowboys owner Jerry Jones and order players to stand for the anthem or be fired.

POINT: Even if the immediate issue is resolved outside the courtroom with all parties in agreement, it would behoove player attorneys to pay special attention to employment contract language. A player dismissed for First Amendment rights may have a viable claim that there was no clear contractual ground to terminate him and press a breach-of-contract claim.

COUNTERPOINT: Owners might be reluctant to sign contracts with ironclad protections for any kind of player conduct. In the end it will likely be the marketplace that resolves the controversy. If the protests impact ticket and television revenues, that will speak louder than any sideline show of player solidarity.[9] ■

1. http://www.labordaysblog.com/2017/09/trump-plays-ball-to-knee-or-not-to-knee/#more-1382.
2. *Id*.
3. *Texas v. Johnson*, 491 U.S. 397 (1989). Justice Scalia, when asked to explain his vote in favor of the majority, said, "If it were up to me I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I am not a king."
4. *Id*.
5. *Id*.
6. https://www.washingtonpost.com/.../white-house-rebuffs-ethics-office-recommendation-to-discipline-kellyanne-conway.
7. Labordays, *supra* note 1.
8. *Id*.
9. *Id*.

New Criminal Justice Legislation

By Barry Kamins

This article contains an annual review of new legislation amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

Substantive Legislation in the Budget Bill

There were four substantive pieces of legislation that were enacted as part of this year's budget bill: evidence of identification by photographs; videotaping of confessions; raising the age of criminal responsibility; and sealing of prior convictions.

Identification by Photograph

Effective July 1, 2017, a witness can now testify during trial that he identified a suspect from a photograph.[1] Such evidence, however, will only be admissible if a "blind" or "blinded" identification procedure was utilized. Those terms will be defined below.

Prior to enacting this legislation, New York had maintained an evidentiary rule – the only state to do so – that did not permit evidence that, prior to trial, a witness had identified the defendant from a photograph. This evidentiary rule existed statutorily for 90 years.

In *People v. Caserta*,[2] the Court of Appeals explained the twin rationales for the exclusion of such evidence. First, the Court was concerned that jurors may draw the likely inference that the defendant had been previously arrested from the fact that the police were in possession of the defendant's photograph. Indeed, the Court referred to the source of these photographs as the "rogues' gallery."

The second rationale for the rule was a concern that photographs were a more suggestive, if not less reliable, means of identification. As the Court noted, photographs are sometimes of poor or uneven quality and easily distorted. Such photographs could depict a dated or distorted image of a suspect and render any identification unreliable.

The prohibition against prior photo identification evidence was not absolute. For example, defense counsel could open the door to such evidence should counsel

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mislead a jury by creating an inaccurate impression that a witness was unable to identify, or had not identified, the defendant prior to trial. In addition, should a defendant refuse to participate in a corporeal lineup, evidence of a pre-trial photographic lineup would be admissible.[3] If a witness's testimony was challenged as a recent fabrication, evidence of a prior photographic identification would be admissible as a recent fabrication on the condition that the identification predated the motive to testify. Finally, a *defendant* could choose to waive the protection of the *Caserta* rule by eliciting testimony about a prior photographic identification with the intention of establishing that a witness had been mistaken.

Over the last decade, the *Caserta* rule was re-examined and debated by numerous groups addressing the causes of wrongful convictions. The Innocence Project noted that scientific and psychological literature shows that witnesses tend to be committed to their initial identification even if that identification is mistaken. A photo array is often the first identification procedure and, therefore, it was seen as critical that the reliability of that procedure be improved.

In the last legislative session, prosecutors sought to overturn the *Caserta* rule in exchange for the imposition of procedures that would make identifications at photo arrays more reliable. Various defense groups advocated for changes in the procedure – some arguing for several mandatory reforms while others were willing to accept the "blinded" procedure as the only *quid pro quo*.

The new legislation does not make mandatory many of the reforms sought by some groups. What is an essential element of the legislation, however, is the required use of "blind" or "blinded" procedures.

In a "blind" procedure, the administrator does not know the identity of the suspect. Two people are required to conduct a blind array – one to assemble the array and one to administer it.

In a "blinded" procedure, while the administrator may know who the suspect is, by virtue of the procedure's administration, the administrator does not know the suspect's position in the array until the procedure is completed. This can be accomplished in several ways. An array can be assembled by someone, other than the administrator, and then placed in an unmarked folder for the administrator. This is known as the "two-person shuffle." Or the administrator can create multiple arrays in which the suspect's position is different in each; each array is in a separate sealed envelope. The witness then selects one of the envelopes to use as the array. This is known as the "one-person shuffle." Regardless of which procedure is used, the administrator should be positioned in such a way so that he or she is not in the witness's line of sight during the viewing of the array.

The above procedures were mandated based on the scientific literature that established certain principles relating to the role of an administrator conducting a photo array. It has been documented that the state of mind of the administrator might contribute to the suggestiveness of a photo array. Administrators who know the identity of the suspect in the array may inadvertently or intentionally influence the witness's identification. Conversely, an administrator who does not know the identity of the suspect is unlikely to steer the witness to the suspect through verbal or nonverbal cues.

If an administrator utilizes either a "blind" or "blinded" procedure, the prosecutor will now be permitted to offer testimony that the witness identified the defendant's photograph on a prior occasion as the perpetrator of the crime. This will constitute evidence-in-chief, thus overruling *Caserta*, and it will make New York the 22nd state to utilize blinded identification procedures.

The failure to utilize a "blinded" procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL § 710.20(6).

The legislation also required the Division of Criminal Justice Services (DCJS) to promulgate a number of written best practices for photo and corporeal (live lineup) identification procedures that must be disseminated to police agencies around the state. It is important to note that these procedures are not mandatory and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

In June, DCJS promulgated these procedures and disseminated them to all police departments around the state. These best practices incorporate many years of scientific research on memory and interview techniques. They focus on seven critical aspects of administering photo arrays: selection of fillers; inviting a witness to view an array; instructions to the witness prior to viewing an array; administering the procedure; post-viewing questions of the witness; documentation of the procedure; and speaking with the witness after the procedure.

Seven Aspects of Administering Photo Arrays

With respect to the selection of fillers, the new protocols suggest that a description of the perpetrator, given by the witness, be taken into account when selecting fillers to be used in the array. A witness's description of the perpetrator can be relevant to the suggestiveness inquiry. Prosecutors and defense counsel will argue whether the composition of an array unfairly highlighted a defendant based upon the witness's description. "The court, for its part, must evaluate the suggestiveness of the pre-trial identification procedure both in light of *and* in spite of the witness's description."[4]

The protocols discuss what the police should say to a witness when inviting him or her to view an array. For example, a police officer should *not* tell the witness

whether a person is in custody or whether the police have any corroborating evidence, e.g., a confession or physical evidence. The police should merely advise the witness that they intend to conduct an identification procedure without saying anything about the suspect.

Once the witness has arrived at the police facility, the protocols discuss the nature of the instructions that should be given to the witness. Initially, the witness should be told that the perpetrator may or may not be in the array and that the witness should not assume that the administrator knows the identity of the perpetrator.

The witness must also be instructed about the quality of the photographs in the array. For example, the witness should be told that individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. In addition, the true complexion of a person may be lighter or darker than shown in the photograph. The witness will be told to ignore any markings that may appear on the photographs.

Finally, the witness should be told that every witness who makes an identification will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind.

After viewing a "blind" or "blinded" photo array, the witness will be asked whether he or she recognized anyone and, if so, what photograph was recognized. In addition, the witness will be asked "from where do you recognize the person in the photograph?" Finally, the witness will be asked to describe his or her level of confidence, e.g., "without using a number, how sure are you?"

The protocols suggest certain best practices with regard to documenting the procedure. Unless the witness objects at the outset, the entire identification procedure should be memorialized using audio or video recording. This may not be possible if there are equipment issues or the police believe that a recording would jeopardize the safety of a witness. The memorialization should include any physical or verbal reaction to the array as well as a confidence statement by the witness.

Once the identification is concluded and documented, the administrator should not make any comment to the witness that would suggest that the witness identified the correct suspect.

A few observations can be made about the new protocols. The "blind" procedure requires the use of two individuals while the "blinded" procedure, using the "one-person shuffle," only requires one administrator. Thus the "blinded" array will be easier for law enforcement to administer and may become the default method for the police. In addition, the police may decide not to conduct corporeal lineups at all since photo arrays are much easier to administer. As a result, in a case without any independent forensic evidence, a conviction could rest solely upon a single photo identification.

The above protocols are not mandatory and a failure to utilize them will not mandate the suppression of a pre-trial identification. As many police agencies around the state begin to utilize them, however, they will undoubtedly become standardized procedures of pre-trial identification.

New procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.

A National Trend

These new procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.[5] Many of these reforms embrace the current state of scientifically accepted identification research. For example, in *State v. Henderson*,[6] the New Jersey Supreme Court used its supervisory powers to direct law enforcement to adopt best practices based on the scientific research of the last three decades. Supreme Court Justice Sonia Sotomayor recently noted that a vast body of scientific literature has reinforced the concern expressed by the court a half-century ago that eyewitness misidentification is the single greatest cause of wrongful conviction in this country.[7]

Video Recording of Custodial Interrogations

A second substantive enactment in the budget bill requires the video recording of custodial interrogations by a public servant at a detention facility when the interrogation involves certain enumerated felonies.[8]

A "detention facility" is defined as any location where an individual is being held in connection with criminal charges that have been or may be filed. The statute expressly includes a police station, correctional facility, holding facility for prisoners and a prosecutor's office. The recording must include the entire custodial interrogation, including the administration of *Miranda* warnings and the waiver of such rights.[9]

The video recordings are required only when the interrogation involves one of 19 enumerated felonies. They fall within the following categories: any A-1 felony other than a controlled substance felony under Article 220 of the Penal Law; any Class B violent offense under

Article 125 of the Penal Law (homicide); any Class B violent felony offense under Article 130 of the Penal Law (sex offense); and the A-II felonies of predatory sexual assault (PL § 130.95 and § 130.96). As a result, the statute does not apply to certain significant felonies, including second-degree rape and first-degree robbery.

The statute excuses the failure to record a statement for "good cause" by the prosecutor and lists 10 examples of what would constitute good cause. The excuses fall into several general categories: where the failure to record is beyond the control of the People; where the recording would jeopardize the safety of any person or reveal the identity of a confidential informant; or where a suspect refuses to be interrogated if the interrogation is recorded.[10] The list is not exhaustive.

The prosecutor has the burden of establishing good cause for the failure to record the interrogation. Should a court find, however, that there was not good cause for failing to record, the court may not suppress a confession or statement based solely on that ground. A court shall consider the failure to record as a factor, but not as the sole factor, in determining whether such confession shall be admissible at trial. At the defendant's request, the court must instruct the jury that the People's failure to record may be weighted as a factor, but not as the sole factor, in determining whether a statement was voluntarily made, or was made at all.[11]

Raising the Age of Criminal Responsibility

The third new law raises the age of criminal responsibility in New York.[12] As of October 1, 2018, all 16-year-olds and, on October 1, 2019, all 17-year-olds with a few exceptions, will no longer be criminally responsible for misdemeanors – those charges will now be handled in Family Court where the individual may be adjudicated a "juvenile delinquent." The only exception is where the misdemeanor is either accompanied by a felony charge, is the result of a guilty plea in satisfaction of felony charges, or falls under the Vehicle and Traffic Law. In those instances, the misdemeanor charges will remain in the local criminal court. In addition, traffic infractions and stand-alone violations will continue to be adjudicated in local criminal courts.

The adjudication of felonies for this age group is more complicated. All felony cases will originate in a newly established Youth Part in the Superior Court in each county, presided over by Family Court judges who will receive specialized training in juvenile justice and adolescent development.[13]

A 16-year-old or 17-year-old who is charged with a felony under the new law is designated an "adolescent offender" (AO) and, upon arrest, the AO will be arraigned in the Youth Part.[14] Thus, individuals in this age group will bypass the local criminal court completely unless they are arrested at a time when the Youth Part is not in session, e.g., at night or on the weekend. At those times, the AO must be arraigned before special "accessible magistrates" designated by the presiding justice of each Appellate Division. These magistrates must be specially trained in juvenile justice and adolescent development and, presumably, current local criminal court judges would fill the role of "accessible magistrates."[15]

Once an adolescent offender is arraigned in the Youth Part, there is a provision for the case to be removed to Family Court where the individual could be adjudicated a "juvenile delinquent." Whether a case is removed depends on the severity of the offense.

When an adolescent offender is charged with any crime *other* than (1) a class A (non-drug) felony; (2) a violent felony; or (3) a felony for which a juvenile offender would be criminally responsible under CPL § 1.20(42), the statute comes close to a presumption in favor of a removal to Family Court.

The statute provides that the case "shall" be removed to Family Court *unless* the prosecutor files a motion within 30 days of the arraignment to prevent the removal. Ultimately, the court shall grant the motion for removal unless it determines that "extraordinary circumstances" exist that prevent the transfer to Family Court. The statute does not define "extraordinary circumstances."[16]

When an adolescent offender is charged with a class A (non-drug) felony or a violent felony, the court must adjourn the case no later than six calendar days after the arraignment. At the second appearance, the court must review the accusatory instrument to determine whether the case should be removed to Family Court. In order for the prosecutor to prevent the removal he or she must prove by a preponderance of the evidence that one of the following is established in the accusatory instrument: (1) the defendant caused "significant physical injury" (not defined) to a non-participant in the offense; (2) the defendant displayed a firearm, shotgun, rifle, or deadly weapon; or (3) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual contact or sexual contact.[17]

If the prosecution satisfies its burden, the case remains in the Youth Part and the defendant is prosecuted as an adult. Should the defendant be convicted, the court "shall consider the age of the defendant in exercising its discretion at sentencing."[18]

Under the new statute, *juvenile offenders* are arraigned in the Youth Part after their arrest and thus bypass the local criminal court unless the Youth Part is not in session.[19] The procedures for removing juvenile offenders to Family Court remains the same as under the prior statute although the numbering of the sections has changed.[20]

It should be noted that juvenile offenders and adolescent offenders who are not removed to Family Court are prosecuted as adults in the Youth Part. Nonetheless, they are still eligible for youthful offender treatment.

Finally, adolescent offenders who are held on bail prior to a conviction will no longer be held on Riker's

Island as of October 1, 2018. Each county must provide a "detention center for older youth."[21] An adolescent offender sentenced to an indeterminant or determinate sentence will be committed to the Department of Corrections and Community Supervision for placement in an adolescent offender facility.

Expansion of New York's Sealing Statute

The fourth substantive change in the budget bill is an expansion of New York's sealing statute that aligns this state with a majority of other states in addressing the collateral consequences of past convictions. A new section, Criminal Procedure Law § 160.59, applies to all offenders (adults, adolescent offenders and juvenile offenders) who have past convictions.[22] It is the first time New York will seal prior convictions – the current law only sealed violations and dismissed cases.

Under the new statute, an application can be made to seal up to two convictions, only one of which can be a felony. To qualify for sealing, at least 10 years must have elapsed from the date of sentence or the release from incarceration, whichever comes later.[23] The application must be made to the sentencing judge and if the applicant has two convictions, the application must be made to the judge who presided over the higher classification of crime. If the two crimes are misdemeanors, the application must be made to the judge who sentenced the defendant on the later date.

If the prosecutor objects to the application, he or she has 45 days to file an objection and a court can conduct a hearing to make a determination. Pursuant to the statute, the court must consider any relevant factors including the impact of sealing upon the defendant's reentry or rehabilitation as well as the impact on public safety and the public's confidence.[24]

Certain convictions are not eligible for sealing, including violent felonies, sex offenses under Article 130 of the Penal Law, homicides, A felonies, and an offense for which registration as a sex offender is required.[25]

The new sealing statute is different from the current sealing statutes (CPL §§ 160.50 and 160.55). First, unlike the current statutes, the new law permits the Department of Criminal Justice Services to retain the fingerprints and photographs of the defendant. In addition, the new law permits a number of "qualified agencies," including prosecutors' offices, to have access to these records.

Finally, a defendant cannot be required to waive the right to apply for sealing as part of any plea agreement.[26] In addition, an inquiry about a prior sealed conviction will constitute an unlawful discriminatory practice.[27]

Other Legislation

Aside from the budget bill, the legislature enacted a number of individual bills addressing criminal justice issues. As usual, the legislature amended the definition of certain crimes and increased penalties of others. It should be noted that for the second year in a row, Governor Cuomo vetoed a bill that would have amended the definition of a gravity knife. Over the past 14 years, more than 65,000 New Yorkers have been arrested for possession of a gravity knife, making this one of the most prosecuted crimes.

A gravity knife is "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."[28] The knife was originally designed for use by paratroopers in World War II who needed to cut themselves free from a parachute that had become tangled in a tree or other obstruction. The knife could be opened by using one hand; the user pointed the knife downward and the blade became free from the force of gravity and the flick of the wrist.

The law, which was enacted in 1958, has been criticized as being too broad in that it has been enforced against large groups of individuals who use these knives every day as part of their trade. Law enforcement officials, however, caution that these knives present a threat to safety and that there are many alternative instruments that can be used by tradespeople including the widely used utility knife with a half-inch blade and the standard folding knife.

The governor vetoed last year's bill because, in his opinion, the bill would have potentially legalized all folding knives and placed a burden on law enforcement to determine the design attributes of each knife. This year in vetoing the bill, the Governor found that while it did succeed in removing any ambiguity in the definition of a gravity knife, "it did so in a way that would essentially legalize all folding knives."[29] This, he said, would have resulted in greater confusion among law enforcement and knife owners.

The legislature has responded to an increase of bomb threats against Jewish community centers, by adding "community center" to the definition of "public place." As a result, a person who makes a bomb threat against a community center can now be convicted of the felonies of Placing a False Bomb and Falsely Reporting an Incident.[30] In addition, the legislature closed a loophole that had existed in enforcing the crime of Obstructing a Firefighting Operation. The law has been expanded to protect a firefighter who is performing emergency medical care on a sick or injured person.[31]

In another amendment, the legislature has eliminated the inconsistent regulation of "sparkling devices" throughout New York State. A new law authorizes the sale of "sparkling devices" outside of cities with a population of one million or more, exempting them from the definition of "fireworks" and "dangerous fireworks."[32] Finally, illegal deer poaching is now a misdemeanor, punishable by up to a year in jail.[33]

As part of the budget bill, New York State will reimburse all counties for improvements in indigent defense

services. This builds upon a 2014 settlement in which the state agreed to settle a class-action lawsuit[34] that accused the state of failing to provide adequate representation to indigent defendants in five counties (Suffolk, Washington, Ontario, Onondaga and Schuyler). The settlement committed the state to pay for improved services to indigent defense systems in those counties, but did not address New York's other 57 counties.

Under the new legislation, the Office of Indigent Legal Services must provide a statewide plan to provide for the following: ensuring that defendants are represented by counsel at arraignment; reducing caseloads for public defenders; and improving the resources available to attorneys representing indigent defendants. In addition, the state will provide up to $250 million over six years to pay for the implementation of these reforms.[35]

A "transportation network company," such as Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.

Procedural Changes

A number of procedural changes were enacted in the last legislative session. In 2016, the legislature enacted a bill establishing requirements for law enforcement agencies with respect to sexual offense evidence kits. This year the legislature has enacted several amendments that clarify last year's bill.

First, it was clarified that the requirements apply to police and prosecutorial offices. Second, agencies are required to develop a DNA profile when the biological evidence obtained is eligible for comparison to the federal CODIS database. The agencies are also required to take an inventory of the kits and submit the inventory to the New York State Division of Criminal Justice Services. The agencies will also have less time to submit these kits for analysis; the time has been shortened from 180 days to 30 days. Failure to comply with the time frames for submission and testing, however, will not be grounds for suppression of evidence under Criminal Procedure Law § 710.20. Finally, the effective date of most of these changes was extended to one year after it becomes law.[36]

Under current law, a pre-sentence investigation report may be waived by the parties when a sentence of felony probation is to be imposed. A new law now also permits a waiver of the report when a conditional discharge is to be imposed.[37] Another new law would require police officers investigating a vehicular accident to request that all operators of the motor vehicles involved in the accident submit to a field sobriety test where a person was seriously injured or killed as a result of the accident. The request must be made if the police officer has reasonable grounds to believe that the operator committed a "serious traffic violation," defined as operating a vehicle in violation of enumerated sections of the Vehicle and Traffic Law. These violations include driving with a suspended license, leaving the scene of an accident, speeding, and reckless driving. A motorist who refuses to take the test would be subject to a suspension of his or her license.[38]

Another procedural change is designed to facilitate the appeal from a court that is not designated a court of record. These courts do not utilize stenographers to make records of the proceedings. As a result, an appeal is heard on a record pieced together by means of (1) "an affidavit of errors" prepared by the appellant and (2) a summary of the facts made by the judge. A decade ago the Office of Court Administration installed electronic recording devices in these courts. Nonetheless, the Court of Appeals recently held that a transcript derived from an electronic recording of the proceedings is not an acceptable substitute for the filing of an affidavit of errors.[39] In order to provide an appellant sufficient time to obtain the transcript of the electronic recording, an amendment extends the time to file a Notice of Appeal from 30 to 60 days.[40]

Finally, the legislature has concluded that the felony of animal fighting is a heinous crime that remains largely undetectable. As a result, it has added this crime to the list of designated crimes eligible for an application for an eavesdropping or video surveillance warrant.[41]

Sex Offenders

Several new laws will affect sex offenders. First, a "transportation network company," such as Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.[42] Second, the Division of Criminal Justice Services must notify the appropriate law enforcement agency within two business days (rather than 48 hours) if a registered sex offender changes residence or enrolls in an institution of higher learning.[43]

Crime Victims

Victims of crimes will benefit from several new laws. Initially, the court system will make available translation services to all Family and Supreme Courts to assist in the translation of orders of protection where the person protected by the order has limited English proficiency or has a limited ability to read English.[44] In addition, victims of domestic violence can now make an application in County and Family Court, in addition to Supreme Court, for an order separating their voting registration records and any other records from records available to the public.[45]

Under a new law, prosecutors must provide the Board of Parole with a copy of the written notice it provides crime victims regarding the disposition of a criminal case and the victim's right to be heard by the board. This will enable the board to contact crime victims about the status of a parolee's hearing.[46] Finally, crime victims will now be compensated for transportation costs associated with any appearance in a criminal case from an arraignment through post-trial hearings.[47] In addition, reimbursement for crime scene cleanup expenses will now be paid to additional members of a victim's family.[48]

Prisoners

Several new laws will impact prisoners. Recognizing that inmates are routinely transferred from one facility to another for a variety of reasons, the legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.[49] The Parole Board will now be required to post its administrative appeal decisions online within 60 days of its determination.[50] Finally, last year a new law authorized the use of a qualified interpreter at parole hearings where an inmate does not speak English or speaks English as a second language. This year, an amendment requires the interpreter to be appointed by the New York State Office of General Services.[51]

Extending Laws

A number of laws scheduled to sunset this year have been extended. For example, Kendra's Law was extended until June 20, 2022; it established a statutory framework for court-ordered assisted outpatient treatment of individuals with mental illness.[52] A number of laws had their expiration dates extended from September 1, 2017 to September 1, 2019: numerous sentencing laws as well as laws relating to inmate work-release programs, electronic court appearances in designated counties, and the use of closed-circuit television for certain child witnesses.[53] Finally, certain sections of the Arts and Cultural Law, relating to the resale of tickets to places of entertainment, have been extended until June 20, 2018.[54]

New York City Local Laws

The New York City Council has enacted a number of local laws designed to facilitate the posting of bail and the release of inmates. First, in any case where less than $10,000 bail is set, the New York City Department of Corrections may delay the transportation of the defendant to a correctional facility for four to 12 hours to permit the inmate to have bail posted, if the delay is requested by a pretrial services agency.[55]

Second, the Department of Corrections will begin accepting cash bail payments online, beginning on April 1, 2018, and once cash bail is posted an inmate must be released within five hours (beginning on October 1, 2017); four hours (beginning on April 1, 2018); and three hours (beginning on October 1, 2018).[56]

Finally, where a defendant is held on bail, the Department of Corrections shall ensure that a "bail facilitator" meets with an inmate within 48 hours of admission to a facility. The facilitator must explain to the inmate how to post bail or bond, the fees that may be collected by bail bond companies and must assist the inmate with any reasonable measures related to the posting of bail.[57] ■

The legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.

1. 2017 N.Y. Laws ch. 59 (amending Penal Law § 60.30), eff. July 1, 2017.
2. *People v. Caserta*, 19 N.Y.2d 18 (1966).
3. *People v. Perkins*, 15 N.Y.3d 200 (2010).
4. *New York Identification Law*, Hibel, at 4–16.
5. "*The Promises and Pitfalls of State Eyewitness Identification Reforms*," 104 Ky. L.J. 99 (2016).
6. *State v. Henderson*, 27 A.3d 872 (2011).
7. *Perry v. New Hampshire*, 565 U.S. 228 (2012) (*dissenting opinion*); *U.S. v. Wade*, 388 U.S. 218, 219.
8. 2017 N.Y. Laws ch. 59 (amending Penal Law § 60.45).
9. Amending Penal Law § 60.45(3).
10. Amending Penal Law § 60.45(3).
11. Amending Penal Law § 60.45(3)(d).
12. 2017 N.Y. Laws ch. 59, eff. October 1, 2018 and October 1, 2019.
13. Criminal Procedure Law § 722.10 (CPL).
14. CPL § 1.20(44).
15. CPL §§ 722.20 and 722.21.
16. CPL § 722.23(1).
17. CPL § 722.23(2).
18. Penal Law § 60.10(a).
19. CPL § 722.20.
20. *Id.*
21. Correction Law § 40(2).
22. 2017 N.Y. Laws ch. 59, eff. October 7, 2017; ch. 60.
23. CPL § 160.59(5).
24. CPL § 160.59(7).
25. CPL § 160.59(1).
26. CPL § 160.59(11).
27. Executive Law § 296 (16).
28. Penal Law § 260.00(5).
29. Governor's veto message, No. 171.

30. 2017 N.Y. Laws ch. 167, eff. November 12, 2017 (amending Penal Law § 240.00).

31. 2017 N.Y. Laws ch. 124, eff. November 1, 2017 (amending Penal Law § 195.15).

32. S. 724, awaiting the governor's signature.

33. S. 387, awaiting the governor's signature.

34. *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010).

35. 2017 N.Y. Laws ch. 59.

36. S. 980, awaiting the governor's signature.

37. 2017 N.Y. Laws ch. 194, eff. August 21, 2017 (amending CPL § 390.20).

38. S. 5562, awaiting the governor's signature.

39. *People v. Smith*, 27 N.Y.3d 643 (2016).

40. 2017 N.Y. Laws ch. 195, eff. October 20, 2017 (amending CPL § 460.10).

41. A.2806, awaiting the governor's signature.

42. 2017 N.Y. Laws ch. 60, eff. July 1, 2017 (amending CPL § 700.05).

43. 2017 N.Y. Laws ch. 17, eff. January 27, 2017 (amending Correction Law § 168-j).

44. 2017 N.Y. Laws ch. 55, eff. July 19, 2017 (amending Judiciary Law § 212).

45. S.6749, awaiting the governor's signature.

46. 2017 N.Y. Laws ch. 193, eff. August 21, 2017 (amending CPL § 440.50).

47. S.338, awaiting the governor's signature.

48. 2017 N.Y. Laws ch. 117, eff. January 21, 2018 (amending Executive Law § 624).

49. 2017 N.Y. Laws ch. 254, eff. September 21, 2017.

50. S.3982, awaiting the governor's signature.

51. 2017 N.Y. Laws ch. 9, eff. March 8, 2017 (amending Executive Law § 259-i).

52. 2017 N.Y. Laws ch. 67.

53. 2017 N.Y. Laws ch. 55.

54. 2017 N.Y. Laws ch. 68.

55. Local Law 1541, eff. September 20, 2017.

56. Local Law 1531, eff. October 1, 2017.

57. Local Law 1561, eff. January 18, 2018.

The Emergence of and Need for Aging and Longevity Law

By Robert Abrams

I'm 61 years old. I still think I'm a young man. Apparently, I'm not.

According to millions of Americans, especially those under 30 years of age,[1] I'm an old person,[2] a senior citizen,[3] an elder[4] and almost a geriatric.[5] This perception is embraced and enhanced by the media,[6] politicians,[7] and assorted intellectuals.[8]

At least I am not alone. I am part of a growing demographic that currently includes approximately 110 million Americans who are 50 years of age or older,[9] a subset of which are the 62 million people who are at least 60 years of age.[10] Assuming I live long enough to reach my life expectancy, which appears to be 83.6 years,[11] I will become part of the 3 percent of Americans from my generation who have a chance to reach the century mark.[12] It is estimated that if and when I celebrate my 100th birthday, I would become one of the approximately 564,000 centenarians.[13]

Moreover, I am also part of a professional demographic that includes 1,355,963 attorneys in the United States, which includes a subset of 177,035 lawyers in New York State.[14] Many of my fellow attorneys are my age or

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older.[15] I hope and expect to eventually join the demographic of New York attorneys who are over 75 years of age and still practicing law.

While I can take some comfort in these numbers, I am also aware that being part of a growing demographic is not an antidote to the plethora of challenges that accompany increased longevity. In fact, as we "old folk" age together, we apparently become a ubiquitous societal burden which results in health-related, financial, legal and moral/ethical dilemmas.

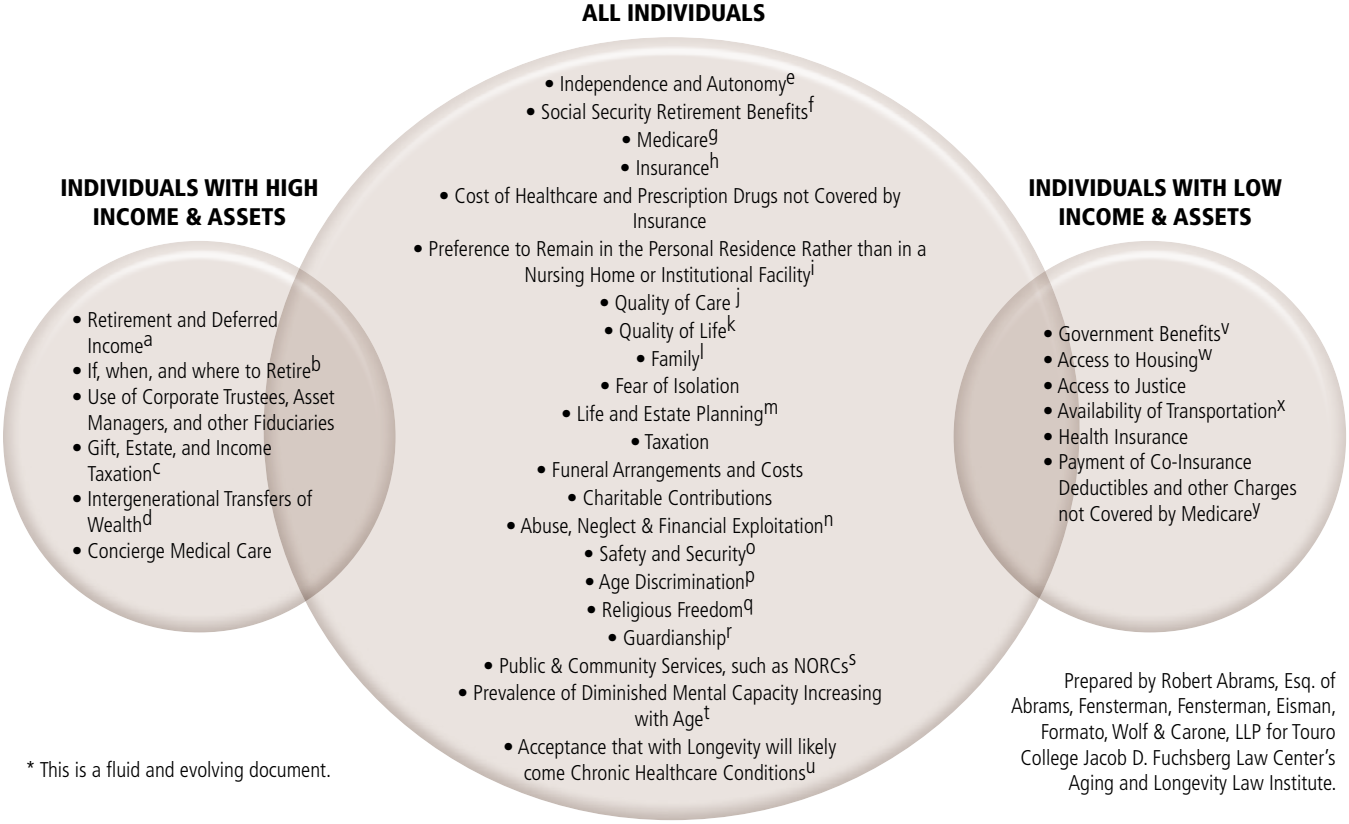
These societal burdens are a direct result of real life individual legal challenges that we and our loved ones may experience as we (they) grow older. As illustrated by the following chart, some such potential legal challenges are universal, while others may be based on financial status.

Ironically, many of the over 100 million Americans who are 50 years of age or older and their loved ones and neighbors, an additional approximate 130 million adult Americans,[16] choose not to consider and/or address these issues until they are directly confronted with one or more of the referenced challenges. Such procrastination will not reduce the likelihood that most of the over 100 million Americans over the age of 50, including lawyers and judges, will require the services of knowledgeable attorneys who are competent to address the complex legal matters that comprise the emerging field of Aging and Longevity Law. Unlike other substantive areas of law that focus on a particular group or subject, Aging and Longevity Law is focused on:

> A confluence of the numerous substantive areas of the law which individually and collectively address the diverse legal challenges and related life contingencies that impact and accompany the increased longevity of the over 100 million Americans who are fifty years of age or older.[17]

Aging and longevity lawyers must not only be familiar with the law but must also understand, *inter alia*, the aging process, the etiology and manifestations of diminished mental capacity, interpersonal, family and business relationships, the health care continuum and possess an understanding of and sensitivity to the realities of aging, which often requires decisions to be made in contemplation of and/or shortly before death.

Legal Issues That Accompany Increased Longevity: Similarities and Differences Due to Financial Status*



* This is a fluid and evolving document.

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Over the past several years, a number of court decisions have helped shape a needed dialogue on legal issues associated with increased longevity. For example, the issue of health care decision-making has changed dramatically over the past 40 years. Seminal cases such as *In re Storar*[18] and *Cruzan*,[19] combined with legislative initiatives such as the Healthcare Proxy[20] and the Family Health Care Decisions Act,[21] have made it clear that all adult individuals are presumed to have the capacity to consent to and/or refuse health care treatment, including artificial nutrition and hydration, as well as other forms of life-sustaining treatment.[22]

Multiple alternatives for surrogate decision-making have been approved in New York over the past three decades. Agents appointed pursuant to a health care proxy may be authorized to make life and death decisions on behalf of the principal.[23] Guardians appointed pursuant to Article 81 of the Mental Hygiene Law may be authorized to make major medical decisions.[24] The Family Health Care Decisions Act and the Do Not Resuscitate Statute are examples of default statutes where the government has established a priority selection system which empowers a surrogate to make health care decisions on behalf of an individual who lacks capacity.

The evolution of health care decision-making has included a discussion and, in some cases, action regarding the legislation of physician-assisted suicide. Some states have authorized physician-assisted suicide, while others, such as New York, have not.

In its' *per curium* decision in *Myers v. Schneiderman*,[25] the N.Y. Court of Appeals made the following observation about physician-assisted suicide in New York and throughout the United States:

> As the Supreme Court observed, "[t]he earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828." New York's Task Force on Life and the Law, which was first convened in 1984, carefully studied issues surrounding physician-assisted suicide and "unanimously concluded that [l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable" and that the "potential danger[s] of this dramatic change in public policy would outweigh any benefit that might be achieved." The Legislature has periodically examined that ban – including in recent years – and has repeatedly rejected attempts to legalize physician-assisted suicide in New York.
>
> The Legislature may conclude that those dangers can be effectively regulated and specify the conditions under which it will permit aid-in-dying. Indeed, the jurisdictions that have permitted the practice have done so only through considered legislative action and those courts to have considered this issue with respect to their own State Constitutions have rejected similar constitutional arguments. At present, the Legislature of this State has permissibly concluded that an absolute ban on assisted suicide is the most reliable, effective, and administrable means of protecting against its dangers.[26]

Notwithstanding the Court's finding that the legislature had a rational basis for criminalizing assisted suicide, the Court also noted by implication that the "present" decision of the legislature was subject to change. I suspect that changes, if any, will be the result of litigation commenced by knowledgeable Aging and Longevity Law practitioners.

In addition to the pursuit of continued clarity on health care decision-making, aging and longevity lawyers will, *inter alia*, also help develop standards to prevent, detect and address the abuse, neglect and financial exploitation of older persons and identify appropriate safeguards to plan for and address the legal needs and rights of the millions of Americans with diminished mental capacity. As lawyers creatively address these individual and societal problems, the ultimate outcomes will often be decided and/or guided by judges, who grasp the significance and far-reaching implications of their decisions.

For example, in *Campbell v. Thomas*,[27] Justice Prudenti determined that a defendant spouse who married a terminally ill man, who suffered with dementia and did not possess the requisite capacity to enter into the marriage, should not be entitled to the surviving spouse's right to an elective share. In her decision, the judge married equity and law to reach a just result:

> We find this result to be compelled not only by the need to protect vulnerable incapacitated individuals and their rightful heirs from overreaching and undue influence, but to protect the integrity of the courts themselves. It is "an old, old principle" that a court, "even in the absence of express statutory warrant," must not "allow itself to be made the instrument of wrong, no less on account of its detestation of everything conducive to wrong than on account of that regard which it should entertain for its own character and dignity." In this case, the record reveals that Nidia secretly entered into a marriage with a person whom she knew to be incapable of consenting to marriage, with the intent to collect, as a surviving spouse, a portion of his estate. A crucial step in the completion of that plan was Nidia's assertion of a right of election in the Surrogate's Court. Of course, the powers of the judiciary are not unlimited, and courts are not capable of righting or preventing every wrong. The courts, however, can, and must, prevent themselves and their processes from being affirmatively employed in the execution of a wrongful scheme.
>
> The equitable doctrine pursuant to which we find that Nidia has forfeited her right of election does not displace legislative authority, but complements it. Our decision does not reflect an effort to avoid a result intended by the Legislature. Rather, for the following reasons, it is clear to us that the Legislature did not contemplate the circumstances presented by this case when it enacted EPTL 5-1.2.[28]

Moreover, Judge Prudenti concluded her opinion by calling on the legislature to re-examine the law to prevent this common form of elder abuse and financial exploitation:

> Although we exercise our equitable power to award appropriate relief in this case, we nonetheless call upon the Legislature to reexamine the relevant provisions of the EPTL and the Domestic Relations Law and to consider whether it might be appropriate to make revisions that would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm and unjustly enrich themselves at the expense of such victims and their rightful heirs.[29]

Whereas Justice Prudenti requested the legislature to create new legislation, Justice Leone in *In re Klapper*[30] also provided an important public service when he interpreted Article 81 as a landmark statute that ensured and promoted the rights of incapacitated persons:

> There is no question that the use of such Medicaid planning by competent persons is legally permissible and that proper planning benefits their estates. The question presented herein is whether incapacitated persons should be accorded this same right to engage in Medicaid planning or, more specifically, whether a court, pursuant to Mental Hygiene Law § 81.21, may authorize a guardian to transfer part of an incapacitated person's assets to or for the benefit of another individual for the purpose of Medicaid planning on the ground that the incapacitated person would have made such transfer if he or she had the capacity to act.
>
> To deny a guardian the authority (where the requirements of Mental Hygiene Law § 81.21 are otherwise met) to make such transfer of the incapacitated person's assets would result in denying that person the opportunity which is available to all competent persons of this State who require long-term nursing home care and who have assets they desire to gift to their families, simply because he or she is incapacitated and is unable from a cognitive standpoint to make such transfer himself or herself. Such a result would be in direct contravention of the expressed intention of article 81.[31]

Judge Leone's decision is consistent with the intent of Mental Hygiene Law Article 81 as reflected in the following excerpt from the Law Revision Commission Comments to Mental Hygiene Law § 81.21: "most particularly, the court should consider whether a competent reasonable person in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances."[32]

The increased flexibility afforded to guardians pursuant to Article 81 has allowed them to engage in all matters of planning to ensure that an incapacitated person is entitled to the same opportunities as competent persons, including, but not limited to, estate and Medicaid planning:

- In *In re John XX.*,[33] the guardian was authorized to effect the transfer of the incapacitated person's (IP) assets for the purpose of rendering the IP Medicaid eligible.[34]
- In *In re Elsie B.*,[35] the IP's guardian was authorized to exercise the right retained by the IP as settlor of a revocable *inter vivos* trust by modifying the trust by adding co-trustees.[36]
- In *In re Buhaina*,[37] the IP's guardian was authorized to use the entire net proceeds due to the IP from her father's estate to establish and fund a supplemental needs trust for the IP.[38]

In each of the above cases, the guardian was required to consider the IP's prior expressed wishes. Such recognition of the individual's prior expressed wishes is particularly important in ensuring their wishes regarding medical and end-of-life care are known and respected.

- In *In re Regina L.F. (Lisa R.)*,[39] the IP had memorialized her end-of-life wishes, including wishes regarding artificial hydration and nutrition, in a health care proxy that she had executed at the age of 66 when she was of "sound mind and body." However, the nutrition and hydration provision inserted into the Supreme Court Order Appointing Guardian conflicted with the IP's wishes which were "clearly and unambiguously" expressed in her health care proxy." Since the law is clear that competent adults can make health care decisions, including the right to refuse life-sustaining treatment, and that such an expression should be respected even if the person subsequently becomes incompetent (*see In re Westchester County Med. Ctr. [O'Connor]*, 72 N.Y.2d 517 (1998)), the provision in the Supreme Court order appointing the guardian was vacated.[40]

Creativity in individual cases has resulted in systematic changes that respond to the legal issues associated with increased longevity. For example, over the last several years, a special unit has been established in the New York County Supreme Court to ensure that individuals with or alleged to have diminished mental capacity, who are defendants in New York County eviction proceedings, are not only provided with legal counsel but, when appropriate, have their matter transferred to the Article 81 Part to have the eviction and a guardianship proceeding combined and presided over by the same Supreme Court justice.[41] Moreover, many local bar associations and individual attorneys routinely provide lo bono and pro bono legal services to low income older individuals who require legal information, counseling and/or assistance.

A common theme in all of these initiatives is the recognition by dedicated lawyers and judges that many older individuals may suffer from some form of diminished mental capacity and the significant difficulty in determining who should assess capacity and what evidence should be relied upon. Such recognition raises a major area of controversy as to whether, *inter alia*, capacity decisions should be made independently by a judge with or

without medical evidence or if capacity determinations should be made solely by physicians. This issue is further complicated by the reality that the criteria to determine capacity may vary based, *inter alia*, on the legal matter at issue,[42] the location,[43] and whether the principal(s) has executed advance directives.[44]

On December 14, 2017 in New York City, NYSBA in coordination with the Aging and Longevity Law Institute at Touro Law School will present a special program on *The Aging Brain and the Law*. This program will feature legal and medical scholars, including, but not limited to, Elkhonon Goldberg,[45] Harry Ballan,[46] Robert Swidler,[47] and the Hon. A. Gail Prudenti,[48] who will debate the respective roles of legal and medical professions in addressing legal capacity. This program underscores the importance of creating a meaningful dialogue between

Aging Issues

In preparing the curriculum for the nation's first Aging and Longevity Law Online Master's Program, which will commence in the Spring 2018 semester at Touro Law School, I created an outline of the substantive and procedural subject areas on Aging and Longevity Law. Following is a condensed version of some of the subject areas that will be covered. For the complete list go to www.tourolaw.edu.

1. **Abuse, Neglect and Financial Exploitation**
   - Victimization of individuals with diminished mental capacity
   - High incidence of abuse by family members
2. **Advance Directives and Declarations**
   - Familiarity with available statutory instruments such as powers of attorney and health care proxy
   - Selecting agents
3. **Age Discrimination**
   - Statutory and constitutional protection for older persons
   - Awareness of areas of age discrimination including:
     - Employment
     - Health care
     - Housing
4. **Autonomy and Personal Choice (Civil and Constitutional Rights)**
   - Right to self-determination
   - Right to privacy and confidentiality
   - Enjoyment of privileges such as driving
5. **Banks and Other Financial Institutions**
   - Personal guarantee and other forms of collateral
   - Reverse mortgages, equity lines and other loan products
   - Spousal obligations
6. **Business Law**
   - Sale, transfer and/or purchase of business interests
   - Special tax considerations for transfers between family members
   - Impact of employment on individuals eligible for Social Security
7. **Consumer transactions**
   - Scams
   - Identity theft
   - Government and private protection/assistance for victims of consumer fraud
8. **Contracts**
   - Requisite capacity to enter into a contract
   - Special attention to clauses including personal guarantees, mandatory contribution, liquidated damages, applicable law, etc.
9. **Criminal law**
   - "Crimes" committed by residents in health care facilities such as nursing homes, psychiatric facilities and hospitals
10. **Disability law**
    - Federal statutes including the Americans with Disabilities Act and Family Leave Act
    - State statutes designed to protect and respect individuals with disabilities
11. **Emergency preparedness**
    - Personal (and familial) responsibility
    - Responsibility of health care providers
12. **End of Life**
    - Right to Die/Desire to Live
    - Organ Donation
    - "Do Not" Orders: Resuscitation, Intubation, Hospitalization, etc.
    - Hospice care
    - Assisted suicide: a state by state issue
13. **Estate Administration and Litigation**
    - Familiarity with state(s) probate and intestacy laws
    - Spousal rights
14. **Estate Planning**
    - Gift and estate tax issues
    - Pros and cons in regard to avoidance of probate

the legal and medical professions to address the medico-legal issues associated with increased longevity.

Conclusion

As I discussed in the opening paragraphs, we have a vested personal and professional interest in Aging and Longevity Law issues. The aging of America's population is unprecedented, especially with the oldest among us,[49] a demographic many of us hope to join.

Analogous to physicians who are certified as geriatricians,[50] lawyers must develop the knowledge and skills to recognize, assess and address the myriad legal issues that impact their older clients as well as understand and appreciate the impact that non-legal factors such as health and mental status; financial status; family dynam-

15. Family law

- Evolving definition of family
- Marriage and spousal rights and obligations
- Divorce and annulments

16. Federalism

- Knowledge of federal statutes that directly impact the aging and longevity demographic including, but not limited to, Medicare, Social Security, Veterans Administration Benefits, Americans with Disabilities Act, Older Americans Act, Family Leave Act, etc.

17. Food, Drugs and Cosmetic Law

- By whom and how are medications paid including but not limited to Medicare drug coverage, private insurance, private pay, Veterans Administration, Medicaid, etc.
- Drug subsidies for low income individuals

18. Government Benefits/Programs

- Eligibility requirements for Medicare, Social Security, Veterans benefits, Medicaid and other federal and state programs

19. Guardianships and Surrogate Decision-Making

- Familiarity with alternatives to and requirements of Article 81
- "All or nothing" mandate of Article 17A
- Family Health Care Decisions Act and other "priority" based statutes

20. Health Law

- Knowledge of the applicable statutes, regulations and case law concerning healthcare providers
- Special attention to the admission and discharge policies of hospitals and nursing homes
- HIPAA and other privacy regulations
- Family Health Care Decisions Act; guardianships and other forms of Surrogate Decision-Making, MOLST, POLST, etc.

21. Insurance law

- Use of hybrid policies such as conversion of life insurance policies to pay for health care
- Impact of cash value of life insurance policy on Medicaid and other government programs

22. Labor and Employment Law

- Taxation of wages for Social Security recipients
- Mandatory/voluntary retirement

23. Litigation

- Knowledge of basic fundamentals involving Article 81 and 17A guardianships, estate administration, personal injury, medical malpractice and other types of litigation involving the aging and longevity demographic

24. Municipal Law

- Local and state administration and enforcement of federal programs such as Medicaid
- Tax incentives for and obligations of aging and longevity demographic

25. Real Property Law/Landlord Tenant Issues

- Types of ownership and legal implications of such ownership
- Reverse mortgages
- Tax considerations

26. Retirement planning

- Social Security calculations and rules
- Health care needs and coverage

27. Rules of Professional Conduct and Rules of the Chief Judge

- Good faith efforts to help a client who suffers from diminished mental capacity
- Representation of two or more family members, whether or not matter is adversarial

28. Taxes

- Gift and estate taxes
- Taxation of Social Security income

This list continues to evolve as with increased aging and longevity comes many new challenges. ■

ics; business and personal relationships; and residence and/or domicile have on these legal matters.

Increased longevity has and will continue to exasperate existing legal challenges and have and will continue to create new ones. With a combination of education and collegiality, however, the legal community shall be poised to assist our clients (and ourselves) to meet these challenges. ■

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13. *Id*.

14. Report, American Bar Association, ABA National Lawyer Population Survey (2017), https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf.

15. According to data compiled by the American Bar Association, 62 percent of attorneys in the United States are over the age of 45, while 13 percent of attorneys are over the age of 65. Report, American Bar Association, Lawyer Demographics (2013), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf.

16. Report, Age and Sex Composition in the United States: 2014, United States Census Bureau, Table 1. Population by Age and Sex: 2014 (2014), https://www.census.gov/data/tables/2014/demo/age-and-sex/2014-age-sex-composition.html.

17. Informational Brochure, Touro College Jacob D. Fuchsberg Law Center, Aging & Longevity Law Institute, What is Aging and Longevity Law?, https://www.tourolaw.edu/AgingAndLongevityLawInstitute/?pageid=850.

18. 52 N.Y.2d 363 (1981).

19. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990).

20. N.Y. Pub. Health Law § 2981 (McKinney 2012).

21. N.Y. Pub. Health Law Art. 29-cc.

22. N.Y. Pub. Health Law § 2944-c (McKinney 2012).

23. N.Y. Pub. Health Law § 2982 (McKinney 2004).

24. N.Y. Mental Hyg. Law § 81.22 (McKinney 2010).

25. 2017 WL 3897181 (2017).

26. *Myers v. Schneiderman*, 2017 WL 3897181, at *5–6 (2017) (internal citations omitted).

27. 73 A.D.3d 103 (2d Dep't 2010).

28. *Campbell v. Thomas*, 73 A.D.3d 103, 119 (2d Dep't 2010) (internal citations omitted).

29. *Id*. at 121.

30. 1994 N.Y. Misc. LEXIS 700 (Sup. Ct., Kings Co. 1994).

31. *In re Klapper*, 1994 N.Y. Misc. LEXIS 700, at *8–11 (Sup. Ct., Kings Co. 1994).

32. N.Y. Mental Hyg. Law § 81.21 (McKinney 2015), *Law Revision Commission Report*.

33. 226 A.D.2d 79 (3d Dep't 1996).

34. *In re John XX.*, 226 A.D.2d 79, 84 (3d Dep't 1996).

35. 265 A.D.2d 146 (3d Dep't 2000).

36. *In re Elsie B.*, 265 A.D.2d 146, 147 (3d Dep't 2000).

37. 187 Misc. 2d 312 (Sup. Ct., Monroe Co. 2000).

38. *In re Buhaina*, 187 Misc. 2d 312, 315 (Sup. Ct., Monroe Co. 2000).

39. 132 A.D.3d 1344 (4th Dep't 2015).

40. *In re Regina L.F. (Lisa R.).*, 132 A.D.3d 1344, 1345 (4th Dep't 2015).

41. Informational Brochure, New York State Unified Court System, Litigants with Diverse Needs, http://www.courts.state.ny.us/ip/nya2j/diverseneeds/integratedpart.shtml; Shlomo S. Hagler, *Innovative Part Integrates Guardianship and Housing Matters*, 245 N.Y.L.J. 119 (2011).

42. The determination of whether an individual has the requisite mental capacity depends upon the function the client is attempting to undertake. Capacity requirements fall onto a spectrum, requiring the lowest amount of capacity to execute a will and requiring a greater capacity to execute advanced directives. *See generally In re Estate of Kumstar*, 487 N.E.2d 271 (N.Y. 1985) (discussing the requisite requirements for testamentary capacity); N.Y. Gen. Oblig. Law § 5-1501(c) (McKinney 2009) (discussing the requisite capacity to execute a Power of Attorney); N.Y. Pub. Health Law § 2980(3) (McKinney 2012) (discussing the requisite capacity to execute a Health Care Proxy).

43. In determining whether a client has requisite capacity, the location of the client becomes paramount as capacity standards differ from state to state and the application of such standards may differ if the client resides in residential facility or hospital, rather than the community.

44. The prior wishes of a principal should be respected; however, in recent years there have been some cases where courts have disregarded the wishes of the principal's agent, even when it may not have been appropriate.

45. Informational Brochure, NYU Langone Health, Faculty: Elkhonon Goldberg, https://med.nyu.edu/faculty/elkhonon-goldberg.

46. Informational Brochure, Touro College Jacob D. Fuchsberg Law Center, Faculty & Administration: Harry Ballan, https://www.tourolaw.edu/About-TouroLaw/bio.aspx?id=304.

47. Informational Brochure, Clarkson University: Icahn School of Medicine at Mount Sinai, Faculty: Robert N. Swidler, http://bioethics.uniongraduatecollege.edu/about/faculty/12/Robert-N.-Swidler-Esq.

48. Informational Brochure, Maurice A. Deane School of Law at Hofstra University, Administration: Judge A. Gail Prudenti, http://law.hofstra.edu/directory/administration/prudenti/.

49. News Release, The U.S. Census Bureau, 2010 Census Shows 65 and Older Population Growing Faster than Total U.S. Population (Nov. 30, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn192.html (stating that the largest growth rate among age groups is 85-94).

50. A geriatrician is "a medical doctor who is trained to meet the special health issues of older people." Jonathan Peterson, *Where Are the Doctors You'll Need?*, AARP Bulletin (Apr. 2016), https://www.aarp.org/health/conditions-treatments/info-2016/geriatrician-geriatric-doctor-physician.html.

Diagram Endnotes

(a) People over the age of 60 have billions if not trillions of dollars in deferred income. At the mandatory distribution age, 70 ½, such individuals must begin taking distributions of their deferred income to avoid a taxation penalty.

(b) In addition to the numerous personal factors in determining where to retire, including where family is located or relocation to a warmer climate, wealthy individuals may also take into account legal and financial benefits of the states that they may choose to retire in, such as states with no income tax.

(c) Affluent aging individuals must be cognizant of the tax ramifications of their ventures and actions, such as the United States Gift Tax on any transfer to an individual in excess of $14,000 in a taxable year, long term capital gains and losses, and estate tax liability after death. *See generally,* Internal Revenue Code.

(d) In conjunction with estate planning, wealthy individuals may plan accordingly to avoid excess estate tax liability, including structuring bequests and transfers that skip generations, in an effort to avoid and minimize the Generation Skipping Tax.

(e) Aging and longevity law requires a delicate balance of the civil and constitutional rights of the individual, including, but not limited to, the right to vote, the right to privacy and confidentiality, the right to travel and the right to self-determination against the state's *parens patriae* powers.

(f) The Social Security Act was signed into law by President Franklin Roosevelt in 1935 in response to the Great Depression. The eligibility rules for Social Security have changed over the past few decades including, but not limited to, the taxation of Social Security benefits for individuals who work, and the eligibility age.

(g) Ninety-seven percent of Americans 65 years of age or over are enrolled in Medicare. Marilyn Moon, *What Medicare has Meant to Older Americans*, Social Security Administration, https://www.ssa.gov/history/pdf/WhatMedicareMeant.pdf. Medicare is our de facto national health insurance program for older persons.

(h) Some older individuals have the benefit of retiring with long-term health care insurance as well as other supplemental insurance, while others, primarily of a lower socioeconomic status, may be required to rely on government assistance. Nonetheless, even those individuals that have the benefit of retiring with private insurance are still required to maintain Medicare as their primary insurance and their private insurance as secondary insurance. Informational Brochure, Medicare, *Which Insurance Pays First*, https://www.medicare.gov/supplement-other-insurance/how-medicare-works-with-other-insurance/who-pays-first/which-insurance-pays.html.

(i) In accordance with the U.S. Supreme Court Decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), New York has passed the Olmstead Act, which creates an obligation to provide services to persons that suffer from disabilities by integrating their needs into their current setting, in an effort to avoid relocation of the individual.

(j) There has been serious concern among the medical profession as there is a severe shortage of geriatricians and other medical professionals who are specifically trained to manage aging medical and health related issues.

(k) How one defines quality of life may vary from person to person but every person has a minimum standard for such person to believe there is quality to their life. Numerous states have passed regulations requiring nursing homes to act in a way that promotes the quality of life of their residents.

(l) The definition of family is starkly different than it was 40 years ago. Many families are now considered "blended," which creates significant differences in estate planning and advanced directives.

(m) Simply put, for those who do not plan, the government will ultimately make all material decisions for the person on their behalf, including, but not limited to, intestate estate distribution, health care decisions, personal decisions and financial decisions. *See generally* Robert Abrams, *Are You a Planner or a Gambler?*, 83 N.Y. St. B. Ass'n J. 6 (Summer 2011).

(n) Numerous states have enacted independent penal laws, which directly address elder abuse. New York has not, as of yet, enacted an independent penal code, but rather, New York has codified elder abuse as a form of a hate crime, permitting a criminal court to increase the degree of a misdemeanor or felony committed by the defendant if the jury concludes beyond a reasonable doubt that the older individual was targeted because of his or her age. N.Y. Penal Law §§ 485.05 & 485.10. In addition, in civil proceedings, courts have routinely held that they have the inherent equitable power to rectify a wrong committed against an older person due to that person's age and/or cognitive function.

(o) According to the American Psychological Association and the PEW Research Center, there are approximately 12 million Americans 65 years of age or older who live alone.

(p) A common theme of age discrimination has arisen, especially in the housing and employment areas. New York, as well as Congress, has enacted legislation in an attempt to remedy such discrimination. However, mandatory retirement ages have been upheld by both the N.Y. Court of Appeals, under the New York Constitution, and by the U.S. Supreme Court, under the Federal Constitution

(q) As people age and come closer to death, it is not uncommon for them to become more religious and their need to retain such closely held religious belief becomes paramount. Lawrence T. White, *Why Are Old People So Religious?*, Psychology Today (Feb. 16, 2016), https://www.psychologytoday.com/blog/culture-conscious/201602/why-are-old-people-so-religious.

(r) As a threshold issue, guardians are necessary for people who suffer from diminished mental capacity that have either not executed advanced directives or have executed such directives, but they are either unenforceable or are being abused by their agents. A common issue with guardianships is that the area of regulation is reserved exclusively to the states pursuant to the 10th Amendment. As such, state statutes widely vary in their application.

(s) Domicile and place of residence will determine what type of services are available to aging persons in their community. According to U.S. News, the following are the top 10 cities for aging persons to reside as they provide the best community support for aging persons: Minneapolis, Boston, Pittsburgh, Cleveland, Denver, Milwaukee, San Francisco, Portland, Kansas City and Newark. Philip Moeller, *10 Top Cities for Senior Living*, U.S. News (Sept. 29, 2011), https://money.usnews.com/money/retirement/slideshows/10-top-cities-for-senior-living.

(t) A major concern to individuals as they get older is that they may begin to suffer from some type of cognitive impairment that will impair their thought process or judgment. According to the Centers for Disease Control, there are currently more than 16 million people in the United States living with cognitive impairment, with an estimated 5.1 million Americans 65 years of age or over suffering Alzheimer's disease, a number which is expected to rise to 13.2 million by 2050. Informational Brochure, Centers for Disease Control, *Cognitive Impairment: A Call for Action, Now!* (Feb. 2011), https://www.cdc.gov/aging/pdf/cognitive_impairment/cogimp_policy_final.pdf.

(u) According to the Centers for Disease Control, currently 80 percent of aging Americans are living with at least one chronic medical condition, while at least 50 percent of older Americans suffer from at least two.

(v) Common government benefits include, but are not limited to, Medicaid, Medicaid Supplements, Medicare, Social Security Insurance, Social Security Disability, the Supplemental Nutrition Assistance Program, and the Home Energy Assistance Program.

(w) In certain areas of the country, especially the New York City tri-state area, there is a lack of affordable housing for low-income senior citizens. *See generally* The Editorial Board, *New York's Affordable Housing Shortage*, N.Y. Times (Feb. 7, 2014).

(x) Lower income aging individuals face complications with transportation, in that they may be unable to or not easily able to travel to and from doctor's appointments, medical facilities, pharmacies, or the grocery store. Certain municipalities have created programs to assist, such as Access-a-Ride, providing door-to-door transportation to individuals within New York City who are unable to use public transit due to a physical or mental disability.

(y) Many older persons either do not have medical insurance or have medical insurance that does not cover all costs of physician appointments and medications. *See generally* Informational Brochure, Medicare, Medicare 2017 Costs at a Glance, https://www.medicare.gov/your-medicare-costs/costs-at-a-glance/costs-at-a-glance.html for a list of common out-of-pocket costs that beneficiaries are required to pay for certain services. Due to these exorbitant costs, many older individuals may end up dying rather than receiving the medical treatment they need.

19 Holes: Questions Regarding the NYC Law on Inquiring About Salary History in Employment Decisions

By Robert Kantowitz

Introduction

Effective on October 31, 2017,[1] it has become unlawful in New York City for –

> an employer, employment agency, or employee or agent thereof [t]o inquire about the salary history of an applicant for employment or [t]o rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract.[2]

There is no question that in a free market an employer should be free to ask about an applicant's salary history, both to understand how others have evaluated the applicant's contributions over time[3] and to avoid negotiating against itself. Against that, the stated rationale for this legislation is to help close the alleged disparity in which women have historically earned less than men, which is presumed to be the result of discrimination against women.[4] The legislation, unfortunately, is broader than

appropriate to address this issue.[5] It also is fundamentally ill-suited to deal with the middle to upper echelons of employment, where the variations among different individuals' earning power are the greatest, information is the most opaque, direct comparisons among individuals' roles and effectiveness are the most difficult and the distinctions are the most subjective.

This article will not discuss whether this legislation is necessary or is more an exercise in political correctness. Nor will I consider the separate issue of equal pay for equal or equivalent work, other than to note that at the higher levels of employment, legislation on that score is hard to apply, since it is comparatively rare that positions and performances are so directly comparable as to be equivalent. Nor is my purpose to discuss in detail how this legislation works; rather, I intend to demonstrate, through a series of questions and observations, numerous aspects of how it *does not work*.

Similar legislation has been enacted in Philadelphia. Other jurisdictions that have recently passed or have been considering legislation include Massachusetts (law due to take effect in 2018), California, Oregon, Texas and Puerto Rico. I have not scoured the courts for decisions on whether this kind of legislation can withstand challenge, but I note that at least one case has been filed claiming that the Philadelphia law violates the First Amendment and the Commerce Clause, among other federal and state provisions.[6] The government initially agreed to a stay pending resolution of the challenge. The court dismissed the complaint on standing grounds, for failure to name one or more employers that would be affected because they generally ask for wage history; on June 13, 2017, the plaintiff amended the complaint to add such specific information about a number of employers including itself. As of this writing, no further information is available on the progress of this litigation.

General issues

1. Searching for and using general information.

The legislation says nothing about assembling information that is not specific to the applicant, such as current compensation levels for individuals (i) in particular kinds of positions, (ii) who are working for particular employers or (iii) in particular cities, and then using the data as a starting point for the general salary range for the position or for discussions with a particular applicant. FAQs published by the New York City Human Rights Commission[7] state:

> "May an employer search for information about the salaries paid to individuals with the applicant's specific title at the applicant's current or former place of employment . . . ?" No. Employers may search for general information about industry compensation standards but may not search for specific information about salary history that is intended to uncover the salary of a specific applicant.

Given the focus on "a specific applicant," I would submit that as long as the inquiry is not too fine-tuned, it is permissible and the employer may use it in deciding on what salary to offer.

2. Oops . . .

If the employer asks a candidate about salary history, does that taint the entire exercise – potentially requiring the employer to hire the individual or to pay damages until the individual finds another job – or can the employer refuse to hire the person and, if challenged, demonstrate that there were other, lawful reasons why the candidate was not hired?[8] And who has the burden of proof? Caution is advised to make sure that interviewers not go "off script" where that can mean "off a cliff."

3. Waivers?

Suppose that the employer violates the law and asks salary history, but then hires the employee on mutually acceptable terms. May the employee sue a few years down the road if things do not work out well, or can the employer invoke laches or argue that the employee's accepting the job constituted a waiver? Nothing in the law dictates either such result, but the law should not be providing a long-term "free rider option" either. May an employer condition employment on an explicit release of claims under this legislation?

4. Voluntary disclosures.

The legislation provides that

> where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may consider salary history.[9]

Moreover, an employer is allowed to tell an applicant the proposed salary range and to ask about the applicant's expectations with respect to compensation.[10] Is asking for a reaction to a proposed range or asking the candidate to explain why his stated compensation expectation is justified permissible, considering that the only relevant benchmarks that a candidate will usually have

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to make the best case are his or her own salary history? The FAQs state that:

> A disclosure of salary history is "without prompting" if the average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer's words or actions.

That standard is so vague as to be nearly meaningless. In light of the legislation's explicit permission to the employer to have these kinds of discussions, it is hard to see how the FAQ could deem them to be prompting.

5. Favoring internal transfers.

This law does not apply to "internal transfers or promotions within an organization."[11] Many organizations routinely hire and transfer internally whenever possible for quite valid reasons such as efficiency and morale building. May they favor internal candidates over external candidates also based in whole or in part on the consideration that they know and can consider the internal candidates' compensation history but not that of the external applicants? Apparently, yes.

6. Considering only candidates who volunteer information.

As long as the employer does not ask for the salary history, it appears not to be unlawful *per se* to favor applicants who volunteer salary history. (An employer adopting this approach would be well advised not to announce it, since that would call into question whether any disclosure were voluntary.) In any event, a rejected applicant who was not asked about salary history and did not volunteer it would probably never know whether that made any difference because an assertion that "no one asked and I never volunteered" is plainly nothing more than confirmation that the employer obeyed the law and should not form the basis for a fishing expedition.

7. The difficulty of having to prove a negative.

The employer is prohibited from "conduct[ing] a search of publicly available records or reports for the purpose of obtaining an applicant's salary history,"[12] but how can anyone ever police this? Can a plaintiff who adduces no evidence obtain discovery as to whether an employer performed a search or surveyed counterparts and headhunters, or as to whether two people spoke on the sidelines at a little league baseball game or on the train ride in from the suburbs? Presumably the employee has the burden of proof but if there is some circumstantial evidence that suggests that the employer had violated the law, how could it ever be rebutted conclusively? Under many circumstances it would be impossible for the employer to poll everyone in the organization to corroborate that no one, anywhere in the organization, at any time, looked into such data.

8. Sometimes "you just know."

Salary information that comes to light unexpectedly in the course of verifying other information cannot be used.[13] Yet, there are circumstances where it may be fairly clear to the employer, even with no investigation, what the salary history was. For example, the discussion of an applicant's expectations may permissibly include what to do about any unvested equity or deferred compensation that the applicant would have to forfeit to leave his or her current position,[14] and in certain kinds of organizations and industries, it is easy to connect the dots from those figures to a general sense of what the individual has been making. If the applicant was previously employed by the employer or had applied in the past, the employer will know some of the applicant's salary history. In these situations, telling an employer not to use information that is already legally in its possession is like telling Dorothy and her companions to "pay no attention to that man behind the curtain."

Under many circumstances it would be impossible for the employer to poll everyone in the organization to corroborate that no one, anywhere in the organization, at any time, looked into such data.

Drafting ambiguities and limitations

9. More on internal transfers.

Internal transfers are excluded from the law, as noted above. Does that mean that the employee's *entire* salary history, including from before having joined the organization, is a fair subject for inquiry regarding an internal transfer? Apparently, yes.

10. The restrictions do not apply after hiring.

As noted above, the law prohibits "inquir[ing] about the salary history . . . during the hiring process, including the negotiation of a contract." There is no restriction after a person is already employed. So, an employer apparently may call in a new employee and say, "We'd like to know a little bit about you for our files,"[15] or, more pointedly, "Now, see here, New York is an 'at will employment' state, and if you do not disclose your salary history, you're fired." In many situations compensation may be comprised of a relatively level base salary plus a bonus that is contractually guaranteed only for the first year but not thereafter, and it is not unheard of for one's bonus to fluctuate considerably from year to year. There would appear to be nothing that would preclude taking pre-

employment compensation history into account once any guarantee has expired.

11. Once the door opens . . . .

As noted above

> where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history.[16]

The repeated use of the term "salary history" with no definite or indefinite article suggests to me that once the applicant has opened the door, even a crack – for example by saying, "One year I made as much as $X" – the employer is free to ask or investigate fully. Lest one consider that a trap for the unwary, it is worth pointing out that, as in the case of certain rules of evidence and the Fifth Amendment, the legislation excludes consideration of probative information in the interest of a collateral societal goal, and therefore the protected applicant should not be able to have it both ways, providing selective information and yet precluding discovery of the full picture.

12. A different spin.

Analogously to an employer, a headhunter should not tell a candidate, "I can't ask your salary history, but I won't waste everyone's time if you don't volunteer it," because this would likely be considered prompting. But suppose that a headhunter truthfully advises a candidate, "In many cases, you may have an advantage over others if you volunteer salary history." I hesitate to interpret the law as then deeming a disclosure not to have been fully voluntary.

13. Prevarication.

Suppose that a candidate is asked the question and cleverly creates a misimpression or explicitly lies – either inflating the numbers to get a better offer or deflating them so as not to price himself out of the market – and is hired. If the employer discovers the true salary history, can it fire the employee for dishonesty, or would the employer be barred from doing so on the basis of having "unclean hands"? Nothing in the text or history of the law appears to approve of lying as self-help; that would appear to be a matter of "even dirtier hands," and encouraging or excusing it would certainly be against public policy.[17]

Questions of scope and jurisdiction

14. Consultants and independent contractors.

As noted at the outset, the legislation refers to "an employer" and to "an applicant for employment." If a firm is looking to hire a person as an independent contractor, can the firm ask what his or her hourly or monthly rate historically has been or what he or she had been earning in a previous position as an actual employee of another employer? Yes, since in using the terms "employee" and "employment" the statute apparently makes no attempt to include independent contractors or business partners.[18] On the other hand, in many situations there is some flexibility for a person performing services to have either status, and having initially discussed engaging him as a contractor, the employer might offer him a position as an employee. Does having asked about compensation while still contemplating hiring him as a contractor taint the entire process? What if one starts working as a contractor and later is offered a similar position as an employee; are such situations retroactively covered or are they considered internal hires? The FAQs indicate, unhelpfully, that a case-by-case analysis is in order.

15. Subject matter jurisdiction.

New York purports to have the right to regulate conduct if and only if it has an impact in New York.[19] Can this legislation apply based on any or all of the following? – (i) the employer is headquartered in New York City, (ii) this employee will, or may, be working in the City some, most or all of the time, (iii) this employee will be directed by someone working in the City and/or (iv) this employee will direct others who work in the City?

16. Personal jurisdiction.

If in connection with a New York City position, the employer conducts the prohibited questioning or research outside New York City, is there *in personam* jurisdiction? Same question regarding a headhunter, and does it matter whether it is a retained search or the much more common "throw it up and see if it sticks" exercise where the headhunter as of yet has no relationship with the employer? Same question for internet job postings. The recent Supreme Court case of *BNSF Railway v. Tyrrell*[20] suggests that a search firm that is not a New York resident and is headquartered elsewhere[21] could *not* be hauled before city authorities with respect to discussions and actions that take place outside the city, even pertaining to a job that will be sited in the city, and good luck to the city in trying to get a jurisdiction where the headhunter actually does business to enforce New York's legislation. If the employer itself is headquartered outside the city and does relatively little business in the city, it may well be subject to *in personam* jurisdiction regarding a job that is primarily in the city but not with respect to jobs elsewhere even if they have collateral effects in the city or if the employees might spend some time in the city.

17. More on personal jurisdiction.

As noted above, the legislation purports to prohibit even the act of gathering the information. It is hard to see how New York City has jurisdiction to regulate activity that takes place outside its municipal boundaries, even if the

city can prohibit *use* of the information with an impact within New York City. It may require cellphone tower records and the records of internet service providers to establish where a computer was connected to the internet or who made a call to whom, and it may be beyond the city's power to compel disclosure of those records.[22]

18. Potential effects on how people do business.
Conversely, are employers and headhunters who are physically located in New York City restricted with respect to jobs outside the city? Under the controlling case law, the impact would need to be in the city, but could the law be interpreted to apply to a position outside the city if an interview took place in the city or if any part of the decision is made in the city? The FAQs might be read to this effect, so look for headhunters to direct applicants not to contact their New York City offices, even though one leading case suggests that where a decision is made is not relevant if the job itself is not in New York City.[23]

19. Last but not least: the Constitution.
Is this legislation constitutional?

a. *First Amendment*. The legislation restricts commercial speech. Can it withstand a First Amendment challenge?[24]

b. *Commerce Clause*. The legislation purports to regulate conduct that may take place entirely outside New York on the basis of an impact in New York. In addition, much of the workforce in the metropolitan area crosses state lines on a daily basis. Can the legislation withstand a Commerce Clause challenge?

Conclusion

Promoting this legislation as a public benefit is like enticing a consumer to buy a wheel of cheese that has a promising appearance but once unwrapped fills the room with a pungent aroma and turns out to consist mostly of holes. This legislation should be scrapped before it ever has a chance to affect anyone, and all the parties should go back to the drawing board to come up with more targeted and effective ways to identify and eliminate discrimination where it exists. ■

The legislation restricts commercial speech. Can it withstand a First Amendment challenge?

1. "Boo!" It is probably coincidental that the effective date was Halloween.

2. N.Y. City Admin. Code § 8-107(25)(b)(1)–(2) (internal numbering omitted and punctuation conformed to standard English usage).

3. In that regard, salary history differs from whether one is currently employed, which often bears little relationship to qualifications for a position, especially in a recession and especially at the upper echelons. In New York City, employers have been prohibited for several years from discriminating in hiring based on current employment status. N.Y. City Admin. Code § 8-107(21).

4. *But see* Joann Lubin, *Rankings Defy Usual Gender Gap*, The Wall Street Journal, June 1, 2017, at B2 ("Women in the corner office of the biggest U.S. firms made more money than men in six of the last seven years").

5. Consider an employer that has narrowed down the pool to a few finalists all of whom are men. There is no reason why the employer should not then be permitted to request their compensation histories.

6. *See Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, Civ. No. 17-1548 (E.D. Pa., filed Apr. 4, 2017). See generally item 19 below.

7. http://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page.

8. The remedies include hiring, reinstatement or upgrading of the employee, back pay and future pay and attorney's fees. N.Y. City Admin. Code § 8-120. Civil penalties can run as high as $250,000.N.Y. City Admin. Code § 8-126. Although the employer can show mitigating factors in connection with the determination of the size of a penalty, there is no explicit provision that demonstrating other good and sufficient reasons for not hiring the individual or for offering the particular salary will carry the day.

9. N.Y. City Admin. Code § 8-107(25)(d).

10. N.Y. City Admin. Code § 8-107(25)(c).

11. N.Y. City Admin. Code § 8-107(25)(e)(2).

12. N.Y. City Admin. Code § 8-107(25)(a).

13. N.Y. City Admin. Code § 8-107(25)(e)(3).

14. N.Y. City Admin. Code § 8-107(25)(c).

15. P. Simon, *Mrs. Robinson* (1968).

16. N.Y. City Admin. Code § 8-107(25)(d).

17. Similar issues litter the legal landscape, from criminal entrapment to the use of "testers" who pose as house-seekers where discrimination is suspected. This question is a bit of a "gotcha." If the individual has proven to be a high performer, the employer might excuse the lie as a negotiating tactic or as puffery because it does not go to the heart of the kind of honesty and fidelity that an employer expects, while if the individual is a poor performer, there will be numerous other reasons to let him or her go.

18. One group that is not covered would be incoming lateral partners of law firms (if they are true partners and not just employees with a loftier title), despite the debate as to whether and why female partners make less than male partners and some of the high-profile litigation that this has spawned.

19. *See, e.g., Hardwick v. Auriemma*, 116 A.D.3d 465, 466–67 (1st Dep't 2014), *lv. to appeal denied*, 23 N.Y.3d 908 (2014).

20. ___ U.S. ___, 137 S.Ct. 1549, No. 16-405 (May 30, 2017).

21. The place of incorporation also dictates where a corporation is "at home," but as far as I know there is no such thing as incorporation in New York City (as distinct from incorporation in New York State). The law regarding jurisdiction over individuals, as distinct from corporations, may be more muddled and could even vary within New York City as between the First and Second Departments. *See Daimler "At Home" Standard as Applied to Individuals* in *New York State L. Dig.* No.682, at 2 (Sept. 2017). Based on *Lebron v. Encarnacion*, No. 16-CV-4666 (ADS) (ARL) (E.D.N.Y. May 31, 2017), a good argument might be made that (i) there is no "general jurisdiction" over a non-domiciliary individual based on a relatively limited amount of business in New York, and (ii) there is no specific jurisdiction because the conduct took place outside New York despite having an effect in New York.

22. Another intersection of technology and law. One of the earliest matters on which I worked, over 35 years ago, involved New York City's assertion of Unincorporated Business Tax liability against a writer who lived in the city but claimed that he wrote his material on weekends while traveling by train outside the city to visit a relative. There was simply no way to confirm or disprove the defense.

23. See *Hardwick,* 116 A.D.3d at 467 ("it is the place where the impact of the alleged discriminatory conduct is felt that controls whether the Human Rights Laws apply, not where the decision is made").

24. At least in a broad sense, this legislation has a rational purpose of regulating communication to tamp down on undesirable conduct:

> Regulating commercial speech in order to discourage transactional conduct that could constitutionally be prohibited (instead of regulating the conduct) is neither inconsistent with, nor a manipulation of, the democratic process. That the government does not eliminate the whole evil that it legitimately perceives, but instead proceeds piecemeal or by stages is not itself a valid constitutional objection.

Brudney, The First Amendment and Commercial Speech, 53 Boston Coll. L. Rev. 1153, 1197 (2012) (footnote omitted). Although the issue most commonly arises with advertising (such as the statutory prohibition on tobacco advertising on television and radio that began in the 1970s), commercial speech generally is entitled to some level of protection, and, self-serving pronouncements of politicians and activists notwithstanding, the legislation is a rather blunt instrument. Moreover, it is often a maddening exercise to decide whether something is a regulation of speech or of conduct. *See Expressions Hair Design v. Schneiderman*, ___ U.S. ___ , 137 S.Ct. 1144, No. 15-1391 (Mar. 29, 2017), which held that regulating the manner in which a seller may communicate prices and associated credit card charges was a regulation of speech rather than of conduct (i.e., the prices and charges themselves) and remanded the case for a determination as to whether the regulation survives constitutional scrutiny.

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The Forgotten Case of a Schoolteacher and a Future President

By Mark C. Zauderer

Twelve years after her passing, I often find myself thinking about Rosa Parks, the legendary civil rights figure who courageously refused to obey a bus driver's order to give up her seat to a white passenger on a segregated bus in Montgomery, Alabama. And when I think of her well-known story, it reminds me of the story of Elizabeth Jennings, another African-American woman who bravely stood against racial segregation in public transportation. However, Elizabeth Jennings' story is more local, much older and largely forgotten. In fact, you may already be asking: who?

Many New Yorkers may not know that in the early and mid-19th century, New York City's public transportation systems were racially segregated. If African-Americans wanted to ride on one of the city's horse-drawn trolley cars, they were required to ride only on specially designated trolley cars that bore a sign reading, "Colored People Allowed in this Car." Enter Elizabeth Jennings, who in 1854 attempted to board a whites-only trolley car and, in doing so, helped bring about the change in New York City that Rosa Parks would help propel forward in Montgomery, Alabama 100 years later.

The Remarkable Jennings Family

Elizabeth Jennings, born in New York City in 1830, was part of a hard-working and accomplished family. Her father, Thomas L. Jennings, was a community activist and prominent tailor who, in 1821, became the first African-American to be granted a patent by the United States government[1] for inventing a cleaning process called "dry scouring," the precursor to dry cleaning.[2]

With the fees he earned from his patented dry cleaning process, Thomas Jennings bought freedom for his wife, also named Elizabeth,[3] as she was born into slavery and

would have remained a slave until July 4, 1827 under New York's Gradual Emancipation Laws of 1799 and 1817. Mrs. Jennings went on to become a prominent community member herself.[4]

Elizabeth's three siblings also lived successful lives while branching out from New York. Her brother William became a businessman in Boston, and was described as a leader of the African-American community.[5] Her brother Thomas Jr. studied dentistry in Boston and then established his own practice in New Orleans.[6] Her sister Matilda was a dressmaker who lived with her family in New York until she married and moved to San Francisco in the 1860s.[7]

Elizabeth, the Schoolteacher

Elizabeth was accomplished in her own right. She was considered an outstanding teacher who devoted her professional life to providing young African-American children with an education. Elizabeth began teaching in 1848, at the age of 18, in the "'Girls' Department' of 'Colored Public School No. 2,' operated by the Public School Society."[8] In 1849, Elizabeth changed jobs and taught at a "school conducted by a virtually all-black organization, the New York Society for the Promotion of Education among Colored Children."[9] When that organization shuttered in 1854, Elizabeth was hired by the New York City Board of Education, which had been established only 12 years earlier in 1842, and taught in the "Boys' Department" of the Board of Education's "Colored School No. 5."[10]

In 1860, Elizabeth was transferred from the "Boys' Department" to the "Primary Department" of "Colored School No. 5."[11] In that same year, Elizabeth married a young man named Charles Graham and began teaching under her married name, Elizabeth J. Graham.[12] She continued to teach at Colored School No. 5 through 1864, when she then seemingly retired from the public school system and began private teaching or tutoring.[13] In 1895, Elizabeth's teaching career culminated in her helping establish, in her own home at 237 West 41st Street, the first kindergarten for African-American children in New York.[14]

Running Late on a Sunday Afternoon

Although Elizabeth spent a lifetime doing commendable, significant and life-changing work for young African-American children as a schoolteacher and educator, it is ironic that her most indelible mark on the African-American community may have come because, on one fateful Sunday afternoon, she was simply running late.

In addition to her roles as schoolteacher and educator, Elizabeth had found time to study and play music as well. By 1854, she was serving as the organist at the First Colored American Congregational Church, which was on Sixth Street near the Bowery.[15]

On Sunday, July 16, 1854, Elizabeth and her friend, Sarah E. Adams, were running late for church, where Elizabeth was expected to rehearse with the choir once more before a late afternoon or evening worship service.[16] In a hurry to get to the church, Elizabeth and Sarah rushed to the corner of Pearl and Chatham Streets and hailed the first horse-drawn Third Avenue trolley car they saw.[17]

As fate would have it, the trolley car that Elizabeth hailed was whites-only and did not display the sign "Colored People Allowed in this Car." But that made no difference to Elizabeth, who attempted to board the car as soon as the driver stopped.

What happened next is best told by Elizabeth herself. She described the events surrounding her attempt to board the trolley car in a written statement that she prepared for a group protest that was held at her church the following day. As Elizabeth recounted:

> "We got on the platform, when the conductor told us to wait for the next car.
> "I told him that I could not wait, as I was in a hurry to go to church (the other car was about a block off); he then told me that the other car had my people in it, that it was appropriated for that purpose; I then told him I had no people; it was no particular occasion; I wished to go to church, as I had been going for the last six months, and I did not wish to be detained."[18]

Elizabeth then described the verbal exchange that she had with the conductor, who did not want her to board the trolley car. Losing patience and not wanting to engage in any further debate with her, the conductor assaulted Elizabeth and attempted to forcibly remove her from the car. As Elizabeth further explained in her statement:

> "He then said I should come out or he would put me out. I told him not to lay his hands on me. He took hold of me, and I took hold of the window sash and held on. He pulled me until he broke my grasp from that (but previously he had dragged my companion out, she all the while screaming for him to let go.). He then ordered the driver to fasten his horses, which he did, and come out and help him put me out of the car. They then both seized hold of me by the arms and pulled and dragged me flat down on the bottom of the platform, so that my feet hung one way and my head the other, nearly on the ground.
>
> "I screamed murder with all my voice, and my companion screamed out, 'You'll kill her. Don't kill her.'
>
> "The driver then let go of me and went to his horses. I went again in the car, and the conductor said you shall sweat for this. Then (he) told the driver to drive as fast as he could and not take another passenger in the car, to drive until he saw an officer or a Station House.
>
> "They got an officer on the corner of Walker and Bowery, whom the conductor told that his orders from the agent were to admit colored persons if the passengers did not object, but if they did, not to let them ride.

> "When the officer took me, there were some eight or ten persons in the car. When the officer, without listening to anything I had to say, thrust me out, and then pushed, and tauntingly told me to get redress if I could. This the conductor also told me and gave me some name and number of his car. He wrote his name Moss and the car No. 7, but I looked and saw No. 6 on the back of the car.
>
> "After dragging me off the car, he drove me away like a dog, saying, not to be talking there and raising a mob or fight.
>
> * * *
>
> "I would have come up [to the meeting] myself, but am quite sore and stiff from the treatment I received from those monsters in human form yesterday afternoon. This statement I believe to be correct, and it is respectfully submitted."[19]

Those who attended the church protest and listened to Elizabeth's statement "unanimously resolved their 'reprehension' at the conduct of the Third Avenue Railway Company employees, agreed to form a committee to 'bring the whole affair before the legal authorities,' and to 'demand at the hands of the proprietors, as colored citizens, the equal right to the accommodations of 'transit' in the cars.'"[20]

The Schoolteacher and a Future President

Following the protest, a committee comprised of the leading African-American men in the city, which presumably included Elizabeth's father, went to the offices of Culver, Parker and Arthur, at 289 Broadway, and asked the firm to represent Elizabeth in a lawsuit against the Third Avenue Railway Company, which operated the trolley car from which Elizabeth was thrown.[21] The committee selected this firm because it had a reputation in the African-American community for handling abolitionist cases, and its founding partner, Erastus Culver, was widely known as an abolitionist and as a featured speaker at meetings of the New-York Anti-Slavery Society.[22]

The firm took on the engagement, and assigned the case to its newest and youngest partner, Chester A. Arthur.[23] Arthur, who would later be President of the United States from 1881 to 1885 following the assassination of President James A. Garfield, was then only 24 years old. Although he had been admitted to the bar only two months prior to the assault on Elizabeth, Arthur had already shown a commitment to anti-slavery causes. In 1852, as a law clerk, Arthur participated with Culver and John Jay, the namesake grandson of the former New York Governor and United States Supreme Court Justice, in the famous Lemmon Slave Case, in which they successfully argued that slaves transported through New York State were thereby freed.[24] (Arthur continued to work on the case as it made its way up to the N.Y. Court of Appeals, which ultimately affirmed the lower court's decision in March 1860.) Even before that, Arthur expressed abolitionist sentiments when, at 17 years old, he wrote an anti-slavery essay in May 1847 while still a student at my alma mater, Union College, in Schenectady, New York,[25] where a statue of Arthur looks across the college campus.

Elizabeth commenced her lawsuit in Brooklyn, where the Third Avenue Railway Company was headquartered, and sought $500 in damages as well an order requiring the trolley service to be desegregated.[26] The case went to trial on February 22, 1855 – only seven months after Elizabeth was thrown from the trolley car – before an all-white, all-male jury.[27] At the start of the trial, Arthur called Brooklyn Circuit Judge William Rockwell's attention to a recently enacted state statute making common carriers liable for the acts of their agents and employees.[28]

> "I screamed murder with all my voice, and my companion screamed out, 'You'll kill her. Don't kill her.'"

As a result, it was reported "that 'Judge Rockwell gave a very clear and able charge, instructing the Jury that the Company were liable for the acts of their agents, whether committed carelessly and negligently, or wilfully and maliciously. That they were common carriers, and as such bound to carry all respectable persons; *that colored persons, if sober, well-behaved, and free from disease*, had the same rights as others; and could neither be excluded by any rules of the Company, nor by force or violence; and in case of such expulsion, the Company was liable."[29]

The jury returned a verdict in Elizabeth's favor, and awarded her damages of $225 plus $22.50 in costs.[30] After the verdict was rendered, the Third Avenue Railway Company agreed to immediately desegregate its trolley service.[31]

Conclusion

Notwithstanding the outcome of Elizabeth's case and the desegregation of the Third Avenue Railway Company's service line, other trolley car lines, all owned and operated by different private companies, continued to segregate their services. It would take several more years and many additional legal challenges to complete the integration of New York City's public transportation system, which was not fully realized until the enactment of New York's Civil Rights Act of 1873, which provided that African-Americans would have "full and equal enjoyment of any accommodation, advantage, facility or privilege," including common carriers.

Although her case was only the beginning of a movement, Elizabeth's attempt to board a whites-only trolley car and her subsequent legal victory served as the spark that rallied the African-American community together to fight and defeat the discriminatory practices of New York City's public transit operators.

Yet Elizabeth remains largely unknown today, while Rosa Parks went on to become an icon in American history. Why? One explanation is the differences in media coverage in the 19th and 20th centuries. There was no television or radio in the 1850s, and the New York media consisted of many newspapers serving different readerships. Back then, newspapers owned by whites rarely included news about African-Americans, who were served by newspapers like the *Colored American*, the *National Anti-Slavery Standard*, and *Frederick Douglass' Paper*. Moreover, at the time of Elizabeth's assault, which occurred years before the first shots were fired in the Civil War, it was slavery, and not the more local issue of segregation, that was the subject of the nation's attention. Thus, there was no groundswell of coverage similar to that which followed Rosa Parks' arrest.

There are also legal reasons why Elizabeth's case did not draw coverage beyond New York, even though she was able to hire a top-level law firm (and a future president), to try her lawsuit against the trolley car company. For one thing, Elizabeth's case was handled as an assault and led to a verdict of $225, which effectively ended public exposure of her ordeal. And for another, Elizabeth's demand, as part of the lawsuit, that the trolley company desegregate was a personal and local victory without the benefit of a landmark ruling from the U.S. Supreme Court.

By contrast, Rosa Parks made her stand against segregation in the 1950s, when television was becoming a major source of news for many American households, and when mainstream newspapers were beginning to cover what would become the civil rights movement. Rosa Parks was selected by civil rights leaders to serve as the "face" of the movement, and the highly publicized Montgomery bus boycott that followed was organized around her arrest and began on the day of her court hearing. Her cause was also being championed by a young, charismatic and brilliant minister named Martin Luther King Jr., who was emerging as a national leader of the civil rights movement. By the time the U.S. Supreme Court issued its landmark 1956 decision in *Browder v. Gayle*, in which segregation on Alabama's intrastate buses was declared unconstitutional after being challenged by four other African-American women, Rosa Parks was nationally recognized and indelibly linked to the movement.

Yet despite the differences in these cases, one thing ties them together: the legal system worked in helping to bring an end to segregation. It worked in 1855 in New York City, just two years before the U.S. Supreme Court would hand down the awful *Dred Scott* decision. It worked again in 1956, when segregationist policies were struck down by a more enlightened U.S. Supreme Court. And while not every legal challenge was successful, it ultimately worked for plaintiffs both famous and all but anonymous, for those with means and those without. That is worth remembering if you ever have occasion to stand at the corner of Park Row and Spruce Street, perhaps on your way to the courthouses on Centre Street, and glance up at the street sign that reads "Elizabeth Jennings Place," a modest tribute to her special place in New York's history. ■

1. Honoring Thomas Jennings of New York City as the first African-American to be granted a patent by the United States, H.R. Res. 514, 113th Cong. (2014).
2. *Id*.
3. Mary Bellis, Thomas Jennings, the First African-American Patent Holder, ThoughtCo., June 26, 2017, https://www.thoughtco.com/thomas-jennings-inventor-1991311.
4. Jerry Mikorenda, Beating Wings in Rebellion: The Ladies Literary Society Finds Equality, The Gotham Center for New York History, Apr. 7, 2016, http://www.gothamcenter.org/blog/beating-wings-in-rebellion-theladies-literary-society-finds-equality; *Colored American*, Sept. 23, 1837.
5. John H. Hewitt, *The Search for Elizabeth Jennings, Heroine of a Sunday Afternoon in New York City*, History 387, 389 (Oct. 1990).
6. *Id*. at 390, n.9.
7. *Id*.
8. *Id*. at 400, n.34 (citation omitted).
9. *Id*. at 399–400.
10. *Id*. at 405
11. *Id*. at 407–08.
12. *Id*. at 408.
13. *Id*. at 410.
14. *Id*. at 413.
15. *Id*. at 390.
16. *Id*.
17. *Id*.
18. *Id*. at 390–91 (citing *Frederick Douglass' Paper*, July 28, 1854).
19. *Id*. at 391–92 (citing *Frederick Douglass' Paper*, July 28, 1854).
20. *Id*. at 393 (citing *New York City Tribune*, July 19, 1854; *Frederick Douglass' Paper*, July 28, 1854).
21. *Id*. at 393–94, 396.
22. *Id*. at 394.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*. at 396.
27. *Id*.; *Jennings v. Third Avenue Railroad Co.* (1854), Historical Society of the New York Courts, http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-04/history-new-york-legal-eras-jennings-third-ave.html.
28. Hewitt, *supra* note 5, at 396.
29. *Id*. (citing *New York Daily Tribune*, Feb. 1855, with italics in original).
30. *Id*. at 396–97; *Jennings v. Third Avenue Railroad Co.* (1854), *supra* note 27.
31. *Jennings v. Third Avenue Railroad Co.* (1854), *supra* note 27.

The "*NOT* to-Do List" to Manage Tasks and Distractions

By Paul J. Unger

Paul Unger (punger@affinityconsulting.com) is a national speaker, author and thought-leader in the field of legal technology. He has lectured in the United States, Canada and Australia. He will be speaking on this topic at the New York State Bar Association in December.

Social media, Facebook, Instagram, client fires, 24-hour news, Trump, hurricanes, Trump, murders, Trump, crime, Trump, Russia, Trump, North Korea, 150 emails a day, constant interruptions. It's too much for us to handle and it's resulting in workday paralysis, even before you sit down to start your day!

In my seminars and my book, I outline many strategies to manage tasks and distractions. However, I thought it might be helpful to state them a slightly different way . . . as a "NOT to do list." Here are 12 "NOTS" to keep yourself laser-focused:

1. **Do NOT begin your day by immediately diving into email.** Instead, begin your day with a five-minute private planning session. I use Self Journal™ for this and time block my day on paper, along with stating some 30,000 foot goals and reciting three things that I am thankful for. Put a plan together for your day *before* diving into email. You can always adjust as the day unfolds, but start with a plan.
2. **Do NOT start your day without a team huddle.** Instead of diving right into your email, or your first appointment or project, after your five-minute planning session have a quick huddle with your immediate team. I call this the lightning round. Each person has 60 seconds to recite what they have going on today and for the rest of the week. This encourages communication, awareness of projects, and almost always results in shifting some tasks and schedules around to better distribute work and help each other.
3. **Do NOT participate in meetings unless there is an *agenda*.** And certainly don't ever organize one without one. I like to take it a step further and try to identify a goal or theme for the meeting to give it "purpose" or spark engagement. Whatever the case, showing up to a meeting that doesn't have an agenda and a clear purpose is a recipe for wasting time and killing morale.
4. **In meetings, do NOT say "I will get that done this weekend or tonight!"** Why would you completely derail your personal life that way? Stop being a martyr and schedule these things during the business day. We all need a life outside of work and making

promises like this will kill your personal life.

5. **In meetings, do NOT let people ramble.** We all know who these people are. They either don't prepare for a meeting, don't read the agenda and stay on task, or they just love to hear themselves talk. Everyone's time is valuable and deserves respect. When this happens, politely say, "Perhaps we can talk about this offline or record it as an issue to include on a future agenda so we can tackle the issues on our agenda today." Don't be too rigid about this, though! There are times when spontaneous topics are important. Try to fit those spontaneous topics into an agenda item where the floor is open for items not on the agenda.
6. **Do NOT keep your Outlook inbox up on your computer monitor all day.** Your inbox is one of the most disruptive environments to place yourself in if you are trying to do project work or "deep" level work. It's like choosing to write a complex brief or letter in a war zone! Literally every two-to-three minutes a bomb or a fire is landing in your inbox. How can one possibly focus in an environment like that? Instead, skim your calendar in the morning and decide how many times and for how long you can batch process your emails that day. Every day will be different. Aim for something reasonable like five times a day (the average American worker checks email an idiotic 74 times a day).
7. **Do NOT carry your phone 24/7.** Let's face it, that smartphone is a ball and chain. If you don't believe me, take a phone "fast" by leaving your phone in the car's glovebox all day while you are at work. Let your loved ones know to reach you at the office phone in case of an emergency. You will feel *liberated*. It is incredible how often we check our phones during the day, and it is having a terrible impact on productivity.
8. **Do NOT answer a call from an unknown caller.** Look, we never want to miss an important call or lose a potential new client that may be calling in. I get it, but you have to balance this rule appropriately. If your job is sales/business development, you probably will take more calls from unknown callers. If your job is more project work, you surely should take fewer calls. When we take calls from unknown callers, we run the risk of derailing our day by getting sucked into a conversation that we aren't ready for, or a similar situation. It is always a little dangerous.
9. **Do NOT check social media 24/7.** Check social media one or two times at the most during the work day (unless you are doing business development or marketing). In fact, think about taking a 30-day social media "fast" . . . and I mean all of it . . . Facebook, Instagram, LinkedIn, Twitter . . . *all of it*. It is addicting and a huge productivity zapper.
10. **Do NOT micro-manage and answer everyone's questions and solve all their problems!** Empower the people that you pay to solve problems on their own and think for themselves. When co-workers and partners come to you and ask what they should do, or how to solve a problem, the first thing out of your mouth should be: "How do you propose that we solve this problem?" or "I want you to think about this and do a little research and present to me two or three possible solutions and then let's talk about it." We need to get our team members to a place where they know how to problem-solve and build their confidence enough to make more decisions on their own, or at a minimum, presenting the right recommendation to you.
11. **Do NOT multitask!** It is not enough to say that multi-tasking is bad. We need to practice single-tasking. We need to clear off our desks *and* our multiple monitors of information that is not directly relevant to the project that we are executing. One way to do this is using the Pomodoro technique. Pomodoro is an easy technique that utilizes the 25-minute tomato timer. We single-task (preferably deep-level work/project work) for 25 minutes and then take a break and do whatever we want for five minutes. In other words, we work in intervals. The human brain functions very well maintaining attention to a single task for 25 minutes. After 25 minutes, we begin to lose focus. By giving ourselves a five-minute break, we can return to deep-thought work for another 25 minutes very easily. This technique will make a huge impact on productivity and will also help combat procrastination. Think about it . . . we can endure even the most tedious dreaded task for 25 minutes, right? Once we get a little momentum going and we get immersed in the project, it becomes a lot easier. If you feel like adjusting the time a bit, go for it. I usually do 40 minutes with a 10-minute break.
12. **Do NOT do shallow work first thing in the morning.** Dive into deep-thought work, writing, and projects early in the day. There is little question about it . . . our brains function better following quiet time or sleep. We also know that we can be highly productive while the rest of the world is sleeping because there are far fewer (if any) interruptions. This can be one of the most productive times of the day. ■

ASK KK

BY MARCUS BLUESTEIN AND NINA LUKINA

Marcus Bluestein is the Chief Technology Officer at Kraft Kennedy. He leads all of Kraft Kennedy's technical practice groups, drawing on more than twenty years' experience of designing and implementing information systems at law firms as well as on his current research in enterprise technology. He specializes in helping law firms develop, implement, and test business continuity and disaster recovery plans. **Nina Lukina** is a Marketing Associate in the New York office of Kraft Kennedy. She researches and writes about emerging topics in technology. A former consultant at Kraft Kennedy, she's worked on many IT strategy and information security projects for law firms.

Password Management for Law Firms

To KK:

My firm has an annoying but duly cautious password policy that means I'm juggling new passwords every 90 days, on top of all the ones I need for research sites. I know emailing lists and sticking Post-Its to my desk isn't safe, but I'm hesitant to trust a password vault tool. What if it gets hacked? How are attorneys with client-sensitive data dealing with password management these days?

Med Mal Attorney

Med Mal:

Dealing with a profusion of passwords is indeed a challenge. You are not alone in your frustration.

Password managers like LastPass, RoboForm, and 1Password are great tools for web-based passwords, such as the ones you use for Westlaw and Lexis, as well as your personal online accounts. They won't help you log into your firm's network, though.

The best solution to simplify network login is Windows Hello, which uses facial and fingerprint recognition technology. Hello is a feature of Windows 10. While it is, admittedly, still rare for the Hello camera to be available, the fingerprint scanner is available on most computers now. You can also purchase it separately in a keyboard. Aside from Hello, there are few options that are both secure and convenient. You are correct that the Post-It is not a good idea.

Web password managers are an effective remedy for a deluge of passwords. Your concern that these tools themselves may get hacked, however, is reasonable. A hacker who gets into your password vault will have all your passwords. To mitigate the risk, use a popular manager that's been tried by many users before you, such as one of the platforms we name above.

Further, make sure that the password you use for the vault itself is extremely secure, as in 20 characters or longer. I recommend using a passphrase – a sequence of words that, while long for a password, is not hard to remember. Security researchers now believe that passphrases are more secure than shorter, complex passwords that include numbers, symbols, and upper-case letters.

That said, password managers can make your life easier and actually heighten your security online. Crucially, they offer the option of randomly generating long, complicated passwords for your accounts. Use these. Your account will be harder to hack and you won't have to remember and type your credentials upon every login. ■

ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

I'm currently representing a client whose honesty (or lack thereof) is becoming a problem. The litigation involves a dispute between siblings regarding a family business and, like many familial disputes, is highly contentious. I've always had a suspicion that, given the opportunity, my client might try to pull something to get a leg up on his siblings, but there haven't been any specific incidents that alarmed me until now. While preparing him for his deposition recently, the client all but told me that he intends to lie when asked a particular question by opposing counsel. Although I had my suspicions that something like this might happen given my client's personality and the nature of the dispute, I was still shocked. I always assumed that his brash statements and frequent outbursts were a product of his frustration with the whole case. I reminded the client that he would be testifying under oath during his deposition and warned him of the risks of perjury, but he was unfazed. He intends to go forward with his "strategy" during his deposition, and I'm not sure what to do. I know the client will decline any request I make to be relieved because it will be expensive for him to get a new attorney up to speed on this matter.

We have a status conference coming up before the court-appointed referee, and I'm considering moving to be relieved before the conference. Can I move to be relieved instead of notifying the court of the client's intent to lie at the deposition? If I am not relieved before the conference, do I have an obligation to tell the court referee what he said during our prep session even though my client hasn't actually committed perjury yet? What about opposing counsel? If I am obligated to inform the court referee and/or opposing counsel, are there any particular precautions I should take in order to safeguard my client's rights? In the event that I can no longer ethically represent this client, and am relieved as counsel, do I have to tell his next attorney of his apparent intention to lie during his deposition? On the off chance that the client does allow me to withdraw as counsel, if he decides to represent himself as a pro se litigant, do I still have an obligation to inform the court of his intent to lie under oath?

Another issue involving this troublesome client is also looming on the horizon. In the event that I am relieved as counsel, I'm certain that he will be furious with me. On prior occasions, he's been slow to pay his legal bills and has dissected many of my time entries, asking questions about every little task. I'm actually still waiting on him to pay his most recent bill, and I'm concerned that I'm not going to get paid after he finds out that that I've made a motion to be relieved. If I do have to bring an action against this client to collect my fees, to what extent am I obligated to maintain attorney-client confidentiality especially in light of my reason for seeking to be relieved?

Very truly yours,

I. M. Forthright

Dear I. M. Forthright:

There is a fine line between an attorney's duty to be an advocate for his client and his responsibility as an officer of the court to be candid and forthright. Most of the time, lawyers navigate this boundary without difficulty. We are taught early in our careers – even as law students – the importance of "candor toward the tribunal" and hear horror stories about the shame and lasting damage that can occur when a lawyer betrays this duty. Generally speaking, the risk to our livelihoods is enough to keep the strength of our advocacy in check. But what are our responsibilities when we suspect our *clients* may be crossing the line?

The *Forum* previously addressed a situation where a client gives an attorney confidential information that contradicted her testimony *after* the deposition and the attorney's confidentiality obligations. *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2012, Vol. 84, No. 6. Your question takes us to another level. What should an attorney do when his client has not *yet* perjured himself, but the attorney reasonably believes the client *may* or *will* sometime in the future?

To answer this question, we first need to dissect Rule of Professional Conduct (RPC) 3.3(b). Pursuant to this Rule, "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This Rule imposes a mandatory obligation on attorneys to report criminal or fraudulent conduct – even intentions that have not come to fruition – that threaten the integrity of the proceeding if the attorney *knows* his or her client (or another person involved in the proceeding, such as a witness) intends to commit the fraudulent or criminal act. Thus, to answer your first question regarding whether you can move to be relieved

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

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as counsel without notifying the court of your client's intention to lie, you first need to assess the strength of your knowledge. As RPC 3.3(b) instructs, if you know for a fact that your client intends to lie, disclosure is mandatory. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1101 (2016 ed.) ("if counsel for *another* party intends to call a witness that the lawyer knows will testify falsely, and if the lawyer cannot remedy the problem by talking the other party's counsel out of doing so, then Rule 3.3(b) will require the lawyer to disclose that intended perjury to the court"). However, a mere hunch or suspicion is not enough to trigger disclosure under RPC 3.3(b). *See* NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014) at ¶ 14 (citing NYSBA Comm. on Prof'l Ethics, Op. 837 (2010) ("[a]lthough a person's knowledge may be inferred from circumstances, it is clear that a mere suspicion would not be enough to constitute knowledge").

Notably, under the RPC, there is no longer any exception for confidences or secrets. Before the adoption of RPC 3.3, DR 7-102(B)(1) stated that a lawyer with evidence "clearly establishing" that a client had perpetuated a fraud on a tribunal had to first insist that the client correct the fraud, and if the client refused the attorney was required to disclose the fraud to the tribunal, except when the information was "protected as a confidence or secret." Now, pursuant to RPC 3.3(c), the duty applies "even if compliance requires disclosure of information otherwise protected by [RPC] 1.6." *See* NYSBA Comm. on Prof'l Ethics, Op. 837 (2010). But more on that later. For now, based on the facts you have given us, you *do* have an obligation under RPC 3.3(b) to report your knowledge that your client intends to lie (*i.e.*, commit a fraud or perjure himself).

Under RPC 1.0(w), a "tribunal" is defined as including "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." RPC 1.0(w). Comment 1 to RPC 3.3 specifically notes that RPC 3.3 "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." RPC 3.3 Comment [1]. As such, both you and your adversary are bound by RPC 3.3(b) during your status conferences before the referee and depositions and must conduct yourselves accordingly.

A lawyer "knows" something when he or she has "actual knowledge" of the fact in question. RPC 1.0(k). However, the NYSBA Committee on Professional Ethics has opined that a lawyer's knowledge can be inferred from circumstances. *See* NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014). This is arguably the most subjective aspect of the analysis and will be based primarily on how well you, the attorney, know your client and how you came to know of your client's intention to engage in fraudulent or criminal conduct. If your client blurted out that he would lie under oath in a frenzied moment, that is one thing. If he has mentioned it on more than one occasion and has a "plan" for the execution of the lie, that is quite another. Unfortunately, this is largely a matter of trusting your instincts. Before proceeding to take remedial measures under RPC 3.3(b), however, you should have (another) frank and serious discussion with your client regarding the consequences of perjury, and inform him of your obligation under RPC 3.3(b). *See* RPC 1.6 Comments [6A, 14]. If he seems unaffected, you will know what you have to do.

As to how much disclosure is required, Comment 14 to RPC 1.6 gives us some guidance. "[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose," and disclosure in an adjudicative proceeding "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." Therefore, in your situation, you should be prepared to disclose: (1) that you reasonably believe that your client intends to lie during his deposition, and what that lie is; (2) how you became aware of his intention; and (3) why your belief is reasonable. Before making a *full* disclosure to the referee, ask whether the disclosure can be made *in camera* or subject to a protective order. Disclosure to the tribunal under RPC 3.3 is mandatory even if the information being disclosed is confidential; however, that does not mean that your adversary needs to be privy to every detail. In fact, Comment 14 to RPC 1.6 implies that he should not.

If you are unsuccessful in persuading your client *not* to follow through with his plan, it is best to withdraw from the representation. RPC 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be illegal or fraudulent. RPC 1.16(b)(1) actually *requires* a lawyer to withdraw from representing a client if the lawyer knows that the representation will result in a violation of the RPC or of law. Moreover, paragraphs (c)(2), (c)(4), and (c)(7) of RPC 1.16 allow an attorney to withdraw from a representation in circumstances even if he does not have definite "knowledge" of his client's intention, if the client: (1) persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client insists upon taking action with which the lawyer has a fundamental disagreement; or (3) the client fails to cooperate in the representation or otherwise makes the representation unreasonably difficult for the lawyer to carry out effectively. *See* RPC 1.16(c)(2), 1.16(c)(4), 1.16(c)(7). And, if all else fails, a lawyer can always withdraw from a matter for any reason as long as it is not materially adverse to the client's interests under RPC 1.16(c)(1). Comment 3 to RPC 1.16 notes that there might be some difficulty in seeking court approval of a withdrawal if it is based on a client's demand to engage in unprofessional conduct. *See* RPC 1.16 Comment [3]. The comment suggests that if the court inquires as

to the reasoning, "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." *Id.*

With respect to your inquiry regarding attorney-client confidentiality when attempting to collect legal fees, you must look to the attorney-client confidentiality rule found in RPC 1.6 and, more specifically, the exception found in RPC 1.6(b)(5)(ii): "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee." Your question depends on whether you reasonably believe it is necessary to disclose any confidential information to recover your fees. This exception should be used sparingly as it is a very limited exception.

Comment 14 to RPC 1.6 addresses the need for attorneys to use this exception almost as a method of last resort. As discussed above, it notes that "[b]efore making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure." RPC 1.6 Comment [14]. In your case, you should certainly reach out to the client to attempt to resolve your fee dispute before commencing any litigation. On a side note, you should also review Part 137 of the Rules of the Chief Administrator of the Courts to make sure you are in compliance with New York's Fee Dispute Resolution Program before commencing litigation. Even if you are still at an impasse with your client after attempting to resolve the dispute yourself, it is advisable to use great restraint when you initially divulge information during the commencement of an action or ADR.

Professor Roy Simon notes, "[w]hen the lawyer files a lawsuit to collect fees, the necessary disclosures should originally be narrow, limited to the elements of a cause of action or the bare information needed to initiate an arbitration proceeding or attach a client's property. But as the proceeding widens out to the discovery or proof stage, the lawyer may reveal . . . whatever information is reasonably necessary to put all the facts before the tribunal or arbitrator." Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 315. Based on your description of the events, your complaint for the recovery of legal fees should not need to reveal any confidential information. You can draft a cause of action without revealing the detailed reasons for the breakdown in the attorney-client relationship.

The NYSBA Committee on Professional Ethics has opined on this topic in a few instances, including a very thorough opinion that is relevant to your situation. In NYSBA Comm. on Prof'l Ethics, Op. 980 (2013), an attorney learned that a client was working "off the books" and that the client gave false information to a tribunal about their personal finances. The client subsequently filed for bankruptcy protection from creditors, including the attorney, and the attorney sought to disclose the confidential financial information in the bankruptcy proceeding in an effort to collect legal fees. Acknowledging that the RPC did not "shed much light" on how attorneys should determine what information is reasonably necessary to be disclosed under RPC 1.6(b)(5)(ii), the opinion articulated four guides for attorneys to consider: "First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances. Second, the lawyer should try to avoid the need for disclosure. Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee. Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client." *Id.* The committee did not opine on whether the attorney could disclose the confidential information, however, because it was not clear how the attorney planned to use it. *Id.*

In the event that you do bring an action to collect legal fees, based on what you told us, we recommend that you only reveal confidential information – such as the client's intention to lie – to *defend* yourself against claims by the client that he was harmed in some way as a result of your withdrawal. The client's intent to lie is irrelevant as to whether you are owed fees for the legal services you performed. Therefore, disclosure of the intention to lie in the complaint would be broader than is necessary to state a cause of action. If, on the other hand, the client claims that he should not be required to pay your legal fees because you abandoned him in the middle of the action by withdrawing as counsel, or another reason based on his intention to lie, we are of the opinion that RPC 1.6(b)(5)(ii) permits you to disclose the confidential information to defend your reason for withdrawal. In revealing such information, it is advisable to limit the harm to the client such as an attempt to seal this information in the event that the entire case cannot be sealed. By limiting your disclosure of confidential information to the defense of your representation, you will have demonstrated your reluctance to make such a disclosure and your efforts to avoid abusing the confidential information. There may be situations where attorneys are required to reveal confidential information in order to prosecute a claim for attorney's fees, but your situation does not appear to warrant it.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a partner in a small boutique law firm and we decided that it was time to update our website. In look-

ing at other law firms' websites to get ideas, we realized that all of the firm's "branding" was outdated, especially since we are trying to develop business with small start-up companies in the technology sector. Now, instead of just updating our website, we decided to rethink every aspect of our branding, including online attorney biographies, business cards, social media, and letterhead. We obviously want to retain a professional image and comply with the attorney advertising rules, but we really want to stand out to modern technology and social media savvy companies. I know there are a number of restrictions on attorney advertising. What issues should we consider with our rebranding? Are there any advertising or branding issues we should avoid?

Sincerely,
Ed G. Adman

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her to get her to sign the divorce and custody papers.

9. "On more than one occasion the defendant entered the plaintiff's house without permission.[9]"
10. "The court clerk said, "Place your right hand in the air and repeat after me.""

Hyphens

Hyphenate between compound adjectives immediately before a noun. Don't hyphenate if the compound adjective appears after the noun. Commonly used compound adjectives don't need to be hyphenated. Hyphenate after "well" if it's used in an adjectival phrase. You can still hyphenate after "well" even if it isn't used in an adjectival phrase but the phrase wouldn't mean the same thing if it's flipped around.

Hyphenate when using the prefixes or suffixes *all, ex, quasi,* and *self.* Don't hyphenate "self" when it's added to a suffix, and don't hyphenate an adverb or adjective ending in *-ly*. In addition, if you add a prefix or letters to the beginning of a word without a hyphen, you'll confuse your reader. There's a major difference in meaning between "pre-judicial" and "prejudicial." *Example:* "Plaintiff moved for summary judgment." *Becomes* "Before the court is plaintiff's summary-judgment motion." Rephrasing the sentence makes the sentence clearer.

Hyphenate when you spell any two-word number greater than 20 but lower than 100. *Example:* "The attorney has twenty three witnesses who place the defendant at the scene of the crime." *Becomes:* "The attorney has twenty-three witnesses who place the defendant at the scene of the crime." (This issue won't come up if you prefer to write "23," not "twenty-three.")

Exercises: Hyphens

Rewrite the following sentences.

1. She's a small claims attorney.
2. Jake Jerome has 33 counts of felony assault on his Criminal-Court record.
3. John Miller is a well known civil rights activist.
4. A chocolate covered brownie is in the refrigerator.
5. The victim acted in self defense.
6. John needs Sam to resign the document.
7. The patient was hurting her-self in front of the judge.
8. The prosecution asked the judge, "May I cross examine the witness?"
9. The defendant had a concealed weapons permit.
10. There were thirty two people in the court room during the day long trial.

Commas

A comma separates introductory elements from the main part of the sentence. The introductory element can be a word, phrase, or clause about when, where, how, or why the action in the sentence occurs. Without a comma after an introductory clause, the sentence might confuse the reader. If there's no possibility that the reader will misread the sentence, an introductory comma can be omitted after a short adverb clause or phrase.

A comma must precede a coordinating conjunction connecting two or more independent clauses. The seven coordinating junctions are *and*, *but*, *for, nor, or, so*, and *yet*. If independent clauses are present, use commas. If the clauses are short, don't use a comma. Using a comma between two independent clauses, rather than a coordinating conjunction (known as a comma splice), results in a run-on sentence.

Use a comma when there's a nonrestrictive element. A nonrestrictive element is a word group that doesn't limit or restrict the meaning of the noun or pronoun it modifies. Because nonrestrictive elements are nonessential to the meaning of the sentence, the commas will denote that to the readers. If the element is restrictive, then it's essential to the meaning of the sentence, and there shouldn't be a comma.

Legal writers best place transitional or interrupting words in the middle of a main clause using commas. Examples of transition words are the conjunctive adverbs *however* and *therefore*.

Exercises: Commas

Rewrite the following sentences.

1. Law school, however is exceptionally expensive.
2. The prosecutor repeated her question but the witness still didn't understand.
3. Unaware that opposing counsel could hear her the attorney made an offensive comment.
4. I finished the brief early yet I decided to stay at work late until I finished other assignments.
5. He seemed reluctant to accept the plea, but, decided to do so.
6. A large portion of the internship like the field of law is writing.
7. Using the negotiation skills she learned in law school Ms. Miller negotiated a good settlement for her client.
8. The court officer addressed the witness on the stand: "If you need water sir just ask."
9. The jurors don't realize exactly, how important their work is to the administration of justice.
10. You can finish your coffee outside the courtroom or you can throw it out but you can't bring coffee inside the courtroom.

Periods, Exclamation Points, and Question Marks

Periods are placed at the ends of declarative sentences, mild commands, and indirect questions. If a sentence ends with an abbreviation, use only one period. Abbreviated titles should always have a period.

Use exclamation points only when trying to convey strong emotions or surprise. When used properly, exclamation points represent meanings and tones that can't be expressed with a period.

Legal writing doesn't contain many question marks. Unless you want to use them as a rhetorical device, use question marks only at the end of a

direct question. When making a polite request or a command, don't use a question mark. If a sentence begins with "whether," don't use a question mark. When you have a series of questions, even if they aren't separate sentences, they should contain question marks. Whether the first letter of a sentence is capitalized depends on the preceding punctuation. Rhetorical questions should end with a question mark.

> Use exclamation points only when trying to convey strong emotions or surprise.

Exercises: Periods, Question Marks and Exclamation Points

Rewrite the following sentences.

1. I'm wondering who'll win the trial?
2. Please submit that brief by Friday?
3. Ladies and gentlemen of the jury, if all the evidence points toward his guilt, will you convict him.
4. The client asked the attorney whether they can settle the case by Friday?
5. The jurors confront a difficult choice: should they convict on all counts, should they convict on some counts, or should they acquit?
6. The jury reached a verdict at 4:15 p.m..
7. The judge, frustrated by the noise, shouted "quiet in the courtroom."
8. The prosecution called Dr Warren to the stand.
9. The judge asked the attorneys, "What is the problem here. Who exactly is representing the defendant."
10. "I always paid my rent." the defendant yelled at the landlord.

Now that you've completed the exercises (we hope you didn't peek at the answers!), study these answers. In the next issue of the *Journal*, the *Legal Writer* will offer more punctuation exercises.

Answers: Quotations

1. A period always goes inside the quotation mark. *Corrected Version*: While testifying, Samantha said, "Only one person could've committed this crime."
2. In this example, the intern is asking a question. Quotation marks should be placed around the question. *Corrected Version:* The intern asked, "Is the *New York Times* a newspaper I should read daily?"
3. The question mark goes inside the quotation mark. *Corrected Version*: Ms. Jones pointed to the defendant when the prosecution asked, "Who robbed you?"
4. The quoted section isn't a question. The question mark should be placed outside the quotation mark. *Corrected Version*: Did you or did you not testify to the following: "Samuel was not at work between 12:00 p.m. and 2:00 p.m."?
5. Remove quotation marks around quotations of 50 words or more. But in a block quotation, the internal quotation mark becomes a double quotation mark.
6. All colons, semicolons, and footnote or endnote numbers should be placed outside the quotation mark. Also, remove the unnecessary transition in this sentence. The transition creates a run-on sentence. *Corrected Version:* "The defendant is sick," the attorney said; "he will not be present today."
7. Remove the comma following "as." Don't place a comma before a quoted word if you wouldn't place the comma there without the quotation mark. *Corrected Version:* The jury considered the plaintiff's insulting remarks to the defendant as "unlawful."
8. Quotation marks should be placed around words used in a special way. *Corrected Version*: Ms. Smith states that her husband played "mind games" with her to get her to sign the divorce and custody papers.
9. Endnotes always go outside the quotation mark. *Corrected Version:* "More than once did the defendant enter the plaintiff's house without permission."[9]
10. The quotation marks at the beginning and end of the sentence should be omitted; you're quoting only what the court clerk said, not the whole sentence. *Corrected Version:* The court clerk said, "Place your right hand in the air and repeat after me."

Answers: Hyphens

1. Without a hyphen, this sentence could mean that she's a small attorney who handles claims. *Corrected Version*: She's a small-claims attorney.
2. Hyphenate numbers from 21 to 99. Hyphenate "Criminal Court" only when it's written in lower case. *Corrected Version*: Jake Jerome has thirty-three counts of felony assault on his Criminal Court record.
3. "Well" is used in an adjectival phrase. Hyphenate. *Corrected Version*: John Miller is a well-known civil-rights activist.
4. Hyphenate when a compound adjective appears before the noun. *Corrected Version*: A chocolate-covered brownie is in the refrigerator.
5. "Self" is used as a prefix. It specifies the defense the victim is making and becomes one word that needs a hyphen. *Corrected Version*: The victim acted in self-defense.
6. It doesn't make sense for Sam to resign the document. Add a hyphen where necessary. *Corrected Version*: John needs Sam to re-sign the document.
7. "Her-self" isn't in the dictionary. *Corrected Version*: The patient

was hurting herself in front of the judge.

8. Hyphen "cross examine." *Corrected Version*: The prosecution asked the judge, "May I cross-examine the witness?"
9. Without a hyphen, this sentence can state that the weapons permit, not the weapon, is concealed. *Corrected Version:* The defendant had a concealed-weapons permit.
10. Always hyphenate numbers between twenty-one and ninety-nine. Additionally, "daylong" should be hyphenated. *Corrected Version:* Thirty-two people were in the courtroom during the day-long trial.

Answers: Commas

1. Set off interrupting words with commas. *Corrected Version*: Law school, however, is exceptionally expensive.
2. Place a comma before a coordinating conjunction in a compound sentence. *Corrected Version*: The prosecutor repeated her question, but the witness still didn't understand.
3. When reading this sentence, you need to pause before "the attorney made an offensive comment." Insert a comma. *Corrected Version*: Unaware that opposing counsel could hear her, the attorney made an offensive comment.
4. Put a comma in a compound sentence. One word that denotes a compound sentence is "yet." *Corrected Version*: I finished the brief early, yet I decided to stay at work late until I finished other assignments.
5. The "but" in this sentence is essential to its meaning. It's a restrictive term that doesn't require commas. *Corrected Version*: He seemed reluctant to accept the plea but decided to do so.
6. The comparison to the field of law isn't a restrictive element. It's not essential to the meaning of the sentence. Commas are necessary. *Corrected Version*: A large portion of the internship, like everything in the field of law, requires good writing.
7. An introductory phrase is needed to understand the sentence. A comma is necessary to introduce it. *Corrected Version*: Using the negotiation skills she learned in law school, Ms. Miller negotiated a good settlement for her client.
8. An interrupting word in this sentence must be set off with commas. *Corrected Version*: The court officer addressed the witness on the stand: "If you need water, sir, just ask."
9. There's no need for a comma after "exactly." Omit it. *Corrected Version:* Jurors don't realize exactly how important their work is to the administration of justice.
10. A comma should precede any coordinating conjunction that connects two or more independent clauses. Place a comma before "or" and "but." *Corrected Version:* You can finish your coffee outside the courtroom, or you can throw it out, but you can't bring coffee inside the courtroom.

Answers: Periods, Question Marks, and Exclamation Points

1. This sentence isn't a direct question. It shouldn't end with a question mark. *Corrected Version*: I'm wondering who'll win the trial.
2. This command should end with a period. *Corrected Version*: Please submit that brief by Friday.
3. The sentence is a question and requires a question mark. *Corrected Version*: Ladies and gentlemen of the jury, if all the evidence points toward his guilt, will you convict him?
4. This sentence isn't a direct question. It's a polite request. It shouldn't have a question mark. *Corrected Version*: The client asked the attorneys whether they can settle the case by Friday.
5. A colon precedes this set of questions; each question should have a question mark. Don't capitalize the first letter of each question. *Corrected Version*: The jurors confront a difficult choice: should they convict on all counts? should they convict on some counts? should they acquit?
6. Use only one period when ending the sentence with an abbreviation. *Corrected Version*: The jury reached a verdict at 4:15 p.m.
7. The judge commanded quiet in the courtroom. The punctuation must denote that sentiment. Capitalize the first letter in the quotation because it's the beginning of a sentence. *Corrected Version*: Frustrated by the noise, the judge shouted, "Quiet in the courtroom!"
8. Abbreviated titles should always have a period. *Corrected Version*: The prosecution called Dr. Warren to the stand.
9. These are questions. They should end with question marks. Because a question mark pauses a question, capitalize the first letter in the question. *Corrected Version:* The judge asked the attorneys, "What's the problem here? Who exactly is representing the defendant?"
10. Place an exclamation point when it's obvious that strong emotions are present. *Corrected Version:* "I always paid my rent!" the defendant yelled at the landlord.

In the next issue of the *Journal*, the *Legal Writer* will continue with more punctuation-related issues in legal writing. ■

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in New York County, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial interns Alexandra Dardac (Fordham University) and Rosemarie Ferraro (University of Richmond) for their research.

BY LUKAS M. HOROWITZ

Lukas M. Horowitz, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

"Objection, Hearsay" . . . (I Think)

Hearsay feels like a cruel prank created by judges and practicing lawyers in an attempt to haze law students. With so many exceptions to the rule against hearsay, it is not one rule, but many. Exceptions overlap, and multiple exceptions can apply to one statement. When anticipating utilizing the hearsay objection in court, deciding in a matter of seconds who is a declarant, what is a statement, etc., I begin to question my choice of profession. One thing is certain: I will definitely be setting aside additional time for evidence come finals. However, because I have the good fortune to study under a true – and possibly *the* – evidence guru, Professor Michael Hutter, I know all will eventually be revealed.

Hearsay is challenging. Rule 801(c) states hearsay is a "statement that the declarant does not make while testifying at the current trial or hearing; and a party offers into evidence to prove the truth of the matter asserted in the statement." Often a critical factor in analyzing hearsay is whether a witness's statement is subject to cross examination. The rule goes out the window when you get into the hearsay exceptions listed out in Rule 803: Exceptions to the Rule Against Hearsay. My favorite thus far is excited utterance, FRE 803(2). What intrigues me most about this exception is that at common law it was premised on the notion that when someone reacts to the stress caused by an event or condition, the boost of adrenaline to their system prevents that person from lying. The utterance occurs in a manner in which the individual does not have time to fabricate a lie. But that doesn't make the statement true. How many times in your life have you stubbed your toe on something left in the wrong place by someone else, and you curse that person's name out loud? What if you were incorrect about who left the item? You would be making an excited utterance, but you would be mistaken.

I was having a conversation with my father recently. The topic of our discussion: Dying declarations as an exception to hearsay. I had asked him if he thought the rationale behind this hearsay exception, that nobody wants to die a liar, was fair. His response was, "Please, when I am on my deathbed, I will make certain that the last thing I say is, 'My wife did it!'" While he was joking (I hope), I nevertheless began to wonder whether this hearsay exception made sense in our century or if it was based upon an outdated belief. I may be a cynic, but my impression is that the common law defers too much to a belief in the inherent good faith of human nature.

Of course, evidence is not my only course. Ah, the First Amendment. How foolish I was to think that it was merely "freedom of speech, religion, the right to assemble, and to petition the Government for a redress of grievances." (Full disclosure, I had to look up that last part regarding petitions). Roughly half a semester into my Con Law II course, I have come to appreciate just how many facets the First Amendment has. The focus of class recently was on the ability to use governmental property in the pursuit of expressing First Amendment rights. There are three different types of government property: the traditional public forum, like sidewalks and parks; properties designated as a public forum, in which the property is intentionally opened and made available for that purpose; and properties designated as a limited public forum, limiting use of the property to certain groups, or for the discussion of certain subjects.

Aside from the fact that I now know it is within my constitutional rights to practice my expressive dancing on public sidewalks, I am hung up on the third forum. On its face, this forum looks to limit certain speech by allowing certain speech. While restrictions on First Amendment rights in the traditional public forum and designated public forums are subject to strict scrutiny, restrictions to speech in the limited public forum need only be reasonable and viewpoint-neutral. This seems to be a deviation from the very notion of a "public" forum, albeit limited, when the government is selecting both who can speak and what can be spoken about. Granted, property used under the third category is not typically used for First Amendment expression. But is it fair to call this a "public" forum under these guidelines, or, more accurately, restrictions?

I recently began litigating my very first case, representing a very smart, intelligent, and dare I say, devilishly handsome fellow: me. Over the past year and a half I have been engaged in an epic struggle with Albany's Parking

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BECOMING A LAWYER
CONTINUED FROM PAGE 60

Authority. With countless skirmishes already in the history books, the war wages on, quite relentlessly I might add. Having shamefully shelled out a couple of hundred dollars already in parking tickets, I am ready to go to war. My evidence includes an airplane ticket receipt and a sworn affidavit.

I hope everyone has enjoyed this mild autumn and is keening for the upcoming holidays, as I am. While home for the holidays, I will be sure to keep a watchful eye on my mother any time she pours a drink for my father, and, now that I think about it, for me too! I think he was onto something. ■

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BY GERALD LEBOVITS

Legal-Writing Exercises: Part V — Punctuation

In the last issue of the *Journal*, you improved your legal-writing skills by completing exercises on specificity, parallelism, subject/verb proximity, and transitions. This issue in the Legal-Writing Exercises series reviews concepts in punctuation: the rules for quotations, hyphens, commas, question marks, exclamation points, and periods. At the end of each section, you'll be tested on the concepts discussed and asked to edit the sentences. You can change words, rearrange words, or add or delete words. After you've edited the sentences, look at the answers at the end of the article to determine whether you've edited them correctly.

Quotations

It's bad form to begin sentences or paragraphs with quotations. When you quote, give context; a good lead-in to your quotation guides readers into the quotation and tells them what they should look for. Quote only what's essential and what you can't say better than authoritative sources. And make sure you use quotation marks when quoting someone or something directly. It's plagiarism if you don't, but scholarship if you do.

All edits, alterations, additions, and deletions need to be evident. Use brackets or ellipses to show changes. A bracket is used when you change the capitalization of the first letter of a quoted word, to add a word to the quotation, or to alter a work. A three-dot ellipsis is used to show omissions in the middle of a sentence of punctuation or of one or more words. A four-dot ellipsis is used to omit the last part of a quoted sentence, provided that the omitted section isn't a citation, footnote, or endnote and that the remaining portion is an independent clause.

Use double quotation marks to open and close a quotation: "xx." Add and close a quotation within a quotation with a single quotation mark: "xx 'yy' xx." *Or*: "xx 'yy.'"

Don't use quotation marks around block quotations — quotations of 50 words or more. A quotation that long should be blocked: single-spaced, indented left and right, with a citation on the line after the quotation ends, and without quotation marks (unless there's a quotation within a quotation). Note that New York courts add the citation on the same line as the quotation and require that quotation marks surround the quotation.

Question marks, exclamation points, and dashes should be placed within the quotation only if they're part of the original quotation. If they're not, they go after the quotation mark. All periods and commas are correctly placed in U.S. style inside the quotation marks. Colons, semicolons, and footnote or endnote numbers are correctly placed outside the quotation mark.

Exercises: Quotations

Rewrite the following sentences.

1. While testifying, Samantha said, "Only one person could've committed this crime".
2. The intern asked, Is the *New York Times* a newspaper I should read daily?
3. Ms. Jones pointed to the defendant when the prosecution asked, who robbed you.
4. Did you or did you not testify to the following: "Samuel wasn't at work between 12 p.m. and 2 p.m.?"

It's bad form to begin sentences or paragraphs with quotations.

5. A brief contains the following:
   "Defendants' motion to dismiss under CPLR 3211 (a) (5) on the basis of collateral estoppel should be denied. For collateral estoppel — issue preclusion — to apply, the following requirements are necessary: 'There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.' (*Schwartz v Public Adm'r of Bronx County*. 24 NY2d 65, 71 [1969].)"
6. "The defendant is sick;" the attorney said, "therefore, he will not be present today."
7. The jury considered the plaintiff's insulting remarks to the defendant as, "unlawful."
8. Ms. Smith states that her husband played mind games with

Continued on Page 57

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