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Journal
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JULY/AUGUST 2018
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Editor-in-Chief, 1961–1998

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Men Behaving Badly

I have never before considered myself to be naïve, but perhaps naiveté is the reason that I have found myself so surprised by the widespread allegations of sexual assault, sexual harassment and boorish behavior by powerful, well-known men. As the #MeToo movement has made clear, millions of women are not surprised, as they have dealt with this terrible behavior for many years and struggled with its enormous impact on their lives.

Yes, I knew that women could be victimized by men. Both my mother and my aunt had been professional women during a much less enlightened time, a time when it was "a man's world," and they had described enduring many difficult situations with unpleasant and unwanted advances and inappropriate behavior. I heard similar stories from the first woman to be president of NYSBA, my dear friend Maryann Saccomando Freedman. But I will admit that it has been jarring for me to face the reality of just how prevalent the problem is.

Furthermore, it is deeply distressing to me that laws to prevent sexual harassment have not been effective in inhibiting such conduct – not even within our justice system. After 15 women told their stories of sexual misconduct by Alex Kozinski, a judge in the U.S. Court of Appeals for the Ninth Circuit, Chief Justice John G. Roberts Jr. formed a working group to examine harassment in the federal judiciary. In a report issued in June, the group, which interviewed scores of current and former judiciary employees, found that inappropriate conduct was "not limited to a few isolated instances" and recommended sweeping changes to address wrongdoing.

Judge Kozinski has stepped down from the bench. He did apologize, saying that he "had a broad sense of humor and a candid way of speaking to both male and female law clerks alike" and that, "in doing so, I may not have been mindful enough of the special challenges and pressures that women face in the workplace." With all due respect to Judge Kozinski, that's just not good enough.

It is important to note that sexual harassment and sexual assault are not partisan issues, and bad behavior can be found across the political spectrum. It was nearly a quarter century ago that Anita Hill spoke out about harassing behavior by a man who was nominated (and later confirmed) to serve on our nation's highest court. While skepticism and caution were appropriate when Hill testified about the matter before a Congressional committee, she faced grueling questions and unduly harsh treatment from both Democrats and Republicans.

I feel great compassion for Ashley Judd, Anne Heche, Gwyneth Paltrow, Uma Thurman and other prominent women who have spoken out about being victims of sexual harassment and sexual assault. I also can't help but think about the plight of women working in low-paying service jobs with supervisors who make unwanted or inappropriate advances or demands and have the power to retaliate against them if they don't acquiesce. In all likelihood, these women have more tenuous support systems and fewer financial resources to fall back on.

Ultimately, it is clear to me that all of us need to stand up for women – and men – whenever we see harassment or abuse occurring. It is not enough to say that sexual harassment is wrong; all of us must confront the abusers, and all of us must have the courage to refuse to accept such behavior. This is not a "women's issue." It is an issue for every one of us.

As attorneys and State Bar Association members, we have an even greater responsibility here. We must use our knowledge and experience to identify areas where improvement is needed and highlight ways to nurture and support gender equity in our profession and in our society.

report that found that women attorneys remain considerably underrepresented in courtrooms across the state as well as in alternative dispute resolution (ADR). The report found that female attorneys comprise just 25 percent of attorneys in lead counsel roles in courtrooms statewide. It encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and in all aspects of litigation, and be selected as neutrals in ADR. The report's findings were affirmed by the American Bar Association. I am committed to working during the coming year to address the report's findings and to identify ways to increase opportunities for female attorneys.

At the same time, I find that I am concerned by the tendency in the current environment to assume guilt whenever there is an allegation or even a rumor of sexual abuse or harassment. Adherence to the basic principle of our criminal jurisprudence, the presumption of innocence, is tested with each new accusation, especially when the men either admit to the conduct or deny it but resign from powerful jobs or withdraw from public life.

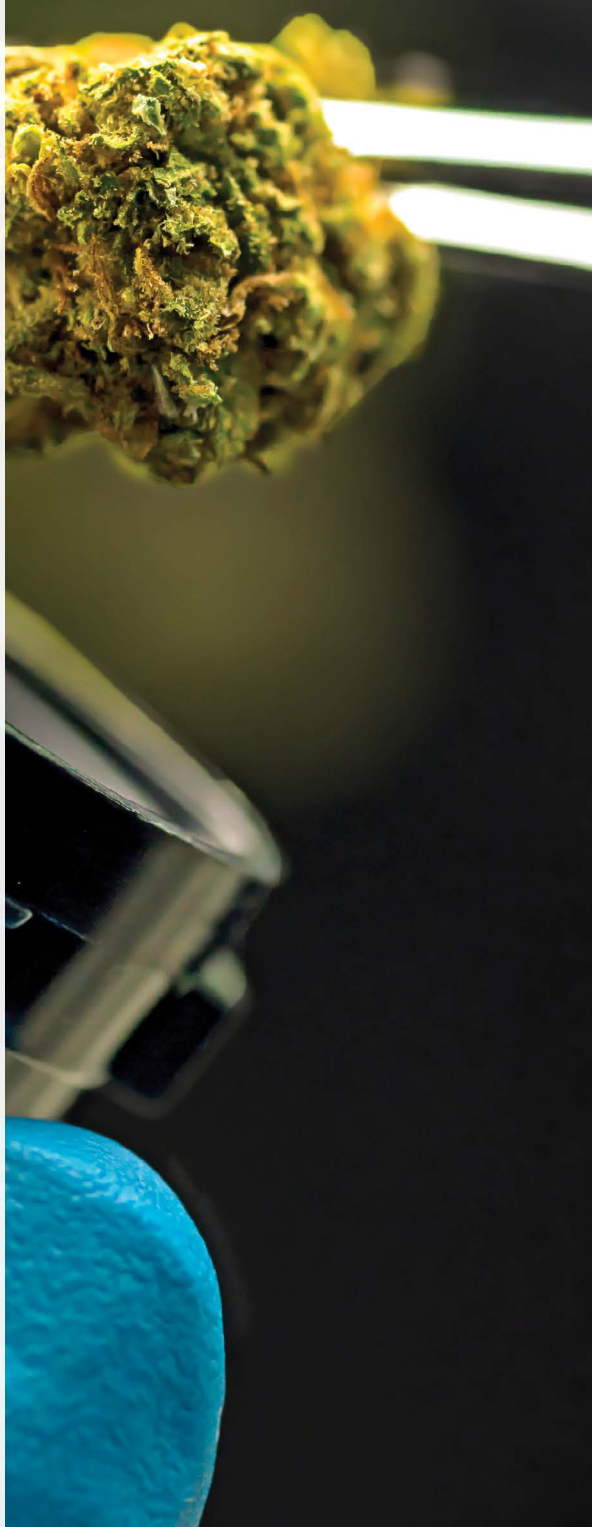
Women must be supported and encouraged when they are brave enough to come forward with accusations. But we must also be vigilant to preserve basic concepts of due process. If we fail to do so, we will be doing grievous harm in the name of justice.

If I was naïve about this issue in the past, I am no longer. I hope that you will join me, both in working to stop sexual harassment and abuse when we see it, and in helping to ensure that, as we do so, we uphold the basic tenets of our justice system.

MICHAEL MILLER can be reached at mmiller@nysba.org

A New York State of Marijuana

An Uncertain Future, a Painful Past



This issue of the Bar *Journal* provides a unique and penetrating look at cannabis laws in New York – how the state once had the harshest drug laws in the country and how today it has joined with 29 other states to legalize medical marijuana. Not only that but New York may soon join the nine other states that have legalized the recreational use of marijuana – a prospect that is coming ever closer to reality in light of a state Department of Health report that recommends a commercial and recreational marijuana program for New York. All this in the span of a few years, as society's views on drug use, abuse, addiction, and crime have evolved from zero tolerance to recognizing the therapeutic benefits of medical marijuana and the great potential it has for targeting scourge diseases like autism and Alzheimer's, as well as the realization that long prison terms for non-violent low level drug crimes – mandatory under the Rockefeller drug laws – have ruined so many lives even as they failed to target kingpin traffickers.

This issue examines the changes in cannabis law and its ramifications for employers and employees, in "Marijuana and the Workplace: A Current Look at Cannabis Law," by Sara E, Payne and Geoffrey A. Mort; how the new law impacts the distribution of medical marijuana, in "Medical Marijuana in New York: Where We've Been and Where We're Going," by Ms. Payne and Lee Williams; the intersection of a legal cannabis business and intellectual property rights, in "Counseling Marijuana Clients on Intellectual Property Protection and Enforcement," by Karen Bernstein, and the constitutional issues raised in a recent Supreme Court case that may apply to future efforts to legalize marijuana, in "*Murphy v. NCAA*—A Road Map to Cannabis Federalism Issues?" by Diane Krausz. The common thread tying all of these articles together is the conflict between state laws legalizing certain uses of marijuana and the federal law that still classifies cannabis as an illegal drug.

What makes this issue of the *Journal* unique is the perspective it provides on New York's past attempts, and failure, to combat drug crime by instituting draconian measures known as the Rockefeller drug laws. Joseph W. Bellacosa, a retired Court of Appeals judge, places that bleak era in context in his illuminating article, "Rockefeller's 'Vaulting Ambition,' Attica, and the Drug Laws." As he somberly observes, the state's highest court could have prevented miscarriages of justice if only it had stood up to a powerful and politically ambitious governor.

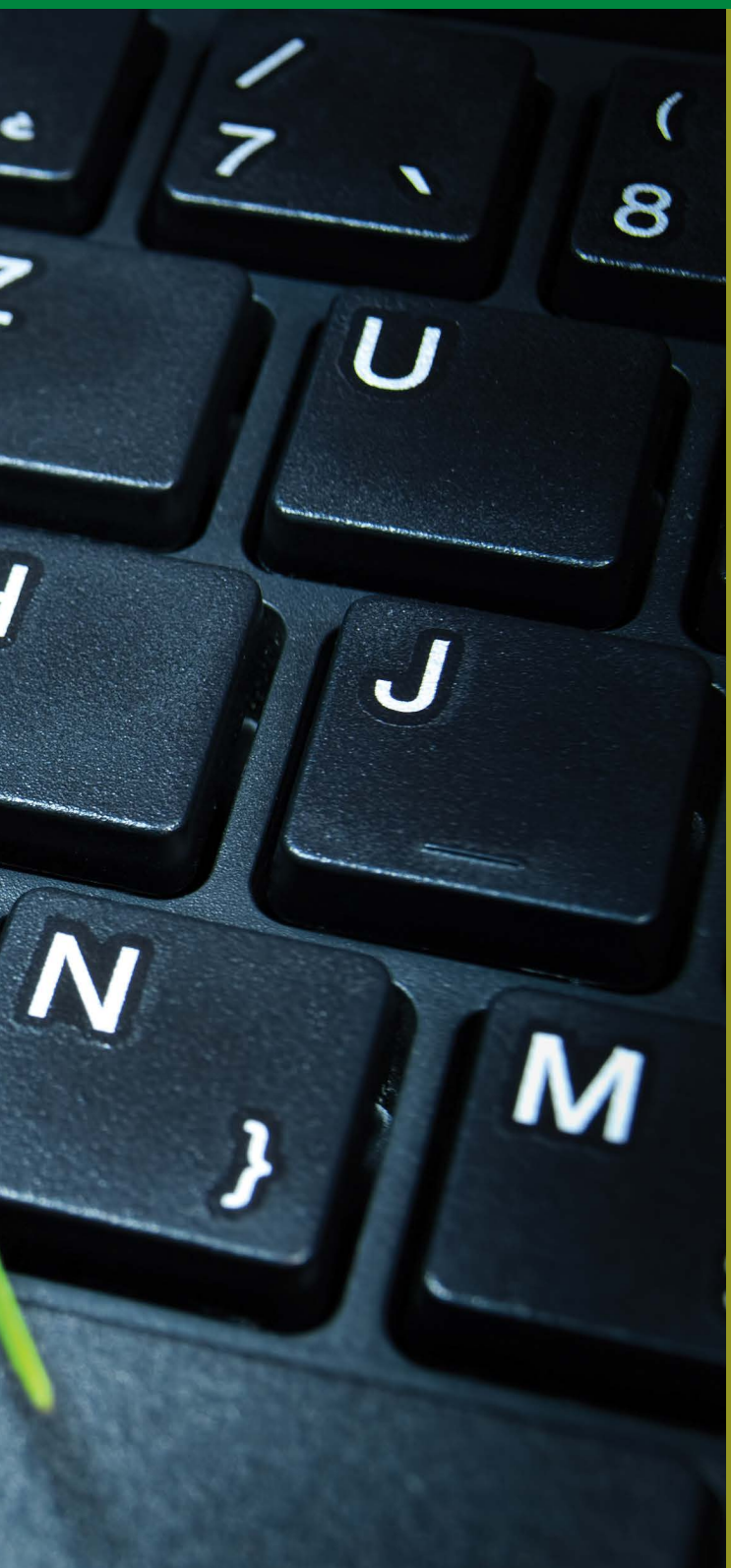
Finally, our *Attorney Professionalism Forum* raises a thorny question – given the conflict between New York and federal statutes, if an attorney provides a client with legal advice on New York's marijuana law, will he or she be violating federal law? As the *Forum* notes, it's complicated.

Medical Marijuana

A Current Look at Cannabis Law

By Sara E. Payne and Geoffrey A. Mort

in the Workplace:



Twenty-nine states, including New York, plus the District of Columbia, have legalized medical marijuana.[1] Because marijuana remains an illegal substance under federal law, its legal use under state law raises a number of issues. These issues are playing out with increasing frequency in courts across the country.

In New York, the Compassionate Care Act (CCA) was signed into law on July 5, 2014.[2] In brief, the CCA authorizes the manufacture, sale, and use of medical marijuana within the state, and directs the state's Department of Health to promulgate regulations implementing and governing the program. The first marijuana dispensaries permitted under the CCA opened in January 2016, at which time New Yorkers with certain enumerated medical conditions could become "certified" and legally purchase and use medical marijuana.[3]

Sara E. Payne is counsel with Barclay Damon LLP, chair of the firm's Cannabis Service Team and a member of the NYSBA Committee on Cannabis Law. She has extensive experience in the cannabis industry and represents one of the first five registered organizations authorized to produce and distribute medical marijuana in New York State. She has represented clients before state agencies, including the Department of Health and the Bureau of Narcotics Enforcement, and has counseled cannabis companies on wide-ranging issues, including navigating the licensing process; regulatory compliance; corporate structure; capitalization; government relations; coordinating interactions among stakeholders; and advising on banking, insurance, intellectual property, leasing, taxation, land use, contract and vendor issues, among others. Website: http://barclaydamon.com/profiles/Sara-E-Payne. Twitter: http://barclaydamon.com/profiles/Sara-E-Payne. LinkedIn: www.linkedin.com/company/barclaydamonllp/.

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Though medical marijuana has been legal in some states for more than 20 years, case law in the employment context has been slow to develop. While there is no case law in New York to date, a number of cases arising under other state medical marijuana laws are illustrative for employers and employees. Existing decisions generally address the tension between federal and state law as an overarching theme, and the most common legal questions include: (1) whether the Controlled Substances Act (CSA) preempts state marijuana laws; (2) whether the Americans with Disabilities Act (ADA) protects employees who legally use marijuana under state law; (3) whether an employer has a duty to accommodate an employee's legal marijuana use; and (4) whether employees are protected against adverse employment actions because of their legal marijuana use. In this respect, a significant majority of cases decided by both state and federal courts arise in the context of employee drug testing.

Generally speaking, drug testing cases tend to involve reasonably similar fact patterns: an employee has a serious medical condition which, under the supervision of a health care professional, is treated with medical marijuana pursuant to a duly enacted state law. When such an employee is drug tested by his or her employer, the test is invariably positive for cannabis. Commonly, the employee voluntarily disclosed his or her status as a medical marijuana user prior to drug testing and mistakenly believes that compliance with the state marijuana law will protect them against adverse employment action based on a positive drug test. These cases commonly hold that state marijuana laws are preempted by the CSA, that an employee's use of marijuana is not protected under the ADA, and that an employers' zero-tolerance (or similar) drug policy is an acceptable basis upon which to terminate a medical marijuana user's employment, rescind a job offer, or refuse to hire a candidate. However, state legislation respecting employee rights is evolving, and a few recent decisions deviate from the judicial trend favoring employers. Together, these developments may represent a new trend favoring employees and emphasizing states' rights to legislate marijuana use.

FEDERAL PREEMPTION

Employers commonly rely on federal preemption as a defense in cases involving alleged wrongful termination (or rescission of an offer or refusal to hire) based on an employee's legal marijuana use. In cases where an employer relies on a preemption defense, it typically asserts that the Supremacy Clause of the U.S. Constitution requires that state statutes, such as medical marijuana laws, be interpreted consistently with federal law – usually the CSA.[4] The preemption doctrine, as applied to state medical marijuana laws, was discussed at length in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry.*[5] In *Emerald Steel,* the Oregon Supreme Court articulated that the key question under a preemption analysis is whether a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[6] Because the intent of the CSA, in the court's view, is to criminalize and prohibit all use of "Schedule I" drugs, of which marijuana is one, Oregon's medical marijuana law stands as an obstacle to the CSA, and is therefore preempted by the CSA. In other words, the court reasoned, Congress "has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana."[7]

The 2015 Colorado case *Coats v. Dish Network*[8] so vividly captures the paradoxes, emotions, and core issues involved in the intersection of legal medical marijuana use and employment law that it merits discussion. Mr. Coats was a quadriplegic who had been confined to a wheelchair since youth. He held a valid registration card under Colorado's medical marijuana statute and used marijuana at home in the evening to help him to sleep so he could work during the day at defendant's telephone customer service call center. He alleged he was never impaired at work and never used marijuana in the workplace; in fact, Mr. Coats was considered a model employee. After three years of employment with defendant, defendant performed drug tests on all of its employees. Mr. Coats tested positive for marijuana and, as a result, his employment was terminated. He then sued Dish Network, alleging that his discharge violated Colorado's Lawful Activities Statute,[9] which prohibits discrimination against an employee for engaging in a lawful activity during nonworking hours. Mr. Coats's lawyers argued that because Colorado law permits the use of medical marijuana, Mr. Coats's use of the drug was a lawful activity. Both the trial court and the Colorado Court of Appeals found in favor of defendant, and Mr. Coats appealed to the Colorado Supreme Court. At issue was whether the use of medical marijuana was a lawful activity or not. Colorado's high court held that it was not because, notwithstanding state law, marijuana use is prohibited by the CSA.

The *Coats* case attracted national attention and is perhaps the most widely known case involving medical marijuana, drug testing, and employment law. Mr. Coats's lawyers described the case as involving a perfect storm of facts, upon which if Mr. Coats could not prevail, it would leave serious doubt as to who could.[10] The facts of the case were indeed wrenching, and the outcome was particularly noteworthy because Colorado's medical marijuana law is widely considered to be one of the strongest in the country, as it is codified as an amendment to the State Constitution. The law does not, however, contain an express prohibition against employment discrimination.

In the wake of *Coats*, a federal district court in the Second Circuit addressed a similar issue under Connecticut's

medical marijuana law which may have far-reaching implications. In *Noffsinger v. SSC Niantic Operating Co. LLC,*[11] the court directly addressed whether "federal law precludes the enforcement of a Connecticut law [prohibiting] employers from firing or refusing to hire someone who uses marijuana for medical purposes."[12]

The plaintiff in *Noffsinger* used a synthetic FDA-approved form of cannabis at night to treat post-traumatic stress disorder. After she was offered a job by defendant, her pre-employment drug test was positive for cannabis, and her job offer was rescinded. Ms. Noffsinger thereafter commenced an action alleging, *inter alia*, a violation of the anti-discrimination provision contained in Connecticut's medical marijuana law. Specifically, plaintiff argued that defendant's refusal to hire her violated Connecticut's Palliative Use of Marijuana Act, or PUMA, which prohibits employment discrimination against those who legally used marijuana. Defendant argued that PUMA was preempted by three federal laws and, primarily, the CSA. The court concluded that the CSA is not in direct conflict with PUMA and ruled in favor of plaintiff.[13] Grounding its analysis in obstacle preemption, the court reasoned:

> The mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power. Rather, obstacle preemption precludes only those state laws that create an actual conflict with an overriding federal purpose and objective (internal citations omitted). [The CSA] does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for [the CSA] to preempt state law unless there is a positive conflict between [it] and [ ] state law so that the two cannot consistently stand together.[14]

In its analysis, the court observed that there were no prior decisions interpreting PUMA and pointedly distinguished prior decisions addressing federal preemption of state medical marijuana laws, including *Emerald Steel Fabricators* and *Coats.* In noting that the above-referenced decisions and others "h[ad] come out in favor of employers, [the foregoing cases did] not concern[ ] statutes with specific anti-discrimination provisions,"[15] and "a statute that clearly and explicitly provide[s] employment protections for medical marijuana could lead to a different result"[16] from cases upholding adverse employment actions.

The court thus distinguished between plaintiff's underlying disability and the treatment for that disability (i.e., medical marijuana), finding that discrimination based on one's choice of treatment is entirely lawful.

DISABILITY DISCRIMINATION AND STATUTORY PROTECTIONS

State anti-discrimination statutes prohibit, as a rule, employment discrimination against disabled persons. Because most individuals enrolled in medical marijuana programs satisfy the definition of "disabled" under state law and the ADA, medical marijuana users who have been discharged as a result of a failed drug test often argue that their termination constitutes disability discrimination and/or that a waiver from a zero-tolerance drug policy permitting the employee to continue using medical marijuana would have been a reasonable accommodation that the employer failed to provide. As a matter of course, courts historically rejected these arguments.

For example, in *Shepherd v. Kohl's Dep't Stores,*[17] the court pointed out that "there is no evidence . . . plaintiff was fired because of his [disability] and not because of the manner in which he chose to treat that condition." The court thus distinguished between plaintiff's underlying disability and the treatment for that disability (i.e., medical marijuana), finding that discrimination based on one's choice of treatment is entirely lawful.

In *Ross v. RagingWire Telecommunications, Inc.,*[18] the California Supreme Court used similar reasoning. There, plaintiff, like the plaintiff in *Shepherd* and other cases, asserted he was disabled and that because he used medical marijuana to treat the symptoms of his underlying condition, his discharge constituted disability discrimination. The *Ross* court noted that marijuana use under any circumstances brought the plaintiff "into conflict with defendant's employment policies,"[19] which the court observed were in accord with federal law. Thus, the court held that California's medical marijuana law "does not require employers to accommodate the use of illegal drugs."[20] The court's reliance on the preemptive nature of the CSA in *Shepherd* and *Ross* is common across cases alleging discrimination under the ADA. However, discrimination claims brought under state law have been more successful.

In *Barbuto v. Advantage Sales and Marketing, LLC,*[21] plaintiff was offered a position with defendant and, after accepting the offer, submitted to defendant's mandatory drug testing. Prior to the drug test, plaintiff advised defendant that she would test positive for marijuana, explaining that she suffered from Crohn's Disease which she managed with medical marijuana as a legal participant in the Massachusetts medical marijuana program.

Nevertheless, plaintiff's employment was terminated based on a positive drug test. Here, the court focused on a provision in the Massachusetts medical marijuana law that provides "[a]ny person meeting the requirements under this law shall not be penalized in any manner, or denied any right or privilege" because of their medical marijuana use.[22] Plaintiff subsequently commenced an action for, *inter alia*, handicap discrimination under Massachusetts law.

Here, the court held that even if the employer "had a drug policy prohibiting the use of [marijuana], even where lawfully prescribed by a physician, the employer would have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives [to marijuana] whose use would not be in violation of its policy."[23] Thus, concluded the *Barbuto* court, failing a drug test is not a valid basis for terminating a legal medical marijuana user unless the employer unsuccessfully sought to obtain agreement with the employee on an accommodation other than marijuana. The court further found that, even though use and possession of marijuana violates federal law, that fact alone does not make legal medical use under state law a per se unreasonable accommodation. This decision is particularly noteworthy in two respects.

First, the court declined to infer a private cause of action under the medical marijuana law because it did not contain express employment protections. However, the court used language from the medical marijuana law together with the handicap discrimination law to find that plaintiff adequately stated a claim for handicap discrimination.

Second, the court's analysis with respect to defendant's refusal to permit plaintiff's use of medical marijuana as a reasonable accommodation is worthy of comment. Defendant argued that plaintiff was terminated not because of her handicap, but because of her marijuana use. The court found the foregoing argument unpersuasive, stating:

> By the defendant's logic, a company that barred the use of insulin by its employees in accordance with a company policy would not be discriminating against diabetics because of their handicap, but would simply be implementing a company policy prohibiting the use of a medication. Where, as here, the company's policy prohibiting any use of marijuana is applied against a handicapped employee who is being treated with marijuana by a licensed physician for her medical condition, the termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination.[24]

Based on this reasoning, the *Barbuto* court found that plaintiff's use of medical marijuana was not facially unreasonable as an accommodation. Defendant was thus obligated to engage in the interactive process, but thereafter could present evidence demonstrating the requested accommodation would cause it to suffer an undue hardship.

As is relevant in New York, the CCA includes anti-discrimination language very similar to the Massachusetts language. Particularly, the CCA provides that certified patients "shall not be [ ] denied any right or privilege" based on their legal marijuana use. Further, "being a certified patient shall be deemed [as] having a disability" under the human rights law, civil rights law, penal law and criminal procedure law,[25] and anti-discrimination laws prohibit employers from discriminating against disabled persons. Consequently, a New York court may accept the *Barbuto* analysis and permit a plaintiff's handicap discrimination claim arising from a medical marijuana user's failed drug test to proceed to trial. A different outcome would likely result absent the CCA's anti-discrimination language. To that end, courts across the country routinely uphold adverse employment actions against medical marijuana users where the state law does not set forth analogous anti-discrimination protection.

For example, the court in *Roe v. TeleTech Customer Care Mgmt. LLC*[26] held that Washington's Medical Use of Marijuana Act (MUMA) did provide a private right of action for an employee discharged as a result of legal medical marijuana use. There, Washington's high court rejected the argument that a public policy forbidding adverse employment actions based on legal marijuana use should be inferred from MUMA in the absence of express employment protection. The Sixth Circuit's reasoning and holding in *Casius v. Walmart Stores, Inc.*[27] was similar. There, the court held that the Michigan statute's language did not "impose restrictions on private employers"[28] that would prevent them from discharging medical marijuana users, so plaintiff's discharge was not unlawful.

WRONGFUL TERMINATION AND PUBLIC POLICY

In states with wrongful termination statutes, medical marijuana users against whom adverse employment has been taken commonly argue their dismissal was wrongful because their conduct was permitted by state law. The court in *Ross, supra,* observed that California's wrongful termination law set forth an exception to the employment at will doctrine by providing "an employer may not discharge an employee for a reason that violates a fundamental public policy of the state."[29] However, plaintiff's reliance on public policy proved fatal, as the court concluded that California's Compassionate Use Act "simply does not speak to employment law,"[30] and therefore no public policy rendered plaintiff's dismissal wrongful.

The plaintiff in *Roe, supra,* ran afoul of the same reasoning. The *Roe* court held that because no clear public policy existed disallowing the termination of marijuana card holders who fail drug tests, the employee had no cause of action for wrongful discharge. In this respect, few medical marijuana statutes contain sufficiently strong language to support a claim that public policy protects legal medical marijuana users from adverse employment action, and as a result, challenges for wrongful discharge on public policy grounds have largely failed.

UNEMPLOYMENT BENEFITS

Another issue that sometimes arises with respect to medical marijuana is whether registered employees fired after failing workplace drug tests are eligible for unemployment benefits. A Michigan appellate court discussed this question at length in *Braska v. Challenge Mfg. Co.*[31] Although Michigan's unemployment insurance law disqualifies an individual who tests positive for drugs from receiving benefits, Michigan's medical marijuana law provides that a person possessing a medical marijuana registry identification card "shall not be subject to . . . penalty in any manner . . . for the medical use of marijuana."[32]

Courts across the country routinely uphold adverse employment actions against medical marijuana users where the state law does not set forth analogous anti-discrimination protection.

Here, the court found that denial of unemployment benefits did constitute a "penalty" and rejected the state's argument that denial of benefits was the result of failing a drug test, not using medical marijuana. The plaintiffs' use of medical marijuana, reasoned the court, "and their subsequent positive drug tests are inexplicably intertwined."[33] Of course, employees in states that permit medical marijuana, but do not have a statute with the protections of Michigan's law, might well face not only dismissal, but a loss of unemployment benefits. New York's medical marijuana statute, however, does contain language similar to Michigan's.

NEW YORK PRECEDENT

While New York courts have not weighed in on these issues yet, one administrative decision is on point. In *Taxi & Limousine Comm'n v. W.R.*,[34] a fitness proceeding alleging respondent's unfitness was commenced against a taxi licensee who "failed" an annual drug test. Under the relevant regulations, a failed drug test is one that is the "result of illegal drug use." Here, respondent held a valid New York medical marijuana certification card. Typically, when a taxi licensee tests positive for a controlled substance, the result is reversed if the licensee presents a

valid prescription and the results of the positive drug test are consistent with use of the substance as prescribed.

The Taxi & Limousine Commission argued that marijuana should be treated differently from other controlled substances because the service it uses to review positive drug tests and prescriptions only recognizes medical marijuana prescriptions in Arizona. The administrative law judge (ALJ) disagreed with this reasoning and found that respondent's drug test was not "failed" because the positive result did not arise from "illegal drug use" since respondent held a medical marijuana certification. In concluding a finding of unfitness was improper, the ALJ cited the legislature's intent that medical marijuana patients be deemed to have a disability and may not be penalized in "any" manner or denied any right or privilege solely because of their certified use of marijuana.

Taxi & Limousine Comm'n, *Barbuto* and *Noffsinger* suggest that New York courts are likely to find that legal medical marijuana users have some employment protections as disabled persons, that employers are obligated to engage in the interactive process with them, and that continued medical marijuana use may be a reasonable accommodation.

As the medical marijuana program established by the CCA grows and becomes more established, New York will undoubtedly encounter the same legal issues that other states with such programs have. When it does, New York courts – in grappling with preemption and other issues raised by legalized marijuana – will at least have the advantage of several decades of case law from California, Colorado, and elsewhere to provide them with guidance as they seek to balance our state's medical marijuana statute against the CSA and employer fears regarding employee drug use.

1. For the purposes of this article, we are only addressing employment law issues relating to *medical* marijuana. This article does not address employment law issues arising from the recreational use of marijuana, which is now legal in nine states.
2. N.Y. Pub. Health Law § 3360, *et seq.*
3. 10 N.Y.C.R.R. §§ 1004.2; 1004.3.
4. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (holding pre-emptive intent may be inferred if there is an actual conflict between state and federal law).
5. 230 P.3d 518 (Ore. 2010).
6. *Id.* at 528.
7. *Id.* at 530.
8. 350 P.3d 849 (Colo. 2015).
9. Many states have such laws; in New York, the statute is referred to as the "Legal Activities Law."
10. Press Release, The Evans Law Firm, *Brandon Coats v. Dish Network LLC* (June 19, 2015), http://the evans law firm.com/about us/our-cases-in-the-news/Coats-v-DISH-Colorado.aspx.
11. 273 F. Supp. 3d 326 (D. Conn. 2017).
12. *Id.* at 330.
13. *Id.* at 334.
14. *Id.*
15. *Id.* at 335.
16. *Id.* at 335.
17. 2016 U.S. Dist. LEXIS 101279, *19 (E.D. Cal. 2016).
18. 174 P.3d 200 (Cal. 2008).
19. *Id.* at 204.
20. *Id.*
21. 78 N.E.3d 37 (Mass. 2017).
22. ALM GL ch. 94I.
23. *Id.* at 44.
24. Barbuto at 467–68; similar reasoning was used in *EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. 2015) and *Coles v. Harris Teeter*, LLC, 217 F. Supp. 3d 185 (D.D.C. 2016), which both involved plaintiffs' legal medical marijuana use under state law and terminations after failed workplace drug tests. Both employee-plaintiffs alleged that they were discriminated against because of their disabilities (epilepsy and glaucoma, respectively), not because of positive drug test, and each defeated motions to dismiss and for summary judgment by producing evidence that their dismissal were motivated by their disability. For example, the plaintiff in *Coles* alleged that his employer had not fired another employee who tested positive on several workplace drug tests.
25. N.Y. Pub. Health Law § 3369(2).
26. 257 P. 3d 586 (Wn. 2011).
27. 695 F.3d 428 (6th Cir. 2012).
28. *Id.* at 435.
29. *Id.* at 208.
30. *Id.*
31. 861 N.W.2d 289 (Mich. Court of Appeals 2014).
32. *Id.* at 299.
33. *Id.* at 300.
34. OATH Index No. 2503/17 (July 2017).

Medical Marijuana in New York:

Where We've Been and Where We're Going

By Sara E. Payne and Lee Williams

Signed into law in 2014, the Compassionate Care Act (CCA) allows New Yorkers to access medical marijuana. The act was implemented by the Department of Health (DOH) through regulations finalized in April 2015, and legal medical marijuana was available for sale beginning in January 2016. Although New York was the 24th state to legalize medical marijuana, the regulatory framework was widely labeled as the most restrictive in the country at the time.[1]

In July 2015, the DOH authorized five vertically integrated Registered Organizations (ROs)[2] to grow, manufacture and dispense medical-grade cannabis. Under their authorizations, ROs are allowed to operate growing and/or manufacturing facilities and a maximum of four dispensaries. Presently, there are about 20 dispensaries operating across the state. Dispensaries may only sell "approved" medical marijuana products, which are those that the DOH has put through rigorous laboratory testing for, among other things, potency and chemical composition, and which may only be sold in specific dosage forms. Permissible dosage forms under the CCA are limited and include sublingual (tincture), vaporization and capsule administrations. Until recently, all approved products were based on highly manufactured cannabis oil extract.[3]

Patients seeking to use legal marijuana in New York must suffer from a debilitating or life-threatening condition and a severe symptom associated with that condition,[4] as expressly enumerated in the CCA itself. In this respect, medical marijuana could only be recommended for 10 disease states in the early months of the program.[5] By comparison, many other state medical marijuana programs allow providers to exercise considerable discretion to recommend medical marijuana for many conditions or any condition for which they believe marijuana would be an effective treatment.

To participate in the medical marijuana program as a patient, a person is required to enroll online through the DOH website. They must then be seen by a certified provider and that provider must determine that the person suffers from a qualifying disease and a qualifying symptom.[6] The provider may then make a recommendation for medical marijuana, which must be submitted to the DOH, along with other documentation, in order to become a "certified" patient. The DOH then issues the patient a registration card. Once a patient has a registration card, they may visit one of a limited number of dispensaries, as described above, where they are counseled about using medical marijuana by a licensed pharmacist. After completing the process, patients can purchase up to a 30-day supply of medicine. As a general matter, health insurance does not cover medical marijuana, and patient costs range from $100 to well in excess of $1,000 per month.

Due in large part to its restrictive nature, New York's medical marijuana program got off to a very slow start. However, over the past year or so the DOH has taken a number of steps to expand it. Particularly, the DOH made a list of certified providers available on its website, allowing quali-

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fied patients to more easily identify health care professionals authorized to recommend medical marijuana. The list of qualifying conditions was also expanded to include post-traumatic stress disorder and chronic pain. As a point of reference, chronic pain now represents almost two-thirds of all medical marijuana recommendations. In mid-2017, five additional ROs were authorized to enter the market, effectively doubling supply capacity, and wholesaling between ROs and delivery services was also approved. As a result of these steps, there are now nearly 57,000 certified medical marijuana patients in New York.

Just as the medical marijuana program is finding its footing, the state is considering legalizing marijuana for adult recreational use ("Adult Use"). Patients, providers, ROs and other stakeholders, including state legislators who passionately advocated for medical marijuana approval, fear that Adult Use will decimate the medical program – as Adult Use approval has done elsewhere. This need not be the case, however, and unlike other state medical marijuana programs, the restrictiveness of New York's medical marijuana program may work to its advantage.

As most people are aware, marijuana remains illegal under federal law. Consequently, it has not been possible to test and study its medicinal properties in the United States in a robust, scientific way. Nevertheless, there is a growing body of medical research suggesting marijuana has far-reaching therapeutic benefits.

Perhaps the most widely known beneficiaries of medical cannabis to date are children suffering from treatment-resistant forms of epilepsy. In many cases, clinical results of treatment with medical marijuana have been remarkable for these children. So effective, in fact, that the first marijuana-based pharmaceutical to treat epilepsy was recommended by a Food and Drug Administration panel in April 2018.[7] However, researchers are finding that epilepsy is not the only disease that can be effectively treated with cannabis. For example, marijuana is being studied as a treatment for diseases like Alzheimer's, where existing pharmaceuticals are frequently of limited benefit.[8] With respect to the ongoing opioid crisis, multiple studies show a significant decrease in opioid prescriptions, opioid-based medical emergencies and opioid-related deaths in states with medical marijuana programs.[9] Promising Israeli research suggests that medical marijuana may be a particularly effective way to treat Autism Spectrum Disorder symptoms.[10] These are just a few examples.

The therapeutic promise of cannabis is enormous – but that promise cannot be realized without a tremendous amount of medical research. In this respect, New York may have an opportunity that other states do not. It is the home of world-renown research institutions and has an existing supply of medical-grade cannabis. There is no doubt that clinical research will be difficult as long as marijuana is illegal at the federal level, but to the extent research opportunities are growing, New York is positioned to lead the way.

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1. Some state medical marijuana laws passed after the CCA, such as the Texas law, are now considered more restrictive than the CCA.

2. Initially, the CCA and regulations promulgated thereunder permitted only five ROs. The DOH approved five additional ROs in 2017.

3. Amendments to New York's medical marijuana regulations, effective in December 2017, permit approved products made from plant material as opposed to oil extract. However, any plant-based products approved by the DOH must meet the same consistency and potency standards as products made from oil extract. For a number of reasons, achieving mandatory requirements with plant material is very difficult, and to date, no plant-based products are commercially available.

4. The approved conditions or symptoms include: wasting syndrome; severe chronic pain resulting in substantial limitation of function; severe nausea; seizures; or severe persistent spasms.

5. The following are the originally approved conditions: cancer; HIV/AIDS; ALS; Parkinson's disease; MS; spinal cord damage with neurological indication of intractable spasticity; epilepsy; IBS; neuropathies; and Huntington's disease.

6. Currently, only 1,660 health care providers across the state are certified to recommend medical marijuana.

7. Sheila Kaplan, *F.D.A. Panel Recommends Approval of Cannabis-Based Drug for Epilepsy*, N.Y. Times, Apr. 19, 2018, https://www.nytimes.com/2018/04/19/health/epidiolex-fda-cannabis-marajuana.html.

8. *See, e.g.*, Cao, Chuanhaia; Li, Yaqiong; Liu, Hui; Bai, Ge; Mayl, Jonathan; Lin, Xiaoyang; Sutherland, Kyle; Nabar, Neel; Cai, Jianfeng,, Journal of Alzheimer's Disease, Vol. 42, No. 3, pp. 973–84 (September 2014).

9. *See, e.g.*, Kevin P. Hill, MD, MHS, Andrew J. Saxon, MD, *The Role of Cannabis Legalization in the Opioid Crisis*, JAMA Intern Med. 2018;178(5):679-680. doi:10.1001/jamainternmed.2018.0254; Ashley C. Bradford, W. David Bradford, Amanda Abraham, Grace Bagwell Adams, *Association Between U.S. State Medical Cannabis Laws and Opioid Prescribing in the Medicare Part D Population*, JAMA Internal Medicine, 2018; DOI: 10.1001/jamainternmed.2018.0266.

10. *See, e.g.*, Debra Kaim, *Is Marijuana the World's Most Effective Treatment for Autism?*, Newsweek, Feb. 15, 2019, http://www.newsweek.com/2018/02/23/really-good-weed-why-cannabis-may-be-worlds-most-effective-remedy-core-806758.html.

Federal Laws Hinder Cannabis Research

By Christian Nolan


Mechtler

Dr. Laszlo L. Mechtler is medical director of Dent Neurologic Institute in Western New York, the largest private neurologic institute in the country.

When New York legalized medical marijuana in 2014, Dent Neurologic, which formed the Dent Cannabis Clinic, began receiving 400 to 500 calls per day from patients interested in medical marijuana to treat debilitating conditions including cancer, HIV/AIDS and multiple sclerosis.

Since then, Mechtler said the clinic has treated roughly 4,500 patients and has a waiting list due to the huge demand. To meet that demand, Dent has 30 providers who are certified to recommend marijuana to patients.

As a result of the "tsunami of patients reaching out," Mechtler took on a leadership role in the fight to legitimize medical marijuana. At the crux of that crusade is the need for better research, including right here in New York, a cause that Mechtler has continued to lobby state lawmakers about.

"The academic community today has a difficult time accepting medical marijuana as a viable form of treatment due to the lack of blinded research studies in the United States," said Mechtler, who is also the chief of neuro-oncology at Roswell Park Cancer Institute. "That's why it's been so difficult for medical societies to properly vet medical marijuana without the proper research."

With the lack of research and a limited patient population for doctors to draw upon, Mechtler is left studying the results he sees in his own patients.

"We receive funding for doing retrospective research on all of our patients," said Mechtler. "Patients fill out an iPad worth of questions in regards to efficacy, side effect profile, and the use of other meds."

At the heart of what's stalling researchers in the U.S. is marijuana's classification as a Schedule I drug, the toughest of all drug classifications under the U.S. Controlled Substances Act. Schedule I drugs have no accepted medical use and are considered highly addictive. This alone has limited the availability of research, Mechtler explained. Mechtler is hopeful lawmakers will downgrade marijuana to Schedule II or III, which are considered to have less potential for abuse.

Mechtler said it is difficult for him and his colleagues in the medical profession to obtain a license for a long-term clinical study of a Schedule I drug.

"We continue to try. I know colleagues for who it took seven, eight years to get," said Mechtler. "It's a shame."

As is also the case with Schedule I drugs, when studied it was typically to look at side effects, not for any potential beneficial effects for medical purposes.

"We are in the midst of an opioid epidemic," said Mechtler. "Medical marijuana is something that should be embraced. We lose over 100 people a day on opioid overdoses and medical marijuana has been shown in studies to decrease the need for opioids in that population."

According to Mechtler, if you are fortunate enough to receive permission from the federal government to conduct research on marijuana for medical purposes, there are still problems that negatively impact the results.

We are in the midst of an opioid epidemic. Medical marijuana is something that should be embraced. We lose over 100 people a day on opioid overdoses and medical marijuana has been shown in studies to decrease the need for opioids in that population.

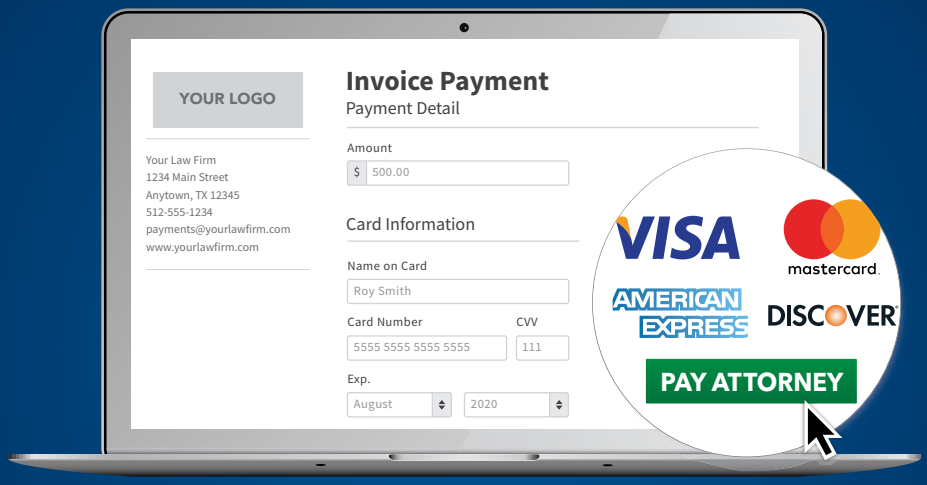
For instance, there is only one marijuana grower contracted with the federal government allowed to provide marijuana for federally funded research. This marijuana comes from Mississippi and researchers and advocates alike have questioned its quality and potency. This substance differs from much of the marijuana often found at dispensaries that patients actually use.

"They crush everything. It doesn't even smell like marijuana," said Mechtler.

"That's another form of legislation that has to be done," continued Mechtler. "If the research is done in New York, let's use New York State growers and not use federal growers who have a poor reputation among researchers."

Mechtler also said that without the right research, insurance companies will never cover medical marijuana for the treatment of chronic conditions. He said 30 percent of patients in New York State who could use medical marijuana to treat their condition cannot afford it anyway.

Christian Nolan is NYSBA's Senior Writer.



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Counseling Marijuana Clients on Intellectual Property

Protection and Enforcement

By Karen J. Bernstein

The intersection of a legal marijuana or cannabis business and intellectual property is one of the most challenging and creative endeavors for a lawyer navigating the limited legal framework that exists. The legal cannabis business client operating under state law has a great need for the practitioner to guide and educate it on the advantage of acquiring and protecting its intellectual property rights.

Cannabis is now legal in 29 states, including the District of Columbia, and there are millions of dollars to be made. The Arcview Group[1] and BDS Analytics estimate that the legal marijuana industry will grow 150 percent from $16 billion in 2017 to $40 billion by 2021. Given the upward trajectory of the legal cannabis industry, practitioners must understand how to help their clients acquire and enforce their intellectual property within the parameters of the federal prohibition on marijuana under the Controlled Substances Act (CSA).

TRADEMARKS

A trademark is any word, symbol, or sound. Trademarks emanate from the Commerce Clause; hence, Congress governs interstate trademark usage. Federal trademark law is codified under the Lanham Act.[2] The purpose of trademarks is to identify the source of brands – like everyone connects McDonald's with hamburgers. Trademark law also serves a function by protecting consumers from being confused in the marketplace.

In the United States – and in most common law countries – the rule is first to use a mark wins, not first to file an application for a mark. Under federal law, the trademark must be a "lawful use."[3] As long as one continuously uses a trademark, it can last forever. For example, Coca-Cola has enjoyed federal trademark rights dating back to 1886.

Under the CSA, the "distribution and dispensing of marijuana . . . are illegal."[4] For any cannabis product that directly involves the manufacture, distribution, or dispensing of marijuana, it is known colloquially in the cannabis industry as a "plant touching business." Accordingly, the general rule is that no plant touching business may obtain federal trademark registration rights because it violates the CSA. If a plant touching business like a dispensary offers something else like wellness classes, however, it may be possible to obtain federal trademark rights based on the non-planting aspect of the business.

In 2017, PharmaCann LLC unsuccessfully challenged a U.S. Patent and Trademark (PTO) Examiner CSA refusal of its trademark applications for PHARMACANN and PHARMACANNIS. PharmaCann owns several mari-

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juana dispensaries throughout New York State and touts itself as the "largest vertically-integrated and unified medical cannabis company operating in highly regulated states."[5] On appeal to the Trademark Trial and Appeal Board, PharmaCann argued that its marks should be permitted federal registration on two bases: (1) that the PTO should defer to the Cole Memorandum, a Department of Justice (DOJ) memorandum sent to all United States attorneys not to enforce the CSA against legal plant touching businesses;[6] and (2) the Rohrabacher–Farr amendment, which was enacted by Congress and prohibits the DOJ from expending funds to prevent states that have legalized medical marijuana from implementing their own state laws authorizing the use, distribution, possession, or cultivation of medical marijuana.[7] Like others before it,[8] PharmaCann's appeal was affirmed.

In the alternative, many cannabis plant touching businesses have sought state trademark rights, which come with it own set of limitations. New York permits cannabis trademarks, provided that the goods and services fit within New York State's identification of goods and services.[9]

Bear in mind, if one obtains state trademark rights they are limited to the state and do not provide the ability to enforce the trademark in other states operating under the same brand name. Some plant touching businesses, however, have used intellectual property licensing schemes by expanding their brands and technology to operators in other states who hold licenses to manufacture, process, and dispense marijuana, as will be discussed, *infra*.

COPYRIGHTS

Copyright protection emanates from the U.S. Constitution.[10] To qualify for copyright protection, the eligible subject matter (*e.g.*, books, films, music, plays, etc.) must be "[o]riginal works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[11] Unlike trademarks that last forever as long as they are used, copyright protection lasts for the life of the author plus an additional 70 years, or 95 years from the date of first publication or a term of 120 years from the date of creation, whichever expires first.[12]

Unlike trademarks, which involve interstate commerce, copyright law does not prohibit cannabis copyrights because it involves creative expression. Accordingly, your client may not be able to obtain federal trademark protection for a plant touching brand, but it could obtain copyright registration for a logo for its business, provided the creative work qualifies as eligible subject matter. Unlike trademark protection, which is limited by country, owning a federal copyright registration provides protection not only in the United States, but also in more than 175 countries through a treaty known as the Berne Convention.[13]

PATENTS

Like copyrights, patents emanate from the U.S. Constitution.[14] Patents are granted for new, useful and non-obvious inventions for a period of 20 years from the filing date of a patent application, and provide the right to exclude others from exploiting the invention during that period.[15]

There is nothing in the patent law that prohibits someone from obtaining a registered patent that touches the plant. Patents consist of utility, design, and plant patents. Utility patents can take the form of a method, process, or device. So, for example, a method patent usually refers to a way to use a product to accomplish a given result, and process usually refers to a series of steps in manufacture. Thus, one might speak about a method for curing headaches that comprises the administration of a therapeutically effective dose of cannabis or speak about a process for making CBD oil. A device patent could be, for example, an inhaler that contains cannabis or a specially made electronic vaporizer.

New York permits cannabis trademarks, provided that the goods and services fit within New York State's identification of goods and services.

TRADE SECRETS

A trade secret is any valuable business information that is not generally known and is subject to reasonable efforts to preserve confidentiality. Like patents, trade secrets can cover processes, methods, and devices. There is no prohibition on whether the trade secret involves legal cannabis.

Like trademarks, trade secrets can last forever, but differ from trademarks because they last for so long as they are kept secret (*e.g.*, Coca-Cola recipe, Kentucky Fried Chicken recipe). The trade secret must be one that is not generally known in the public. The types of securities placed on preserving the confidentiality of the secret are essential. There are limitations on trade secrets, however, such as whether the "trade secret" is really proprietary. If it can be easily reverse engineered, as opposed to mimicked, then it may not really be a trade secret.

IP LICENSING

One of the ways that businesses in the legal cannabis industry seek to expand their intellectual property assets is by licensing their brands and know-how in other states. Specifically, companies like Cannabis Testing Lab, Steep Hill, and Willie's Reserve, have expanded their brands and technology across multiple states.

When it comes to trademark licenses in New York, however, it does not have a regulatory scheme set up wherein the holder of a New York State license to sell cannabis (known as a "Registered Organization" or RO) can be considered a brand licensee because the regulatory scheme provides those ROs to only grow, manufacture, and dispense medical marijuana within a vertically integrated system with the only exception of the ability of ROs to wholesale marijuana to each other in bulk the State's Medical Marijuana Program.[16] In other words, there is no such thing as brand licensing in New York State. Nothing stops your New York cannabis client, however, from licensing its brand elsewhere.[17]

There are some considerations in licensing intellectual property, however. Specifically, most intellectual property licenses involve either percentages based on royalties or flat fee payments for the license, but when it comes to cannabis it is much more complicated and such a scheme could rise to the level of an ownership interest in the cannabis state-licensed entity.

Specifically, Washington state might consider the licensor a "true party of interest" if royalties are obtained from a license, which could subject the licensor to abide by Washington's Liquor and Cannabis Board's regulations. Other payment structures exist whereby the licensor takes a royalty on the basis of the licensee's revenue or profit, which could view your client as a "financial interest holder" in a licensee. Colorado considers anything over 30 percent an "ownership interest." New York requires the RO to disclose all contracts and agreements when renewing its operational license and so be mindful that the percentages and/or royalties you may negotiate for your client of any trade secrets and know-how are not to appear as if your client has a substantial financial interest in the RO.

You also want to make sure that in negotiating a trademark license that your client does not accidentally negotiate an "accidental franchise" agreement. Trademark licenses should contain provisions involving the licensee abiding by the quality control standards required by the brand licensor, but when the brand licensor starts dictating how the brand licensee should operate its business it could trigger state and federal franchise laws.

DIFFICULTIES IN IP ENFORCEMENT IN THE FEDERAL COURT

Since plant touching businesses cannot obtain federal trademark rights and are limited geographically by the state in which they operate, there are more limitations on how your client may be able to enforce their rights.

If your client has state trademark rights they could bring a state court action for infringement of a state trademark, but only if they can obtain personal jurisdiction over the defendant. They could also sue based on misappropriation against someone operating in the same state. Unfortunately, the client will be prohibited from bringing a federal court action for lack of standing because their plant touching brand activities are not protected under federal trademark law. Even if your client has state trademark rights and tries to sue under diversity of the parties in federal court, they will lack standing due to the CSA.

Copyright litigation in federal court may be an option, however, because there is no prohibition on cannabis under the U.S. Copyright Act. Despite this allowance, it is questionable whether a federal court would entertain a federal copyright infringement lawsuit when the plaintiff is involved in a federally unlawful activity. Once again, state courts may provide some relief based on a misappropriation theory.

Likewise, patent owners would presumably lack standing to bring patent infringement lawsuits in federal court even though the PTO does not care whether a particular invention involves cannabis. Although one may be able to obtain patent protection on an invention that concerns cannabis, the issue is that the infringement would be based on a defendant practicing an invention that is unlawful under the CSA, so the plaintiff's case would, in all likelihood, be dismissed.

Trade secrets are a product of state law. Many businesses in the legal cannabis industry employ trade secrets to protect everything from their cannabis extraction processes (like extracting oil from whole plant cannabis) to customer lists. It is anticipated that most litigation involving trade secrets employing cannabis will remain in state court in those states where cannabis is legal.

In 2016, the Defend the Trade Secrets Act (DTSA) was promulgated, which provides a federal private right of action for violation of trade secrets. Unless the plant touching business is suing on the basis of things like theft of customer lists, it will probably lack standing to bring a federal case under the DTSA.

CONCLUSION

Understanding the political climate and intricacies of protecting your client's intellectual property in cannabis is key to effectively counseling your clients. New York State continues to expand its medical marijuana program and beyond. Indeed, Governor Cuomo has commissioned a study on the impact of marijuana legalization for adult use, and New York City Mayor Bill de Blasio has instructed the New York Police Department to stop arresting people who use marijuana in public. Perhaps these are signs that marijuana prohibition will come to an end in New York State sooner rather than later, which may influence the possibility of federal legalization so that legal marijuana businesses may have the same rights to own and enforce their intellectual property in federal court just as any other legal business in this country.

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1. For purposes of full disclosure, the author is outside intellectual property counsel to The Arcview Group. This article is for informational purposes and should not be taken as legal advice.
2. 15 U.S.C. §§ 1051 et seq.
3. Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127.
4. 21 U.S.C. §§ 801 *et seq.*
5. http://www.pharmacann.com/#about (last visited June 8, 2018).
6. https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (last visited June 8, 2018).
7. *In re PharmaCann LLC,* TTAB, Nos. 86520135 and 86520138 (T.T.A.B. June 16, 2017). It should be noted that on January 4, 2018, Attorney General Jeff Sessions rescinded the Cole Memorandum. For now, the Rohrabacher-Farr Amendment, which is an amendment to the appropriations bill, continues to be extended. Most recently, its name has changed to the Rohrabacher-Blumenauer Amendment. The next extension of the Amendment must be voted on in September 2018.
8. *See In re Morgan Brown*, Serial No. 86362968 (T.T.A.B. July 14, 2016) (refusal of application for HERBAL ACCESS for "Retail store services featuring herbs"). *See also In re JJ206, LLC, dba JuJu Joints*, Serial Nos. 86474701, 86236122 (T.T.A.B. Oct. 27, 2016) (refusal of applications for POWERED BY JUJU and JUJU JOINTS for "smokeless cannabis vaporizing apparatus, namely, oral vaporizers for smoking purposes; vaporizing cannabis delivery device, namely, oral vaporizers for smoking purposes").
9. Title 19, Chapter III, Part 130.
10. The Congress shall have power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Article I Section 8, Clause 8.
11. 17 U.S.C. § 102.
12. 17 U.S.C. § 302.
13. *See* http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited June 7, 2018).
14. *See*, *supra*, note 2.
15. 35 U.S.C. §§ 100, *et seq.*
16. Title 10, Chapter XIII, Part 1004.
17. https://mjbizdaily.com/new-york-medical-marijuana-company-etain-expanding-into-california/ (last visited June 8, 2018).

Murphy v. NCAA— A Road Map to Cannabis

By Diane Krausz

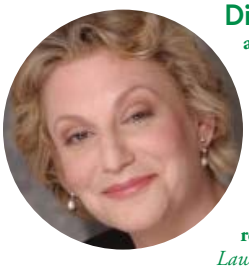
The recent Supreme Court majority decision in *Murphy v. NCAA*[1] not only energized operators of New York casinos[2] and the sports-gaming industry, but it also provided a current judicial analysis of Constitutional federalism that might prove valuable in New York State's future efforts to legalize cannabis.

In a recent article,[3] Professor Sam Kamin concludes that the opinion in *Murphy* indicates

> in the area of marijuana legalization . . . it is now clear that the federal government *cannot prohibit states from implementing marijuana law reform. Just as it cannot force the states to enforce the federal marijuana prohibition, it cannot require them to keep their own prohibitions in place, or force states that have regulated and taxed marijuana to undo such laws* [emphasis added].[4]

DETAILS OF THE *MURPHY V. NCAA* CASE

Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992. This federal law prohibited any state that did not already permit sports gambling from authorizing such conduct.[5] In 2014, 12 years after the enactment of PASPA,[6] New Jersey passed a law giving the state legislature the authority to repeal existing state laws that prohibited casinos in Atlantic City, N.J., from taking adults' bets on sports and at horseracing tracks within the state. The NCAA (National Collegiate Athletic Association) and three major sports leagues brought an action in federal court against the governor of New Jersey and other state officials seeking to repeal the new state law, claiming that it was in violation of PASPA. New Jersey then counterclaimed that PASPA was in violation of the "anti-commandeering" principle of the Tenth Amendment, which forbids Congress from having the power to issue orders directly to the states.



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The Supreme Court, in 2018, reversed the Third Circuit Court of Appeals, making the New Jersey law valid, and repealed the federal law, PASPA, making it unable to prevent New Jersey from modifying or repealing its state law prohibiting sports gambling. This means that the *federal law* that *prevented* New Jersey from making *its own law permitting sports gambling in a specific and limited matter* was *struck down* by the Supreme Court. That New Jersey derived this right and its protection from the Tenth Amendment, in a majority opinion written by Justice Alito, was "simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States."[7] It is worth noting that, in her dissent, Justice Ginsburg did not disagree with the overall result of the decision, but merely commented that rather than repeal the entire federal law, appropriate amendments would have been adequate.[8]

It is important to note that the majority opinion also allowed the federal government the opportunity to change its law by enacting another one, and therefore be able to continue to oversee sports wagering on a federal level:

> The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own . . . . Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not.[9]

Specifically, the majority opinion not only ruled that PASPA's anti-authorization provision was in violation of the Tenth Amendment, but it also held that the current federal law was an invalid preemption provision under

Federalism Issues?

the Supremacy Clause of the Constitution,[10] because it did not meet the two requirements of (i) representing the exercise of a power conferred by the Constitution on the Congress, and (ii) "confer[ing] upon Congress the power to regulate individuals, not States."[11] Understanding the majority opinion and its interpretations of these two particular articles of the Constitution, the Tenth Amendment and the Supremacy Clause, including prior adjudicated cases, is extremely useful and valuable when applied to other important areas of law, such as marijuana legalization.[12]

NEW YORK AND CANNABIS LAW

Even more complex than in the sports-gaming world, federal and states laws, and the interaction between the Tenth Amendment and the Supremacy Clause, have been, and continue to be, an active area for debate, litigation, and confusion.[13] After the majority opinion in *Murphy v. NCAA*, it can be asserted that this recent decision brings some clarity to, going forward, what type of legislation states may pursue for marijuana legalization, absent the unlikely chance of any changes in the federal law.[14] On behalf of *Murphy*, a group of Constitutional scholars[15] filed an amici brief on a writ of certiorari to the U.S. Court of Appeals for the Third Circuit.[16] These seven scholars, who described themselves as "legal scholars at major American law schools who have studied, taught courses about and/or published scholarship on federalism and other legal doctrines implicated in this case," included several law professors who had extensive backgrounds in cannabis law research and writing, among other areas.

The amici brief argues the law using the facts and issues of the *Murphy* case, but clearly makes the strong argument for the states' rights to repeal laws prohibiting the use of cannabis and for the unconstitutionality of the federal government's attempt to enforce the federal law against the states in these instances, as well as in regard to sports gambling. Although there is no conclusive evidence in the majority opinion that the amici arguments were incorporated in the majority opinion by Justice Alito, this brief itself, and the resources used in its drafting, provide a thorough and interesting read of history, arguments, and facts that might be applied in the future.

1. 138 S. Ct. 1461 (2018) (hereinafter "Murphy").
2. Aaron Elstein, *Game On, New York's casinos are gearing up betting on sports,* Crain's, May 28-June 3, 2018, pp. 21–23.
3. Sam Kamin, Murphy v. NCAA: *It's about much more than gambling on sports*, The Hill, May 15, 2018 (hereinafter "Kamin").
4. *Id.*
5. *Murphy, supra* note 1, at footnote 22.
6. Note that this was the second law authorizing gambling enacted by New Jersey, one having failed and been denied certiorari by the Supreme Court in 2012.
7. *Murphy*, *supra* note 1.
8. *Murphy*, *supra* note 1; Justice Ginsburg's Dissent.
9. *Murphy*, *supra* note 1.
10. Article 1, Section 8 of the Constitution, certain times granted where federal law is the "Supreme Law of the land," *Murphy*, *supra* note 1.
11. *Murphy*, *supra* note 1.
12. And, of course, to immigration and state sanctuary issues. *See* Garrett Epps, *The Supreme Court Says Congress Can't Make States Dance to Its Tune*, Politics, May 14, 2018.
13. See, for example, David S. Schwartz, *High Federalism: Marijuana Legislation and the Limits of Federal Power to Regulate States,* Cardozo Law Review, Vol. 35, No. 567 (2013).
14. Kamin, *supra* note 3.
15. *See* American Bar Association, www.supremecourtpreview.org, *Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioners*, William Trunk, Counsel of Record, Robbins, Russell, Englert et al., *Christie v. NCAA.*
16. *Id.*

Rockefeller's "Vau Attica and the Dr

A Rueful Judicial Perspective

Blood in the Water, Heather Ann Thompson's exhaustively researched, 2017 Pulitzer Prize-winning book, revisits a painful chapter in New York State's history – the Attica prison uprising of September 1971. The immediate toll in human life was horrific – 33 inmates and 10 others, including guards and civilian employees, most of them killed after state troopers, National Guardsmen, and other "law enforcement personnel" stormed the prison to put down the riot. The long-term toll was also devastating – untold thousands of lives shattered by a "tough on crime" crackdown that shortly followed the Attica siege with the 1973 enactment of the Rockefeller drug laws. And at the core of these proximately related events was the ambition – or "vaulting ambition," as Shakespeare once trenchantly described this fatal character flaw– of Gov. Nelson A. Rockefeller, whose lust for the White House set in motion a chain of events that would reverberate for decades with disastrous humanitarian results.

This article was inspired by *Blood in the Water*, which stirred recollections of events of that era, directed by an extraordinarily powerful and successful governor. He was able to enlist a compliant legislature to support his agenda that might have been restrained by the courts had they, too, exercised some of their residual independent separate branch powers. With utmost respect for my judicial colleagues through all my years of service in different capacities at the Court of Appeals and in the judicial branch, my look-back leads me to the rueful sense that the courts missed the opportunity, previewed by then-Chief Judge Charles D. Breitel, to flex their own considerable adjudicative and appropriate supervisory authority to mitigate some of the extensive damage wrought by the Rockefeller drug laws. Instead, what the governor and legislature set in stone in the aftermath of the Attica travesty, the courts accentuated by not finding a judicious path to mitigate the authoritarian and draconian agenda of the other branches.

Joseph W. Bellacosa is a retired New York State Court of Appeals judge.

A TALE OF TWO GOVERNORS

> *I have no spur*
> *To prick the sides of my intent, but only*
> *Vaulting ambition*
> *Which o'leaps itself,*
> *And falls on th'other.*
>
> – Macbeth, 1.7.25-28

Nelson Rockefeller was elected New York governor four times, but his real ambition, a quest that began in the 1950s, was the White House, and he made several attempts to capture his big prize. His first try for the GOP presidential nomination was in 1960, but the party chose Vice President Richard Nixon, who was seen as a likely winner over the relatively unknown senator from Massachusetts, John F. Kennedy. Rockefeller tried again in 1964, but by then the GOP had shifted sharply to the conservative right and for Barry Goldwater, and Rockefeller was shouted down at the convention as an East Coast liberal elitist. In 1968, Rockefeller vowed to stay out of the race, only to launch a belated effort after the front-runner, Michigan Gov. George Romney, tailspun out of contention due to his "brainwashed" slip of the tongue about the Vietnam War. Rockefeller's star again fell short. Three years later, in 1971, he sensed another opening to appeal to his party's conservative wing by taking a hard line in Attica (he would later win the approval of President Richard Nixon for his dramatic direction to end the Attica uprising by overwhelming brute force). Rockefeller's stance was a stolid refusal to negotiate with inmates and then, after the human carnage that followed,

lting Ambition," ug Laws

By Joseph W. Bellacosa

he doubled down on his toughness by driving his drug laws through the legislature, as the harshest in the nation.

Blood in the Water documents how Rockefeller may have been subconsciously, and even overtly, never far from his driving ambition for the highest office in the land while deciding what to do to resolve the Attica crisis. Near the surface and pressing his dwindling timetable was his political calculation to be perceived as "presidential" and tough on crime. That diminished any chance for a cool, rational analysis and contributed to his disastrous order to attack the prison.

Then, less than two years later, Rockefeller horse-traded with the legislature to garner support for his tough drug laws. He dangled a huge pork barrel of 30 new Court of Claims appointive judgeships to the legislators that they could parcel out among themselves and their supporters.

I am mindful of Gov. Rockefeller's significant achievements during his years in Albany – in the field of higher education, for example, especially his efforts to enhance the stature of the State University of New York, and for building grandiose, modern edifices throughout the state and at Rockefeller Center in Manhattan. Those accomplishments are sadly outweighed on the humanitarian scale by his two egregious failures – Attica and the Rockefeller drug laws – both brought on by his ever-present "vaulting ambition."

To appreciate Rockefeller's approach, with some comparative perspective and how it distorted his decision-making, it is instructive to look at a successor New York governor, Mario Cuomo, who also faced a similar challenge of two prison uprisings during his tenure, the first one only 12 years after Attica and in his first weeks in office. Cuomo met and resolved these crises in gover-

nance in a vastly different way – peacefully, by nonstop talking, and with no casualties.

In many ways, the two governors were polar opposites, which is not surprising given their starkly different backgrounds. Rockefeller was born into a family of entrepreneurial success, immense wealth, and philanthropic influence. Growing up in privilege, Rockefeller had come to see himself as singularly fit and experienced to hold the highest office in the land. Many others saw him that way, too. He was, after all, a Rockefeller, whose grandfather, John D. Rockefeller, also stood apart from the crowd with vast fame and power. Yet the patriarch's own legacy was also scarred for his indifference to, or perhaps even facilitation of, the violent methods his hired hands used to put down the 1914 Ludlow coal miners' strike, where two dozen people were killed, including miners and women and children.

What the governor and legislature set in stone in the aftermath of the Attica travesty, the courts accentuated by not finding a judicious path to mitigate the authoritarian and draconian agenda of the other branches.

Nearly 70 years later, that history foreshadowed his grandson's actions that would come across as coldly indifferent, too, this time to the people trapped inside a prison uprising, as he refused to negotiate directly, or even be perceived as negotiating, with the inmates toward a peaceful end to the crisis. Author Thompson exposes the fatal character flaw through the Machiavellian lens of the leader's exercise of "majesty of rank" in dealing with a "great enterprise."

By contrast, Mario Cuomo[1] was shaped by humble beginnings, growing up in the back of his immigrant family's grocery storefront in Jamaica, Queens. He had one immense advantage over Rockefeller, though – he was a voracious reader and lover of history, so when he was faced with a "great enterprise" in governance, he had already absorbed and learned the painful lessons of Attica. His first crisis was a hostage-taking uprising at Ossining Correctional Facility, in January 1983. Unlike Rockefeller, who presided from his Capitol Executive Office, Cuomo promptly gathered his new key staff, left the office, and went directly to the prison to set up a command post. He had one overriding objective, according to his chief counselor at the time, the late Tim Russert (later of "Meet the Press" renown): to get everyone out safely and end the riot peacefully. Cuomo did just that, by following a starkly different modus operandi: "talk, talk, talk."[2] In August of 1988, Cuomo faced a second prison uprising, this time at Coxsackie Correctional Facility, just south of Albany. Once again, he resolved the crisis peacefully, through talking.

Mario Cuomo could talk, of course. He was a gifted orator likened in a recent book to the great Roman orator Cicero.[3] Cuomo also had a professorial and philosophical bent, a teacher-thinker in the Socratic method who valued the wisdom, learning, experience and dialogued opinions of others. Over time, though, some critics would dub him "Hamlet on the Hudson" for seeming to ponder too much and too long, to a point of indecisiveness.

What Mario Cuomo lacked in wealth and privilege, he made up for in character largely molded by his immigrant family experience and his formal classical education. Though he was known to be an admirer of the mystical writings and teachings of the Jesuit *Pere* Teilhard de Chardin (e.g., *The Divine Milieu*),[4] his entire formal education (high school, college, law school) was at St. John's, in the spirit of St. Vincent de Paul's order of the Congregation of Missions, founded in Paris 440 years ago. Their service mission is a down-to-earth person-to-person outreach to the poor, the downtrodden, the beaten-down, including prisoners, who should be visited as prescribed in St. Matthew's Gospel, Chapter 25. This Biblical-Vincentian principle, sometimes referred to as "servant leadership," is diametrically opposed to the human flaw of "vaulting ambition" and was the guiding light to a person like Cuomo, immersed in human values and worth. The admonition of Cardinal Woolsey in *Henry VII* 3.2440-442 serves as an apt conclusion to this observation:

> *Cromwell, I charge thee, fling away ambition*
> *By that sin, fell the angels: How can man then,*
> *The image of his Maker, hope to win by it?*

THE ROLE OF THE COURTS

The Rockefeller drug laws, under the coaxing banner of "sentencing reform," were part of the "war on drugs" and drug lords. The criminal justice policy was launched not with massive weaponry and troops like Attica, but with a battalion of law-enactment and enforcement troops (legislators, prosecutors and judges) brought to mandatory lockstep by a governor's force of will. The misguided process was as destructive on a human and moral scale, if not more so, than the Attica assault, because it was inflicted under color of law and procedure. The drug laws disastrously affected many more thousands of "victims" with their draconian immediate and long-term consequences, followed by various official investigations and prolonged civil and criminal litigations.

A First-Hand Look at Dual Travesties

As inmate populations skyrocketed under the Rockefeller drug laws, the need to build new prisons to accommodate the influx and overcrowding fell into Gov. Cuomo's lap. He struggled to find the capital funds in burgeoning budgets, as he got stuck with Gov. Rockefeller's big bad check for the prison building financial crisis. Yet, to this day, some wrongly remember Cuomo more for building prisons than for his progressive leadership, keen intellect, and soaring oratorical gifts.[1]

In 1995, as a judge on the N.Y. Court of Appeals, I had a firsthand look at the legacy of the Rockefeller drug laws when I was invited to visit the Bedford Hills Correctional Facility to conduct a workshop with a group of women inmates – most of them quite young. About 25 inmates were assembled around a long, rectangular table, flanked by the prison chaplain, Sister Elaine Roulet, a deputy warden, myself, and one particular inmate, Angela Thompson (see main article).

I emphasized that I was not there to provide legal advice, much less offer assistance in any cases, but only to give a general outline of the flow and methods of the criminal justice system at various levels and how judges worked within a structure where the courts operate as a separate, independent branch of government. The women were attentive and often interrupted with questions sparked by my comments and curious about how my description of the functioning system might benefit their cases, including appeals and habeas corpus applications. At times some of them openly expressed anger and resentment, with some inmates expressing frustration about my disclaimer that I was ethically prohibited from offering more pertinent help to them.

At one point, the anger boiled over as one inmate accused me of being like all the rest – the lawyers and officials, including judges, who "screwed her" at every step of her case and lied to protect their own interests.

Just scanning the classroom "students" gave me a graphic visualization of the results of the disastrous Rockefeller drug law sentencing scheme. On a purely humanitarian scale, it had wreaked an enormous toll. While the drug laws eventually would be moderated somewhat by corrective amended legislation, that would not occur until decades later. In the meantime, incalculable suffering was inflicted. For example, inmate Angela Thompson, who was pregnant when she was sentenced as a teenager, was allowed to bond with her child for only a few months in the prison's "Children's Center"[2] before the child was sent to foster care. It took many years for them to be reunited.

The invitation for me to conduct the workshop had been extended by Sister Elaine. At my official exit interview after the class, Sister Elaine was asked by the prison superintendent (who did not attend the discussion) how the session had gone; the wry and wrenching comment from the good nun was that "the Judge did not raise any expectations that anyone was getting out any sooner than required." I could not raise any expectations, of course, because the Court of Appeals rulings had upheld the drug laws, with no exceptions, and I was ethically barred from any direct assistance other than by education.

And yet the overall forum had a very positive feel and impact, including a surprise incident as I was heading to my car to leave the prison. The same inmate who had challenged me as being "just like all the rest" had somehow arranged for a guard to hand me an envelope. I had reservations about opening it, but I'm glad I did because inside I discovered a handbook that she had written as head of an inmate committee to help fellow inmates stay in touch with outside relationships until their sentences were completed. The title page had a handwritten inscription that read: "Judge, keep up your passion for the law. Thank you for coming," signed by the aforesaid inmate.

It remains one of my prized keepsakes from any presentations or lectures I have ever given, and I have given a lot over many decades.

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1. *See* Saladin Ambar, American Cicero – Mario Cuomo and the Defense of American Liberalism (Oxford University Press, 2018). Professor Ambar's short book applauds Cuomo's progressive liberalism but revives the criticism that he would likely be remembered principally as a builder of prisons. Repeating that criticism is unfortunate, even though the author does lay the blame for this bitter legacy on Gov. Rockefeller, who engineered passage of the draconian drug laws of 1973 that led to the need for new prisons.

2. The Children's Center was initiated by Sister Elaine, and has since been a model for similar programs at women's prisons elsewhere. Jean Harris, who served time in Bedford Hills for the 1980 murder of Dr. Herman Tarnower, creator of the Scarsdale Diet and author of the bestselling book on the subject, spent many hours working in this center. Gov. Cuomo commuted her sentence in 1992.

Right from the effective date of the legislation, a cascade of challenges and appeals quickly ensued questioning the facial constitutionality of the sentencing scheme on grounds of cruel and unusual punishment, disparate proportionality of sentencing, and inherent distortions in the traditional distribution and separation of governmental powers among the three branches of government.

Defense lawyers argued that the altered sentencing structure implicated violations of a panoply of fundamental substantive rights and procedural safeguards – *People v. Broadie*, and a batch of other cases, were argued together in a one-day binge docket at the Court of Appeals, which resulted in an all-encompassing opinion by Chief Judge Breitel.[5]

That seminal lead case rejected the challenges by all the appellants and upheld the presumptive facial constitutionality of the drug laws as a legitimate exercise of legislative authority. Its rationale, however, built in a very important saving grace and caveat, called a "rare case exception." While the legislative scheme thus survived the threshold facial constitutional challenge that fateful day, Chief Judge Breitel, writing institutionally for the Court, carved out that important precedential reservation for the subsequent exercises of judicial authority. It was supposed to allow for elbow-room review against particular and disproportionate applications in future cases.

Yet shortly afterward, Chief Judge Breitel found himself in dissent with respect to his own crafted "rare case" exception. The majority of the Court of Appeals, in the next major ruling, held that a low-level drug packager, Winnie Jones, did not qualify for the "as applied" rare case exception. By a vote of 4 to 3, appellant defendant Jones was thus sentenced with the mandatory full sweep of the Rockefeller drug laws.[6]

Fast forward 15 years later, to 1994 (and a lot of water and cases under the bridges "up the river"), and the jurisprudence encountered the last nail in the "rare case" sealed box.[7] This defendant, Angela Thompson, happened to be one of the inmate-attendees at a workshop at Bedford Hills that I conducted.[8] Her unique facts seemed ready-made and four-square for what Chief Judge Breitel had in mind in tucking that reservation into the *Broadie* opinion. But his dissent in the immediately following *Winnie Jones* case (for both of which I was also present as Clerk of the Court of Appeals) hung forebodingly in the air. Sadly, Angela Thompson was deprived of the rare case exception exercised by the trial justice, Hon. Juanita Bing Newton. The reversal by the Court of Appeals gave precedence to the worst of the legislative imperatives of the Rockefeller drug laws: "mandatoriness." For all practical purposes, that ruling eliminated the small judicial reservoir of oversight and common-sense proportionality and was accomplished with a razor-thin vote of four judges in a majority opinion trumping the trial justice and the two judges dissenting (one taking no part).[9] That affected not only the particular case but also sent an Albany chill down the judicial spine for any other trial judge who might dare to face down a higher court reversal by invoking the virtually DOA (dead on appeal) rare case exception.

Alas, the Judicial Branch might have made a precedentially justified contribution, difference, and defense of its own Third Branch authority. Instead, by deferring so absolutely to legislative prerogatives its considerable muscles atrophied. This is especially unfortunate because the rulings negated any mitigating discretionary authority, long the traditional province in the judicial branch work of sentencing. Trial sentencing judges were effectively instructed not to exercise particularized assessments in sentencing, as was attempted at the trial sentencing level for Thompson, only to have the sentence overturned by what constituted a court of highest and last resort "re-sentencing."

When Justice Juanita Bing Newton prudently exercised what she rightly thought was that tiny crack in the window of judicial sentencing discretion reserved by *Broadie's* expressed rare case exception, she was overruled by the Court of Appeals. The majority ruling held simply that the legislative policy prerogative was paramount and allowed no such exception. The prevailing rationale and its foreboding precedent were that the "run-the-table" sweep of the Rockefeller drug laws' retraction of judicial discretion was unremitting and absolute. The denouement: a teenage drug packager, Angela Thompson (like the earlier low-level defendant Winnie Jones), who had received an eight-year minimum sentence at the hands of the trial justice after a full trial, ended up with a minimum legislatively mandated sentence of 15 years to life.

Her criminal offense was a marginally low-level drug possession crime. Yet, her sentence was identical to that of her drug kingpin "uncle," who pled guilty. This had a Dickensian irony of ironies ring to it – a demonstrably disproportionate sentencing paradigm derived from the same set of criminal circumstances but with vastly different levels of criminal responsibility and severity of punishment.

A positive historical footnote affords a surprising twist. Angela Thompson received a Christmas sentencing clemency a few years after the Court of Appeals ruling from the pen of no less a governor than Republican George Pataki (renowned as tough on crime, as a critic of the Court of Appeals as too liberal and lenient, and as the New York death penalty revivalist who defeated Mario Cuomo largely on that odious issue – see, chapter 1, Laws of 1995). His Executive Branch "rare case" exception gave Angela Thompson a get-out-of-the-Bedford-Hills-jail card at almost precisely the eight-year minimum marker originally fixed by the trial court justice. Thus, her case came full circle: the original "rare case" exception created

by the Court of Appeals (Breitel CJ), applied by a trial justice (Juanita Bing Newton), overruled by the Court of Appeals, and at long last re-instated by tough-on-crime Gov. Pataki's stroke of a pen. *Mirabile dictu!* Ruefully, this executive action was a one-off, not a structural change in the sweeping operation of the Rockefeller drug laws themselves, and thus did not redound to anyone else's benefit who got caught in their mandatory clutches.

CLOSING THOUGHTS

Hearkening to a theory advanced by John Whitney and Tina Packer in their book *Power Plays*: *Shakespeare's Lessons in Leadership and Management*,[10] Gov. Rockefeller's fateful decisions in 1971 and 1973 may be seen as the kind of Machiavellian "great enterprise" that a putative leader is instructed to grasp, but in Rockefeller's case brought him to a "bad end." Shakespeare spoke thus in *Julius Caesar* when he had Brutus tell Cassius:

> *As Caesar loved me, I weep for him;*
> *As he was fortunate, I rejoice at it;*
> *As he was valiant, I honor him; but as he was ambitious, I slew him.*
> *There is tear for his love; joy for*
> *His fortune; honor for his valor; and*
> *Death for his ambition.*

Rockefeller's "vaulting ambition" ultimately boomeranged and brought him down to human size, in part because his hubristic character was exposed, just as in *Macbeth*. His dreams to be President and his reputation as a great governor were shattered by these decisions, leaving him and his legacy instead marred with the bitter taste of infamy. Heather Thompson's book renders a devastating judgment in this regard about Attica, and the history of the Rockefeller drug laws compounds the tragedy immensely. One can only imagine how Shakespeare might have dramatized such a tragic character.

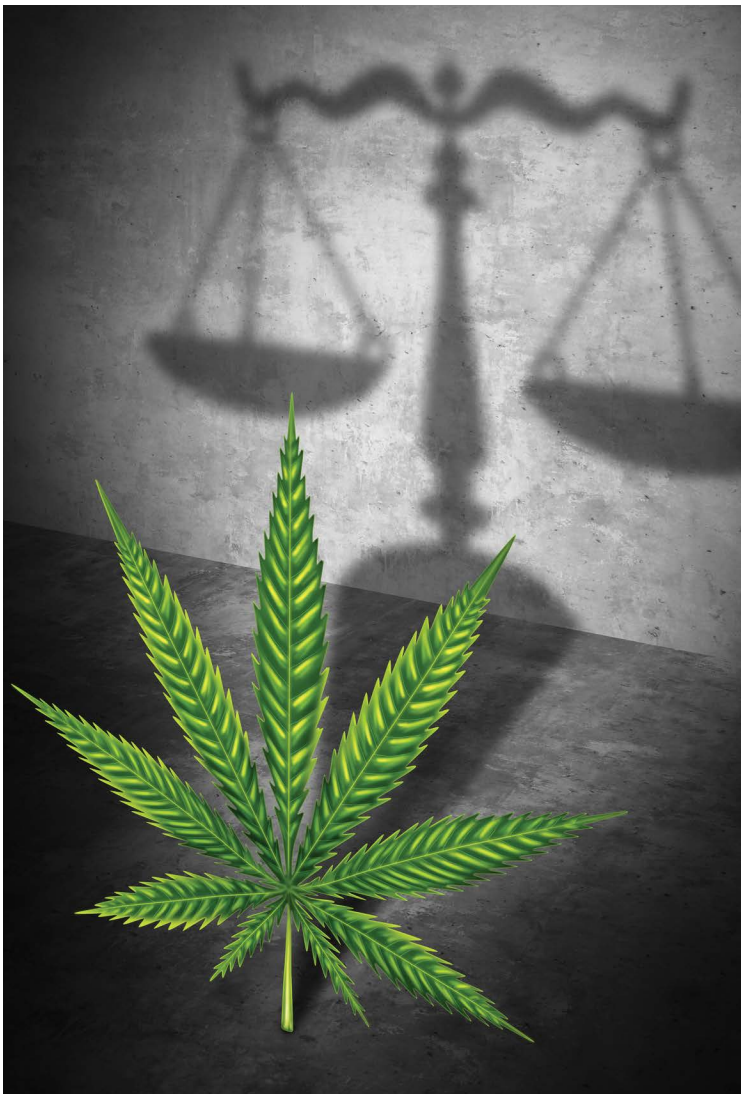
In contrast, Mario Cuomo was possessed of bedrock character with soaring oratorical gifts and a cerebral approach to all things. Those attributes served him and the public well in shaping how he handled the Ossining and Coxsackie prison crises. Ironically, it brought him momentary and minor critical acclaim, but with little to no lasting public appreciation as part of his record of public achievements. Instead, he is critically remembered as a prison builder. Here then is the rub and saving grace – his actions do not live in infamy, either. Rockefeller's do. Of the two governors, Mario Cuomo turns out to be the better public servant leader from the standpoint of humanitarian sensitivity. His more nuanced actions were imbued with thoughtfulness about the objects of his actions, modesty and respect for history.

Once again, the Great Bard, through Antonio's character and utterance in the *Merchant of Venice,* provides a fitting summation of the contrast I have tried to draw between the two governors – Mario Cuomo, the unassuming and thoughtful governor, and Nelson Rockefeller, driven by "vaulting ambition":

> *I do oppose*
> *My patience to his fury, and am arm'd*
> *To suffer, with quietness of spirit,*
> *The very tyranny and rage of his.*

---

1. A disclaimer: Mario Cuomo appointed me to the Court of Appeals in 1987.
2. To build on Marc Antony's eulogy of Caesar, evils like Attica live on in infamy, while quiet successes like Ossining and Coxsackie are all but forgotten.
3. *See* Saladin Ambar, America Cicero: Mario Cuomo and the Defense of American Liberalism (Oxford University Press 2018).
4. Cuomo also kept a picture of Saint Thomas More, one of his heroes, on his office wall.
5. 37 N.Y.2d 100, argued March 24, 1975; decided June 18, 1975.
6. *Peo v. Winnie Jones*, 39 N.Y.2d 694, 698 (Breitel, CJ dissenting).
7. *People v. Angela Thompson*, 83 N.Y.2d 477, 488 (Bellacosa, J. dissenting); *infra* note 8.
8. *See* sidebar at page 29. A disclaimer: I wrote the dissenting opinion a couple of years earlier in her case that urged the Court to uphold the trial court's application of the unused "rare case" exception of some residual sentencing particularized discretion.
9. *Angela Thompson*, *supra* note 7.
10. *See* Chapter 9, "The Choice and Master Deceivers of Their Age," Touchstone Edition/Simon & Shuster Inc., New York 2002.



What's Your Status? The Rules for Practicing

***Editor's note**: For a few days in May, NYSBA's Twitter account was bombarded with more than 600,000 messages, compared with an average daily viewership of around 35,000. Most of the new tweets had the same question – would NYSBA disbar Aaron Schlossberg, the New York City attorney who was seen in a social media video directing a racist rant at Spanish-speaking restaurant workers and threatening to call immigration authorities to have them deported? Of course, NYSBA does not discipline attorneys – that is handled by the New York State Unified Court System and the Office of Court Administration. Nonetheless, the sheer number of tweets reflected the scope of confusion over attorney status in New York and the statutes and court rules that apply to all practitioners. The following article reviews those rules, many of which have been updated in the last decade.*

The statutes and court rules of New York State offer a surprising array of status to its attorneys, most of which affect the scope of an attorney's ability to practice law.

ATTORNEY AND COUNSELOR-AT-LAW

The Appellate Division admits an individual "to practice as [an] attorney and counselor-at-law in all the courts of this state."[1] All admitted lawyers take an oath of office declaring that they will faithfully discharge the duties of attorney and counselor-at-law of the State of New York.[2]

Most admitted New York State attorneys have passed the New York State Bar examination.[3] Effective for the July 2016 administration of the Bar examination, the exam consists of the Uniform Bar Examination (UBE),[4] the Multistate Professional Responsibility Exam (MPRE) (both developed by the National Conference of Bar Examiners), the New York Law Course and the New York Law Examination.[5] In addition, every applicant admitted on exam after January 1, 2015, must have completed 50 hours of qualifying pro bono service.[6] Also, applicants who commence their law study after August 1, 2016, or their LL.M. program after August 1, 2018, have to comply with a skills competency requirement.[7]

Finally, in 2014, the Court of Appeals began a Pro Bono Scholars Program which allows third-year law school students to take the February, rather than July, Bar exam and be admitted sooner in exchange for about a semester of pro bono work.[8]

A smaller number of attorneys are admitted on motion by the Appellate Division. Instead of passing the Bar exam, these attorneys must show that they meet the requirements for admission on motion as set forth in the rules of the Court of Appeals,[9] which include admission in a reciprocal jurisdiction[10] and practice for five of the seven years immediately preceding the application in one or more jurisdictions in which the applicant has been admitted to practice. All attorneys, whether admitted on examination or on motion, must also go through the character and fitness review process prior to admission by the Appellate Division.[11] The rules of the Appellate Division, First and Second Departments, also mandate pre-admission orientation to the profession programs.[12]

Absent a subsequent change of status or order, the scope of practice available to an attorney admitted by the Appellate Division on examination or motion is unrestricted.

All admitted attorneys should be aware of at least three obligations[13] of membership in the New York State Bar. They must comply with the Rules of Professional Conduct,[14] register with the Office of Court Administration every two years and pay the biennial attorney registration fee, which is now $375,[15] and comply with continuing legal education requirements.[16]

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in New York

By Daniel C. Brennan

PRO HAC VICE ADMISSION

The rules of the Court of Appeals provide for discretionary admission pro hac vice ("for this turn; for this one particular cause"[17]) to attorneys from other jurisdictions.[18] The application is made to a court of record and permits the attorney to participate in any matter in which the attorney is employed.[19] However, the attorney may not participate in pretrial or trial proceedings unless he or she is associated with an attorney admitted in New York State, who shall be attorney of record in the matter.[20]

Admission pro hac vice is also available to certain attorneys for a period of "no longer than 18 months" upon application to the Appellate Division. Such an 18-month pro hac vice admission is available to an attorney from another jurisdiction who is a graduate of an approved law school or who is a graduate student or graduate assistant at an approved law school in New York State and who is employed by a legal aid organization,[21] a District Attorney, a Corporation Counsel, or the Attorney General. An attorney so admitted pro hac vice may advise and represent clients and participate in any matter during the continuance of the attorney's employment. In the case of a graduate student or assistant at a New York State law school, the admission pro hac vice continues while the attorney is so enrolled or during his employment as a law school teacher in an approved law school in New York State.[22]

The four Departments' rules vary slightly. In the First Department,[23] an attorney from another jurisdiction who is a graduate student or graduate assistant enrolled in a law school in the First Department, or who is a teacher employed by such a law school, may apply for admission pro hac vice to advise and represent clients or participate in the trial or argument of any case while so enrolled or employed if engaged to advise or represent such clients by a legal aid organization or during employment with a District Attorney, Corporation Counsel, or the Attorney General. The period of the pro hac vice admission is set forth in the order granting the application. An 18-month pro hac vice admission is available to an attorney from another jurisdiction who is a graduate of an approved law school while employed by a legal organization in the First Department or during employment with a District

Attorney, Corporation Counsel, or the Attorney General. The Second Department's rules mirror that of the First Department, except that they do not specify employment by a District Attorney, Corporation Counsel or the Attorney General.[24] The Third Department specifies the contents of an application pro hac vice by an attorney who is a graduate of an approved law school and specifies the contents of the order granting the application.[25] In addition, the Third Department has a special "law interns" rule described below.

A censured attorney may continue to practice law. However, the censure will appear as part of the attorney's public disciplinary record.

An attorney admitted pro hac vice pursuant to the rules of the Court of Appeals is required to abide by the standards of professional conduct imposed upon members of the New York State Bar and is subject to the jurisdiction of the courts of New York State with respect to any acts occurring during the course of the attorney's participation in the matter.[26]

LAW INTERN

The rules of the Appellate Division, Third Department, provide for the designation of "law interns."[27] They are law students who have completed at least two semesters of law school and eligible law school graduates who are hired by state agencies or legal aid organizations. The application is made by the employer. The rules authorize law interns to engage in specified legal services which are limited according to the court, the degree of supervision of the intern, and the kind of activity. The intern's supervising attorney assumes personal professional responsibility for the intern's work. A law intern may provide legal services under the rule until admitted to the Bar or notified that he or she failed the New York State Bar exam given immediately following law school graduation. An intern who fails that exam but applies to take the next exam may be redesignated as a law intern by the Presiding Justice.

TEMPORARY PRACTICE

In 2015, the Court of Appeals promulgated a temporary practice rule.[28] This rule authorizes a lawyer not admitted to practice in New York State to provide legal services on a temporary basis in New York State. Among other conditions, the lawyer must be admitted to practice and in good standing in another State or territory of the United States or be a member in good standing of a recognized legal profession in a foreign jurisdiction. In addition, the temporary legal services must (1) be undertaken in association with a lawyer admitted to practice in New York State or (2) be related to a court proceeding if the lawyer is assisting a lawyer or other person authorized to appear in the proceeding or (3) be related to an arbitration, mediation or alternative dispute resolution proceeding or (4) if not within (2) or (3) be related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice. An attorney licensed as a legal consultant or registered as in-house counsel may not engage in temporary practice pursuant to the temporary practice rule. A lawyer who practices temporarily in New York State pursuant to the rule is subject to the New York Rules of Professional Conduct and the disciplinary authority of New York State.

TEMPORARY PRO BONO PRACTICE FOLLOWING MAJOR DISASTER

The rules of the Court of Appeals authorize the provision of temporary pro bono legal services by attorney authorized to practice law in another United States jurisdiction following a determination of major disaster.[29] The rule sets forth supervision parameters, limits on duration, and admission by the Appellate Division and registration with the attorney registration unit of the Office of Administration. Such attorneys admitted pro hac vice are required to comply with the standards of professional conduct imposed on members of the New York State Bar.

LEGAL CONSULTANT

The rules of the Court of Appeals authorize the Appellate Division to license legal consultants.[30] A legal consultant license is available to a lawyer admitted in a foreign country who has practiced law in the foreign country for three of the past five years, who possesses the necessary moral character and general fitness, who is over 26 years old, and who intends to practice as and maintain an office as a legal consultant in New York State. A legal consultant may also be a member of the New York State Bar.[31] The governing statute[32] and the rules of the Court of Appeals set forth limitations on the legal services a legal consultant may provide but do not attempt to set the parameters of the practice in which a legal consultant may engage. For example, Judiciary Law § 53 (6) states that a legal consultant shall not practice in the courts of this State but may render legal services in New York state within limitations prescribed in the rules of the Court of Appeals. The rules of the Court of Appeals regarding legal consultants are captioned scope of practice, rights and obligations, and disciplinary provisions. The legal consultant statute and rules are designed to facilitate transnational legal practice.[33] In general, a legal consul-

tant license authorizes the foreign attorney to provide advice and legal services pertaining to the law of the foreign country of admission.

IN-HOUSE COUNSEL REGISTRATION

In 2011, the Court of Appeals promulgated a rule providing for the registration of in-house counsel.[34] An in-house counsel is an attorney employed full-time in this State by a non-governmental corporation, partnership, association or other legal entity that is not itself engaged in the practice of law or the rendering of legal services outside such organization. The Appellate Division may register as in-house counsel an applicant who (1) is admitted to practice in another State or territory of the United States or in the District of Columbia or (2) is a member in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors-at-law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority. The applicant must also be currently admitted in good standing in at least one reciprocal jurisdiction, within or without the United States, i.e., a jurisdiction which would similarly permit an attorney admitted to practice in New York State to register as in-house counsel. The in-house counsel must register with the attorney registration unit of the Office of Court Administration. In-house counsel legal services are largely limited to matters directly related to the attorney's work for the employer entity although he or she can also provide pro bono services.

DISCIPLINARY AUTHORITY

The Supreme Court has power and control over attorneys and all persons practicing or assuming to practice law and the Appellate Division is authorized to censure, suspend from practice or remove from office any attorney admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice.[35] Effective April 1, 2009, the Appellate Division replaced the Code of Professional Responsibility with the New York Rules of Professional Conduct.[36] Effective October 1, 2016, the Appellate Division adopted uniform rules for attorney disciplinary matters.[37] In October 2016, each Department also amended its rules governing attorney disciplinary procedures.[38]

LETTER OF ADVISEMENT

A Letter of Advisement is a letter issued at the direction of an Attorney Grievance Committee upon a finding that the attorney has engaged in conduct requiring comment that, under the facts of the case, does not warrant the imposition of discipline. A Letter of Advisement is confidential and does not constitute discipline but may be considered by an Attorney Grievance Committee or the Appellate Division if it considers further discipline.[39]

ADMONITION

An Admonition is discipline issued at the direction of an Attorney Grievance Committee or the Appellate Division, where the attorney has engaged in professional misconduct that does not warrant public discipline by the Appellate Division. An Admonition is private discipline, shall be in writing and may also be delivered to a recipient by personal appearance before the Attorney Grievance Committee or its chairperson, and may be considered by the Attorney Grievance Committee or the Appellate Division in determining future discipline. The Attorney Grievance Committee may issue an Admonition when it finds, by a fair preponderance of the evidence, that the attorney has engaged in professional misconduct.[40]

CENSURED ATTORNEY

A censured attorney may continue to practice law. However, the censure will appear as part of the attorney's public disciplinary record.

SUSPENDED ATTORNEY

An attorney suspended from practice by the Appellate Division may not practice law in New York State. Indeed, by statute, the Appellate Division is required to insert

in each order of suspension or disbarment a provision which commands the attorney thereafter "to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another" and forbid the performance of any of the following acts, to wit: "the appearance as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority" and "the giving to another of an opinion as to the law or its application, or of any advice in relation thereto."[41] Attorneys may also be suspended on an interim basis while a disciplinary proceeding is pending[42] or for incapacity.[43]

DISBARRED ATTORNEY

An attorney disbarred by the Appellate Division is prohibited from practicing law. Whereas a suspension usually carries a specific time period, a disbarment lasts for at least seven years.[44] Generally, an attorney convicted of a felony "ceases" to be an attorney or competent to practice as such by operation of statute but the Appellate Division will nevertheless thereafter strike the attorney's name from the roll of attorneys, i.e., disbar the attorney.[45]

An attorney disbarred by the Appellate Division is prohibited from practicing law.

An attorney may admit disciplinary charges and proffer his resignation. If the Appellate Division accepts the resignation, it will enter an order removing the attorney from office by order of disbarment.[46]

REVOKED LICENSE

The Appellate Division is authorized to revoke the admission of an attorney to practice for any misrepresentation or suppression of any information in connection with the attorney's application for admission to practice.[47]

REINSTATED ATTORNEY

An attorney who has been suspended or disbarred from practice may be reinstated to practice by the Appellate Division. Unless otherwise stated in the decision, the attorney may then engage in the unrestricted practice of law. To be reinstated, an attorney must show, by clear and convincing evidence, compliance with the order of disbarment, suspension or removal from the roll of attorneys, compliance with the rules of the Appellate Division, the requisite character and fitness to practice law, and that it would be in the public interest to reinstate the attorney to the practice of law. If the attorney seeking reinstatement has been disbarred or suspended for more than six months, the application must include proof of passage of the MPRE within the prior year. The Appellate Division may also require the attorney to successfully complete the New York State Bar Examination or specified CLE or both. An attorney who has been suspended for six months or less shall not be required to submit proof of passage of the MPRE unless otherwise directed by the Appellate Division.[48] It should be noted that there may be a presumption against the reinstatement of a disbarred attorney and that a disbarment may be considered the Appellate Division's conclusion that an attorney has engaged in professional misconduct that so endangered the public or so dishonored the profession that removal from office was warranted and that the disbarment is not just a form of lengthy suspension.[49]

REGISTRATION

All attorneys admitted to practice in New York State are required to file a biennial registration statement with the attorney registration unit of the Unified Court System and to pay the biennial registration fee, currently $375. Noncompliance with the registration requirement shall constitute conduct prejudicial to the administration of justice and shall be referred to the appropriate Appellate Division Department for disciplinary action.[50] The registration rules do not provide for an inactive status allowing an attorney to pay a lesser or no registration fee. Periodically, the Appellate Division Departments suspend from practice lists of attorneys who have not complied with the registration requirement.[51]

RETIRED ATTORNEY

The attorney registration rules[52] permit an attorney to register as retired. An attorney so registering does not have to pay the biennial registration fee. An attorney is retired from the practice of law when, other than the performance of legal services without compensation, the attorney does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law. For purposes of registration, judges are considered retired. The rules define the practice of law to mean the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the State of New York *or elsewhere* and shall include the appearance as an attorney before any court or administrative agency.[53] Retired status is not meant to be an inactive status.

The Fourth Department's rules specify the notices a retiring attorney shall make to clients, other attorneys, and the Office of Court Administration.[54]

ATTORNEY EMERITUS

The attorney registration rules provide that an attorney in good standing, at least 55 years old and with at least 10 years' experience, who participates without compensation in an approved pro bono legal services program, may enroll as an "attorney emeritus."[55]

VOLUNTARY RESIGNED ATTORNEY

The Appellate Division permits attorneys to resign from the Bar voluntarily for non-disciplinary reasons.[56] Attorneys who so resign are usually located outside New York State and resign because they no longer wish to pay the biennial attorney registration fee. Some are older attorneys who are retiring from practice while others are attorneys who are admitted and practice elsewhere but no longer need to be admitted to practice in New York State. The contents of an application to resign are set forth in the Appellate Division rules.[57] If the Appellate Division accepts the resignation application, it issues an order.

On occasion, an attorney who resigns voluntarily for non-disciplinary reasons changes his mind and wants to be a member of the New York State Bar again. Upon application, the Appellate Division can reinstate the attorney to practice. The contents of such a reinstatement application are set forth in the Appellate Division rules.[58]

CONDITIONAL PRACTICE

The Appellate Division may place conditions on an attorney's practice of law, whether upon initial admission to the Bar,[59] upon a censure,[60] upon a stayed suspension,[61] or upon a reinstatement to practice.[62] The Appellate Division rules also provide for confidential stay of a disciplinary investigation or proceeding and diversion to a monitoring program.[63] Typical conditions might include submission of periodic CPA reports confirming that the attorney is maintaining his or her escrow account and preserving client funds in accordance with applicable rules, submission of periodic medical or employment reports, restitution, participation in the New York State Bar Association Lawyer Assistance Program, compliance with the statutes and rules regulating attorney conduct, not being the subject of any further disciplinary action, and/or completion of additional CLE, especially in ethics and professionalism. Such decisions or orders usually also authorize applications for termination of the conditions.

OFFICIAL DOCUMENTS

The New York State courts do not issue bar cards or similar documentation that would verify an attorney's status. Each Appellate Division Department will issue, for a fee of $5 (First and Second Departments) or $10 (Third Department), a certificate stating that the attorney was admitted to practice by that Department, is in good standing, and is in compliance with the attorney registration requirements.[64] Embossed and engraved certificates of admission only are also available for a fee. Each Department can also generate a disciplinary history letter. Further information is available on the Appellate Division websites.[65]

The attorney registration unit of the Unified Court System assigns attorney registration numbers to registered

attorneys. UCS offers a public search of certain public attorney registration information.

The Unified Court System will also issue a "secure pass" photo ID card to a New York attorney to ease his entry into court facilities. Information on the application process is available on the website of the Unified Court System under Legal Profession – Attorney Registration Secure Pass.[66] A $50 fee is charged.

1. *See* Judiciary Law § 90 (1)(a), (b).
2. *See* Judiciary Law § 466.
3. Eligibility to take the Bar exam can be shown by study of law in an "approved" law school, or a combination of law school study and law office study, or a combination of law school study and the actual practice of law in another jurisdiction, a combination of the study of law in a foreign country with other requirements, or participation in the Pro Bono Scholars Program (*see* 22 N.Y.C.R.R. 520.2 (a)(3)).
4. Effective October 1, 2016, an applicant who sat for the UBE in another jurisdiction may transfer the score earned on that examination to New York in lieu of taking the UBE in New York State, provided among other things, that the applicant achieved a score on the UBE equal to or greater than the passing score established by the New York State Board of Law Examiners (*see* 22 N.Y.C.R.R. § 520.2 (b))).
5. *See* 22 N.Y.C.R.R. §§ 520.8, 520.9.
6. *See* 22 N.Y.C.R.R. § 520.16.
7. *See* 22 N.Y.C.R.R. § 520.18.
8. *See* 22 N.Y.C.R.R. § 520.17.
9. *See* 22 N.Y.C.R.R. § 520.10.
10. The Rules of the Court of Appeals require an applicant to show that he or she is currently admitted to the Bar in a jurisdiction which would similarly admit an attorney admitted to practice in New York State to its Bar without examination (*see* 22 N.Y.C.R.R. § 520.10 (a)(1)(iii); *see also* Judiciary Law § 90 (1))(b)); 22 N.Y.C.R.R. § 840.7).
11. *See* CPLR Article 94; 22 N.Y.C.R.R. §§ 602.1, 690.5–690.18, 805.1, 1022.34.
12. *See* 22 N.Y.C.R.R. §§ 602.3, 690.21.
13. By administrative resolution of the Administrative Board of the Courts attorneys are also encouraged to provide pro bono services. In addition, under certain circumstances when performing legal services in New York State, an attorney may be required to have an office in the State (*see* Judiciary Law § 470; *Schoenefeld v Schneiderman*, 821 F.3d 273 (2d Cir. April 22, 2016)).
14. *See* 22 N.Y.CR.R. pt. 1200.
15. *See* Judiciary Law § 468-a; 22 N.Y.C.R.R. pt. 118.

16. *See* 22 N.Y.C.R.R. pt. 1500.
17. Black's Law Dictionary.
18. *See* 22 N.Y.C.R.R. § 520.11.
19. The rules of the First and Second Departments specify that the attorney applies for admission pro hac vice to the court in which the cause is pending to participate in the trial or argument of a particular cause (*see* 22 N.Y.C.R.R. §§ 602.2 (a), 690.3 (a)). The rules of the Third Department state that the application shall be made to the court in which the action or proceeding is pending (*see* 22 N.Y.C.R.R. § 805.3 (a)).
20. *See* 22 N.Y.C.R.R. § 520.11 (c). The Second and Fourth Departments have specific rules for such pro hac vice admission before their courts (*see* 22 N.Y.C.R.R. §§ 670.6 (e), 1000.13 (l), 1022.9 (a)).
21. The rule refers to an organization described in Judiciary Law § 495 (7). The described organizations are organizations which offer prepaid legal services; non-profit organizations whether incorporated or unincorporated, organized primarily for a purpose other than the provision of legal services and which furnish legal services as an incidental activity in furtherance of their primary purpose; and organizations which have as their primary purpose the furnishing of legal services to indigent persons.
22. *See* 22 N.Y.C.R.R. § 520.11 (a)(2), (b).
23. *See* 22 N.Y.C.R.R. § 602.2 (b), (c), (d).
24. *See* 22 N.Y.C.R.R. § 690.3 (b), (c), (d).
25. *See* 22 N.Y.C.R.R. § 805.3 (b).
26. *See* 22 N.Y.C.R.R. § 520.11 (e).
27. *See* 22 N.Y.C.R.R. § 805.5.
28. *See* 22 N.Y.C.R.R. pt. 523.
29. *See* 22 N.Y.C.R.R. § 520.11 (d).
30. *See* 22 N.Y.C.R.R. pts. 521, 610, 692; 805.4, 1029.
31. *See* Hope B.Engel, *New York's Rules on Licensing of Foreign Legal Consultants*, 66 N.Y. St. B.J., vol. 66, no. 4, at pp 36-37 (March/April 1994)..
32. *See* Judiciary Law § 53 (6).
33. *See* Engel, *supra* note 33.
34. *See* 22 N.Y.C.R.R. pt. 522.
35. *See* Judiciary Law § 90 (2); 22 N.Y.C.R.R. §§ 1240.12 (Attorneys Convicted of a Crime), 1240.13 (Discipline for Misconduct in a Foreign Jurisdiction).
36. *See* 22 N.Y.C.R.R. pt. 1200.
37. *See* 22 N.Y.C.R.R. pt. 1240.
38. *See, e.g.,* 22 N.Y.C.R.R. pt. 806 (Third Department).
39. *See* 22 N.Y.C.R.R. § 1240.2 (i).
40. *See* 22 N.Y.C.R.R. §§ 1240.2 (b), 1240.7 (d) (2) (v). The Letter of Advisement and Admonition replace confidential discipline previously authorized by the Appellate Division, such as reprimand, admonition, letter of caution and letter of education.
41. *See* Judiciary Law § 90 (2).
42. *See* 22 N.Y.C.R.R. § 1240.9.
43. *See* 22 N.Y.C.R.R. § 1240.14.
44. *See* Judiciary Law § 90 (5)(b); 22 N.Y.C.R.R. § 1240.16 (c) (1)
45. *See* Judiciary Law § 90 (4) (a) (b), 22 N.Y.C.R.R. § 1240.12.
46. *See* 22 N.Y.C.R.R. § 1240.10.
47. *See* Judiciary Law § 90 (2); *In re Canino,* 10 A.D.3d 194 (2d Dep't 2004).
48. *See* 22 N.Y.C.R.R. § 1240.16.
49. *See* ABA Standards for Imposing Lawyer Sanctions (February 1986), 2.10 Readmission and reinstatement, Commentary, p. 24, cited in *In re Feldman,* 252 A.D.2d 733 (3d Dep't 1998).
50. *See* Judiciary Law § 468-a; 22 N.Y.C.R.R. pt. 118.
51. *See, e.g., In re Attorneys in Violation of Judiciary Law 468-a*, 113 A.D.3d 1020 (3d Dep't 2014).
52. *See* 22 N.Y.C.R.R. § 118.2 (g).
53. *Id.*
54. *See* 22 N.Y.C.R.R. § 1022.25.
55. *See* 22 N.Y.C.R.R. § 118.2 (g).
56. *See* 22 N.Y.C.R.R. § 1240.22. The Third Department has clarified that such an attorney must be current in his or her attorney registration obligations (*see, e.g., In re Hanson*, 146 A.D.3d 1229 (3d Dep't 2017).
57. *See* 22 N.Y.C.R.R. § 1240.22 (Appendix E).
58. *See* 22 N.Y.C.R.R. §§ 1240.14 (e), 1240.22 (Appendix F).
59. Usually by unpublished court order.
60. *See, e.g., In re Schunk*, 126 A.D.2d 772 (3d Dep't 1987).
61. *See, e.g., in re Canale*, 209 A.D.2d 816 (3d Dep't 1994).
62. *See e.g. In re Wheatley*, 15 A.D.3d 771 (3d Dep't 2005).
63. *See* 22 N.Y.C.R.R. § 1240.11.
64. *See* 22 N.Y.C.R.R. §§ 600.15 (a)(2), 670.22 (b)(6), 800.23 (c)(2).
65. See www.nycourts.gov.
66. *Id.*

NEW YORK STATE BAR ASSOCIATION

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NYSBA

Another Look at Mass Shootings, and How They Can Be Prevented

The New York State Bar Association (NYSBA) has always been at the forefront of issues that are critical to the welfare of our state and our country. This year, NYSBA will return to an issue that continues to be a scourge of our society – the prevalence of gun violence and mass shootings in the United States.

The newly formed Task Force on Mass Shootings and Assault Weapons will consider the connection between mental health and mass shootings; the relationship between domestic violence and mass shootings; and government oversight of assault weapons and accessories, consistent with constitutional protection of a person's right to possess guns, to prevent the plague of mass shootings devastating our country.

The task force will make appropriate recommendations aimed at decreasing the occurrence of mass shootings in our country. In particular, it will explore the potential effectiveness of enhanced waiting periods and enhanced background checks; uniformity of rules regarding purchases in stores and at gun shows; whether private sellers should be required to conduct background checks on the domestic violence registry; and federal and state regulation of assault weapons and related accessories such as large ammunition magazines, "bump stocks" and other devices.

NYSBA is certainly not alone in our efforts to tackle this national crisis. On February 22, 2018, New York Gov. Andrew Cuomo entered into a memorandum of understanding with New Jersey Gov. Philip D. Murphy, Connecticut Gov. Dannel P. Malloy and Rhode Island Gov. Gina M. Raimondo to form States for Gun Safety, a coalition to combat gun violence. This coalition will work to create a multi-state task force to trace and intercept illegal guns and enhance intelligence gathering, information sharing and efforts to prevent and respond to mass gun violence, and will establish a regional gun violence research consortium that will include researchers in various disciplines who will collect and analyze data and produce reports to support efforts to reduce gun violence. Shortly after the initial announcement, Massachusetts, Delaware and Puerto Rico also joined the States for Gun Safety coalition.

The coalition is working with the country's first Regional Gun Violence Research Consortium, which brings together thought leaders and researchers from the involved states to undertake groundbreaking research across multiple disciplines in order to address this crisis of mass shootings and the use of assault weapons occurring in our country.

To help understand these issues, it is useful to look at the facts about recent mass shooting incidents:

- In the October 1, 2017 shooting at a concert in Las Vegas, Nevada that left 58 people killed and 422 injured, the shooter had a cache of 24 legally purchased guns, mostly semi-automatic rifles, many of which were outfitted with bump-fire stocks that allow semi-automatic rifles to fire rapidly like automatic rifles. The bump-fire stocks, also known as bump stocks, are legal in many states.
- A November 5, 2017 shooting at the First Baptist Church in Sutherland Springs, Texas resulted in 26 people killed and 20 injured. The shooter, a former U.S. Air Force airman, had been court-martialed and jailed for assaulting his wife and son and should not have been allowed to buy the guns he used in the shooting. But his conviction was never entered into the FBI database. If it had been he would not have passed the background check and would not have been able to purchase the guns.
- In the February 14, 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida, the shooter was a troubled student with a history of depression who had been expelled the year before. Authorities released chilling cellphone videos taken before the incident by the shooter in which he said, among other things: "I'm going to be the next school shooter of 2018;" "My goal is at least 20 people, with an AR-15;" "It's going to be a big event. And when you see me on the news you'll all know who I am." He was shown laughing, and singing the words, "You're all going to die." Seventeen people were killed and 17 people were injured that day.
- On May 18, 2018, a mass shooting at Santa Fe High School in Santa Fe, Texas resulted in 10 people killed and 10 injured. The 17-year-old shooter was a student at the school, and police reportedly found journals on his computer and cellphone in which he talked about wanting to commit the shooting and kill himself as well (he was captured alive). He also reportedly had a social media history that included a T-shirt with the words "BORN TO Kill" on it and a jacket bearing Nazi and other symbols.

While these four tragedies have elements in common, they also indicate the many facets of the problem – and the huge challenges that we face in addressing it. Individuals with mental illness and a history of domestic violence have been allowed to obtain assault weapons that are then used to wreak devastation and death. Massive quantities of assault weapons, and accessories that make them even more deadly, are sold to individuals whose intent is not lawful, but deadly. Laws designed to prevent guns from falling into the hands of people who should not have them are not being effectively administered and enforced.

It is important to note that this is not the first time that NYSBA has studied the issue of gun violence. A Task Force on Gun Violence, formed in 2013, focused on public education about gun laws and the Second Amendment; and supporting federal efforts to collect and share data on gun violence, which had been stymied by Congressional actions. The 2015 report from the task force addressed a number of issues, including the absence of gun violence data, including why that information is missing, and proposed corrective actions to enable lawmakers and policy makers to make informed judgments about gun regulations.

Since that report was issued, NYSBA has worked to reverse restrictions on the collection of gun violence data. NYSBA in 2015 declared its support for President Obama's call for greater data collection on gun violence;[1] and on January 7, 2015, the association issued a memorandum in support of the repeal of the Dickey Amendment,[2] which, in effect, forced the Centers for Disease Control and Prevention to stop its research into firearm violence.

The Task Force on Mass Shootings and Assault Weapons will recommend concrete proposals, including model federal and state laws and regulations that will serve to diminish the frequency of mass shootings while protecting an individual's right to lawfully possess firearms. NYSBA members recognize that there will be no easy or simple solutions to this problem, but we remain committed to working to end the epidemic of gun violence that has touched so many lives in our country.

1. See the October 2, 2015 release: Association Joins Call for Congress to Reverse Restrictions on Gun Violence Data, http://www.nysba.org/CustomTemplates/PressReleaseList.aspx?id=58922.

2. Memorandum in Support, January 7, 2016 (calling for the repeal of the Dickey Amendment), http://www.nysba.org/workarea/DownloadAsset.aspx?id=61172.

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A Day in the Life of an Attorney: The Cybersecurity, Technology, and Crime Risks We Face

By John Bandler

Attorneys face cybercrime threats every day that jeopardize our practice, clients, and family. This is true for solo practitioners and members of large firms, representing individuals or multi-national conglomerates, and in all practice areas. Knowledge, awareness, and effort are required to protect from cybercrime and fraud threats.

Let's review a day in the life of Lex, our fictional lawyer, to illustrate the threats to our professional and personal lives, and see how crime, cybersecurity, information security, technology, and safety are related and enmeshed in our lives.

THE DAY BEGINS

It is midnight so the calendar day has officially begun, but Lex and his family are asleep. His home is quiet, as is the neighborhood. Lex is an attorney in a small firm, handling many legal issues for his clients.

Elsewhere, the worldwide cybercrime economy is hard at work across every time zone. Some cybercriminals are awake and at work on their schemes. Others have set in motion computer programs to perform malicious work without ever needing rest – so called "bots." These cybercriminals collectively control an army of computers throughout the world, many of them infected with malware and transformed into malicious tools without their owners' knowledge.

One program is trying to gain access and compromise the administrator portals of millions of websites, one of which is LexLaw.com. First it tries to log in as user "admin," with a password of "admin," but access is denied because this is not the website's username and password. It tries a different guess, is denied, and the process continues.

A different program attempts to log into email accounts, including Lex's work and personal email accounts. Lex's passwords are long and complex, and are unlikely to be guessed by this program. He also uses two-factor authentication, which means that guessing the password is not enough – the hacker would need possession of Lex's smartphone to get the one-time code from his email provider.

A third bot has been scanning the internet looking for connected devices. It finds Lex's home internet connection, starts to communicate with his router, and tries to gain access. It goes through a list of default usernames and passwords (including username "admin" and password "admin") but is unsuccessful and keeps trying. It runs through a sequence of hacking attacks but that doesn't work either. Recently, Lex updated his router's firmware to patch it against these vulnerabilities, and he also rebooted it according to the FBI's May 2018 advisory, a step which could help ensure it is not infected by malware.

Lex's children are sleeping, their smartphones and laptops are off and charging in the living room. The children are frequently tempted to check their devices, but know this is not allowed at night. However, some of their classmates are still awake and communicating with each other by social media, text, and email. Some messages are funny and harmless, but some are cruel or inappropriate, and all of them are sacrificing rest and relaxation.

Nearby, someone is trying to gain access to Lex's Wi-Fi network through password guessing, and is also attempting to access the network administrator portal. Whether this person merely wants to borrow Lex's internet connection or do something nefarious is unknown, but fortunately the Wi-Fi password is long and complex, and the router is patched.

LEX WAKES UP

At 6 a.m. Lex's alarm rings and he is up before the family. He logs into his computer and then checks LinkedIn, which prompts him to boost his contacts. That sounds like a great idea, so he clicks the button to accept the suggestion, is prompted for a password so he enters his LinkedIn password, but gets an error message. By now he realizes that LinkedIn wants the password to his email account, which fortunately is different from his LinkedIn password. It would have been unfortunate to give LinkedIn access to his email account and its contents, and for automatic invitations to have been sent all over.

Lex reviews an email he drafted last night, summarizing legal options for a client. After some final touches it is ready to send so he types the first few letters of the client's name into the "To" field, then hits enter for the autocomplete function to fill in the address. He is about to hit "Send" when he takes a last look and realizes he is about to send it to the wrong person! That would have been disastrous, so he corrects the email address, takes another look to confirm, and then sends it on its way. He wonders if this day will be a continual test of his information security knowledge and awareness.

Lex gets ready, says goodbye to his spouse and children, starts the drive to the office and then receives a call from Janet, his client in a pending real estate transaction. She is buying a home and wants to know if there are any updates on the closing. Lex tells her the recently scheduled date, and they discuss the details.

> **Lex**: Janet, remember what I told you when you first retained me. Any payment instructions will be confirmed with a phone conversation between us. Any changes to those payment instructions will also be confirmed by phone.

Janet laughs and says she remembers his earlier warning about this fraud risk, sometimes known as "business email compromise" or "CEO fraud." She promises not to rely on an email, since emails can be hacked or spoofed.

Lex had conducted this call while keeping his hands free and ensuring sufficient attention is devoted to the dangerous task of driving the car. After they hang up, Lex feels his smartphone vibrating and is tempted to check it, but resists. The constant demands of technology upon our attention and concentration are a challenge, but he soon reaches his destination and checks his text and email messages.

He is representing a client in a contract dispute where the settlement offer was accepted and the attorney for the opposing party has now emailed payment instructions. He asks that Lex's client wire the funds as soon as possible to the account provided, and indicates he is unavailable to talk by phone. Lex is about to forward the instructions to his client, but decides to wait and verify the instructions. Soon, he is in his office and calls opposing counsel.

> **Lex**: Hi Michael, Lex here. I got your email, I just wanted to confirm a few things.
>
> **Michael**: Hi Lex, what email?
>
> **Lex**: The email you sent me with the bank wiring instructions.
>
> **Michael**: Impossible, I didn't send that. I am still waiting to hear back from my client.
>
> **Lex**: You didn't send me an email 15 minutes ago?
>
> **Michael**: No, I didn't send anything.

Clearly, something is not right. Someone has impersonated Michael and knew a lot about this pending transaction. Fortunately, Lex knows what to do, and the two discuss their next steps. (You can learn this too, in an upcoming NYSBA *Journal* article.)

Lex is meeting a colleague at a local coffee shop, gets there first, grabs a table by the window and checks his phone. He

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is frustrated by the slowness of his cellular service and the shop offers free Wi-Fi, which Lex considers using. But then his imagination starts working; he wonders if another customer in the coffee shop might be a malicious hacker, and whether the coffee shop maintains their Wi-Fi network securely. Have they heeded the FBI advisory or patched their router? Lex knows that connecting to public Wi-Fi networks has risks, and decides that today it is not worth it.

Just then, he receives a text from Bill, who is on the way and asks that Lex get his coffee. Lex gets up, makes the purchase, and as he is returning to the table he panics. He realizes that he had left his cell phone on the table and his laptop in his bag under the table. As he walks back quickly he sees that his phone is no longer on the table, and his bag with the laptop is missing. His mind is racing because he is not sure if he locked the phone before he got up – maybe right now the thief is sifting through all of his emails and contacts? Then he looks to the side and sees Bill, staring at him with a mischievous smile while holding Lex's phone in one hand, and briefcase in the other.

> **Bill**: Hi there Lex, you look nervous! Don't you remember learning that the first principle of information security is maintaining physical security of your computers?

Bill is right; that was one of the many gems of knowledge contained in the book they both read, *Cybersecurity for the Home and Office: The Lawyer's Guide to Taking Charge of Your Own Information Security*." Bill absorbed all of the practical information in the book, and now re-reads it periodically to savor the mellifluous prose. (Remember, this article is a work of fiction, with occasional attempts at humor and shameless puffery.)

> **Lex**: Bill, you are right, but this has been a tough day for me. An hour ago, a fraudster tried to redirect a bank wire, and I almost forwarded those instructions to my client. Last night I had a dream about botnets and automated password attacks, and now you give me heart palpitations with this prank, after I bought your coffee.

Bill apologizes but Lex concedes it was a good lesson, and they both discuss the potential implications if Lex's smartphone or laptop were stolen. It affects all three of the main information security principles– confidentiality, integrity, and availability. What data could the thief have accessed? What if the thief could send emails from Lex's system, and alter data? How would Lex's access to his data be affected? They agree on the importance of keeping possession of one's devices, and locking them after use.

After they say goodbye, Lex gets a call from Sandra, who is in charge of training at his firm.

> **Sandra**: Hi Lex, how is your day going so far? Quick question. Is there a connection between attorney professional responsibility, cybersecurity, and technology?
>
> **Lex**: There certainly is! Think about the attorney duties of competence and confidentiality. See the NYS Rules of Professional Conduct and the ABA Model Rules, especially...
>
> **Sandra**: Do you know of any training that covers those?
>
> **Lex**: Yes, I saw a CLE on cybersecurity for lawyers. Protecting yourself, your clients, and your family from cybercrime, privacy, and fraud threats. It was fantastic. I got two ethics credits and knowledge which I am putting to use today.
>
> **Sandra**: Thanks. Send me the information and I'll check it out. Maybe we can do something for the firm. See you later.

Lex returns to the office until noon, then goes to his parents' house for their weekly lunch. As soon as he gets in the door he receives a text from a colleague about to send a letter but requesting a final review. Lex considers his options: His smartphone screen is tiny but his parents have a computer which is well maintained – thanks in part to Lex – so he decides it is safe enough to use for this purpose (unlike a computer in a library or hotel).

Lex launches the web browser in a "private" or "incognito" window so that the computer will not store too much information about his activity. He navigates to his law firm's web portal and enters his username and password, which is not enough to gain access because his firm has implemented multi-factor authentication. Lex is prompted for his one-time code, which he retrieves from his smartphone and types in. He has now proven to the system that he both *knows* his password and *possesses* his smartphone, providing two types of authentication, and the system grants him access. This greatly increases security over passwords alone, which can be guessed or stolen.

Lex accesses the document and reads it, then lets his colleague know that it is good. He "logs out" of his cloud account, then takes a quick look at his parents' computer to make sure it is running properly and safely. He runs a malware scan using reputable free software, and checks that the web browser is updated and not running any unnecessary plug-ins or extensions.

Lex's parents are not getting younger, and they face different cybersecurity and technology challenges compared to his children. It takes effort to ensure that his parents are able to use technology easily, safely, and while staying connected to friends, family, and the world. Pop-up messages, phishing emails, malware, scareware, and technical support scams make computing difficult for everyone, but are especially challenging for seniors. After lunch Lex returns to his office and starts going through his messages.

James, a potential client, has left a message to continue their discussion about his financial institution and the New York State Department of Financial Services regula-

tion called "Cybersecurity Requirements for Financial Services Companies." Lex calls him back and they talk.

James: Lex, thanks for calling, I've got you on speakerphone and with me is Anthony, my general counsel. What do I need to do to comply with this regulation?

Lex: We can help with that, but first we should evaluate your current information security program.

James: I'd rather not get sidetracked with that, because I need to comply with this cybersecurity regulation, and yesterday. I say yesterday in a literal sense, because I must sign a document saying that I complied with the regulation for the past year.

Lex: We should talk about that attestation later. But first we should see how your information security program aligns with what the regulation requires. The regulation is really about information security, not just cybersecurity.

Anthony: Lex, let me interject because I don't agree. The regulation title says cybersecurity, and the text mentions cybersecurity throughout! Let me count it, 1, 2, 3 . . . [counting continues] . . . 73, 74, 75! Seventy-five mentions of "cybersecurity" and hardly a mention of "information security," except once in passing, and when spelling out "CISO." If New York State wanted to issue an information security regulation, that's what they would have called it, so we have to go by their original intent.

James: Exactly. Besides, is "information security" really important? All I hear about in the news is "cybersecurity" and "cyber," so I think we should focus on that.

Lex explains that the rule addresses all aspects of information security, which encompasses cybersecurity, making the case that it is an information security regulation. Lex speculates why the term "cybersecurity" was used so much in the title and text of the regulation, and suggests that they think holistically under the ambit of "Cybersecurity and Information Security."

James: That's very persuasive. Can you give us a quick and free information security lesson?

Lex: Of course. For starters, think "CIA": confidentiality, integrity, and availability. Keep your data and systems *confidential* and from being hacked or stolen. Ensure they maintain *integrity*, that no one can alter or change information without authorization. And keep them *available*, so that operations can continue and are not subject to outages or disruption. That includes backing up your data.

James: Wow, how did you learn all of that?

Lex: I read a marvelous book about cybersecurity, and it helped me take charge of my information security and help my clients. I can come by, give you a copy, and we can get started on your issues. Are you free at nine tomorrow morning?

James: Sounds good, see you then.

Lex reviews a number of email messages from strangers who are requesting legal representation, each willing to pay lucrative legal fees in exchange for what seems to be some very simple legal work, including:

- Finalizing the settlement documents of a nearly completed deal, receiving the settlement funds and then forwarding them – after keeping a hefty fee – to the client.
- Finalize contract documents for the purchase of equipment, receive the payment, keep a large fee, then forward the remainder to the seller.
- Help several different foreign residents (one of whom is a Nigerian prince) secretly transfer funds out of their respective countries.

Lex spots the indicators of fraudulent schemes – criminals trying to recruit him to receive stolen funds, to act as an unwitting money launderer or "money mule." He marks these as spam and deletes them. Then Sandra arrives at his office door.

Pop-up messages, phishing emails, malware, scareware, and technical support scams make computing difficult for everyone, but are especially challenging for seniors.

Sandra: Hi Lex, how has your day been? Can you tell me what you think about this cybersecurity training outline for the firm?

- User knowledge and awareness.
- Information security basics: CIA.
- Device security: Don't lose them, use passwords, and check settings.
- Cloud data security: Use strong passwords and two-factor authentication.
- Back up data and test the backups.
- Business Email Compromise prevention through verbal confirmation of any funds transfer instruction.

Lex: I think you nailed it, perhaps add a section on network security and I will think some more on it. We should buy a dozen copies of this book to give out [*gesturing*], and we should set a date and start fleshing it out.

By now it is time to leave. Lex shuts down his desktop computer, scans his desk and office for any sensitive documents that need to be put away, then makes his way out of the office, saying his goodbyes. The receptionist has left for the day, so the front door has been locked, and Lex makes sure it locks behind him. Information security – and the safety of the firm's employees – requires good physical security.

It has been a busy day, but Lex feels glad that he has protected himself, his firm, clients, and family from many threats, and looks forward to a relaxing evening at home.

To Dropbox or Not to Dropbox?

Cloud-based Access to Documents

By Paul J. Unger

We all love Dropbox. It is incredibly easy and it integrates with almost everything. My reservation with Dropbox is not security per se. It is actually encrypted in transit (upload and download) and at rest. My reservation is that Dropbox (as is true with Box, GoogleDocs, OneDrive) holds the encryption key, so if they are served a court order, they could produce the documents without your involvement.

The bottom line is that you probably shouldn't be storing trade secrets, intellectual property, damaging information/communication, information subject to a protective order unless you apply your own encryption to those files within Dropbox. You could natively encrypt those files using Microsoft's built-in tools or your PDF solution's built-in tools, or with a tool like Sookasa or Boxcryptor, but that could get cumbersome.

Perhaps a better solution would be something like Tresorit (www.tresorit.com). It works like Dropbox, Box, GoogleDocs, OneDrive, but they don't hold your encryption key . . . you do. They call it zero-knowledge authentication, and they are really gaining traction in the legal and medical industries. The cost is about $20 per user per month for 1 terabyte of storage, and they also offer a secure way of sending attachments.

Kicking it up a notch would be a full document management system (DMS) that is cloud-based, like NetDocuments (www.netdocuments.com). I recommend this option if it is in your budget. NetDocs offers encryption in transit and at rest and unparalleled security. It also gives you the ability to share documents with clients via a feature they call ShareSpaces, or send documents as secure links . . . directly from their solution, without having to subscribe to a third-party solution. Further, they have free apps for the iPhone, iPad and Android mobile devices.

The benefit with something like NetDocs is that you keep everything centralized in one secure location. They do require a minimum of five users, so it may not be ideal for the solo firm with one assistant. NetDocs pricing is approximately $40 per user per month, but it gives you a search engine, version control, tight integration with Word, Excel, PowerPoint, Outlook, Acrobat, Nuance PowerPDF, etc., really strong email management, document and area security, and ultimate mobility. NetDocs is appropriate for very small firms, all the way up to large enterprises with thousands of users.

Document management today is as much about email management as it is the storage and retrieval of Word documents and PDFs. This is why the best long-term solution for this problem for lawyers is probably a full document management system. Programs like NetDocuments, Worldox and iManage are incredible tools designed to help manage the saving of client emails in a central secure location where everyone has access to the emails. Having emails stuck in users' inboxes where no one else can see them is *not* a good situation.

Worldox (www.worldox.com) is announcing and showcasing some exciting new email management tools for their solution at their user conference at the end of May. It will be exciting to see what they have in store. Worldox has been a legal industry standard for 30 years.

In conclusion, Dropbox is a fine, easy, cheap solution, but you better be cautious about saving confidential information. I wouldn't do it without adding my own encryption key. The best solution is a full blown document management system, and a happy secure band-aid or middle ground is a solution like Tresorit.

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.

No, @NYSBA Cannot Disbar Aaron Schlossberg

By Christian Nolan

All it took was one tweet from a New York columnist with 977,000 followers and the New York State Bar Association was in the eye of a social media firestorm.

Shaun King's tweet asking NYSBA to get involved was in response to the viral video that surfaced online May 16 of New York City lawyer Aaron Schlossberg's racist tirade directed at Spanish-speaking employees and customers at a Fresh Kitchen restaurant.

New York City lawyer Aaron Schlossberg's tirade in a Fresh Kitchen restaurant sparked outrage.

"Your staff is speaking Spanish to customers when they should be speaking English," Schlossberg said. "It's America."

He then threatened to call Immigration and Customs Enforcement "to have each one of them kicked out of my country."

NYSBA's Twitter account, @NYSBA, was flooded with tweets, some polite, others not-so-polite, urging the Association to discipline or disbar Schlossberg.

"@NYSBA Disbar Aaron M Schlossberg for being a racist bigot!"

"@NYSBA Is this what you tolerate, encourage or condone from a member of your bar association?"

"Alright everyone. Contact the @NYSBA and let's make sure he no longer works in law."

In just a few days, NYSBA received 608,000 views of its tweets. In a normal week it's somewhere above 35,000.

Schlossberg's tirade also received national media attention. And with that came inquiries asking if he was a member (he's not) and if NYSBA planned to discipline him.

Thinking NYSBA handles attorney discipline is a common mistake made by the general public and the news media alike, especially since some states' bar associations do, indeed, handle attorney discipline. The Association provided a written response that is also on its website, explaining how the process works.

"The New York State Bar Association is a voluntary membership bar association, and attorneys are not required to belong to NYSBA in order to practice in New York. NYSBA has no statutory or regulatory role relating to the certification or discipline of attorneys in New York State."

In certain other states, state bar associations handle attorney certification and ethics and disciplinary matters. Under New York law, these matters are handled by the New York State Unified Court System and the Office of Court Administration (www.courts.state.ny.us). Complaints against attorneys are investigated by grievance committees appointed by the Appellate Division of State Supreme Court. Information about the grievance process and contact information for the grievance committees is available at www.nycourts.gov/attorneys/grievance.

NYSBA responded to the flood of Schlossberg-related tweets with a shortened version of the disclaimer and a link. Most people were pleased with the quick response educating them on the process.

"Thank you for your prompt reply. It's always nice to see organizations help and educate the general public. Your assistance is much appreciated."

"Massive thanks for the clarity!"

"Dear @NYSBA – bravo! As a Hispanic, your prompt answer confirms our faith in the system. Thanks a lot."

In the aftermath, @NYSBA gained 200 new followers, 64 new Facebook likes and 50 new Instagram followers. Unable to please everyone, NYSBA's Facebook rating went from 4.1 to 3.8.

As far as Schlossberg goes, grievances have already been filed with the state court system, he's been evicted from his law office and a mariachi band serenaded him outside his home and office May 18 in the presence of over 100 protesters. He has since apologized on Twitter.

Nolan is NYSBA's Senior Writer.

Goshen Central High School Wins NYS Mock Trial Tournament

By Joan Fucillo

In an intense competition before a packed courtroom in the James T. Foley Federal Courthouse in downtown Albany, students from Goshen Central High School, Orange County, edged out the team from Brooklyn Technical High School, Kings County, to win the 2017-2018 New York State High School Mock Trial Tournament. It was Goshen High School's fourth year in the semi-finals, and its first time in the finals.

Over the course of the two-day tournament, eight teams, representing the eight regional winners from throughout the state, argued the fictional criminal case of *People v. Carson Conners.* Conners, an at-risk student at Bigtown High School, reportedly pushed another student, loudly refused to go to the Assistant Principal's office when told to do so, and was subsequently arrested and charged with disorderly conduct.

Conners was suspended from school, but rather than settle the case chose to go to trial. The defense believes that the school's disciplinary policy amounts to a "school to prison pipeline" that targets disruptive students by criminalizing even minor infractions, in this case to keep Conners from participating in an upcoming high-stakes districtwide assessment test.

Hon. Mae D'Agostino, U.S. District Judge for the Northern District of New York, presided over the final round of competition on Tuesday, May 15. Before announcing the winner, Judge D'Agostino spoke of the difficulty in deciding the outcome, saying that mere "millimeters" separated the two teams. She told the six student-attorneys in the final round that "any one of you today could walk into a courtroom downstairs and get to work." Then D'Agostino said, "Know that you were extraordinary in every way."

The six other semifinalists were teams from Clarence High School, Erie County; Fayetteville-Manlius High School, Onondaga County; Notre Dame-Bishop Gibbons High School, Schenectady County; Hunter College High School, New York County; Massapequa High School, Nassau County; and Huntington High School, Suffolk County. All together, about 150 students participated in Monday's semi-finals, with the two winners facing each other on Tuesday morning.

NYSBA President Sharon Stern Gerstman attended Monday evening's dinner after the semi-finals and spoke about her experience as an attorney-coach, coordinator of the Buffalo competition and Mock Trial judge. She told the audience that many of the students she coached "were so good, I remember thinking they were better than some of the lawyers I saw at the courthouse, where I worked."

Acting Supreme Court Justice Gerald Lebovits, a judge in Monday's semi-finals, praised the students' seriousness and their "high level of skill and professionalism, on par with many lawyers." Each team came, he said, with a cadre of volunteers – parents, teachers, coaches and attorneys – noting the striking level of community support.

The members of Goshen's winning team were Fattum Abbad, Nazya Ahmed, Jessica Bailey, Rachel Blustein, Arrington Brendle, Kareena Chhabra, Zachary Constantine, Giannamarie Diaz, Michael Ehling, Liam Higgins, Sara Higgins, Caitlin Hough, Aleena Jacob, Sydney Jessup, Jay Jung, Olivia Klugman, Ava Kunis, Magdalen Larsen, James Lindeman, Anya Malhotra, Domenico Pasquini, Ashley Rivera, Robbie Siracuse and Robert Winslow. The team's attorney coach was Mark Stern and the faculty coach was Robert Karshawer.

The mock trial case and accompanying materials are developed over the summer, and the Mock Trial County Coordinators distribute the case packets in November. Four hundred high schools, 4,000 students and their teacher-coaches and 1,500 volunteer lawyers participated in the 2017-2018 Tournament, and hundreds of judges volunteered their time. County bars help recruit volunteers and local bar foundations lend support.

The New York State High School Mock Trial Tournament – one of the largest in the country – has been administered by the Law, Youth and Citizenship Committee of the New York State Bar Association since 1982. It is supported by The New York Bar Foundation.

Fucillo is NYSBA's senior messaging and communications specialist.

7 questions and a closing argument

Member Spotlight with Colleen M. Grady

Grady is a partner at Alvarez & Diaz-Silveira LLP, Miami, Florida. She lives in Fort Lauderdale.

What do you find most challenging about being an attorney?

I have always struggled with the ebbs and flows of work that are common in my practice as a corporate transactional attorney. I would worry when I had downtime and think that my incredibly busy times would never end. It has taken me many years to appreciate the cyclical nature of my legal practice, and I now take advantage of the slower times to go on an impromptu trip or catch up on my personal life, without worrying so much about when the next deal would come.

What or who inspired you to become a lawyer?

Matlock, the TV series. This may sound strange as the only time I have seen the inside of a courtroom was for my work as a volunteer guardian ad litem! Growing up, I didn't know any lawyers and had no personal contact with the legal profession. After teaching elementary school for a few years, I began looking for an alternative career and remembered how exciting and interesting Matlock made his job seem. Once I was in law school, I loved my contracts class and the professor who taught it and ended up focusing on business law.

If you hadn't become an attorney, what career path would you have pursued and why?

I have Bachelor's and Master's degrees in education and taught 4th grade before going to law school. I left the practice of law mid-career to raise my children and ended up teaching 4th grade again for a year before getting a full-time position at a law school in South Florida. I think that much of my legal practice uses many of those same teaching skills. Although I enjoyed teaching, I genuinely missed the practice of law and was anxious to return to it.

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

I have three sons whom I adopted from orphanages in Ukraine. They were 7, 8 and 9 years old at the time and are now 22, 23 and 25. One works for a major museum in New York City, another for a minor league baseball team in Tennessee and the third is a sous chef in Santa Barbara, California. They have filled my life with more love and pride than I ever imagined possible.

What is your passion outside of work and the law?

I enjoy artistic pursuits. I create multimedia collages using acrylic paint, quotes, magazine cut-outs and other "found" objects. I appreciate the process and the final product (usually!) and find it a great source of relaxation.

What kind of music do you listen to or who is your favorite musician?

I have a keen interest in country music, mainly from the 1990s through the current wave of newer musicians. I like the story lines of the songs, the variety and the easy listening nature of it. Nashville is one my favorite spots because of all the live options to hear this genre. I have a long commute to and from my office and country music helps me set the tone for the day and wind down on my way home.

What is your dream vacation?

I travel a great deal domestically and internationally for work so I often look forward to time by the pool with a good book and a refreshing libation. Living in South Florida gives me many opportunities to enjoy this style of vacation without traveling more than a few hours.

Closing argument: Why should lawyers join the New York State Bar Association?

Lawyers should join the New York State Bar Association because the association provides unique opportunities to connect with other attorneys in your area of practice as well as with those that practice in entirely different fields. This creates great networking and referral opportunities. For an out-of-state attorney, NYSBA provides law updates and online communities that help us keep current and connected even if we are not in an office full of New York–admitted lawyers. It is an invaluable professional resource.

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Burden Back Where It Belongs, but Barely (Part III)

Last month's column explored the majority and dissenting opinions in the April 3, 2018 decision of the Court of Appeals in *Rodriguez v. City of New York*,[1] and promised this month to explore the impact of *Rodriguez* on summary judgment practice. In *Rodriguez,* the Court held that "to obtain partial summary judgment in a comparative negligence case, [] plaintiffs [do not bear the burden to] establish the absence of their own comparative negligence."[2]

Assume you represent the plaintiff in a negligence action where defendant has raised an affirmative defense of comparative negligence. *Rodriguez's* impact on your case will depend on the stage of the case.

WHERE NO MOTION HAS BEEN MADE

For active cases where there has not been a motion for summary judgment, you can now move for summary judgment free from the burden of establishing you client's freedom from comparative fault. There have certainly been cases, post-*Thoma v. Ronai*, where plaintiffs' counsel have evaluated a case's legal terrain and elected not to move for summary judgment based upon the likelihood that freedom from comparative judgment could not be established as a matter of law.

What if the time to move for summary judgment has already run? CPLR 3212(a) provides:

> Rule 3212. Motion for summary judgment
>
> (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.[3]

A change in the law should provide the "good cause shown" basis for seeking leave of court to move after the expiration of the summary judgment in compliance with *Brill v. City of New York*.[4] In 2008, Justice Donna Mills in *Wessler v. New York City Transit Authority*[5] *permitted a motion for summary judgment made more than one year after the filing of the note of issue because of a change in the law:*

> Pursuant to CPLR 3212 (a), a motion for summary judgment may not be made later than 120 days after the filing of the notice issue, except with leave of court on good cause shown. In *Brill v City of New York,* (citation omitted), the Court of Appeals held that "good cause 'in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness –rather than simply permitting meritorious, non-prejudicial filings, however tardy." Although this motion is made beyond 120 days after the note of issue was filed, the court is satisfied that there is good cause for the delay based on the aforementioned change of law (citations omitted).[6]

WHERE A MOTION HAS BEEN MADE

For cases where you have already moved for summary judgment, your next step depends on the stage or outcome of the motion. Obviously, where you prevailed on the motion in the face of a defense of comparative negligence, there should be no appeal by defendant based upon the failure to deny summary judgment based upon your client's comparative fault, and a defendant with a pending appeal who refuses to withdraw the appeal risks a sanction under Rule 130.

WHERE THE SUMMARY JUDGMENT MOTION IS STILL PENDING

One scenario, decreasing as time goes on, is that you have a pending motion for summary judgment. If you have not yet submitted a reply, your reply affirmation would be a proper vehicle to bring the change of law to the court's attention (your adversary will have argued in opposition that your failure to prove freedom from comparative fault mandates denial of the motion, and your reply will cite *Rodriguez* in response to that argument). If your reply has been submitted, but no oral argument has

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been held (and oral argument will be held), a letter to the court (copied to all parties) explaining the change in law and advising the court of your intention to cite the new law at oral argument is one option. Alternatively, a letter request to submit supplemental briefing (and permit your adversary to do the same) can be made.

If oral argument has been held, or will not be permitted, the motion is fully submitted. One approach would be to write the court and request the opportunity to submit additional briefings to expand the record. One authority to cite in support of this approach is CPLR 104:

> § 104. Construction
>
> The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.[7]

Another is CPLR 2004:

> § 2004. Extensions of time generally
>
> Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.[8]

WHERE THE SUMMARY JUDGMENT MOTION HAS BEEN DECIDED (AND YOU LOST)

Where you lost the motion because you failed to satisfy the trial court of your client's freedom from comparative fault, and final judgment has not been entered, trial level motions to renew and/or reargue, an appeal to the appellate division, or a motion to reargue in the appellate division are options. Which you elect will depend, in part, on how recently (if at all) the adverse order was served with notice of entry.

If less than 30 days has elapsed,[9] CPLR 2221(f) permits a joint motion to reargue and to renew can be made:

> (f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.[10]

However, the proper vehicle to have a trial court reconsider its prior ruling based upon a change in the law is a motion to renew pursuant to CPLR 2221(e):

> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.[11]

Unlike a motion to reargue, a motion to renew has no statutory time limit. Satisfying the requisites is straightforward. The new facts not offered on the prior motion? The change in the law. The justification? The change occurred after the motion was decided.

While a trial court has discretion to grant or deny both a motion to reargue and a motion to renew, an order denying reargument is not appealable,[12] whereas denying renewal is, provided the moving party has presented "additional material facts which existed at the time the prior motion was made but were not then known to the party seeking leave to renew" (citation omitted).[13] Accordingly, an appeal taken from a motion to renew based upon a change in the law will have, in the record on appeal, the legal arguments relating to the change in the law.

However, a motion to renew "is not the proper procedural vehicle to address a final judgment and Supreme Court properly treated plaintiff's motion as a motion pursuant to CPLR 5015 to be relieved from the prior order of dismissal and its resulting judgment" (citation omitted).[14]

CONCLUSION

As a practical matter, as a result of motions being made that otherwise would not have been pre-*Rodriguez*, coupled with a spate of renewal motions based on the change in the law, there will likely be an uptick in the number of summary judgment motions made by plaintiffs. While this will tax judicial resources, increased grants of summary judgment under *Rodriquez* should result in a concomitant reduction in the use of judicial resources at the end-stage of cases.

Next month will complete this *Rodriguez* exposition with a review of appellate issues.

School is out, summer has arrived, and I hope you are reading this on your front porch, terrace, or in a park. Have a wonderful July 4th, and try to spend a little less time at the office.

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1. 2018 N.Y. Slip Op. 02287 (2018).
2. *Id.*
3. CPLR 3212(a).
4. 2 N.Y.3d 648 (2004).
5. 2008 N.Y. Slip Op. 30764(U) (Sup. Ct., N. Y. Co. 2008).
6. *Id.*
7. CPLR 104.
8. CPLR 2004.
9. CPLR 2221(d)(3) requires that a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals."
10. CPLR 2221(f).
11. CPLR 2221 (e).
12. *Schenkers Intl. Forwarders, Inc. v. Meyer*, 164 A.D.2d 541 (1st Dep't 1991), *app. denied*, 78 N.Y.2d 852 (1991).
13. *Smith v. Smith*, 97 A.D.2d 932, 933 (3d Dep't 1983).
14. *Maddux v. Schur*, 53 A.D.3d 738 (3d Dep't 2008).

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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LITIGATION FINANCING AND ATTORNEY ETHICAL PITFALLS: PART 2

We begin this month's *Forum* by finishing our answer to Richie Referral's June *Forum* question about litigation financing. *See* Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann & Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2018, Vol. 90, No. 5.

CONFIDENTIALITY CONSIDERATIONS WHEN REFERRING CLIENTS TO LITIGATION FINANCING ENTITIES

What happens to attorney-client privilege when lawyers refer a client or potential client to a litigation financing firm? Lawyers must take special care to not run afoul of their confidentiality obligations under New York Rule of Professional Conduct (RPC) 1.6 by disclosing any client confidences without the informed consent of the client. *See* New York State Bar Association (NYSBA) Committee on Professional Ethics, Op. 666 (1994); NYSBA Comm. on Prof'l Ethics, Op. 769 (2003); NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018).

As part of the decision to invest in a case, the financing firm will likely require the lawyer or the client to disclose certain information to evaluate the matter. *See* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *Report on the Ethical Implications of Third-Party Litigation Funding*, April 16, 2013 at 7. In making these disclosures to the litigation financing firm, clients should be warned that communications with an outside financing source may result in a waiver of the attorney-client privilege. *See id.* The risk of waiver of the attorney-client privilege is significant and some out-of-state courts have ordered the production of communications and documents shared with potential litigation investors, finding that the attorney-client privilege was waived with regard to the documents and communications shared. *See* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *supra*, at 6–8 (citing *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010) (The court held that the plaintiff waived the attorney-client privilege and work-product protection with regard to documents shared with potential TPLF entities. The court also found that since the TPLF firms' interests in the litigation were commercial in nature, the common interest privilege did not apply.); *see also Miller UK Ltd. v. Caterpillar, Inc.,* 17 F. Supp. 3d 711 (N.D. Ill. 2014) (The court held that documents shared with TPLF firms lost their attorney-client privilege protections because the common interest privilege did not apply. The court found that the work-product protection had not been waived, finding that the lawyers' conclusions, opinions and legal theories were not discoverable even if disclosed to potential funders.); *Acceleration Bay v. Activision Blizzard*, 2018 WL 798731 (D. Del. 2018) (The court held that both the work-product protection and attorney-client privileges were waived and the common interest doctrine did not apply.); *but see Devon It, Inc. v. IBM Corp.*, No. CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012) (The court held that the documents turned over to a TPLF investor pursuant to a "Confidentiality, Common Interest, and Non-Disclosure Agreement" did not result in a waiver of the attorney-client or work-product privileges.).

The common-interest doctrine is an exception to the general rule that the sharing of information with a third party destroys the attorney-client privilege. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.,* 27 N.Y.3d 616, 628 (2016). The N.Y. Court of Appeals in *Ambac* held, "an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication, the communication is made in furtherance of that common legal interest, and any such communication relates to litigation, either pending or anticipated." *Id.* at 620. The Court in *Ambac* reasoned that, "When two or more parties are engaged in or reasonably

anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited. The same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation." *Id.* at 38. After the significant *Ambac* decision was issued, attorneys have been warning clients to exercise great caution when sharing privileged communications and work product with third parties or their attorneys in a commercial transaction, if no litigation is pending or anticipated. *See* Maryann C. Stallone, Amanda M. Leone & Richard W. Trotter, *The* Ambac *Decision and the Future of the Common Interest Privilege Under New York Law,* NYLitigator, Spring 2017, Vol. 11, No. 1.

Plaintiffs in the TPLF context have attempted to argue, with mixed results, that financing firms and plaintiffs should indeed have a common legal interest: success in the underlying litigation. When considering whether to apply the common interest doctrine, many courts have required that the parties have a common legal, rather than commercial, interest and "the disclosures are made in the course of formulating a common legal strategy." Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?,* 63 DePaul L. Rev. 305, 343 (2014) (citations omitted). We are not aware of post-*Ambac* New York cases addressing the common interest doctrine in the context of litigation financing. It will certainly be interesting how the issue is ultimately resolved and whether the courts find that the relationship between a TPLF entity and a potential plaintiff more closely resembles a commercial transaction or a common legal interest in anticipation of litigation.

The New Jersey Advisory Commission on Professional Ethics has opined that when dealing with a factor concerning a possible financial advance against an anticipated personal injury judgment or settlement, an attorney "must ensure that the client fully understands the risks of disclosure of such information, including the possible loss of the attorney-client privilege, before securing the client's authorization to disclose information the financial institution may require in order to assess the risk of the transaction. Upon securing such authorization, the attorney should still endeavor to limit, to the extent possible, the amount of information provided to the institution." *See* NJ Advisory Comm. on Prof'l Ethics, Op. 691 (2001). This NJ Advisory Comm. on Prof'l Ethics opinion also suggests that an attorney should limit the information disclosed only to that which is discoverable by an adversary in order to limit any risk of waiver of the attorney-client privilege. *See id.; see also* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *supra*, at 9.

Based upon the foregoing, we suggest utmost caution when disclosing any information to an outside funding source and that clients be apprised of the potential risks.

THE JULY-AUGUST FORUM

To the Forum:

A commercial client recently approached me about New York's adoption of the Compassionate Care Act (CCA) which permits the possession, use and distribution of medical marijuana in New York in certain circumstances. I have worked extensively on Department of Health legal issues and other aspects of the medical industry in the past, but I have no experience with the legalization of marijuana. After I started looking into the New York law for my client, I thought about a recent news article discussing how the federal marijuana laws conflicted with various state laws. It suddenly dawned on me: Am I assisting an illegal drug operation?

I certainly don't want to break any laws or risk losing my license to practice law. Even an *allegation* of being complicit in an illegal drug operation would be disastrous for my career. I also don't want to assist my client in breaking any laws. I feel very strongly, however, that an inconsistency between state and federal laws is a minefield for my client to navigate even with legal representation. This is a relatively new law with little precedent and guidance for its enforcement. At the same time, due to its politically charged and divisive subject matter, I imagine that there will be strict enforcement of the statute. I can't imagine telling any client that as a New York lawyer, I am prohibited from giving him any advice about complying with a New York law!

Am I violating any rules of professional conduct by providing legal advice to my client on the CCA? Are there any limitations on what aspects of a marijuana business I can advise my client? If the policies for federal enforcement of marijuana laws change, will my ability to advise clients on the CCA also change? If my client starts to pay my legal fees from income derived from a marijuana business, am I permitted to accept those fees? Are there any other pitfalls I should be considering when advising a client on a marijuana business?

Sincerely,
Cheech N. Chong

DEAR CHEECH N. CHONG:

There is no doubt that advising clients on any issues associated with the sale, cultivation or distribution of marijuana is an ethical minefield. This is made especially difficult when the enforcement of marijuana laws can quickly and drastically change based on the policies of new presidential administrations.

We begin with RPC 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." We discussed this rule briefly in prior *Forums* in the context of clients who were arguably being deceitful. *See* Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9; Vincent J. Syracuse & Maryann C. Stallone, *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2015, Vol. 87, No. 6. The sale of marijuana, however, is in a whole other league due to evolving public opinion on whether marijuana should be legal and changes in the federal enforcement of marijuana laws.

Many states have modified their versions of RPC 1.2 to address the discrepancies between state and federal marijuana laws to permit attorneys to provide some form of legal advice to their clients. *See* Reinhart, Bruce E., *Dazed & Confused*, Criminal Justice, Winter 2017, Vol. 31, No. 4, at 5. The modified rules of professional conduct in those states generally allow lawyers to advise and/or assist clients where the lawyer reasonably believes the conduct is lawful under state law as long as the lawyer also advises on the related federal law and policy. *See id.* Oregon's Rule of Professional Conduct 1.2(d), for example, specifically includes a reference to marijuana: "[A] lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy." *See id.* In other states, such as Ohio and Washington, bar associations have issued similar advisory opinions opining that lawyers can provide legal advice on the marijuana industry as long as they also advise the client about the federal law and policy. *See id.*, citing Ohio Bd. of Prof'l Conduct, Op. 2016-6 (2016); Wash. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 201501 (2015). Prior to these advisory opinions, the New York State Bar Association Committee on Professional Ethics issued its own advisory opinion that is highly relevant to your inquiry. *See* NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014).

In 2014, New York adopted the CCA, which "regulates the cultivation, distribution, prescription and use of marijuana for medical purposes." *See id.* Although the CCA had already been adopted by 22 other states when it was enacted in New York, the statute conflicted with federal law that prohibits the possession, distribution, sale or use of marijuana and does not provide an exception for medical use. *See id.* The Committee was faced with an inquiry as to whether the RPC permitted lawyers to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others to aid in their compliance with the CCA and the federal enforcement policy. *See id.* One of the key factors that the Committee relied upon in reaching its ultimate conclusion was the U.S. Department of Justice's (DOJ) policy restricting the federal enforcement of marijuana laws. *See id.* The Committee cited to the U.S. Deputy Attorney General's August 29, 2013 memorandum titled, "Guidance Regarding Marijuana Enforcement" ("2013 DOJ Memo"). *See id.* The 2013 DOJ Memo directed its attorneys and federal law enforcement to focus their resources and efforts on issues such as preventing distribution of marijuana to minors, criminal enterprises accumulating revenue through marijuana sales, and the use of marijuana activity as a cover for the trafficking of other drugs. *See id.* The 2013 DOJ Memo further noted that these priorities are less likely to be a threat in jurisdictions with laws legalizing medical marijuana and strict enforcement systems in place. *See id.* The Committee apparently read the 2013 DOJ Memo to say that the federal government would not enforce federal criminal marijuana laws with regard to otherwise legal medical marijuana activities carried out in accordance with strict state regulatory laws such as the CCA. *See id.*

In reliance on the 2013 DOJ Memo, the Committee opined that the RPC permitted "a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana." *See id.* The Committee noted that the federal policy articulated in the 2013 DOJ Memo actually "depends on the availability of lawyers to establish and promote compliance" with the states' regulatory and enforcement systems and cautioned that "[i]f federal enforcement were to change materially, [its] Opinion might need to be reconsidered." In concurring with this opinion, Professor Simon agreed with the Committee's comment that this was a "highly unusual if not unique" question and this opinion "should have little impact outside the narrow context of medical marijuana laws." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 115 (2016 ed.). This guidance offered to us by the Committee may now have gone up in smoke because of a recent DOJ opinion.

On January 4, 2018, the U.S. Attorney General issued a memo ("2018 DOJ Memo") rescinding the 2013 DOJ Memo and noting the federal prohibition for the cultivation, distribution and possession of marijuana, and the significant penalties for those crimes. *See* Jefferson B. Sessions, Att'y Gen., *Memorandum for All United States Attorneys: Marijuana Enforcement* (Jan. 4, 2018). This rescission severely undermined the basis for the Committee's 2014 advisory opinion. Through a March 2018 budget rider, however, Congress effectively continued to bar the DOJ from enforcing any federal laws against the use, distribution, possession or cultivation of medical marijuana in New York through September 23, 2018 when the rider expires. *See* Robert A. Mikos, *Congress Renews DOJ Spending Rider*, Marijuana Law, Policy, and Authority (March 28, 2018) https://my.vanderbilt.edu/marijuanalaw/2018/03/congresss-renews-doj-spending-rider/.

Now what do we do? Based on the 2018 DOJ Memo, and the current language of the RPC, we recommend using caution when advising clients on any aspect of a marijuana business. Pursuant to RPC 1.2(d), lawyers are permitted to advise a client about the reach of the CCA and whether undertaking certain activities would be a violation of federal laws. *See* RPC 1.2(d); RPC 1.2(d) Comment [9] (The prohibition in RPC 9.2 "does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct."); NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014). *Encouraging or assisting* the client in conduct that violates federal law in light of the 2018 DOJ Memo, could be viewed as a violation of RPC 1.2(d). *See id.* Under the supremacy clause of the U.S. Constitution, federal laws supersede contrary state marijuana laws, including the CCA, and possessing, growing, distributing, and prescribing marijuana is currently illegal throughout the United States. *See* Reinhart, Bruce E., *Dazed & Confused*, Criminal Justice, Winter 2017, Vol. 31, No. 4, at 4. In addition to risking a violation of the RPC, there are criminal risks that may apply if you assist your client with a marijuana business. *See id.* at 9. In addition, attorney malpractice policies usually have exclusions for criminal acts and carriers may attempt to deny coverage for any claims of improper legal advice to marijuana businesses. *See id.*

The fact that numerous states have passed legislation for the legalization of marijuana and that it has grown into a multi-billion dollar industry nationwide cannot be ignored. That being said, the DOJ has signaled a greater willingness to allow enforcement of federal marijuana laws to begin, even as against state-approved marijuana businesses, but this could only occur if the Congressional budget rider prohibiting such enforcement were allowed to expire. Implementation of the CCA is a long and complicated process that began when the federal government essentially permitted states to enact their own medical marijuana laws. New York's current governor not only supports the CCA, but has also supported a study for the legalization of recreational marijuana even after the issuance of the 2018 DOJ Memo. *See* Mort, Geoffrey A. & Desiree Gustafson, *New York's Medical Marijuana Law Comes of Age*, N.Y.L.J., April 3, 2018. To further complicate matters, as we were going to press, bipartisan legislation was introduced in both houses of Congress that would effectively hand to the states, U.S. territories and federally recognized tribes the right to regulate the manufacture, production, possession, distribution, dispensation, administration, and delivery of marijuana in all those places that so choose to regulate marijuana. If such legislation becomes law, the risk to legal practitioners advising state compliant marijuana businesses would be effectively mooted. Until such legislation passes or the RPC changes, however, lawyers will remain stuck in the proverbial minefield and face significant risks when representing marijuana businesses in New York. Only time will tell how the federal enforcement issues are resolved.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I recently started supervising students in a law school clinic that assists indigent individuals. We provide a number of services, including evening programs, where people can seek quick legal advice, and they are often referred to other specialized not-for-profit groups that can further assist them. For certain individuals, however, we expect to represent them in court and in other administrative proceedings. I was so enthusiastic about this new position that I reached out to a few of my colleagues at law firms and other not-for profit organizations that I thought could help educate my law students and provide competent pro bono advice to our clients. They were excited to help.

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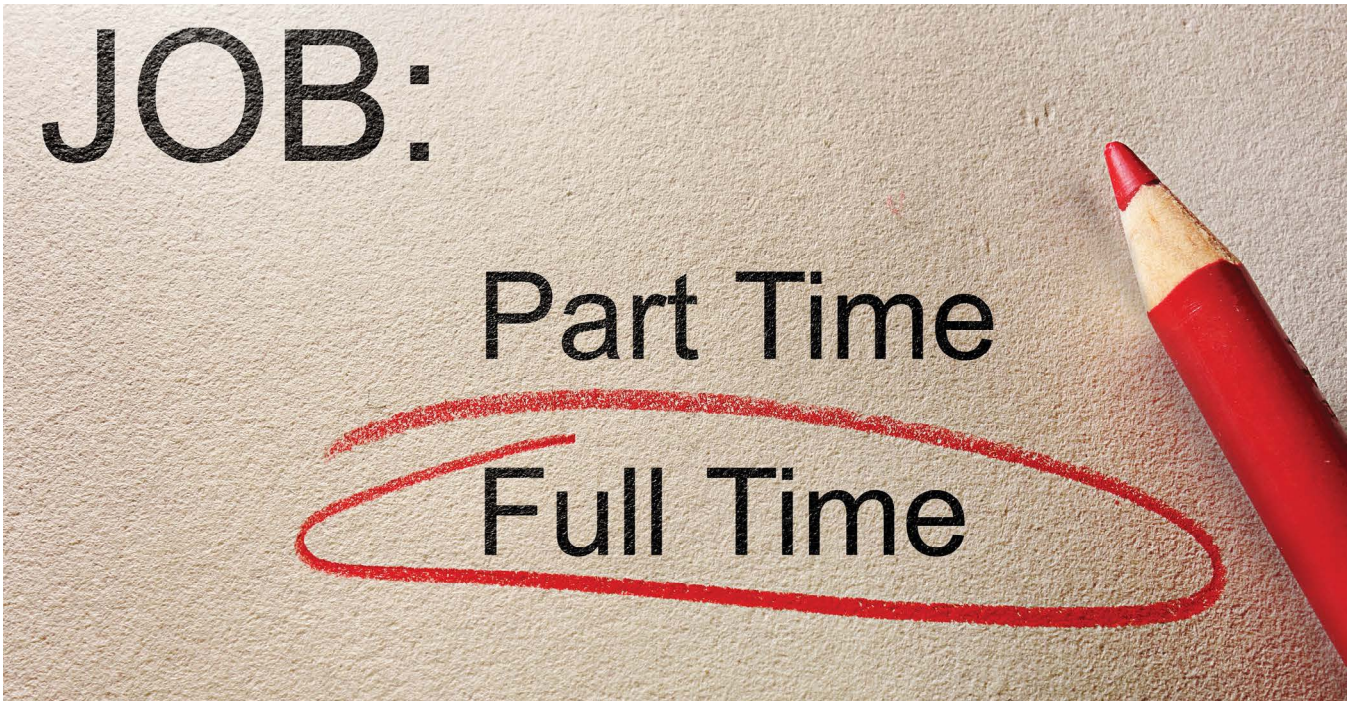
Land Ho!



The summer has taken off, and quickly at that. I have begun working full time at the law firm of Harris, Conway & Donovan, PLLC here in Albany. While the firm may be small in size, the area of law that it covers is the complete opposite. From commercial litigation to beer distribution contracts to personal injury, the firm handles cases from all across the legal realm.

I have worked on responses to interrogatories, a reply memorandum of law, conducted research into lien law trusts and construction arbitration clauses, discovered good faith causes for terminating distribution contracts, and have begun writing a memorandum of law in support of a motion for default judgment.

All of this in just the first two weeks.

The diversity of the work, coupled with the size of the firm, means that the days are busy, but they go by quickly. So far, so good.

This past weekend I found myself driving to Lake George. The weather was beautiful. The water was crisp and clear. I walked away from that weekend having learned a great and vital life lesson: Maps can be deceiving. How did I come to find this out? Well, having looked at a map prior to arrival, my friend, who I was camping with, and I determined that the island we were camping at was "100 percent" close enough to canoe to. Technically speaking, it would appear that, if you've got the time, anything is close enough to canoe to. It was an hour and a half into the canoeing expedition to the island that I realized not only that we had seriously misjudged the map, but that we would be making that same fateful trip back the following day. Between the constant wakes from boats whizzing by and the sheer amount of gear we had in the boat, the journey to the island was anything but relaxing. Still, the trip was awesome. And in a few days, I may be able to move my arms again!

I am getting ready, at least mentally, for the move down to D.C. for my final fall semester. Any suggestions for housing/food/music, etc., are much appreciated!

Lastly, I would like to congratulate my beautiful mother, Susan Horowitz. By the time you read this, she will have officially retired as a middle school guidance counselor, a position she held for more than 30 years. While I imagine this will result in an uptick in, "Hey, just calling to catch up" phone calls, I welcome them. Retired before 60. What a trip!

Lukas M. Horowitz (Lukas.horowitz@gmail.com), 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.

ATTORNEY PROFESSIONALISM FORUM

Continued from Page 57

But when I started to arrange our engagement letters, I realized that this was not going to be as easy as I anticipated. Do I need to run conflict checks with my colleague's law firms? Do I need to run conflict checks with the not-for-profit groups with which we are working? Are the conflict checks limited to the clients involved in the matters where we are acting as co-counsel, or do we have to run conflict checks against all of our respective clients? The law school has a few different clinics that focus on different areas of law and clients. Do we have to run conflict checks against all of the clients in each of the clinics? If we meet with someone in a drop-in session for a short period of time, is there a conflict if we later end up representing someone adverse? If there is a conflict, would it be imputed to any of the other firms or not-for-profits? Are there any other issues I should be concerned about?

Sincerely,
Ed U. Katz

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Writing With Friends: Collaborative Legal Writing

Effective collaboration is crucial in legal practice. It's hard to work with others. Effective collaboration in legal writing requires planning, practicing, and respecting your cowriters. When executed properly, collaboration in legal writing balances workload and improves writing quality.

BENEFITS OF COLLABORATION IN LEGAL WRITING

Working with others allows one person's strength to compensate for another's weakness.[1] Delegating writing responsibilities lightens the burden for all involved. Assigning collaborators to work on tasks at which they are skilled increases the final product's quality.

Collaboration provides different perspectives. Different perspectives enhance legal writing by adding nuance, creating a more fulsome discussion. Collaborative legal writing facilitates an exchange of ideas, enabling interaction with counterarguments.

CURB YOUR EGO

Consider this Step 1: Don't get attached to your writing. The more personally invested you get, the worse it's going to be. During the project, you and your collaborators should frequently share drafts. This prevents one collaborator from becoming too invested in that collaborator's work.[2] Individual egos prevent a free flow of ideas and hinder productivity.[3] You must be open to constructive criticism. Usually, nobody's questioning your competency when criticizing your writing. And if somebody is, let it roll off your back. Your collaborators want you to succeed, if for no reason other than it reflects well on them. Appreciate their suggestions. And, more important, be considerate when criticizing your collaborators' work.

Gerald Lebovits (GLebovits@aol.com), an acting State Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks judicial intern Alessandra Pineiro (Fordham University School of Law) for her research.

CHOOSING COLLABORATORS

You can't always choose whom you work with. Take advantage of the opportunity to pick collaborators when you can. Collaborators commonly encounter scheduling conflicts.[4] Find collaborators who have schedules similar to yours. Look for collaborators who'll make up for your deficits. Or, better yet, who'll also benefit from your strengths.

Collaborating is an opportunity for mentorship. When picking a mentee, think about someone who'll benefit from your instruction. When picking a mentor, look for collaborators who're smarter, who write better, and who work harder than you. You'll learn from them. It might even motivate you to improve.

Some people won't want to work with you. If you need them, pay them or offer to do the grunt work.

WHO TAKES THE LEAD?

It's natural for the most senior colleague to take the lead on a collaborative effort, but that's not always the case. One person might act as a conduit between the more junior associates and senior partners. It might not be necessary to assign the role of "leader." Over time, one person might become the leader, even without a formal designation.

When there's a leader, collaborators should voice their opinions without feeling intimidated. Dissent should be encouraged in a collaborative environment.[5] Collaborators must feel free to disagree, criticize, and suggest. In the legal profession, this might be easier said than done. A younger, less experienced associate will, understandably, prefer not to disagree with a senior partner. The key here is to pick your battles. Don't sweat the small stuff. Don't argue over minor, discretionary, or controversial issues. On bigger issues, speak up, but make sure you have a good source to support your position.

When you're working with only one other person, picking a leader is less important than in larger collaborations. In two-person collaborations, the writers usually consider each other equals. To avoid conflicts later on, you should discuss responsibilities and expectations before starting the writing project.

EDITING

Advice for Editors

Editing consumes time. For some projects, it's a full time job. Designate an editor during the project's prewriting stage to avoid confusion and misunderstanding.[6]

Editing suggestions should be clear and easy to understand. If you're making edits by hand, use a pen with colored ink so that your edits stand out from the original. Meet with the writer while making edits to explain your suggestions and answer the writer's questions as you go. To increase legibility, have the writer send you a digital copy and make edits to the document electronically. The Legal Writer explains this in greater depth below.

Advice for Initial Drafters

Having an editor doesn't excuse you from editing yourself. Proofread your own work. Fix errors. Double check quotations and citations. Give your editor a draft that's as complete and perfect as possible. Doing so gives your editor more time to focus on substantive suggestions for improvement.

Editing and revision is a back-and-forth process. Leave enough time for this process. Give your first draft to your editor long before the final version is due.

Encourage your collaborators to edit or revise your work by referring to it as a draft, even if it seems like a polished final version to you.

CREATIVITY AND ORIGINALITY IN COLLABORATIVE WRITING

Working with others might discourage creativity and originality. You might be tempted to defer to a collaborator's opinion instead of independently researching and forming your own views. This is particularly problematic in scholarly legal writing, because of its more personal qualities. Professor Bryan Garner, who coauthored two different books with Justice Antonin Scalia, suggests, to avoid blind deference, that co-authors work simultaneously on the same section of the project.[7] The collaborators then reconvene to discuss the substantive differences and present their arguments. Others who prefer to work on sections different from their collaborators should keep in mind the potential for overreliance on their collaborators' work.

JUDICIAL OPINIONS AND LAW CLERKS

Judicial opinions are exercises in collaborative writing.[8] The interaction between law clerk and judge distinguishes opinions from collaborative legal writing seen in legal practice or scholarship. The judge is the "leader," we hope. The judge makes the decisions. The judge's name is on the decisions. Law clerks aren't expected always to agree with the judge's final decision. But they're encouraged to offer their own insights. And it's polite that the law clerks at least pretend to accept the judge's final decision.[9]

The law clerk does a large part of the opinion-writing process.[10] Law clerks are almost ghostwriting for their judge. The judge might review the opinion and offer edits.[11] Alternatively, the judge might create a rough outline of the opinion and expect the law clerks to translate it into a complete first draft, with proper citations and formatting.

Consider this Step 1: Don't get attached to your writing.

Law clerks write opinions as though the judge authored them. Law clerks should familiarize themselves with their judge's writing style by studying past opinions and taking note of the judge's edits and suggestions. Therefore, regardless who writes the opinion, the judge must agree with every word.

CONTRACTS

Collaborating With Your Adversary

Contract drafting is another form of collaborative legal writing. Its possibly adversarial nature makes it a unique collaboration. Lawyers work with the other side's lawyers as part of contract negotiation.[12] Because the drafting

process doesn't involve a judge, the lawyers must police themselves. As a lawyer, you have a duty to avoid misrepresentation and fraud.[13] Don't trust your adversary to correct your mistakes, especially if the mistakes benefit them. Be fastidious in your proofreading. Have others look over your work.

Whichever side produces the first draft is the sole author of that draft. The other side then reviews it and takes on an editing role.[14] Writing the first draft is more time-consuming and costly than reviewing and editing your adversary's draft. It's worth it, though. Writing the first draft offers your side an advantage. It sets the tone of the negotiations and anchors the discussion around your client's needs.

Collaborating With Your Client

Clients are part of the drafting process. One of the first steps in that process is to ask your client what is the purpose of the contract and who are the contracting parties. Ask your client about essential terms and deadlines. Before sending any drafts or edits to the other party, send your work to your client. Your client needs to consent to your proposed changes or drafts. Attach a memo to the proposed draft highlighting and explaining to your client the areas of concern and proposed changes. The client might express concerns or offer suggestions. Edit according to your client's suggestions, within ethical limitations, until the client is satisfied.

Look for collaborators who'll make up for your deficits.

ACKNOWLEDGEMENTS

Acknowledge your collaborators.[15] When you're publishing in a secondary source, insist on thanking your collaborators, if they're not co-authors. Express your gratitude sincerely. It takes no extra effort to be kind.

TECHNOLOGY AND COLLABORATION

Technology facilitates collaboration. If you want to work on a single document at the same time as your collaborators, use an application within a web browser such as Google Docs or Microsoft Office Live. You don't have to download any software or files to use these web-based applications. You edit the document while in your web browser, and the document saves changes automatically. Google Docs and Microsoft Office Live allow others to comment and make revisions, as well.

Microsoft Word's "Track Changes" feature is helpful, particularly in the editing stage. It allows other people to go through a document, make their own changes, and explain why they made them. This is done in the Microsoft Word program, not on a web browser. Unlike the web browser word processors, you can't work simultaneously and see your coauthors' changes in real time. The Microsoft Word "Track Changes" feature still might be preferable for some to the web browser applications. More advanced features in Microsoft Word, including citation management, are unavailable in the web browser word applications. "Track Changes" also allows you to toggle between the original and "marked up" versions of the document.

Software compatibility is a challenge for collaborators. Microsoft Word and WordPerfect are incompatible; they save as different file types. Before writing, decide on a program that everyone will use. Google Docs and OneDrive are good options if several collaborators have different word processing programs.

DEADLINES AND SCHEDULING

When working with others, organization and time management prevent confusion and promote cohesion. Discuss final and interim deadlines in the prewriting phase. Interim deadlines for exchanging drafts prevent one collaborator from overinvesting themselves. Interim deadlines are also informative: if one collaborator is struggling to meet an interim deadline, it might show that part of the project was more work-intensive than anticipated or that this collaboration isn't working. Maybe a collaborator's slacking off. Resources can be redistributed and later interim deadlines adjusted.

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1. Mary Barnard Ray & Jill J. Ramsfield, Legal Writing: Getting It Right and Getting It Written 90 (6th ed. 2018).
2. *Id.* at 92.
3. *Id.*
4. *See* Elizabeth L. Inglehart, Kathleen Dillon Narko & Clifford S. Zimmerman, *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 Legal Writing: J. Legal Writing Inst. 185, 225 (2003).
5. *See* Mark Sophir, *Enhancing Your Legal Practice Through Conscious Collaboration*, 72 J. Mo. B. 304, 305 (2016).
6. *See* Ray & Ramsfield, *supra* note 1, at 92.
7. Bryan A. Garner, *The Art of Collaborating*, 99 A.B.A. J. 24, 25 (2013).
8. Douglas K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 Judicature 175, 175 (2001).
9. Ruggero J. Aldisert, *Duties of Law Clerks*, 26 Vand. L. Rev. 1251, 1256-57 (1973).
10. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brooklyn L. Rev. 685, 697 (2001).
11. William Domnarski, In the Opinion of the Court x (1996).
12. Charles R. Calleros, Legal Method and Writing 519-20 (6th ed. 2011).
13. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0 (2018).
14. Robert A. Feldman & Raymond T. Nimmer, Drafting Effective Contracts: A Practitioner's Guide 1-5 (2d ed. 1995).
15. Sometimes acknowledgement is improper, like acknowledging judicial interns or law clerks in judicial opinions. For a discussion on this topic, see Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process,* 76 N.Y. St. B.J. 34, 38 (Aug. 2004).

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