NEW YORK STATE BAR ASSOCIATION
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By Gail Gottehrer

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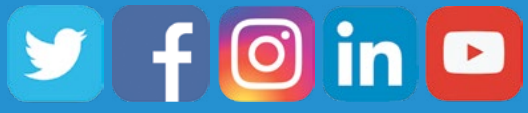

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Leadership: The Legal Profession's Glory

On the wall of the 1837 Chenango County Courthouse is an inscription in large letters: "FIAT JUSTITIA RUAT CAELUM." It means: "Let justice be done though the heavens may fall."

The idea of justice is eternal. We see it in the biblical passage in Deuteronomy commanding: "Justice, Justice, you shall pursue."

That is the lawyers' credo. It is in our DNA. It is who we are. It is what we do.

Throughout the history of our state and nation lawyers have fought for justice. We have led. Leadership is the glory of our profession, and our duty and responsibility.

Why lawyers? Why must we lead public opinion – not follow it? Because lawyers fashioned the framework of our government and built the institutions that are the bulwark of a free people.

As lawmakers in the Legislature, lawyers write the laws. As advocates and judges in courtrooms, lawyers administer justice according to law.

Today, more than ever, the voices of lawyers are needed.

There is an ancient curse, "May you live in interesting times." This expression is intended to be ironic. It reflects anxiety and fear about current events.

We live in "interesting times."

To be sure, extraordinary things are happening all around us. Health, prosperity, peace, and happiness are rising throughout the world. Starvation and extreme poverty are declining. Plagues that wiped out civilizations have been eradicated.

But something is amiss. There are disturbing trends in our society, culture, and politics, about which we should all be concerned.

Whatever your beliefs, we should all be concerned about the polarization and tribalization that is dividing our nation.

We should all be concerned about the anger and incivility that has turned public discourse into a blood sport.

We should all be concerned when public officials mock the principles our nation's founders held to be self-evident or use racially charged rhetoric that tears apart the fabric of society.

Some say we live in a "post-truth" world, where facts and experts are no longer trusted. I don't believe it, but some people do.

But this much is beyond dispute: The public increasingly doubts the ability of institutions built by lawyers to meet the challenges facing our society.

Worse, untold millions of Americans know nothing about the constitutional history of our government. Many do not know or care about constitutional traditions and norms.

All of this imposes a special duty on the legal profession. It also provides an opportunity to perform an important public service.

The public needs our wisdom. They need our expertise. They need our ability to see both sides of an issue, find common ground, and bring people together.

Lawyers know how to debate without dividing. We know how to disagree without being disagreeable. We need to model that behavior.

We must demonstrate, by our example, how differences of opinion can be discussed and debated, without name calling and words that wound.

We must teach our fellow citizens why we need an independent judiciary and the apolitical administration of justice.

We must explain why pluralism and tolerance are our national heritage, and the source of our strength.

New York is a beautiful mosaic of people. We are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. We have varying beliefs and live and work in communities, large and small, urban, suburban and rural.

The tie that binds us is a common set of values and beliefs, foremost of which is summed up by our national motto: E Pluribus Unum. Out of many, one.

The task falls to those learned in the law to teach the meaning of equal justice under law. Our communities need us to explain why we need laws to prohibit discrimination based on race, religion, gender, and sexual orientation.

Most of all, the public needs us to remind it why the rule of law has kept us free for over two centuries.

When the cynics say our institutions are failing, lawyers should answer: "Look at the American legal system." It's working.

Day in and day out, in good times and bad, lawyers and judges are defending our rights and protecting the rule of law.

We belong to the most influential, consequential, impactful profession in American life. Lawyers right wrongs, improve lives, make society better.

We are society's problem solvers. We are the foot soldiers of the Constitution. The rights and freedom the citizenry enjoys mean nothing without lawyers to champion them.

This is a great time to be a lawyer. And we, the more than 300,000 lawyers admitted to practice in New York, are bound together by the singular purpose of attaining justice.

Lawyers should seize this moment. I know we will.

Hank M. Greenberg can be reached at hgreenberg@nysba.org

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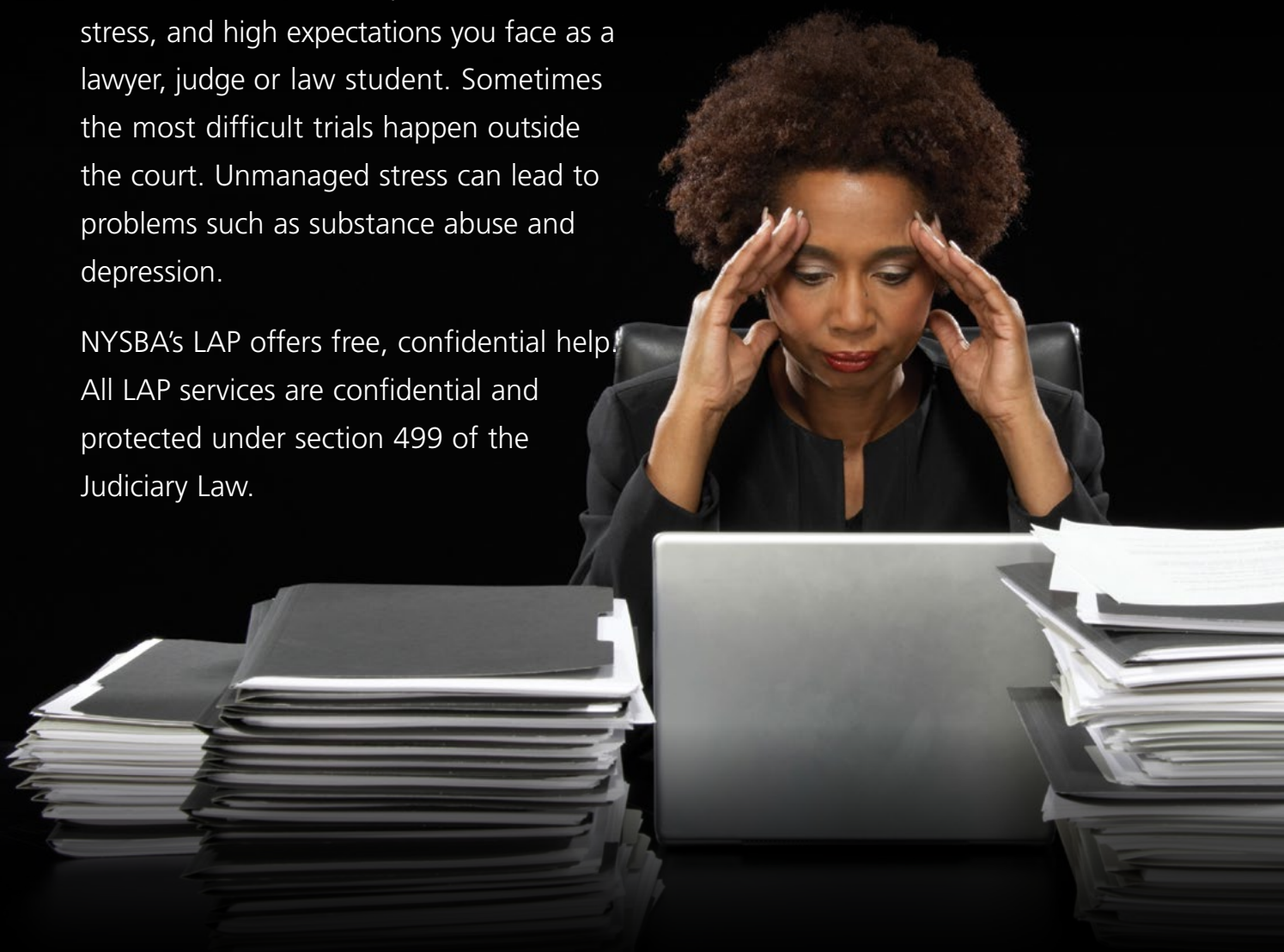

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Defensible Data Disposal:

Once a Risk Mitigation Strategy, Now a Compliance Requirement

By Gail Gottehrer

Increased legislative focus on data privacy and security has made it necessary for businesses and their lawyers to review corporate record retention policies and data disposal practices to determine whether they comply with newly enacted state laws, and to update them accordingly. The penalties for noncompliance with the provisions in these laws that specify the method by which personal data must be disposed of and the time frame for such disposal, combined with the ongoing risk of data breaches, significantly increase the potential liabilities for companies that do not properly dispose of personal data when they are entitled, or required, do so.

THE EVOLVING APPROACH TO DATA RETENTION AND DISPOSAL

For years, data privacy and security lawyers have encouraged their clients to dispose of data that is not subject to litigation holds or regulatory obligations, and that has little, if any, business value, especially if that data contains personally identifiable information about customers, consumers, or other individuals. Defensible data disposal efforts were often met with resistance, in part due to the challenge of reaching consensus within an organization as to which data is sufficiently valuable to the company's operations to be retained, and which data no longer has business value and can be destroyed. In addition, some companies were unable to devote the time and resources necessary to conduct this detailed and often complicated analysis, or did not consider it a high priority.

Corporate priorities began to shift when eDiscovery became a standard feature of litigation, and companies found themselves in the unenviable position of having to put litigation holds on data that they lawfully could have disposed of prior to being sued. Having missed this opportunity to delete data, and now finding themselves with lawsuits filed against them and litigation holds in place, companies were required to preserve, and often review and produce, data that was relevant to the claims and defenses in the new litigation. The costs associated with the review of that data, and the potential impact of that data in the new actions, caused many companies to reevaluate their approach to data retention and disposal. The risks associated with retaining data that was not subject to a litigation hold or a regulatory requirement, that had limited business value, and contained personally identifiable information became even more pronounced as data breaches became increasingly common, and led to class action litigation, regulatory investigations, and reputational damage.

In the wake of the GDPR, numerous U.S. state legislatures have proposed and/or passed laws that expand the scope of what was previously regarded as "personally identifiable information." This trend makes it increasingly important for organizations to sharpen their focus on the personal data they retain, the duration of time they retain it, and how they dispose of it. Some of these laws mandate destruction of personally identifiable data within certain time frames, and impose penalties for failure to do so. As a result, lawyers must be able to help their clients implement, document, and audit their data disposal policies and practices, and ensure that they have defensible explanations for decisions to keep personally identifiable data that may, arguably, be subject to deletion requirements under these new, and relatively untested, laws.

NEW YORK STATE'S SHIELD ACT

In July 2019, New York State Governor Andrew Cuomo signed into law the Stop Hacks and Improve Electronic Data Security Act ("SHIELD Act"). The SHIELD Act's "reasonable security requirement" provides that a person or business that owns or licenses computerized data that includes "private information" of a New York resident must "develop, implement and maintain reasonable safeguards to protect the security, confidentiality and integrity of the private information including, but not limited to, disposal of data."[1] To satisfy the reasonable security requirement, a person or business must implement a data security program, reasonable technical safeguards, and reasonable physical safeguards, as described in the statute. "Reasonable physical safeguards," as defined in the SHIELD Act, include protecting private information against unauthorized access or use throughout the data lifecycle, including during the destruction or disposal of the information, and disposing of private information within a "reasonable amount of time after it is no longer needed for business purposes by erasing electronic media so that the information cannot be read or reconstructed."[2]

The SHIELD Act defines "private information" as either (1) a user name or email address combined with a password or security question and answer that would permit access to an online account, or (2) personally identifiable information about a natural person combined with one of five specified data elements, such as a social security number or biometric information, when either the data element, or the combination of the data element and the personal information, is not encrypted, or is encrypted with an encryption key that has also been improperly accessed or acquired.[3]

Gail Gottehrer is the Founder of the Law Office of Gail Gottehrer LLC, where her practice focuses on emerging technologies. She is the Co-Chair of NYSBA's Committee on Technology and the Legal Profession and a Member of NYSBA's Task Force on Autonomous Vehicles and the Law.

DATA DISPOSAL UNDER LOUISIANA LAW

Similarly, Louisiana's Database Security Breach Notification Law requires a person or company that conducts business in that state, or that owns or licenses data that contains personal information, to take "all reasonable steps to destroy or arrange for the destruction of the records within its custody or control" that contain personal information that is "no longer to be retained by the person or business by shredding, erasing, or otherwise modifying the personal information in the records to make it unreadable or undecipherable through any means."[4] The law defines "personal information" as the first name or initial, and the last name, of a resident of Louisiana, in combination with the individual's social security number, driver's license number, credit card information, passport number, or biometric data, when this information is kept in unredacted or unencrypted form.[5]

DISPOSAL REQUIREMENTS FOR BIOMETRIC DATA

Recognizing the sensitivity of biometric data, Illinois has a specific law that addresses the privacy and security of this type of personal information. The Biometric Information Privacy Act (BIPA) requires biometric information to be "permanently destroyed" when the initial purpose for which it was collected or obtained has been satisfied, or within three years of the individual's last interaction with the entity that collected it, whichever occurs first.[6] Under BIPA, "biometric information" encompasses any information – regardless of how it is captured, converted, stored or shared – that is based on an individual's biometric identifier that is used to identify an individual.[7] Examples of "biometric identifiers" include retina or iris scans, fingerprints, voiceprints, and scans of hand or face geometry.[8]

THE CCPA

Scheduled to become effective on January 1, 2020, the California Consumer Protection Act (CCPA), as currently drafted, gives consumers the right to request that a business "delete" personal information it has collected about them and direct service providers who are in possession of that personal information to delete it as well.[9] For purposes of the CCPA, "personal information" means information that "identifies, relates to, describes, is capable of being associated with or could reasonably be linked, directly or indirectly, with a particular consumer or household." Examples of personal information include names, aliases, postal addresses, IP addresses, email addresses, social security numbers, driver's license numbers, passport numbers, biometric information, geolocation data, Internet activity information, and employment-related information if that data "identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household."[10]

DISPOSAL OF GEOLOCATION DATA

Finally, the Utah "Electronic Information or Data Privacy Act," which was signed into law in March 2019, requires law enforcement to obtain a warrant in order to access certain electronic data held by a third party, including geolocation information,[11] with certain exceptions.[12] The data disposal provision of the law make clear that law enforcement must destroy this data in an "unrecoverable manner" as soon as reasonably possible after the data is collected.[13]

CONCLUSION

Data disposal was once seen as optional – a business decision about whether the risks associated with keeping data of questionable business value justified the allocation of time and resources to review, evaluate, and possibly dispose of that data. With the passage of the SHIELD Act and similar laws, data disposal is now a legal requirement in many states. Companies that do business in multiple states (and countries) may find themselves having to comply with multiple laws that may specify different, and inconsistent, time frames and methods for data disposal. All this makes it increasingly important for companies and their lawyers to be prepared to demonstrate their compliance with these laws, and to be ready to defend their data privacy and security practices, including their decisions about which personally identifiable data to dispose of and which personally identifiable data to keep.

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1. Stop Hacks and Improve Electronic Data Security Act, S.5575-B, § 899-bb(2).
2. *Id.*
3. *Id.*at Section 3(1)(a), (b).
4. Database Security Breach Notification Law, R.S. 51:3074.
5. *Id.*, R.S. 51:3073(4)(a).
6. 740 ILCS 14/15.
7. 740 ILCS 14/10.
8. Biometric data protection laws are also being considered in New York City and New Jersey. *See* New York City Council Int. No. 1170-2018; N.J. A.B. No. 4640 and N.J. S.B. No. 3153.
9. Cal. Civ. Code, § 1798.05.
10. *Id.* at 1798.140(o)(1).
11. The New York City Council proposed a law prohibit telecommunications carriers and mobile applications from sharing users' geolocation information. *See* New York City Council Int. No. 1632-2019.
12. Electronic Information or Data Privacy Act, §23c-102(1)(a).
13. *Id.* at subsection (d).

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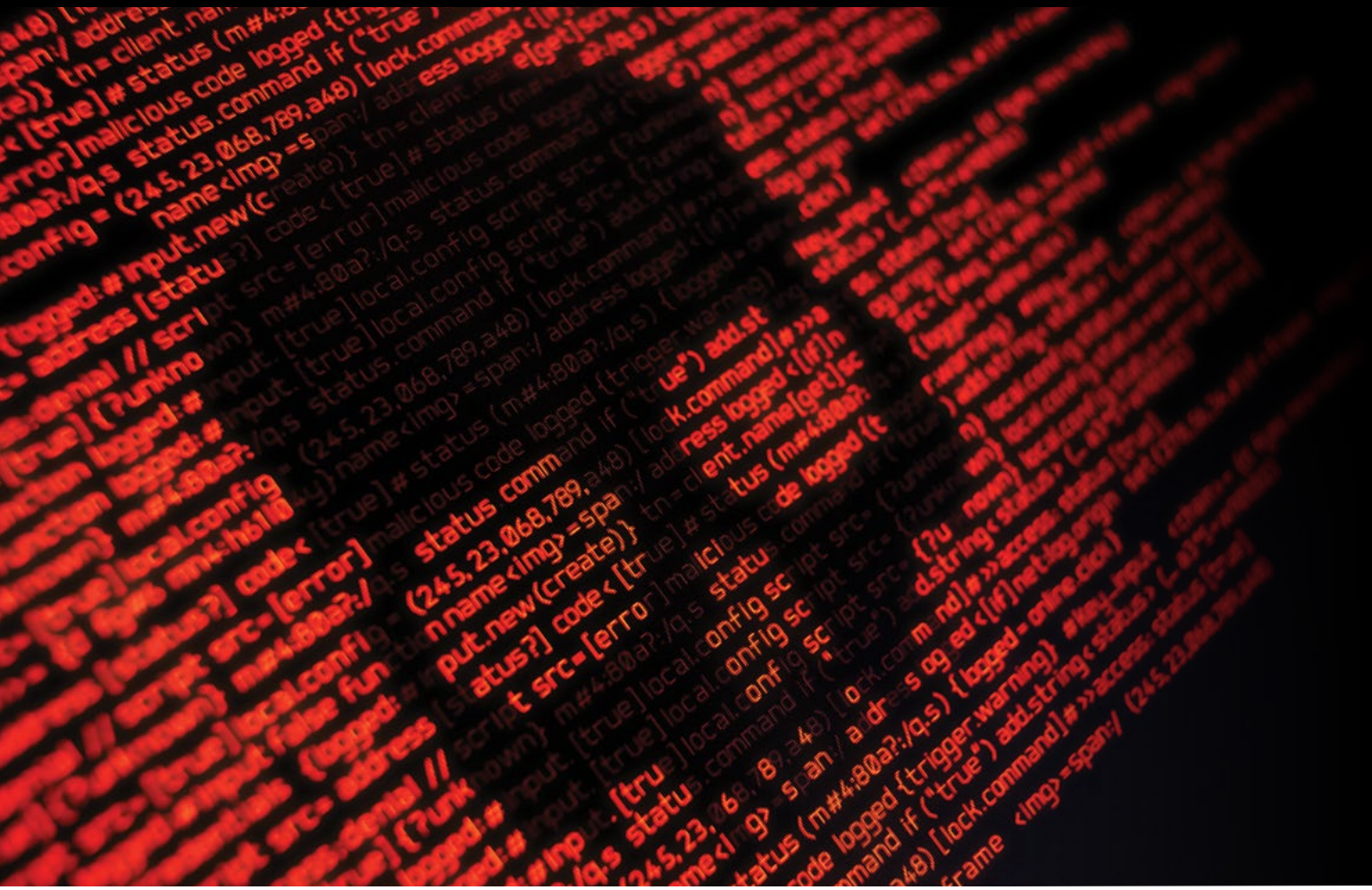
Patching Horror Stories

By Chris Owens and Nina Lukina



BALTIMORE'S PATCHING MISTAKE

On May 7, 2019, the City of Baltimore was hit by ransomware. A month later, in June, *Ars Technica* reported that the city had already lost $18 million. At that point, it was still far from full recovery. Less than a third of employees were back at work. Many were using "paper-based workarounds."

How did this happen? Because the city was behind on patching.

While hackers and foreign agents do seem to be aggressively going after American city governments and law firms, the City of Baltimore itself was not targeted. Cybercriminals simply look for the places where defenses are down and entry is easy, like thieves who try the handle of every parked car on the street in a search for one that's been left unlocked. This was not a zero-day attack. The breach was the result of a giant spray attack looking for the weakest member of the herd.

The city government's paralysis could have been prevented with timely patching. Hackers used an exploit called EternalBlue, for which Microsoft had provided a fix *two years ago.* Likewise, a reported 90% of hacked firms could have saved themselves with a patch.

Patching: it can be tedious, time-consuming, and lacking in visibility as compared to innovative IT projects.

Still, not patching amounts to negligence, especially when privileged data is at stake.

LOSING CONTROL OF DATA

While the city is undoubtedly suffering – systems for tracking water bills, property taxes, and parking fines are down, and Baltimore's IT team has been working round-the-clock to provide the city's 10,000 employees with new passwords – the cyberattack has even more worrying long-term implications for its citizens.

The *Ars Technica* article points to evidence that "personal identifying data, health data, and other sensitive information" was stolen during the hack, which is likely to leave behind a long trail of identity theft and other violations. It will not speak well of Baltimore as place to put down roots.

WHERE WERE THE BACKUPS?

The cyberattack and the city's reaction to it revealed other remarkable gaps in its technology.

The *New York Times* reported::

> It could take months of work to get the disrupted technology back online. That, or the city could give in to the hackers' ransom demands.
>
> "Right now, I say no," Mayor Bernard Young told local reporters on Monday. "But in order to move the city forward? I might think about it. But I have not made a decision yet."

Mayor Young's deliberation over whether to give in to the extortionist demands (against the advice of the FBI) in order to get the city's systems running points to a concerning lack of backups. Kraft Kennedy installs cloud-based, up-to-the-minute backups for our clients with Datto, which also provides security experts with access to event logs, firewall logs, file access records, and registry information for security incident remediation.

EQUIFAX

The Baltimore catastrophe recalls another high-profile cyberattack that led to an enormous exposure of privileged data that could have been prevented with a patching routine.

When the credit-scoring company Equifax was breached, the personal data of 143 million people was exposed. In a familiar story, hackers exploited a vulnerability for which a patch had been released two months earlier. Getting into the unpatched systems was "simple."

Consider also that when Microsoft or other vendors release a patch, they typically provide detailed information on the issue that the new patch resolves. Such information can amount to a blueprint for attacking unpatched systems (and Windows 7 will be such an unpatched and at-risk system in January 2020).

DANGER FOR THE LEGAL INDUSTRY

While Baltimore and Equifax could not hide that they had been attacked, we know from experience that many other such attacks go unreported. Understandably, who wants to admit to such an unforced error?

Law firms especially are in danger. The FBI has warned the industry multiple times that it is being persistently targeted.

AUTOMATING PATCHING IS THE ANSWER

So what is the solution?

A *Network World* article entitled, "The unrelenting danger of unpatched computers" suggests automation, the assignment of clear responsibility, and inventory-taking.

Kraft Kennedy has developed solutions to make all of these tasks straightforward, so our clients can get back to the work they actually want to do. Our Managed Services team manages updates for clients, testing and applying patches as they are released.

For larger firms with many servers, Kraft Kennedy has also pioneered Automated Server Patching. Whereas IT teams used to have to stay up all night to patch such environments, they can now leave it to the efficient tools our Managed Services team has developed. To learn more about getting automated, patched, and protected, we encourage you to reach out to us at hello@kraftkennedy.com.

Chris Owens is the Chief Technology Officer at Kraft Kennedy and leads the Enterprise Client Systems Group from Kraft Kennedy's Houston office. Chris is an expert in server and storage consolidation, disaster recovery and business continuity, email messaging design and migration, document management, and thin-client architecture. LinkedIn: www.linkedin.com/in/christophermowens. Twitter: @KraftKennedy. Blog: www.kraftkennedy.com/blog.

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Supreme Court, New York County:

The Technology-Outfitted Place to Be

By Hon. Saliann Scarpulla

As an integral part of Chief Judge Janet DiFiore's Excellence Initiative, the Office of Court Administration has begun outfitting Supreme Court, New York County courtrooms at 60 Centre Street with state-of-the-art technology. The purpose of this technology is to increase litigation efficiency, expand public participation in the courtroom, and match courtroom capabilities with the everyday experience of a generation of lawyers and litigants who regularly rely on technology.

My courtroom, courtroom 208 at 60 Centre Street, was the first to be outfitted; technological enhancements to other courtrooms are in the works. The most noticeable new technology in my courtroom is an 86-inch screen, which presents a large, clear picture of the evidence to me, the jury, and the person on the witness stand. By touching or using a stylus on the screen, an attorney or witness can highlight information, add additional information, or mark up the evidence, without affecting the integrity of the original evidence. The marked-up version of the evidence can then be saved as a separate document or discarded after the witness finishes testifying.

Hon. Saliann Scarpulla
is Presiding Justice, New York Supreme Court, Commercial Division, First Judicial Department.

The 86-inch screen can play back previously recorded testimony and is equipped with Skype to enable me and the jury to observe in real time the testimony of a witness who is located outside the courthouse. Skype also enables an attorney to "appear" for argument of a motion and to participate in court conferences from a remote location.

New accessibility enhancements are not limited to Skype. Courtroom 208's jury box has been enlarged so that a person in a wheelchair or using a walking aid can comfortably sit on a jury. The courtroom is now also equipped with devices to assist individuals with hearing and/or sight impairments. These technological enhancements aim to ensure maximum participation in the litigation process.

Documents and previously recorded testimony are uploaded to the display monitor via a flash drive, a CD-ROM, or a laptop. And, if an attorney forgets to include a document on the flash drive, CD-ROM or laptop, the

attorney may still display the document by placing it under a document viewer, which projects the document onto the 86-inch screen.

The document viewer is located on a new attorney podium, which also contains separate USB ports and space for the attorney's laptop and paper notes. An attorney who is concerned about the security of the courthouse Wi-Fi system can bring a portable Wi-Fi router, connect it through the attorney podium, and use the private Wi-Fi in court.

The attorney table, witness box, and judge's bench have been supplied with smaller display screens, which show the same images that are displayed on the 86-inch screen. There are also smaller screens on the back of the 86-inch screen, which allow persons sitting in the audience section of courtroom 208 to view the evidence on the larger screen and fully to see any testifying witness. There is a wireless keyboard on my bench that enables me to determine which of the screens display the evidence presented.

By using this innovative courtroom technology, there is no longer any need for attorneys to lug boxes of paper documents into my courtroom. Paperless presentation of evidence to me and the jury saves time in so many ways – including elimination of the wait time to screen document boxes through courthouse security and the time needed to publish a paper document to six or more individual jurors during a trial. The reduction in paper costs is also an obvious money saver.

Similarly, my and the jury's ability to hear attorney argument and witness testimony from persons at remote locations saves time and money. The availability of Skype in courtroom 208 assures litigants that the Supreme Court, New York County, will be accessible to them and their chosen counsel, even if they are not physically located in New York County.

I have been using the new technology in courtroom 208 for many months and have found that the attorneys, witnesses, and litigants who appear before me appreciate the technology and have no difficulty using it because it is very straightforward. To help attorneys become familiar with the technology in courtroom 208, the Office of Court Administration has put together a short demonstration manual that is readily available to attorneys and litigants. Additionally, the Commercial and Federal Litigation Section of NYSBA, the Committee on Technology and the Legal Profession of NYSBA, and the New York State Court System's Committee on Continuing

Legal Education jointly held a live CLE demonstration on the use of the technology in courtroom 208. A video of the CLE presentation will soon be available.

At bottom, the new courtroom technology at the Supreme Court, New York County helps safeguard New York's worldwide status as a leading center for domestic and international dispute resolution. An informal survey of the technology available in other state and international courts shows that our courtroom technology is state-of-the -art and not available in many other fora.

The new courtroom technology also assists in providing litigants with timely and cost-efficient dispute resolution. In her 2019 State of Our Judiciary report Chief Judge DiFiore stated that "[e]quipping our courtrooms with the latest technology so that judges, lawyers, litigants, jurors and members of the public can fully engage in courtroom proceedings is one of the most visible ways in which the court system can demonstrate its commitment to excellence in the delivery of justice." I have found that the technology in courtroom 208 is a powerful tool to speed up litigation time and free me and the jury to focus more fully on the facts, the law, and the delivery of justice.

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NYSBA

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Have you purchased a home?

☐ **Yes** ☐ **No**

Have you been promoted?

☐ **Yes** ☐ **No**

Are you still paying your student loans?

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New York Takes Online Document

By Ronald C. Minkoff

the Lead on Providers

When considering the impact of technology on the practice of law, one of the most important developments in recent years is the growth of the online document provider industry (OLPs). These for-profit entities – some, like LegalZoom, international in scope, and others much smaller – provide members of the public with legal documents they can use to handle their own legal problems, without having to hire a lawyer. These forms cover a vast number of legal subjects, from wills to corporate formation, from litigation to real estate. Moreover, OLPs provide their services in a variety of formats, from those that provide plain blank forms the consumer can print out and complete on their own, to those consisting of computer algorithms that complete forms for the consumer, to those featuring a clerical employee who guides the consumer online to choose the correct form and properly fill it out, and all manner of iterations in between. One recent study reported online legal forms generate approximately $4.1 billion in annual revenues with forms sold to consumers throughout the United States and many other countries.[1]

OLPs pose both a major opportunity for, and an existential threat to, our profession. On the one hand, they provide technology solutions that may make it easier and cheaper for lawyers to service their clients, particularly clients of limited means. On the other, these cheaper products threaten the livelihoods of many practitioners, who simply cannot compete with OLPs on price.

How to address this problem has puzzled the Bar, both locally and nationally, for years. Recently, NYSBA and the New York County Lawyers' Association (NYCLA) have taken the lead. Following a three-year study, and working in conjunction with the American Bar Association (ABA), consumer groups and industry representatives, NYSBA and NYCLA proposed *Best Practices Guidelines for On-Line Document Providers* for consideration by the ABA at its Annual Meeting in San Francisco in August 2019, where they were approved by the ABA House of Delegates. The very existence of the *Best Practice Guidelines* and the process by which they were created represents a major triumph for the organized Bar of our state, making us a national leader in this important area.

Before we discuss the *Best Practice Guidelines*, let's take a step back. The legal form industry did not start online; at least as far back as the 1700s, books were written on "do-it-yourself" law and the concept of a scrivener service pre-dates the internet.[2] An 1859 book entitled *Everybody's Lawyer and Counsellor in Business* contains 400 pages of legal forms and information.[3] Many court systems and governmental agencies make legal forms available to the public.[4] And of course, many older New York practitioners remember Blumberg Forms, blank legal forms on almost every conceivable subject that could be purchased at legal stationery stores and were a staple of New York practice for decades.

Computer technology, however, has taken legal forms to a new level, out of the hands of lawyers and into the hands of consumers. Faced with the choice of paying for a lawyer to guide them or handling the problem on their own with a much-cheaper legal form, many consumers

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have chosen the latter. As a result, the OLP business continues to grow. LegalZoom estimates that it has served four million customers, that its forms may have created one million corporations, and that someone uses its forms to write a will every three minutes in the United States.[5] Indeed, "as computers grow more powerful and ubiquitous, legal work will continue to drift online in different and evolving formats."[6] As Arthur Norman Field, past president of NYCLA, put it, "The public has voted that it wants online legal providers and they are here to stay."[7]

The organized Bar's response to all this has often been confrontational. Bar regulators in Texas, North Carolina, Missouri and other states have sued OLPs (mainly LegalZoom), accusing them of engaging in the unauthorized practice of law (UPL). This approach has generally failed, with either outright dismissal or settlements calling for minor restrictions on the OLPs. In 2016, the Justice Department and FTC jointly recommended, in the wake of a recent settlement of a suit against LegalZoom by the North Carolina Bar, that the North Carolina General Assembly revise the definition of UPL to avoid undue burdens on "self-help products that may generate legal forms."[8] They stated that these self-help products and other interactive software programs for generating legal documents would promote competition by enabling non-lawyers "to provide many services that historically were provided exclusively by lawyers."[9] In short, they told the North Carolina legislature – and others who sought to regulate OLPs – to get off the OLPs' backs, and let the industry compete more freely with lawyers in providing legal services.

The Justice Department and FTC were doing more than just embracing free market principles. They were reacting to a very real need: the inability or unwillingness of a vast majority of Americans to hire lawyers when they need them. It has been posited that the overwhelming majority of low-income individuals and families, and roughly half of those of moderate income, face their legal problems without a lawyer.[10] This "justice gap" is huge and is not closing.[11] According to some estimates, "about four-fifths of the civil legal needs of the poor and two- to three-fifths of middle income individuals remain unmet."[12] Low cost internet legal providers can present the promise of affordable legal services for underserved populations of low and middle income consumers who cannot afford lawyers.

With all of this in mind, NYSBA and NYCLA held separate public forums in 2016 to discuss the role of OLPs and whether and how to regulate them. NYCLA issued a report in 2017 which concluded that OLPs should be regulated, either by the courts or the legislature. This regulation should include such areas as warranties of merchantability, enforceability, dispute resolution, data security, confidentiality of customer information, and many others. The report nevertheless recognized that because such regulation would take time to implement, the OLP industry should in the interim adopt certain best practices similar to the proposed regulations. The NYCLA report was endorsed by the NYSBA House of Delegates in November 2017.[13]

Low cost internet legal providers can present the promise of affordable legal services for underserved populations of low and middle income consumers who cannot afford lawyers.

NYSBA submitted the report to the ABA House of Delegates for the 2018 Annual Meeting. That's when things began to get interesting. Many ABA groups reacted negatively to the report, stating, among other things, that regulation would stifle the OLP industry and exacerbate the "justice gap." The proposal was withdrawn and resubmitted at the ABA mid-year meeting in Las Vegas in January 2019. NYSBA and NYCLA agreed to take a different approach – suggesting only "best practices guidelines" – and the revised proposal began to gain support, even among those who had previously opposed it.

This process led to the creation of the ABA Working Group on On-Line Document Providers, which consisted of NYSBA and NYCLA representatives, as well as representatives of approximately 20 ABA Groups, including the Center for Innovation, the Business Law Section, the Committee on the Delivery of Legal Services, the Intellectual Property Section, the Dispute Resolution Section and many others. Industry representatives, including from LegalZoom and Lexis/Nexis, participated, as well as academics and consumer advocates. For three intense months this past spring, the working group revised the original NYSBA/NYCLA proposal and created a set of 15 *Best Practices Guidelines* that has garnered broad support within the ABA and was approved by the ABA

House of Delegates at its August 2019 meeting in San Francisco with support from the ABA Business Law Section, International Section and Center for Innovation, among others.

The *Best Practices Guidelines* call on OLPs to adopt voluntary standards that will promote access to justice while protecting the public. In summary, the guidelines suggest that OLPs provide:

- Plain language instructions and notifications for their customers;
- Agreements that are valid in each customer's jurisdiction;
- Forms that are up to date and take into account recent changes in the law;
- A system by which each customer affirmatively manifests consent to the OLP's terms and conditions;
- Notification as to how the customer's information will be used or shared with third parties;
- Notification that the customer's information is not covered by the attorney-client privilege or work product protection;
- Reasonable data security; and
- Cheap and convenient dispute resolution mechanisms.

Why go with best practices rather than a regulatory model? Because, as shown above, attempts to regulate the OLP industry across the country have by and large failed, and the federal government has made clear that undue regulation of this industry raises serious antitrust and consumer protection concerns. Moreover, attempts to regulate technology companies tend to become outdated as soon as – and sometimes even before – they are implemented. Perhaps most importantly, NYSBA and NYCLA's goal is to spur innovation in this field, as that will eventually help the public by providing consumers and lawyers with better tools to deliver legal services cheaply and efficiently.

In short, the *Best Practice Guidelines* show NYSBA and NYCLA at the forefront of a nationwide effort to use technological changes developed by OLPs to improve the delivery of legal services and access to justice generally. We can no longer resist these changes, or seek to criminalize an entire industry. Instead, in the best tradition of our profession, we must work with the OLP industry to find new ways to help our clients and close the justice gap.

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1. Issues Paper Concerning Unregulated LSP Entities, ABA Comm. on the Future of Legal Services 5 (Mar. 31, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/final_unregulated_lsp_entities_issues_paper.pdf (citing Will McKitterick, IBISWORLD Industry Report OD5638: Online Legal Services in the U.S. 4 (2014)).

2. Charles Rampenthal, General Counsel of Legal Zoom, Inc., Statement at NYCLA Forum: Should Online Providers of Legal Forms Be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

3. Frank Crosby, Everybody's Lawyer and Counsellor in Business (1859).

4. Such forms appear on, for example, the website of the New York Office of Court Administration (https://www.nycourts.gov/forms/) and the website of California's court system (jttps://www,courts/ca.gov/forms.htm).

5. *See* Statement of Charles Rampenthal, *supra* note 2.

6. Barton, Benjamin H., *Some Early Thoughts on Liability Standards for Online Legal Providers of Legal Services*, 44 Hofstra L. Rev. 541, 546 (2015).

7. Arthur Norman Field, Statement at NYCLA Forum: Should Online Providers of Legal Forms Be Regulated? If So, by Whom? If Not, Why Not? (Sept. 30, 2016). Similarly, Chief Judge Barbara Madsen of the Supreme Court of Washington has stated that "[i]nnovation will continue with or without us, so we need to get in the driver's seat […][w]e need to get on that bandwagon to change the profession before it runs us over. And I believe that, given the statistics I've heard, maybe we've already been run over." Lorelei Laird, *Avvo Founder Tells Lawyers to 'Get Rid of UPL' if They Want Innovation and Access to Justice,* ABA Journal (Aug. 3, 2015), http://www.abajournal.com/news/article/avvo_founder_tells_lawyers_to_get_rid_of_upl_if_they_want_innovation_and_to.

8. *See* letter from Marina Lao, Dir., Office of Policy Planning, Fed. Trade Comm'n and Robert Porter, Chief, Legal Policy Section, Antitrust Div., U.S. Dep't of Justice to Bill Cook, N.C. State Senator, Dist. 1 (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill436/160610commentncbill.pdf.

9. *See id.*

10. Raymond H. Brescia, *What We Know and Need to Know about Disruptive Innovation*, 67 S.C.L. Rev. 203, 206 (2016), http://www.americanbar.org/content/dam/aba/images/office_president/brescia_whitepaper.pdf. *See also* Deborah H. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. Legal Educ. 431, 531 (2013).

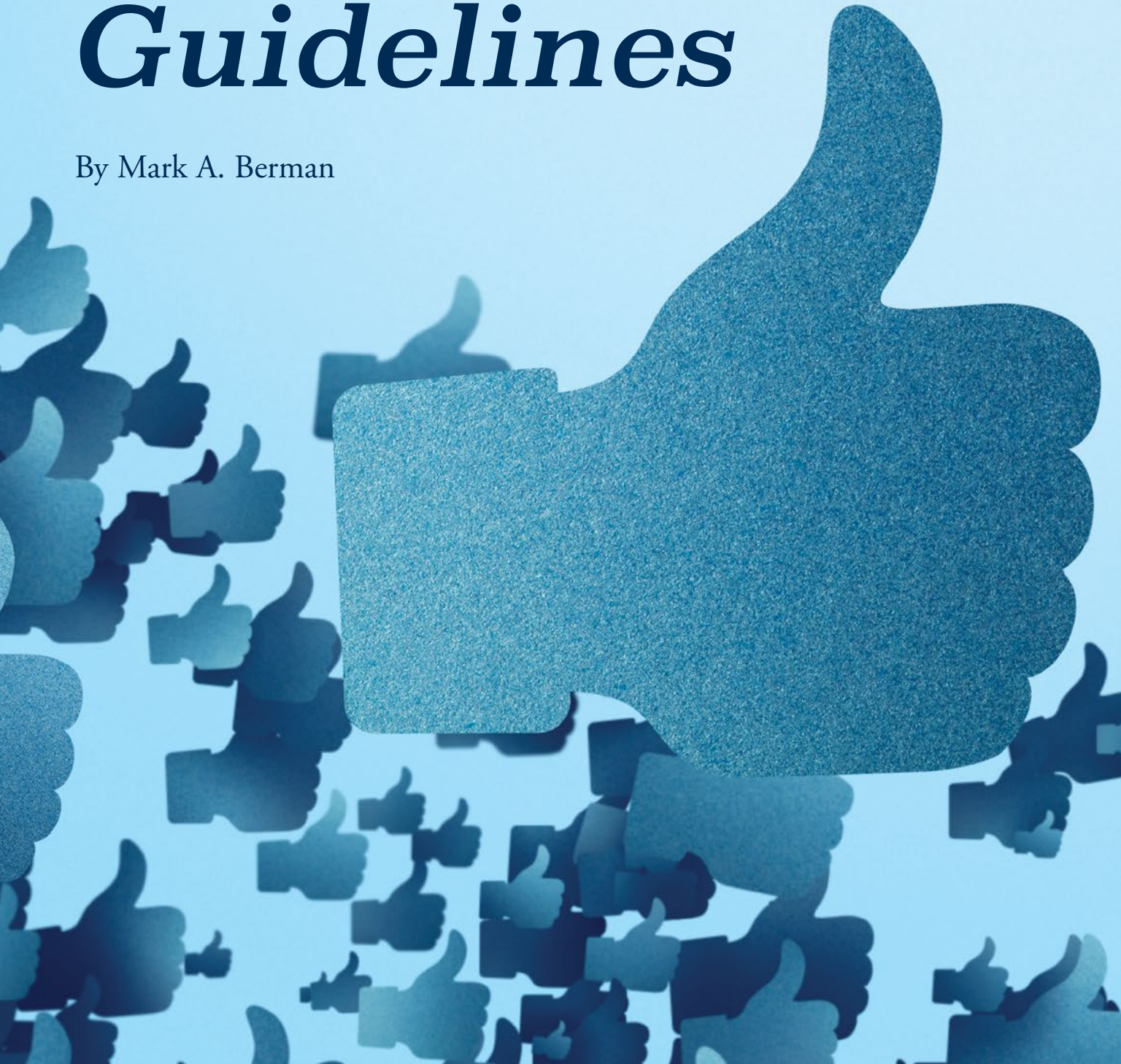
11. Discussion of the "justice gap" is not new. *See, e.g.*, Houseman, Alan, The Justice Gap: Civil Legal Assistance. Today and Tomorrow, Center for American Progress (June 2011), https://www.americanprogress.org/wpcontent/uploads/issues/2011/06/pdf/justice.pdf; *see also* Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income American, Legal Services Corporation (Sept. 2009), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf.

12. ABA COMM., at 3 (citing Deborah Rhode, *Access to Justice* 3 (Oxford Univ. Press, 2004)).

13. The report can be accessed in its entirety at http://www.nycla.org/pdf/NYCLA%20Task%20Force%20Report%20-%20Online%20Legal%20Providers%20of%20Forms%20%282017%29.pdf.

ComFed's *2019 Social Media Ethics Guidelines*

By Mark A. Berman



The Commercial and Federal Litigation Section's *Social Media Ethics Guidelines* have long been recognized as the most widely relied upon publication in the United States on social media legal ethics. The Fourth Edition of the *Guidelines*, which has just been released, shows why they are so highly regarded, why they have been quoted in opinions issued by ethical bodies throughout the country, and why other bar associations have based entire programs on them. As the use of social media continues to grow, and as social media networks proliferate and become more sophisticated, the *Guidelines*, which are based on the New York Rules of Professional Conduct (NYRPC) and ethics opinions interpreting those Rules, have become the go-to source for principles addressing social media issues.

As the *Guidelines* make clear, the key issue for ethical use of social media by lawyers is competence. When using social media – whether to communicate or to advise clients, to advertise, to investigate facts or to monitor communications of jurors – an attorney needs to know how a social media platform works, and appreciate fully the implications of that platform's functions, in order to avoid violating ethical precepts.

For example, even an "anonymous" social media communication may reveal an attorney's "fingerprint," and the recipient may be able to identify not only you, but also your location. Then there is the matter of what specifically must be ethically disclosed by an attorney to a recipient of a social media communication. It's not always self-evident. An attorney's response could inadvertently create an attorney-client relationship and reveal information protected by the attorney-client privilege. And an attorney must be aware that when using a mobile device to communicate over a social media platform, confidential or proprietary information might be accessible through that device. There are other concerns: What limits apply to an attorney who is trying to research or follow a juror during selection, trial, deliberation or thereafter?

Competence means an attorney must realize that in the social media age, technology will alter the way a lawyer communicates with a client in order to ensure that confidences are maintained, especially when using a connection at a hotel, conference, airport or other public places, where others may have access to that communication, or even "hack" it.

Set forth below are each of the guidelines without the accompanying referenced commentary.

1. ATTORNEY COMPETENCE

A: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising, research and investigation.

2. ATTORNEY ADVERTISING AND COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A: Applicability of Advertising Rules

A lawyer's social media profile – whether its purpose is for business, personal or both – may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.

B: Prohibited Use of Term "Specialists" on Social Media

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.

C: Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page

A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer

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also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she may wish to ask that person to remove it.

D: Attorney Endorsements

A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

E: Positional Conflicts in Attorney Advertising

When communicating and stating positions on issues and legal developments, via social media or traditional media, a lawyer should avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on behalf of her clients and the clients of her firm.

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

A: Provision of General Information

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship, and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

B: Public Solicitation Is Prohibited through "Live" Communications

Due to the "live" nature of real-time or interactive computer-accessed communications, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit" business from the public through such means.

If a potential client initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter, may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client.

C: Retention of Social Media Communications with Clients

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person's social media profile or view public posts even if such person is represented by another lawyer.

B: Contacting an Unrepresented Party and/or Requesting to View a Restricted Social Media Websiteage

A lawyer may communicate with an unrepresented party and also request permission to view a non-public portion of the unrepresented party's social media profile. However, the lawyer must use her full name and an accurate profile, and may not create a false profile to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the unrepresented party or otherwise cease all further communications and withdraw the request if applicable.

C: Contacting a Represented Party and/or Viewing a Non-Public Social Media Website

A lawyer shall not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express consent has been furnished by the represented party's counsel.

D: Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a party's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, where such conduct if engaged in by the lawyer would violate any ethics rules.

5. COMMUNICATING WITH CLIENTS

A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made non-public on her social media account, including advising on changing her privacy

and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.

D: A Lawyer's Use of Client-Provided Social Media Information

A lawyer may review a represented person's non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

E: Maintaining Client Confidences and Confidential Information

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media activities and a lawyer's website or blog must comply with these limitations.

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice operates before using it and consider whether any activity places client information and confidences at risk.

Where a client has posted an online review of the lawyer or her services, the lawyer's response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

A: Lawyers May Conduct Social Media Research of Jurors

A lawyer may research a prospective or sitting juror's public social media profile and public posts as long as it does not violate any local rules or court order.

B: A Juror's Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.

C: Deceit Shall Not Be Used to View a Juror's Social Media

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

D: Juror Contact During Trial

After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.

E: Juror Misconduct

If a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

CYBERSECURITY HYGIENE

CHECKLIST

This checklist was developed by students in the spring 2019 Technology and the Law course, a collaboration between the New York State Bar Association Committee on Technology and the Legal Profession and City University of New York School of Law.
For more about the CUNY Law Technology and the law course, see page 28.

PASSWORD PROTECTION

- ❑ Consider dual factor authentication
- ❑ Use complex passphrase with numbers, symbols and/or upper- and lower-case letters
- ❑ Never provide your password when requested by email or through a site. Contact the requester by phone and try to independently verify the legitimacy of the request
- ❑ Use a password generator and manager

PRIVACY

- ❑ Do not use public Wi-Fi
- ❑ Utilize VPN (virtual private network) as appropriate
- ❑ Require a password in order to access a thumb drive
- ❑ Encrypt documents as appropriate
- ❑ Cover the camera on your laptop and tablet
- ❑ Use up-to-date redaction software where appropriate (e.g., PDF documents)
- ❑ Keep work and private personal digital information separate
- ❑ Always manually log off of networks, websites, and email platforms when you are finished
- ❑ Periodically clear out cookies
- ❑ Do not link sites together so as not to share private information
- ❑ Consider faxing confidential information
- ❑ Consider use a credit card RFID (Radio Frequency Identification) shield

HARDWARE, SOFTWARE, AND OPERATING SYSTEMS

- ❑ Keep software and operating systems up to date
- ❑ Implement patches as soon as available
- ❑ Install software to scan for viruses
- ❑ Install a tracker to locate lost devices
- ❑ Install a program/app that can remotely lock or wipe lost devices

LAW PRACTICE MANAGEMENT

- ❑ Purchase cyber security insurance that covers social engineering
- ❑ Always maintain backup files in a secure location
- ❑ Consider encrypting server and/or backup
- ❑ Review cyber security audits of third parties or vendors
- ❑ Ensure backup is not connected to your system so as not to compromise its integrity in the event of a hack
- ❑ Create an incident response plan to be followed in the event of a hack – what to do, who to call, what to change
- ❑ Consider disclosing cybersecurity protocols and concerns in retainer letter
- ❑ Do due diligence on third parties and vendors with whom you are working

NYSBA Collaborates With Law Schools on Technology and the Law Class

In a pioneering collaboration with the New York State Bar Association Committee on Technology and the Legal Profession, City University of New York School of Law offered a Technology and Law course in the spring 2019 semester.

This two-credit course was offered in the evening and 17 students participated, including both day and evening students. Classes featured weekly guest speakers, including NYSBA members, on a range of topics. Similar courses are planned with other New York State law schools in the coming months.

The goal of the course was to provide students with an understanding of the fundamentals of how technology intersects with the law. No particular technology skill or expertise was required, and all students were welcome, regardless of their technological expertise.

The course covered the fundamentals of technology and the law, with a focus on what new lawyers need to know in order to practice competently. Topics included an overview of technology and law in a historical context, privacy and constitutional rights, social media, cybersecurity, professional responsibility and protecting confidential client and law firm information, e-discovery, how algorithms are used by government and private entities, government regulation, artificial intelligence, biometrics and emerging uses of blockchain and distributed applications.

New York is one of a growing number of states that have adopted a professional duty of technology competence. Comment 8 to Rule 1.1 of the NY Rules of Professional Conduct states that a lawyer should:

> Keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information.

Along with CUNY Law Dean Mary Lu Bilek, Immediate Past President Michael Miller attended one of the classes and recalled that "the students were incredibly engaged, and it struck me how valuable this course was for them because it demonstrated the relevance of the law to new, exciting and emerging technologies and explored the avenues where cutting-edge technology and the law intersects.

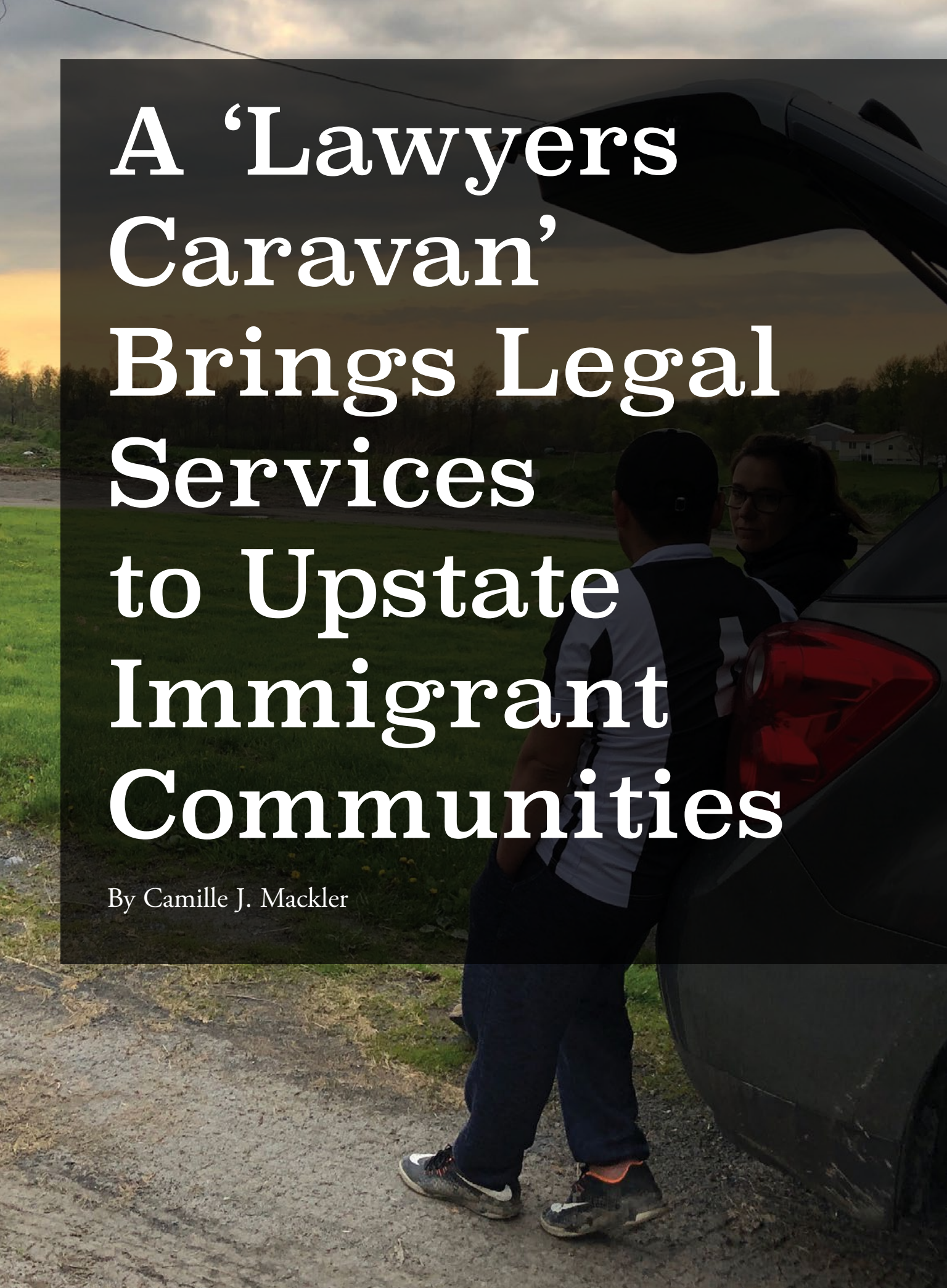
"The Technology and the Law class also helped to demonstrate the relevance of involvement in the organized bar and the ability to employ technology for social justice," Miller said.

Each week's seminar was designed to maximize student participation and discussion about the impact of technology on law practice, the legal system, legal ethics, and on marginalized and vulnerable communities. Students were evaluated on three reaction papers, class participation, and a final paper or project. Topics for the final paper or project included:

- How to use technology to facilitate reentry after incarceration.
- An analysis of *Wisconsin v. Loomis* and the implications of using risk assessment tools in criminal law
- Ethical issues related to autonomous vehicles
- Why technology should be integrated into the law school curriculum and connected to anti-racism and anti-oppression work
- How to use blockchain technology to help student groups, including creating more participation in votes on student and law school initiatives
- The use of automated weapons in the U.S. military
- Facial recognition technology and its origins in physiognomy
- Why drones need to be regulated
- Analysis of smart contracts and the common law

One of the classes focused on cybersecurity for attorneys and was taught in part by an FBI special agent. That class provoked a particularly rich and practical discussion, out of which grew a cybersecurity hygiene checklist that was developed by the students for fellow law students and new attorneys (*insert sidebar location*).

NYSBA Committee on Technology and the Law Chair Mark A. Berman played a central role in developing the course and taught it along with Professor Joe Rosenberg. Guest speakers for the class in which the cybersecurity checklist was developed were Parth Chowlera and Michael DiNicola. Students included: Mirian Albert, Erol Akpinar, Eleni Barefoot, Stephan Cardio, Charles Cooper, Trent Fucci, Matthew Glover, Andrea Irias, Emily Jenkins, Eric Johnson, Jamal Johnson, Andy Laine, Kimberly Mims, Tyreke Moses, Geno Nettle, Antonio Ponton-Nunez, and Jonathan Saxton. The course was also supported by CUNY Law colleagues Amanda Beltran and Chris Argiropolous.



A 'Lawyers Caravan' Brings Legal Services to Upstate Immigrant Communities

By Camille J. Mackler

Sitting on the side of a country road, waiting for a young Guatemalan woman to emerge from a small clapboard house so that I could drive her to a local church, was not what I envisioned doing as a lawyer all those years ago in law school.

Yet last May there I was, deep in New York's North Country, doing just that. Behind the small house, which was so close to the road it didn't have room for a driveway, I could see cows lined up in their enclosures waiting to be milked. A few more houses and signs of farm life – tractors, barns, equipment – were grouped nearby. Fields stretched out all around me, with trees breaking up the landscape here and there. The only sound was the faint rustling of the animals, but even they were mostly silent. After days of rain, the ground was soaked through and the smell of wet grass was faint on the cooler-than-expected air.

The young woman I was waiting for came down the steps, not exactly confident, but not shy either. She hesitated for a second before I waved her into the passenger seat. I secretly wondered at the trust she had in me, a total stranger, as she buckled herself in. We chit-chatted while I drove around the outskirts of Watertown, about 30 miles south of the Canadian border, home to the U.S. Army's Fort Drum and known for its heavy law enforcement presence -- including the U.S. Border Patrol.

I made sure to go exactly the speed limit so as to not risk getting pulled over and asked about my passenger. As I drove, she told me about her life in Guatemala and her decision to come join her brother here in upstate New York. The farmer and his wife were nice, she told me. When her lungs filled with fluid a year ago and she was forced to have open-heart surgery and go on a life-long regimen of dialysis, they let her continue living at the farm even though she could no longer work with the cows.

She did odd jobs and kept the house clean for her brother and their co-workers, but she needed to stay away from the dust and the hay. And she couldn't do too much strenuous activity either. She paid about a day's worth of wages for a ride to the doctor for her treatments, and she was unsure, when we got to our destination, if she should pay me too. She was 24.

Camille J. Mackler is the NYIC Director of Immigration Legal Policy. In her role, she works on crafting NYIC policy priorities relating to access to justice and right to counsel for New York's immigrant communities. Prior to joining the NYIC, Camille was in private practice representing detained and non-detained immigrants facing deportation, in asylum proceedings, or in family-based petitions. She currently serves as the Chair of the Protecting Immigrant New Yorkers Task Force, and the Co-Chair of the New York State Bar Association's Committee on Immigration Representation.

When we arrived at the All Souls Unitarian Universalist Church, a lively group waited for us inside. Seated on couches in the main lobby, workers from various farms caught-up with each other and with the organizers from the Workers Center for Central New York, who had helped us organize the event. Children ran around the hallways and grouped together in the church's playroom, shouting and laughing in an odd mix of Spanish and English.

In various offices throughout the church, lawyers who had come in that day from New York City met with the workers one-on-one. A colleague and I led a *Know Your Rights* presentation for those who waited, holding up poster-sized versions of different kinds of warrants mounted on foam board for all to see.

Later, when the lawyers grouped around a diner table for the first of our nightly debriefs, I felt like the fluorescent lighting's unforgiving glare brought out into the open every feeling of exhaustion and sadness I had.

The idea for a caravan of lawyers traveling to New York's hardest to reach immigrant communities had come to me in a random flash of inspiration the previous fall. It was one of those moments where you trail off mid-sentence as you're chatting with a friend, because you just had an idea that needs to be seized before it fades away. We were in the midst of a conversation about the media coverage of the so-called migrant caravan, which at the time was making its way north through Mexico to the dismay of our elected leaders and with great fanfare by the press, but my mind was on a recent meetings I had had with remote communities in upstate New York. Somehow, the two ideas merged, and the lawyer caravan began to take shape in my head.

A few text messages and a few accidental meetings later, a team had been formed. By the time I left New York City on Mother's Day for the first leg of the trip north we had turned away many who wanted to join, while a motley crew of big-firm lawyers, non-profit attorneys, and rural community organizers banded together on our first lawyer caravan.

ORGANIZING THE CARAVAN PROJECT

To get the project going, I teamed up with Fabiola Ortiz, a lifelong labor organizer now based out of Syracuse and my colleague at the New York Immigration Coalition. With the support of the New York State Bar Association, Fabiola and I worked to bring together a group of about 10 lawyers and a couple of community advocates on a week-long trip during which we would meet with immigrant farmworkers upstate. Our trip would loosely follow the U.S.-Canadian border starting in the area north of the Adirondacks and making our way west nearly to Rochester.

We chose to focus on dairy farms because, unlike their fruit farm counterparts, the work there is year-round, and farmers cannot rely on temporary work-visa programs to bring in necessary labor. New York's dairies, a powerful economic sector for the state, are mainly staffed by unauthorized immigrants who typically work 12-to-14-hour shifts, six days a week, milking thousands of cows three times a day at least. We did *Know Your Rights* presentations for these workers, interviewed them to capture their personal stories, and for those who wanted it, provided one-on-one legal consultations and, if possible, referrals to local attorneys.

New York's dairies, a powerful economic sector for the state, are mainly staffed by unauthorized immigrants who typically work 12-to-14-hour shifts, six days a week, milking thousands of cows three times a day at least.

Our biggest goals were to better understand the needs of these communities, particularly their legal needs, and to strengthen and support local legal capacity. For years, I have been working on researching and documenting access to counsel and access to justice issues for immigrant New Yorkers by examining the obstacles communities face in accessing immigration legal help as well as the challenges lawyers encounter in providing immigration legal services.

Being based in New York City and having practiced there. I was well aware of the resources available downstate as well as the continuing gaps. Working for an organization that served the entire state, I had often heard about New York's upstate-downstate imbalance, but in my mind it remained an academic concept at best.

Since early 2017, using the momentum from the legal efforts at JFK Airport in the wake of the travel ban, legal service providers had been formalizing their relationships through a statewide collaborative we named the Immigrant Advocates Response Collaborative (I-ARC). I was very involved in the organizing of the attorneys at the airport and used that knowledge and the lessons learned to help launch I-ARC.

In late 2018, I set a goal for myself to "network the state" with respect to immigration legal services. Early in 2019, the I-ARC Steering Committee decided to make networking the state one of *its* goals for the year, and as part of that effort I ramped up the work of I-ARC's upstate working group. As we worked to plan the trip, these goals were front and center on my mind. Fabiola and I wanted to bring New York City lawyers to these regions so that they – and I – could see for themselves the challenges in those parts of the state. But we also wanted to work with the local groups to find ways to support and increase their capacity to meet the needs of their communities.

So there we were in Watertown on a rainy Monday, where we set up our operations at the All Souls Unitarian Universalist church. Joining Fabiola and me were Kyle, Eduardo, Saralyn, and Julissa from New York City law firms, Lorilei from a NYC non-profit, community advocates Rebecca, Crispin, and Joel from Central New York, and local advocate Rebecca who was in the midst of building ally networks for immigrant communities in North Country.

Over the next week we visited farms in Jefferson, Cortland, Madison, Onondaga, and Wayne counties and were joined by Carmen, from New York City, and local attorneys Beth, Jakki, and Sara. After that first day, we were a team of all women attorneys for the rest of the week. On the last day, Fabiola, Sara and I met at the home of a farmer, who had invited others from the com-

munity. There, I did the *Know Your Rights* session for workers and employers, and answered questions from them about how to keep their employees safe.

We drove nearly 2,000 miles over five days, doing an impromptu tour of some of New York's prettiest regions and towns: The Finger Lakes, the Adirondacks, Skaneateles to name just a few. On my own one day, driving back to meet the group from an unrelated meeting in Rochester, I stopped by Seneca Falls for lunch. I had wanted to take a photo of the Women's Rights National Monument for my daughter but also stumbled upon the "It's a Wonderful Life" museum. Seneca Falls, as it turned out, is the real-life Bedford Falls. I remembered watching the movie for the first time with my father, when he used it to explain to me that one person can make a difference in the world. It seemed fitting.

The next day, our group unexpectedly had to split up. While one team stayed behind, Fabiola, Lorilei, Carmen and I, along with advocates Crispin and Joel, drove west to Wayne County. We stopped in Skaneateles for a photo opportunity along the way and went to Sodus Point for lunch, walking out to the lighthouse and waving to Canada from across the lake.

We spoke only in Spanish for Crispin and Joel's benefit. It was the first time I experienced the obvious reaction of those around us, who either did not expect or did not approve of us not speaking English. Despite those moments of uneasiness, I remember sitting around a picnic table eating ice creams together that day, joking about our experiences on the trip, and thinking I had the best job in the world.

IMMIGRANT ISOLATION AND INVISIBILITY

Dairy farms, which we specifically targeted on this trip, are a powerful economic engine for New York State. Driven most recently by its booming yogurt industry, New York continues to be a top-producing dairy state. Only California, Wisconsin and Idaho produce more milk annually. New York's dairy farms range in sizes and workforce, but most of the ones we visited had fewer than 10 immigrant workers, and a few thousand cows each. Only in Watertown did we meet workers from significantly larger farms. In addition to the immigrant workers, Americans also work on the farms, usually in the supervisory capacities with shorter hours and better pay and benefits.

Necessarily, the farms are set far apart from each other and from the centers of towns. Each includes several buildings, including barns, milk storing facilities, and the milking parlors themselves, which are essentially large pens with roofs where cows line up, held in place by large iron loops that hang around their necks. The farmworker housing is usually very close to the cows, either next to the pens or across the street. At one farm that we visited, the worker housing had burned down a few years prior in a fire started in hay bales that were stacked right outside the house's windows.

The farmworker housing we visited was generally rundown and badly in need of repairs. The buildings were drafty and cold, unwelcoming on the rainy days we were there. In the one newer structure, rebuilt after a fire, the rooms were barely big enough for one person, yet most were meant for two.

The housing was for the most part devoid of any personal touches or any small improvements that would have made them feel more like homes. Instead, sadness and exhaustion were palpable from the minute we walked in. Most had televisions, but no other obvious means of recreation. Of course, working 12-or- more-hour shifts six days a week, it was unlikely that the workers had much time for anything else.

Nonetheless, there were some reminders of workers' homelands. One home had an altar to the Virgin Guadalupe. On it, the men had placed a jar where, at the end of the month, each put in whatever money they could afford. At the end of the year, the contents of the jar were sent to a church in their native village in Guatemala ahead of Christmas. Next to the altar, they had hung the Guatemalan flag on the wall. Every home we went into also had a tortilla press and boxes of *masa harina* in the kitchen, clearly sent from family back home so that they could make the food they knew.

The neighboring towns stood in stark contrast. Whereas the farms were clearly populated by Central American migrants, the towns we drove through seemed uniformly white. Fabiola had warned me about this and explained to me that the immigrant workers often felt uncomfortable going into town centers because the color of their skin would make them stick out.

What surprised me, though, was the complete lack of evidence that immigrant communities live so close by. We didn't drive by so much as a Mexican restaurant, or a business with a Spanish language sign. The immigrants, so crucial to the region's economic well-being, were invisible in the towns where they lived.

The racism they faced when they left the farms was, of course, only one reason why the workers did not often come into town. Geographical distances also enforce the isolation. The country roads are not easily walkable, and the vast fields between different farms make it hard for someone to simply go see a neighbor at the end of a long workday.

At the time, undocumented immigrants could not obtain drivers licenses in New York (The law that will allow them to do so is set to go into effect on December 14). Without this critical document, they are forced to either risk driving without a license – which in the event they

are pulled over for even a minor infraction, or simply because of racial profiling, would surely lead to a call to U.S. Immigration and Customs Enforcement (ICE) – or paying often up to a day's wages for a ride into town. The fear of encountering law enforcement coupled with the high cost means most workers remain on the farms unless they have a critical need to go somewhere, such as a medical appointment or a grocery run.

But perhaps the greatest isolator of all is the workers' immigration status, or, rather, lack thereof. Nearly all of the workers that we met were out of status. Some, mainly the younger ones who were more recently arrived, had been arrested at the border. Others had been arrested in some unlucky encounter with immigration enforcement in the interior. In either case, they were either going through deportation proceedings, or had deportation orders but risked staying in the United States anyway, trying to work here for as long as possible before being forced to go home. Many others are simply here without status and were hoping to lay low and not come to the attention of immigration authorities.

ACCESS TO JUSTICE – OR LACK THEREOF

In these circumstances, our presence seemed to be somewhat of a surprise to the workers we visited. Most of those we interviewed, approximately 40 individuals in total, told us they did not know who they would ask if they needed to speak to a lawyer. A handful, those who were connected to the broader organizing efforts of local advocates, told us they would go through those community groups. The ones who had already faced a need for a lawyer, generally because they were facing deportation, had met them in ad hoc ways -- by word of mouth, or in the immigration court waiting room. The geographic distances also provided a formidable barrier. For those who were represented, none of the lawyers were local and many were several hours' drive away.

In addition to the lack of local services and the distances involved, language was another obstacle. None of the workers we met spoke English, and most of the attorneys did not appear to speak Spanish. The long work hours and limited availability of classes meant that many could not connect to English language instruction. The farmers often did not speak Spanish either, and relied on the one worker with the best command of English, minimal though it might be, to communicate with the others.

The biggest surprise, to me at least, however, was the lack of trust the workers showed toward us. Looking back, I realize that this was probably part of my big-city arrogance. Or maybe, as a lawyer, I'm used to feeling that I have all the answers and that others must recognize that too. But in this part of the state where obtaining even basic necessities is such a complex struggle, it was clear that our presence was widely met with skepticism.

In many instances, it became obvious that there were many more community members who could have come out but didn't, perhaps out of fear or out of distrust. Coming from a city where lawyers feel inundated with communities' needs for legal representation, it was the first time I began to understand the complexities of working with rural, isolated communities.

THE "NEW" PRACTICE OF LAW

We all come to this work for different reasons. As the daughter of two journalists, I grew up traveling around the world. Through my parents I met countless people who had suffered because their fundamental rights had been violated by their governments and heard the stories of many more. I saw the United States through their eyes – as the shining city on the hill, the champion defender of everyone's human rights. I carried my American citizenship like a badge of honor.

My father was proud of his American Jewish heritage and often spoke of his childhood growing up in a poor Russian Jewish neighborhood in Brooklyn. Our family had been refugees, fleeing to escape the pogroms in Russia and Moldova. My grandmother arrived as a tiny one-year-old baby, and I often pictured her in her parents' arms, looking up at the Statue of Liberty as they sailed by on their way to Ellis Island.

As a child, I spent my summers in France, listening to my mother's parents tell stories of living in Nazi-occupied Paris. They told me over and over that my generation could never understand what it was like to exist under such a regime. In the aftermath of the 9/11 terror attacks, when I felt scared of the world that was changing around me, my grandfather called me to say that what he had meant was that he *hoped* we would never have to understand.

I am proud of all that I have achieved over the last two-and-a-half years, and I recognize that this personal history has carried me through it all. I don't think I ever asked myself what I would do if I had found myself living in those same circumstances, but now I know -- I show up. This is my personal story, but it is part of a much larger narrative.

I was one of the first to arrive at JFK airport the morning the travel ban went into effect in January 2017. I helped launch the protest and then I stayed for nine more days to help organize the legal efforts on the ground. Eighteen months later, in July 2018, I was one of the first to arrive at the Albany County Jail, where the ICE had transferred 300 asylum seekers from the southern border in the dead of night, at the height of the family separation crisis.

In between those headline making moments, there have been countless more efforts, moments of joy and celebration, and times of profound sadness. I've worked to create strong networks between immigration lawyers so that they won't feel alone when confronted with unspeakable cruelty. I've stood on our northern border, watching people beg Canada to admit them because they were too afraid to remain in the United States. I've celebrated each hard-fought court win, from overturning a hateful policy to keeping one man in the country longer with his family.

I am proud to be part of a profession that, when we were pushed to the brink, stood up and said, "not one more." I am constantly amazed by the lawyers I work with every day, who are re-writing the rules of how we practice law and laying it all on the line for every single client. From the hours of research and writing and learning they put into every case, to the teaching and mentoring they offer each other to strengthen the immigration bar as a whole, lawyers have responded to every shift in policy, every new attack on our communities, no matter how dizzyingly fast things come at us.

And we are still responding: As I write these words, lawyers are exposing the atrocities migrant children are suffering in processing facilities at the U.S.-Mexico border, a sad reminder of last summer, when lawyers frantically worked to reunify parents and children separated by our cruel immigration policies.

I'm proud of our lawyer caravan along our other, quieter border, and grateful that our work reminded me not just of all that remains to be done, but also of why we do it in the first place.

New York's Housing Stability and Tenant Protection Act of 2019:

What Lawyers Must Know

By Gerald Lebovits, John S. Lansden, and Damon P. Howard

On June 14, 2019, in response to a housing shortage that has spanned more than half a century, New York's Housing Stability and Tenant Protection Act of 2019 (HSTPA) became law. HSTPA will bring about broad and sweeping changes to the laws governing many forms of housing across New York. HSTPA's proponents argue that it is, among many other things, a long-overdue strengthening of tenant protections following years of landlord abuse. HSTPA's detractors argue that it will, among many other things, have a chilling effect on real-estate development, curtail residential property owners' incentives to improve their buildings, impoverish small landlords, and exacerbate New York's housing shortage.

We take no position on HSTPA's economic, moral, or political attributes or virtues, but instead discuss HSTPA's substantive and procedural provisions and how the new legislation will affect landlord-tenant litigation statewide.

Here, we provide a chart comparing and summarizing the old law and the current law. Future articles will analyze HSTPA and its impact on landlord-tenant litigation, explain the practical effects it might have on landlords and tenants, note interpretations from the courts and attorneys for both landlords and tenants in their attempt to navigate this new sea of law, and anticipate what landlords and tenants will do in light of HSTPA.

CHANGES TO RENT REGULATION

Area of Law	Old Law	2019 Law
Expiration Provisions	Rent regulation expired every 4 to 8 years to allow State legislature to determine whether a housing emergency (vacancy 5% or less) continued to exist.	• Rent-control and rent-stabilization sunset provisions eliminated. • Effective 6/14/19.
Luxury Deregulation NYC Admin. Code §§ 26-504.2 & 26-504.3	***High-Rent Vacancy Deregulation:*** permitted deregulation of a regulated apartment vacated with a legal rent at or above a certain threshold, most recently $2,774.76. Once deregulated, market rent could be charged. ***High Income–High Rent Deregulation:*** permitted high-income deregulation by DHCR order if the apartment was occupied by persons having a total income in excess of $200,000 for the two preceding years and the rent was $2,774.76 or higher.	• Luxury deregulation (both high-rent and high-income & high-rent) now abolished. • Clean-up bill clarifies that any unit lawfully deregulated before 6/14/19 shall remain deregulated; also provides that 421-a buildings are governed by the law in effect before 6/14/19 and remain deregulated. • Ensures that all units regulated as of 6/14/19 will remain regulated. • Effective 6/14/19.

Hon. Gerald Lebovits, an acting Supreme Court justice in New York County, teaches landlord-tenant law at Fordham University School of Law.

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Justice Lebovits and Mr. Howard have co-authored all 11 editions of the State Bar's text Residential Landlord-Tenant Law and Procedure. For their contributions, the authors thank Housing Court Judge Michael L. Weisberg and Sarah J. Konnerth, Justice Lebovits's judicial extern and a student at Fordham University School of Law.

Rent Increases for Building Improvements NYC Admin. Code §§ 26-511(13) & 26-511.1, 26-511(6), 26-405.1	***Individual Apartment Improvements (IAIs):*** permanent monthly rent increases equal to 1/40th of the cost of apartment improvements in buildings with 35 or fewer apartments and 1/60th in buildings with 36 or more apartments; DHCR approval was not necessary; tenant consent required only if the apartment was occupied.	• Increase revised to 1/168th (≤35 units) and 1/180th (>35 units). • IAIs now temporary will be removed 30 years from date increase became effective. • DHCR must notify owners and occupants that IAI increase will expire. • Only 3 IAIs over 15 years permitted, for total aggregate cost of $15,000. • The most a landlord may increase the rent with IAIs is $89 for buildings with fewer than 35 units and $83 for buildings with more than 35 units. • DHCR to promulgate guidelines and create a centralized IAI documentation electronic database. • For IAIs in occupied units, tenant must give informed consent on a DHCR form. The form must be in one of the six primary languages (other than English), as determined by the U.S. Census Bureau. • To charge for IAIs, landlord must remove from apartment all hazardous ("B") or immediately hazardous ("C") violations. • Clean-up bill clarifies that 15-year period and $15,000 cap on 3 IAIs start with first IAI after 6/14/19. • Costs must be "reasonable and verifiable modification or increase in dwelling space, furniture, furnishings or equipment." • Increase in rent is aggregate over 15 years. • Work performed by an independent contractor who is licensed; no relationship with landlord. • Photographs to be taken before and after work is done; photos/records must be kept permanently. • Effective 6/14/19.
	Major Capital Improvements (MCIs): permanent rent increases based on actual cost of building improvements, apportioned among building's tenants on a per-room basis and amortized over 8 years for buildings with 35 or fewer apartments and 9 years for 36 or more apartments; annual rent increases were capped at 6% in NYC and 15% in the rest of the state; owners had to apply for DHCR approval; there was a temporary retroactive component for application processing time.	• Annual cap decreased from 6% to 2%. • Amortization period extended to 12 years if ≤35 units and to 12 ½ years if >35 units. • Retroactive component: MCIs approved 6/16/12–6/16/19 may not exceed 2% cap starting 9/1/19 for any tenant in occupancy on the date of the MCI order. • MCI increase now temporary, will be removed 30 years after effective date. • DHCR required to set a schedule of "reasonable costs." • DHCR must send notice to landlord and all tenants 60 days before end of temporary MCI. Notice shall include the initial approved improvement increase and the total amount to be removed. • MCIs are work essential for preservation, energy efficiency, functionality, or infrastructure of the entire building. • Amount of MCI must be reduced by the amount of any government grant given to help pay for improvements and by any insurance payments that compensate for improvement costs. • Collection of MCI starts on the first day of the month at least 60 days after notice to tenant of the increase. • MCIs not permitted in buildings with 35% or fewer regulated units. • Application requires additional and more detailed documentation; DHCR to audit 25% of MCIs. • No MCI if there are outstanding hazardous or immediately hazardous violations. • Eliminates retroactive portion of MCI. • Independent contractors must perform work. • Effective 6/14/19.

Rent Increases During Vacancies NYC Admin. Code § 26-510(j)	***Vacancy Increase:*** increase of 20% for a 2-year vacancy lease, and 20% minus the difference between applicable 2-year and 1-year renewal lease guidelines for a 1-year vacancy lease. ***Longevity Bonus:*** additional vacancy increase equal to 0.6% for each year since the last vacancy increase if more than 8 years had passed since the last vacancy increase. These increases were in addition to any NYC Rent Guidelines Board (RGB)-approved increase.	• Vacancy increases repealed. • Longevity bonus repealed. • RGB may not adopt vacancy or rent adjustment without legislature's approval. • RGB may not establish rent adjustment or allow any increase that does not apply to all regulated apartments equally. All rent increases are the same regardless whether for a renewal or a vacancy lease. • Effective 6/14/19.
Rent Stabilization Coverage	Rent stabilization was in effect in NYC; parts of Nassau, Rockland, and Westchester Counties; and Buffalo and other upstate cities.	• Rent stabilization available statewide to any municipality with less than 5% vacancy and a population of less than a million where local legislature determines that a housing emergency exists. Same criteria for coverage as within NYC. • DHCR to reconstitute an RGB outside NYC. • Effective 6/14/19.
Rent Overcharge Claims, Treble Damages, Records Requirements, Choice of Forum NYC Admin. Code § 26-516(a), CPLR 213-a	Overcharge claims limited to 4-year period before filing of claim; subject to exceptions like fraud; determination of legal rent limited to 4-year lookback period; landlord required to maintain rent records for 4 years; treble damages imposable for 2-year period before filing of claim if overcharge was willful, but not based solely on failure to file rent registrations; and safe-harbor exception, which allowed the landlord to refund any overcharge, plus interest, and reduce the rent before time to answer complaint expired. Permitted late registrations to avoid overcharge liability.	• 6-year statute of limitations on overcharge claims; but CPLR amended to permit filing of claim at any time; applicable to any proceeding/application pending as of 6/14/19. • Overcharge penalties limited to 6 years preceding the complaint. • No limitation on lookback period to determine legal rent; all available rent history may be examined if "reasonably necessary"; unexplained rental increases can make registrations "unreliable"; base rent is last "reliable" registration filed 6 years or more prior to complaint; certain common law exceptions to the statute of limitations set by Rent Stabilization Code written into law. • Treble-damages period extended to 6 years; no longer defense that overcharge was based on untimely registration. • No safe harbor; treble damages may be imposed even if owner refunds overcharge. • Attorney fees and costs must be imposed if landlord is found to have overcharged a tenant (discretionary under prior law). • Record-keeping obligation extended to 6 years, but no limitation on look-back period to determine legal rent. • Evidence of improvements should not be discarded; new law mentions useful life provisions, which can be as many as 25 years. Failure to maintain records permits DHCR or court to consider evidence of overcharge beyond 6 years. • Although DHCR and the courts shared concurrent jurisdiction under the prior law, the new law gives the tenant the choice of forum.
Preferential Rents NYC Admin. Code § 26-511(14)	Landlords could charge a "preferential" rent that was less than the legal rent; landlord could rescind preferential rent during renewal unless lease provided otherwise.	• Owners may charge only the preferential rent, subject to applicable RGB rates and any other applicable rent increase; when the tenant vacates, the preferential rent can be rescinded if warranty of habitability issues did not cause the vacancy. • Subject to limited exception for buildings subject to a regulatory agreement (i.e., federal housing projects). Effective 6/14/19, but it applies to any tenant subject to a lease on or after the effective date or that is entitled to receive a renewal or vacancy lease on or after that date. • Effective 6/14/19.

Recovery of Regulated Apartments for Owner's Use NYC Admin. Code §§ 26-511(b), 26-408(1)	Rent-regulated apartment(s) could be recovered if the owner or owner's immediate family intended in good-faith to occupy apartment(s) as their primary residence.	• Only one apartment may be recovered. • Landlord must have "immediate and compelling necessity" to recover apartment. • Owner or immediate family must occupy apartment for 3 years after recovery. • New cause of action is created for damages and declaratory and injunctive relief based on owner's fraudulent statement regarding proposed use of apartment; clean-up bill clarifies that this exists only when tenant was required to surrender the premises under owner's own-use provision. • Unless owner can provide an equivalent or superior housing accommodation at same or lower stabilized rent in an area closely proximate to subject unit, owner is precluded from recovering a unit when any member of the household lawfully occupying unit has 15 or more years' (previously 20 years) tenancy; is 62 years old or older; or has a permanent anatomical, physiological, or psychological condition that prevents "substantial gainful employment." • Effective 6/14/19. Applies to any tenant in occupancy on this date.
Non-Profit Exemption from Rent Stabilization	Non-profits operated for charitable or educational purposes exempt from rent stabilization.	• Non-profits operating programs for those who are or were homeless or at risk of homelessness no longer exempt from rent stabilization. • Existing occupants are deemed tenants, and the legal rent is set at the next renewal to the legal rent of the prior tenant, plus applicable RGB increases. • Clean-up bill excludes from the exemption premises owned or operated by a hospital or other charitable organization operated on an exclusive not-for-profit basis. • Effective 6/14/19.
Rent Increases for Rent Controlled Tenants NYC Admin. Code §§ 26-405(a)(5), 26-407.1	Maximum collectible rent for rent-controlled tenants could not be increased by more than 7.5%/year; separate fuel cost adjustment was available based on changes in heating fuel cost.	• Annual increases lesser of 7.5% and average of the last 5 years of RGB 1-year renewal increases. • Fuel cost pass-along eliminated. • Effective 6/14/19.

CHANGES TO THE REAL PROPERTY LAW

Area of Law	Old Law	2019 Law

Notice Prior to Expiration of Lease and of Rent Increase
RPL §§ 226-c, 232-a, 232-b
	Month-to-month tenancies could be terminated with service of 30-day notice; no notice requirement at expiration of ordinary lease or if renewal conditioned on increase in rent.	• Landlords must notify tenants if the lease will not be renewed *or* if rent will be increased by 5% or more.
		• Amount of notice depends on length of occupancy or lease term:
		  • Occupancy <1 year or lease term ≤1 year → 30 days' notice.
		  • Occupancy >1 year <2 years, lease term ≥1 year <2 years → 60 days' notice.
		  • Occupancy >2 years or lease term ≥2 years → 90 days' notice.
		• Notice must specify vacate date.
		• Applies statewide to non-regulated residences; applies to all tenancies, even one-family homes; inapplicable to non-leasing license relationships.
		• If notice not given, tenancy continues on same terms until notice is given and required time passes.
		• In NYC, termination notice requires RPAPL 735 service; outside NYC, or for commercial tenant, landlord's service method is unclear: RPAPL 735 service is not referenced.
		• Under prior and current law, tenant need not give notice before vacating.
		• RPL § 232-b amended to provide that monthly or month-to-month tenancies outside NYC may be terminated by either commercial landlord or any tenant on 30 days' notice.
		• Effective 10/12/19.

Duty to Mitigate Damages by Renting Apartment RPL § 227-e	Landlords were not obligated to mitigate damages. The apartment could have been left vacant, and tenant would have been liable for rent through end of term.	• Landlord must in good faith, according to landlord's resources and abilities, take "reasonable and customary" steps to rent the apartment; residential only; commercial leases and licenses not affected. • Overrules *Holy Props Ltd, L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130 (1995). • Lease provisions to the contrary are void as contrary to public policy. • The person seeking damages has the burden of proof. • Effective 6/14/19.
Notice to Tenant of Failure to Pay Rent and Rent Receipts RPL § 235-e	Other than statutory 3-day rent demand, nothing required landlord to notify tenant that rent was not received.	• Residential and possibly commercial tenants must be notified by certified mail within 5 days that rent was not received on the due date. • Tenant may raise as an affirmative defense to a nonpayment proceeding the failure to provide this notice. • Landlords must maintain records of cash receipts for at least 3 years; rent receipts must be provided upon tenant's request or if rent is paid by cash or any form other than personal check. If payment made in person, receipt to be given immediately. If payment not made in person, receipt must be provided within 15 days. • Effective 6/14/19.
Attorney Fees, other Non-Rent Fees, Rental Application Fees RPL §§ 234, 238-a	If a residential lease provided for landlord's right to recover attorney fees, a reciprocal right was implied at law in tenant's favor. DHCR has discretion to award attorney fees.	• Attorney fees may not be recovered on a default judgment. (*See also*, the new limitation on attorney fees in RPAPL 702, discussed below.) • Limits non-rent fees for rental application to lesser of actual cost of background checks and credit checks or $20 (whichever is less). • To collect the fees for credit or background checks, landlord must provide the potential tenant a copy of the credit or background check and a receipt from the entity conducting the check. • The fee is waived if tenant provides a copy of a credit or background check conducted within the past 30 days. • Landlord is entitled to a late fee of the lesser of $50 or 5% of the monthly rent. • Tenant has a minimum 5-day grace period to pay rent. • Effective 6/14/19.
Retaliatory Eviction RPL § 223-b	Landlords were prohibited from taking action to bring holdover proceeding to evict tenant in retaliation for tenant complaint of violation of health or safety law to enforcement agency, tenant taking action to enforce rights under the lease or at law, or tenant's participation in tenant organization. Rebuttable presumption that eviction was retaliatory if within 6 months of protected tenant actions.	• Protected tenant actions that create presumption of retaliation now includes complaint of breach of habitability to landlord or agent or to prohibit changes to the terms of tenancy. • Rebuttable presumption extended to 1 year of a good-faith complaint. • Presumption now applies to nonpayment proceedings, not merely holdovers. • Potential retaliatory action now includes offering a new lease with an "unreasonable" rent increase. • Landlord may be required to offer a new lease or lease renewal for a term of up to 1 year. • Tenant entitled to attorney fees in civil action for retaliatory eviction. • Effective 6/14/19.
Tenant Blacklists RPL § 227-f, Judiciary Law § 212	Public (including court) records were used to compile "blacklists" of tenants who have had court proceedings against them. Landlords used these records to screen rental applications, regardless whether there was a legitimate basis for the proceeding.	• A rental application may not be refused on the basis of a past or present landlord-tenant action or summary proceeding under RPAPL Art. 7. • A rebuttable presumption is created against a landlord that denies rental after having requested information from a tenant screening bureau or otherwise inspected court records. • Landlord has the burden to provide an alternate reason that tenancy was rejected. • Attorney General has enforcement power; no private cause of action. • Civil penalties between $500 and $1,000 for each violation. • The Unified Court System may not sell residential-tenancy or eviction data. • Effective 6/14/19..

CHANGES TO THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

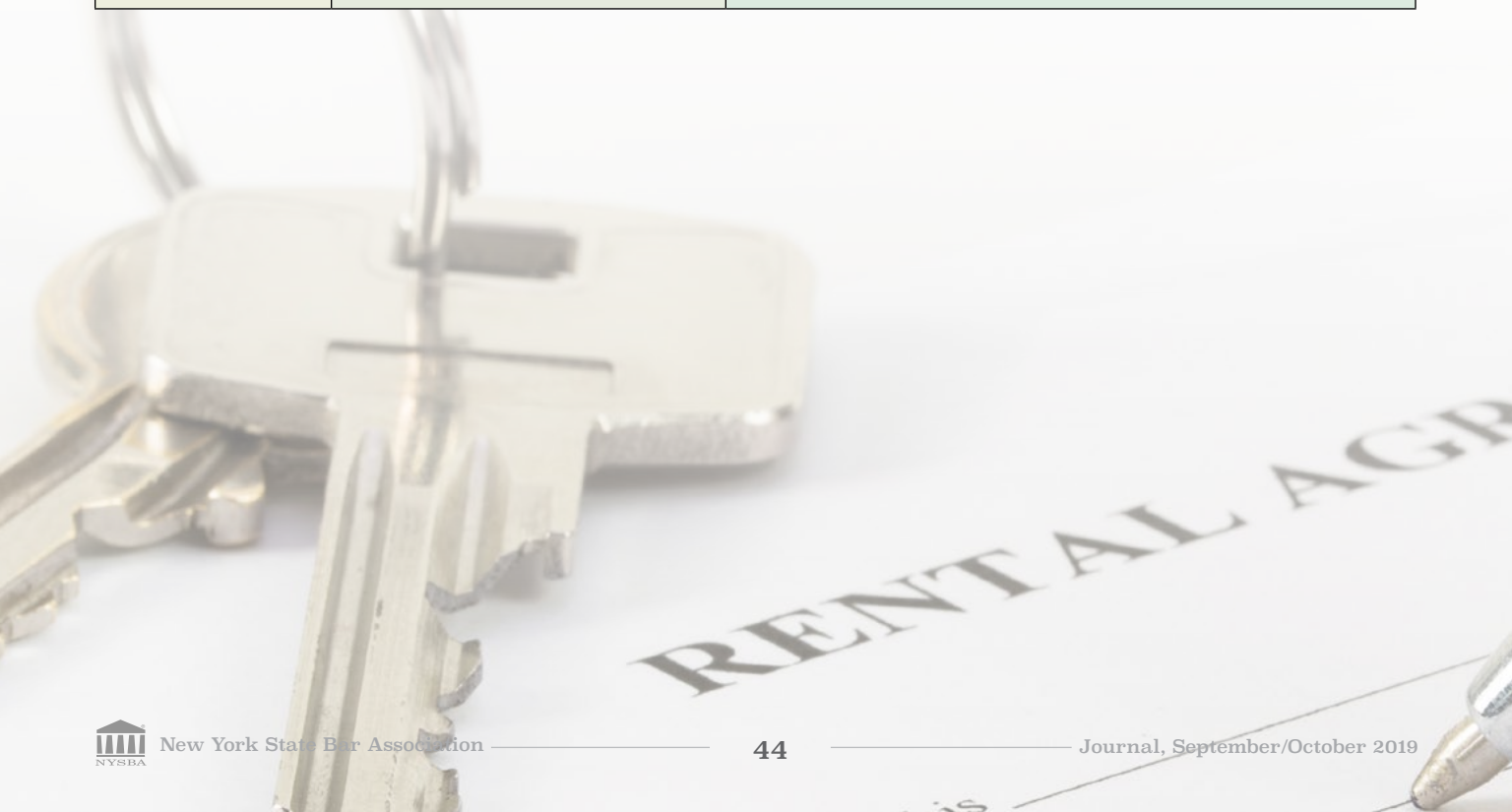
Area of Law	Old Law	2019 Law
Nonpayment Proceedings RPAPL 711(2), RPAPL 732(1), 732(3)	Landlord had to make demand to pay rent 3 days before starting nonpayment proceeding. Oral demands were permitted, but if written, demand must have been served. Tenants had 5 days to answer.	• Oral rent demands no longer permitted. • 14-day written rent demand required; must be served under RPAPL 735. • Landlords may not seek arrears from a surviving spouse, surviving issue, or distributee. Landlord's remedy is solely against estate of the decedent; only possessory (not money) judgment may be obtained against the estate. • RPAPL 711: "No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding." • Tenants have 10 days to answer or will be in default in a nonpayment proceeding. • Court has discretion to grant up to a 5-day stay of the issuance of a warrant post-trial, subject to discretionary stay of up to 1 year under RPAPL 753, discussed below. • Expands rights of occupants who might be in possession after tenant's death; warrant of eviction against the estate of decedent due to nonpayment of rent will not permit landlord to evict occupant in possession; in this case, landlord must commence separate holdover proceeding to evict occupant and regain possession of apartment. • Residential under RPAPL 711(2); residential and commercial under RPAPL 732(1), (2), and (3). • RPAPL 711(2) effective 6/14/19. RPAPL 732 effective 7/14/19.
Timing in Nonpayment Proceedings RPAPL 732(1), 732(3)	Tenants had 5 days to answer.	• Tenants have 10 days to answer or be in default in a nonpayment proceeding. • Court has discretion to grant up to a 5-day stay of the issuance of a warrant post-trial or post-answer default, subject to discretionary stay of up to 1 year under RPAPL 753, discussed below. • Effective 7/14/19.
Right to Pay Prior to Hearing RPAPL 731(4)	Law not codified.	• If full amount of rent is paid before hearing on the petition, landlord must accept payment, and the proceeding must be dismissed. • Applies to residential and probably commercial tenancies. • Effective 6/14/19.
Rent Defined to Exclude Fees RPAPL 702	A residential lease could include provisions for "added" or "additional" rents, such as late and legal fees. A petitioner was able to seek such rent in a summary nonpayment or holdover proceeding. A rent-regulated tenant was subject to a money judgment but not a possessory judgment for not paying additional rent. A non-regulated tenant was liable for both a money and possessory judgment for such rent.	• Residential rent defined narrowly to include only amount charged in consideration for the "use and occupation" of the space. • "No fees, charges or penalties other than rent may be sought in a summary proceeding." • Applies to residential but not commercial proceedings. • Effective 6/14/19.
Timing of Holdover Proceedings RPAPL 733(1), 743	Service of a holdover petition must have been made at least 5 and not more than 12 days before the first court appearance. If petition was served at least 8 days before initial return date, tenant had 3 days to answer.	• Service of a holdover petition must be made at least 10 and not more than 17 days before the first court appearance. • Tenant must answer the petition orally or writing at the first court appearance. RPAPL 743 is amended to eliminate the requirement that an answer be made at least 3 days before the petition returnable/to be heard. • Applies to residential and commercial proceedings. • RPAPL 733 effective 6/14/19. RPAPL 743 effective 7/14/19.

Rent Deposits and Motions for Use and Occupancy During Pendency of Summary Proceedings RPAPL 745	After two adjournments by tenant, or 30 days day after the first court appearance, upon landlord's application, court could direct tenant to deposit any rent or use and occupancy accrued since the petition was served, subject to limited defenses that could be raised at an immediate hearing. If tenant failed to pay, court could dismiss tenant's defenses and counterclaims and grant judgment for landlord. Standard for adjournment was a maximum of 10 days.	• Rent-deposit orders are now discretionary. • Application cannot be made until 60 days after the parties' first court appearance or 2 adjournment requests solely by tenant; only days attributable to respondent's adjournment requests are counted. • Oral applications for a rent deposit no longer sufficient. • When 2 adjournments or 60 days are attributable to respondent, and petitioner files a written motion for rent deposit or use and occupancy, court may order a deposit of rent or use and occupancy, but only for sums of rent or use and occupancy that accrued after the date of the order. • Unrepresented tenant's first request to obtain counsel does not count as an adjournment or as part of the 60 days in determining if application for rent deposit timely. • Hearing now "as soon as practicable"; minimum 14-day adjournment for trial given to either party unless both sides and court agree to shorter adjournment; court has the sole discretion to grant a second or subsequent request for adjournment. • Tenant can defend against a rent-deposit order by establishing one of the following: (a) the petitioner is not a proper party to the suit; (b) actual, partial, or constructive eviction, and respondent has vacated; (c) defense based on Social Services Law § 143b; (d) defense of existing hazardous or immediately hazardous violations of the Housing Maintenance Code in respondent's unit or building common area; (e) colorable defense of overcharge; (f) lack of personal jurisdiction; and (g) unit violates building's certificate of occupancy or is illegal under Multiple Dwelling Law. • Failure to pay use and occupancy or deposit rent may not result in dismissing any of respondent's defenses or counterclaims. • Only penalty for failure to comply with a rent deposit order is that, at the court's discretion, an immediate trial may be ordered, but the tenant's time to deposit may be extended for good cause. • Effective 7/14/19.
Judgments; stays RPAPL 747-a	"In the city of New York, in any nonpayment summary proceeding in which the respondent has appeared and the petitioner has obtained a judgment pursuant to section seven hundred forty-seven of this article and more than five days has elapsed, the court shall not grant a stay of the issuance or execution of any warrant of eviction nor stay the re-letting of the premises unless the respondent shall have either established to the satisfaction of the court by a sworn statement and documentary proof that the judgment amount was paid to the petitioner prior to the execution of the warrant or the respondent has deposited the full amount of such judgment with the clerk of the court."	• Repealed.

The Warrant of Eviction and the Marshal's Notice RPAPL 749(1), 749(2)	Upon issuance of a final judgment of possession, court would issue a warrant of eviction, but court did not specify timing of execution. Marshal had to give at least 72 hours' notice before the eviction. Issuance of warrant canceled the lease and annulled the landlord-tenant relationship, depriving court of the power to vacate the warrant for good cause.	• Warrant of eviction must state the earliest date the eviction can occur. • The marshal must give at least 14 days' notice prior to eviction; warrant may be executed only on a business day from Monday through Friday. • Issuance of warrant no longer cancels landlord-tenant relationship. • If tenant tenders or deposits all the rent due any time before warrant of eviction is expected, warrant in a nonpayment case is vacated unless landlord can establish that tenant withheld the rent in bad faith. • Court may, for good cause, stay or vacate a warrant, stay re-letting or renovation of premises for a reasonable period of time, and restore tenant to possession; nothing may deprive court from power to stay, vacate, or restore tenant to possession of premises after execution of warrant. • Warrant may remove only "persons named in the proceeding." • Applies to commercial and residential proceedings. • Effective 6/14/19.
Post-Trial Stay RPAPL 753(1), 753(3)	In NYC holdover proceedings, courts could stay issuance and execution of warrant for up to 6 months, except if landlord intended to demolish the building. In holdover proceedings based on a lease violation, tenants were given automatic 10-day stay to cure breach.	• In both nonpayment and holdover proceedings, courts statewide have discretion to grant an occupant a stay of up to 1 year; the demolition exception is abolished; there is an exception to court's discretion if the proceeding is based on objectionable conduct or if landlord can establish that occupant is objectionable. • Factors court may consider when granting a stay, or deciding the length of a stay, to determine whether an eviction would cause extreme hardship if stay was not granted: (a) serious ill health; (b) significant exacerbation of ongoing condition; (c) child's enrollment in local school; and (d) any other extenuating life circumstances affecting ability of applicant or family to relocate and maintain quality of life. • Court shall consider any substantial hardship on landlord in determining whether to grant the stay and in setting the stay's length and other terms. • Automatic cure period under RPAPL 753(4) for breach-of-lease provision extended from 10 to 30 days. • If lessee (tenant) is removed from the leased premises after a foreclosure or tax foreclosure, proceeding must be sealed, and all records of the proceedings must be kept confidential. RPAPL 757. • To effect these changes, RPAPL 751(4), which limited stays outside NYC, is repealed. • Effective 6/14/19.
Unlawful Eviction RPAPL 768	Illegal, except by court proceeding, to evict residential occupant who had occupied space for at least 30 days or entered into a lease.	• Unlawful evictions are punishable as a Class A misdemeanor carrying civil penalties from $1,000–$10,000 per violation. • Definition of conduct constituting unlawful eviction is expanded to (a) using or threatening force; (b) interfering or intended to interfere with ability to use dwelling; (c) engaging or threatening to engage in any conduct that prevents or is intended to prevent occupant from lawful occupancy or to induce lawful occupant's vacatur. • Owner required to restore person unlawfully removed. • Applies statewide. • Effective 6/14/19.

CHANGES TO THE GENERAL OBLIGATIONS LAW: SECURITY DEPOSITS

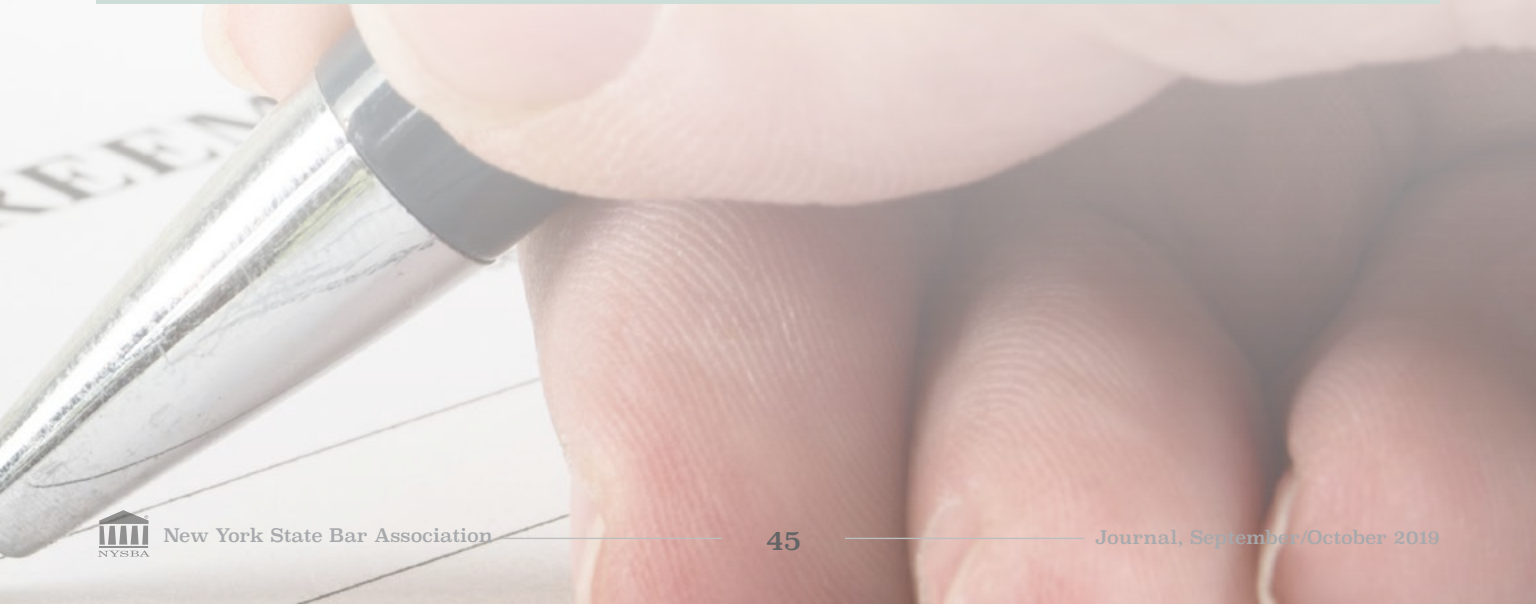
Area of Law	Old Law	2019 Law
Limits on Security Deposits and Pre-Paid Rent GOL § 7-108(1-a)	Rent-stabilized tenants were not required to deposit or advance more than 1 month's rent as security deposit; no limits on security deposits or pre-paid rent for market tenants.	• Tenants in rent-stabilized and unregulated units may not be required to deposit more than 1 month's rent as security deposit. • Abolishes pre-paid rent advances. No more first and last month's rent accepted or required at beginning of tenancy.
Inspection of Premises, Return of Security Deposit GOL § 7-108 (1-a)(c)–(e)	A security deposit had to be returned within a "reasonable time." Law did not specify time.	• After lease is signed but before occupancy begins, landlord must offer tenant an opportunity to inspect apartment (with landlord present). After the inspection, the parties must enter into a written agreement attesting to the condition of the apartment and noting any defect or damage. The agreement is admissible as evidence of the condition of the premises at the beginning of the occupancy only in actions related to returning the security deposit and not for warranty of habitability. • Upon tenant's notice of intent to vacate, landlord must conduct exit walk-thru no more than 2 weeks and no less than one week before the surrender. Landlord must give 48 hours' written notice of inspection. Tenant may be present. After inspection, landlord must give itemized statement specifying repairs and cleaning that shall be the basis of any security-deposit deduction. Tenant may cure any condition before tenancy ends. • Landlord has 14 days from tenant's vacatur to return security and an itemized statement if any portion of the deposit is retained for nonpayment of rent, nonpayment of utility charges, damage caused by tenant beyond wear and tear and moving, or storage of tenant's belongings. • If landlord fails to provide itemization or deposit within 14 days, landlord forfeits right to retain any portion of security deposit. • The security deposit cannot be withheld based on not a claim of wear and tear, attorneys' fees, late fees, additional rent, or other miscellaneous charges. • The itemized statement must specify any repairs or cleaning that shall be the basis of any deduction from the security deposit. Tenant may cure any condition before tenancy ends. • In an action disputing the amount of any security deposit retained, landlord has burden to justify retaining any portion of the deposit. • Willful violation subject to punitive damages up to twice the amount of the deposit. • Effective 6/14/19.



CHANGES TO THE GENERAL BUSINESS LAW: CO-OP AND CONDO CONVERSIONS

Area of Law	Old Law	2019 Law
Conversion to Cooperative and Condominium Ownership GBL § 352-eeee	Although seldomly used, the law permitted conversion based on an eviction plan. In a non-eviction plan, at least 15% of tenants in residence must have agreed to buy before the conversion was effective.	• The eviction option is eliminated. • For a non-eviction conversion to be effective, at least 51% of tenants in residence must agree to purchase. • Tenants in occupancy have 90-day exclusive right to purchase and 6-month right of first refusal. • Holders of unsold shares and unsold units may lose ability to seek MCIs for capital improvements. To qualify for an MCI, building must be 35% rent regulated. • Eligible senior citizens or disabled persons who do not purchase may not be subject to unreasonable rent increases or evicted during their occupancy except for nonpayment of rent, illegal use or occupancy of the premises, failure to provide reasonable access, or a similar tenant breach of obligations to dwelling-unit owner. • Eligible senior citizens/disabled persons who reside in units subject to government regulation remain subject thereto. • Rights granted to eligible senior citizens/disabled persons under the plan may not be abrogated or reduced. • Coop plan offeror has 30 days from receipt of the form from occupant claiming to be a senior citizen or disabled to challenge the claim. Dispute brought before the Attorney General, who has 30 days to make a determination. The determination is subject to CPLR Art. 78 review if filed within 30 days of Attorney General's determination. Absent fraud, this is the sole method to resolve. • NYC only. • Effective 6/14/19.
Manufactured Homes		• Regulates rent-to-own contracts, including changes in use to the underlying land, and provides for tenant protections, including a bill of rights. Caps rent increases at 3% unless landlord can show hardship; then the cap is 6%. • Applies only to one housing community in NYC, on Staten Island. • Effective 7/14/19.

NYSBA's recent CLE program on the Housing Stability and Tenant Protection of 2019 is available to stream online at your convenience. For access to this program, please visit www.nysba.org/store/detail.aspx?id=VGK41. For more information on other Real Property Law CLE programs, visit www.nysba.org/realpropertycurriculum.



Endowment or Inducement?

The Legal Distinction Between College Donations and Bribes

By Elizabeth Vulaj

Everyone says money talks, but what does the sum of $500,000 really say? According to actress Lori Loughlin, it represents a substantial college donation, yet many legal experts, attorneys, and concerned citizens around the world believe it is nothing short of a corrupt bribe. In March 2019, Lori Loughlin, along with over 30 other parents, was charged with conspiracy to commit felony mail fraud and honest services mail fraud, after it was revealed that Loughlin and her husband, fashion designer Mossimo Giannulli, paid scheme organizer William Rick Singer half a million dollars to facilitate her daughters' guaranteed acceptance to the elite University of Southern California.[1]

In April, many of the parents charged (including another prominent actress, Felicity Huffman) pleaded guilty in an effort to lessen their overall sentence, yet other defendants, including Loughlin, pleaded not guilty and now await a trial in the near future, even though no date has been set yet.[2] Many discussions and debates have followed since news of the scandal broke, yet one of the biggest questions people have been asking is: what is the true and legal distinction between a donation and a bribe?

First, one of the key differences lies in who receives the amount of money that the parent is prepared to give: "A donation is made to a college, while a bribe is paid to an employee who, in effect, is stealing an admissions slot, hawking it and pocketing the proceeds."[3] Second, bribes are typically offered to certain individuals (typically that includes admissions officers, deans, or proctors) themselves, whereas donations are made to the name of the school itself. Specifically in New York, bribery in the first degree is defined as when any person agrees to confer a benefit to a public servant upon the agreement or understanding that that public servant's action or decision will be influenced by whatever sum that is given[4] and is considered a felony, whereas it is still perfectly legal for parents to donate large sums of money to the colleges themselves and collect a tax break from it.[5] Third, many note that bribery is more likely to guarantee what the donor wants, since it often occurs within an agreement between two parties, whereas donations "don't guarantee admission but can serve to make a child's application stand out."[6]

Despite the legal differences between the two, many argue that the issue with parents making substantial donations to schools is that, while entirely legal, it still unfairly tips the balance in their favor, since colleges have begun to rely more heavily on increasing tuition rates and donations to get by, due to declines in state funding and federal research aid.[7] And, even though "it's true that making large donations is a relatively transparent, legal tactic . . . it speaks to the prevalence of social reproduction at these schools: a system that is designed to benefit the class they've traditionally served, generation after generation."[8] Recognizing this inequality, many Democratic lawmakers in California have tried to implement laws in an effort to crack down on the corruption in the college admissions processes in many schools across the state since the scandal. Recently, lawmakers advanced a bill that would prevent schools such as the University of California and California State University from granting special admittance to students without the approval of at least three college administrators.[9] Other bills have also called for a ban on "preferential admissions to California colleges for students related to donors or alumni"[10] and proposed eliminating tax deductions for donations to nonprofit organizations that had a part in the cheating scandal.[11]

Bearing all this in mind, what does this mean for Lori Loughlin, especially since, unlike defendants such as Huffman, she rejected[12] prosecutors' initial plea deal back in April and decided to plead not guilty? Reportedly, Loughlin believes she has a strong defense because when she and her husband gave money to Singer's charity, Key Worldwide Foundation, which was later exposed as a money-laundering operation, "they thought the money would be used for a donation and to benefit the school," and she believes a judge will recognize that.[13] Some are not so easily convinced.

In California, bribery is defined as anything of value being given "with a corrupt intent to influence, unlawfully, the person to whom it is given."[14] While it is true that it can be difficult to prove a person's deceptive intent when they are claiming to have made a simple donation, there are many facts in this case that indicate that Loughlin and her husband had both the knowledge and intention to utilize the money given to Singer to unlawfully bend the rules in their favor. First, reports surfaced of phone conversations between Loughlin and Singer in which Singer warned Loughlin that the IRS was investigating his foundation and he told her that "you're probably going to get a call" and that "I have not told them anything about the girls going through the side door, through crew, ever, though they didn't do crew to get into USC… all I told them was that you guys made a donation to our foundation to help underserved kids,"[15]

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to which Loughlin replied, "Uh-hmm,"[16] indicating her knowledge that the money was not being used as a mere helpful donation to benefit Singer's charity or USC. Second, according to various court documents, Loughlin and her husband have also been accused of taking part in staging a photo of their eldest daughter Isabella on a rowing machine, claiming she was a skilled coxswain, even though she never participated in crew.[17] If this accusation is true, it serves as even further evidence that Loughlin not only had knowledge of the overall scheme's deceitful practices, but even participated in facilitating aspects of it herself, making the defense that she believed she was simply making a monetary contribution all that more difficult to believe. Third, with all the crackdowns that lawmakers are fighting to have implemented regarding college donations and legacy admissions in California and across the country, it may become more difficult to utilize the defense of making a gift or endowment to the school once the trial date nears.

The case has not only shed light on the college admissions process in California, but in multiple states as well, including New York. It has been reported that Singer's charity donated over $300,000 to NYU Athletics between 2014 and 2016,[18] yet NYU has not been implicated in the scandal and the school's spokesperson, John Beckman, has called the entire case "deeply troubling."[19] Beckman also maintained that NYU Athletics does not facilitate relationships between coaches and admissions officers regarding potential candidates that they are interested in recruiting.[20] If this is true, and if Singer's action regarding NYU was a mere donation with no condition or agreement that Singer or anyone he knows would directly benefit from this, it is unlikely this would be considered bribery under New York law.[21]

Whichever way a jury or a judge ends up deciding, it is clear that many people in the legal community are trying to more clearly define the difference between a donation and a bribe, and it may become tricky for defendants in the future to use that blurred line in their favor. As of now, Loughlin is not working or actively filming any future projects, and her days are filled with working on her legal defense and awaiting a trial date.[22] Whatever the outcome may be, one thing is clear: the rest of America will continue to be watching.

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Using the Free LaTeX Typesetting System in Your Small to Midsized Practice

By Peter J. Wasilko

As lawyers we tend not to put a lot of thought into presentation. It is the quality of our arguments and the strength of the cases and statutes on which we rely that carry the day in court. Granted that the presentational aspects of any charts or exhibits we prepare are going to dramatically impact our ability to sway a jury, but when it comes to plain old day-to-day text relating to the business aspects of our practices we tend to fall back on the default styling of our word processor of choice and wing it on our own. Only when it comes to big projects like creating a graphic identity or setting up a website do we bring in a professional graphic designer.

Unfortunately, this leads to a relatively low level of presentational quality in our engagement letters, fliers, promotional newsletters and the like when measured against the standards set by the top tier firms with lavish budgets to push high quality typographical design out into every textual client contact. This really matters because even if a small firm crafts a web presence equal to that of a market leader, the moment it follows up with a letter, report, or brochure that looks like it was produced on a vintage Smith Corona typewriter the contrast in presentational polish will shatter the image it worked so hard to project, sowing seeds of distrust. Like it or not, most prospective clients have become accustomed to seeing high quality typography even though they won't be able to identify it on a conscious level.

WORD PROCESSING V. TYPESETTING

To fully appreciate the difference between a word processor and a typesetting system you need to look side by side at two copies of the same text. If you do, you will usually find that the word processor-produced version has more lines, some of which have noticeably bigger inter-word gaps than others, and that when looking at fully justified text (i.e.,u sections where all lines have been adjusted to take up the full width of the column they appear in), lines ending in punctuation marks seem shorter than lines ending in letters. Moreover, choices of hyphenation points and other minutia aren't as well optimized by a word processor. By contrast, the typesetting system will choose better line breaks and employ "microtopography" to produce text that has a more even coverage of the page with more uniform inter-word spacing and more regular looking column edges. Typeset text has the same level of quality as a professionally published book, sending a strong message of professionalism and trustworthiness.

Fortunately, the current state-of-the-art in typesetting is embodied in a free system called LaTeX that produces identical results on Windows, the Mac, and Linux. This is the same software used by university presses to produce textbooks and scientific journals. It takes from 20 minutes to perhaps four hours to install depending on your internet connection and choice of installer. But the real elegance of the system is that it allows you to completely separate your style and presentation from your content by using semantic macros that you can see and edit in your code or send to a colleague in ordinary email.

We should, however, note at the outset that LaTeX is a complement to Word that can add a level of highly refined final polish to the appearance of body copy as well as augment Word's capabilities with specialized formatting effects ranging from complex chart and graphs to multiple hyperlinked bibliographies, indices, and glossaries, margin notes, and footnote series. But when it comes to catching spelling and grammar errors, suggesting improved wording, and providing general writing tools, Word is the program you want to rely on despite some tentative attempts to approximate some of its functionality in the LaTeX ecosystem. Fortunately, as we shall discuss below, there are a number of workflows to let you enjoy the best of both worlds.

INTRODUCTION TO LATEX

With that real-world usage context in mind, let us take a moment to consider the history of LaTeX and how it works. Back in the late 1960s the world-famous computer scientist Donald Knuth became frustrated by the inability of journals to accurately reproduce the mathematical notation he was using in his submissions. Since he was embarking on writing a multi-volume *magna opus The Art of Computer Programming*, he decided that the only way to get his books to look the way he wanted was to write his own software to do that job. This took the form of a core typesetting system called TeX that embodies the best practices of human designers and lays out a document by considering all the different ways it might split the text up into lines and pages, ranks each alternative according to tunable design criteria like avoiding widows and orphans, balancing the heights of multiple columns, minimizing the number of lines in each para-

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graph, keeping inter-word spacing uniform, and the like. It then picks the best alternative from a document- wide perspective, so it might make a less than optimal choice at the line level, if that leads to a better looking page at the paragraph level. In other words, it makes decisions like a chess master looking several steps down the road instead of just picking what seems best at the moment.

But the plain TeX system proved too hard for the average end user to master, so another famous computer scientist named Leslie Lamport developed a set of macros on top of TeX to make things much easier. He called his extensions LaTeX and released them through the TeX User Group (TUG) leading to the emergence of a massive treasure trove of add-on "packages" that can create just about any kind of illustration or effect you might desire, from drawings of chess games to multi-lingual parallel texts and critical scholarly editions. This represents a massive body of work and one could easily spend years exploring its possibilities.

Luckily, while LaTeX makes some incredibly hard things feasible given a major investment in time, it makes easy things incredibly easy in next to no time. We will start at this end of the spectrum with a quick look at LaTeX markup.

LATEX SYNTAX

TeX and LaTeX uses the backslash \ character to introduce commands. Standard TeX and LaTeX commands take the form of a backslash, the command name, an optional asterisk character * to denote a standard command variation like omitting a chapter or section number, an omittable series of comma separated options composed of single word directives and *name = value* pairs, all enclosed in square brackets [], and one or more sets of mandatory parameters enclosed in curly braces {}. Extension packages make more complicated command formats possible, but most commands you will use are as simple as **\author{Perry Mason}**.

In addition to commands, LaTeX has a notion of "environments," which are pairs of **\begin** and **\end** commands that take an environment name as their sole mandatory parameter and then run some code before and after typesetting their contents as in **\begin{document}** . . . . **\end{document}**. Typical environments might adjust page margins, delineate lists, or contain quotations. In case you are wondering, the backslash itself can be displayed in a final document by writing **\textbackslash** so that **** can be used for the extremely common case of forcing a line break. Other punctuation marks that have special meanings in the typesetting language can be written by "escaping" them with a backslash as in \% that typesets a percent sign, which by itself would signal the beginning of a TeX or LaTeX source code comment or line break within a typesetting command.

Sections of reusable LaTeX code can be saved in separate files and spliced into a file as it is being typeset with the **\input{**<file name or path>**}** command, as in **\input{preamble.tex}**. This feature is extra handy when using Word to edit LaTeX source since we can extract all our typesetting boilerplate and re-use it across projects.

Every LaTeX document has a single **document** environment preceded by a **\documentclass** declaration. A document class is a just base boilerplate file that can be created by advanced users to load needed packages, define new commands and environments, and run setup code. Code appearing between the **\documentclass** declaration and **\begin{document}** command is called the preamble. Wikibooks has a free LaTeX book that will walk you through all the commands you'd use on a regular basis: https://en.wikibooks.org/wiki/LaTeX.

AN EXAMPLE DOCUMENT

Here is a sample of what the source code of a minimal LaTeX document looks like, followed by the final PDF page that it produces:

```
\documentclass[draft, twoside, letterpaper]{article}

\usepackage{microtype}

\title{Our Firm's Values}

\author{Ben Matlock}

\date{\today}

\begin{document}

\maketitle

\abstract{We recruit a diverse staff that is committed to using proven advanced technology to provide quality legal services to underserved communities at an affordable price.}

\section{Founding}

Our firm was founded by Perry Mason and Ben Matlock in 1972.

\subsection{Motivation}

After getting rich defending wealthy clients falsely accused of murder, we decided it was time to give back.

\section{Technology}

\begin{itemize}

\item We are using expert systems to help our entry level associates take on pro-bono cases they wouldn't otherwise be experienced enough to handle, so they can learn how to handle routine matters without their needing too much hand holding.

\item We are using AI to spot common mistakes so our supervising attorneys can step in before a client suffers harm.

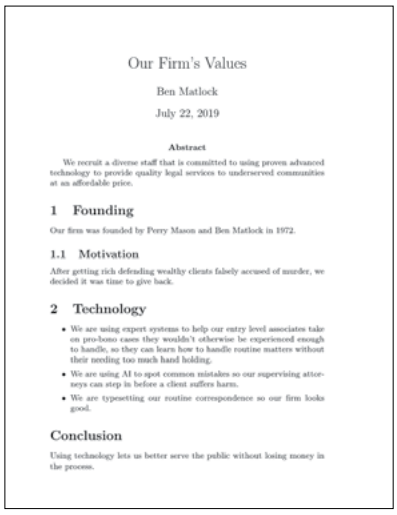
\item We are typesetting our routine correspondence so our firm looks good.

\end{itemize}

\section*{Conclusion}

Using technology lets us better serve the public without losing money in the process.

\end{document}
```



Our Firm's Values

Ben Matlock

July 22, 2019

Abstract

We recruit a diverse staff that is committed to using proven advanced technology to provide quality legal services to underserved communities at an affordable price.

1 Founding

Our firm was founded by Perry Mason and Ben Matlock in 1972.

1.1 Motivation

After getting rich defending wealthy clients falsely accused of murder, we decided it was time to give back.

2 Technology

- We are using expert systems to help our entry level associates take on pro-bono cases they wouldn't otherwise be experienced enough to handle, so they can learn how to handle routine matters without their needing too much hand holding.
- We are using AI to spot common mistakes so our supervising attorneys can step in before a client suffers harm.
- We are typesetting our routine correspondence so our firm looks good.

Conclusion

Using technology lets us better serve the public without losing money in the process.

COMPILING LATEX SOURCE INTO A PDF

There are several ways to turn a LaTeX source file into a finished PDF, beginning with manually running one of several alternate TeX "engines" like **latex**, **pdflatex**, **xetex**, and **lualatex** followed by support programs like **bibtex** or **biber** to build bibliographies and **makeindex** or **xindy** to build indices and glossaries followed by one or additional runs of the TeX engine.

A frequent past criticism of TeX was that most documents looked the same due to a lack of variation in font choice. However, today's **XeTeX** and **LauLaTeX** implementations can use any font installed on your computer including the 923 font families, available at the time of this writing for free download, from Google Fonts. This is done by putting the **\usepackage{fontspec}** directive in the preamble and using the **\fontspec{<font name>}** directive when a font change is desired.) The other TeX engines can also access many alternate fonts that have been pre-packaged for use with **\usepackage{<font name>}** directives that override LaTeX's default fonts.

Building your final PDF can get really confusing which is why free LaTeX editors like **TeXstudio** and **LyX** offer an automatic "Live Preview" of your project that can figure out what to run for you by invoking the **latexmk** program which can usually work out what to do. There are also commercial programs like Texpad for the Mac that use proprietary logic to solve the compilation sequencing problem for you.

Otherwise, for those cases where **latexmk** doesn't do the right thing, you can create a **latexmk** configuration file or use a semi-automated solution called **arara** that knows how to invoke each program when provided with sequencing directives, which are comments in your source file like:

% arara: pdflatex

% arara: bibtex

% arara: pdflatex

THE LATEX EDITORS

There are several free LaTeX editors that provide menus, ribbons and some crude approximation of Word's proofing tools. Of them, **LyX** has the most Word-like interface and is best suited for marking up existing text, while **TeXstudio** is better suited for editing raw LaTeX boilerplate files. Like LaTeX, both programs are free and cross platform and, best of all, contain extensive built-in documentation that will walk you through the process of using them.

USING LATEX WITH WORD

Now that you have a sense of how to use LaTeX proper, we should briefly consider how to integrate it into your existing Word-based workflow so you can avoid the egregious spelling and grammatical errors that can all too easily slip by when one is focused too closely on the typesetting process.

There are five possible Word + LaTeX integration workflows.

1) Word → LaTeX → PDF (via Pandoc or rtf2latex)

The first is to apply light styling and formatting in Word and then convert your document to LaTeX before using the typesetting system to generate your final PDF. There are two superb free document conversion programs that can tackle this task, and you really have to try them both to see which one produces the best results for your document. The most powerful is **Pandoc**, which is a swiss army knife of document conversions that can both read and write **many** different file formats and format variations. You can use it with its **--standalone --read=docx --write=pdf** flags to convert directly from Word's .docx to .pdf or you can use the **--write=latex** flag instead to generate a latex file that you can tweak in an editor before using the LaTeX toolchain as described above to produce your final pdf. If you don't like the results of Pandoc's conversion, you can save your Word document in Rich Text Format (.rtf) and then try the **rtf2latex** program instead, once again optionally tweaking the LaTeX before using your favorite approach to generate the pdf. Either variant of this approach is suitable for simple correspondence.

2) Word → Plain Text → Styled in LyX

The second approach is to eschew Word's formatting tools entirely and adopt a one-pass pipeline model, using Word exclusively for substantive text editing to create a plain text file to style and extend it in a LaTeX Editor. If you want to include margin paragraphs or footnotes, enter their content inline as if it was just a regular sentence or paragraph, and then copy your final text document into LyX, select each note's text and click on the footnote or margin note button in the

LyX formatting ribbon to convert it into an actual note. If you prefer TeXstudio, manually apply the pattern **\footnote{**<footnote content from your original Word manuscript>**}** or **\marginpar{**<margin paragraph content from your original Word manuscript >**}**. The advantage of LyX is that it hides this LaTeX markup in its editor view, while letting you preview the corresponding typesetting commands to help you learn them if you want.

3) Word as a LaTeX Editor

A third approach is Word-centric and best suited for Advanced Word users. It entails using Word's customization facilities to adapt it for use as a LaTeX Editor. In this workflow you will save your document as plain text with a .tex file extension and then use the LaTeX tool chain to produce your final PDF. But first you can make a Word Template File with a basic LaTeX skeleton. I recommend using the Memoir document class for this because it has excellent documentation and is a bells-and-whistles base class that includes the most frequently used packages for you. You can also use *Approach 1* to bootstrap a template file. Then you will also want to add any LaTeX commands you plan to use to Word's dictionary and construct Word Macros to apply the commands you want to use to the current text selection. Office 365 Subscribers can then customize their ribbon with toolbars to trigger these macros; otherwise one can use the View > Macros dropdown menu or an OS Level Macro Utility to trigger them. The NYSBA has CLE Materials addressing advanced Word usage topics.

4) Styled Word with Embedded Latex → LaTeX

Your fourth option is to use Word's native styling tools while also embedding native LaTeX commands like **\index{Issues!Negligence}** and **\printindex** in the Word copy. Then follow *Approach 1* to convert your .docx Word file into a .tex LaTeX file. The resulting file will be valid LaTeX, however the LaTeX commands in your original file will have been converted into LaTeX literals representing the text of those commands as opposed to running them as intended. To make them function as LaTeX Commands they will need to be *unescaped*.

This can be done by writing a Word Macro to reverse the conversion of LaTeX commands into LaTeX literals, reopening the converted .tex file in Word and running that macro on the file before resaving it as text to the same file name.

For example, each **** in your word file would be converted to **\textbackslash** followed by **{}** or a space depending on whether you use rtf2latex or Pandoc, so your macro would have to replace both patterns with a single ****. Likewise, { and } are escaped as **\{** and **\}** and would need to be converted back to { and }. Crafting the *unescape* macro would be a one-time challenge only feasible for advanced Word users.

5) Word with Implicit Knowledge → LaTeX

Finally, at the cost of a bit more up-front setup, it is possible to leverage LaTeX's **XParse** and **Knowledge** packages to implicitly style content using Word as a LaTeX Editor without applying LaTeX styling directly.

Like it or not, most prospective clients have become accustomed to seeing high quality typography even though they won't be able to identify it on a conscious level.

The **Knowledge** package has a **quotation** option that works by searching for text enclosed in plain quotation marks and replacing it with substitution text defined with **\knowledge** directives that can be stored in a shared external file.

In this workflow, your first step is to create a LaTeX document skeleton and put **\usepackage[quotation] knowledge** and **\input{knowledge.tex}** in your preamble, creating an initially empty **knowledge.tex** file, then enclose anything you want formatted in straight double quotes, save as .tex and use your LaTeX tool chain to render the document. This will have the side effect of generating a **.diagnose** file that will list each quoted blurb in the form of an empty knowledge directive that looks like **\knowledge{<quoted text sans quote marks>}{}** which can be directly copied into your knowledge.tex file. The empty set of braces can then be filled with directives like **underline** and **smallcaps** to apply styling. There are also **url=** , **text=** , and **index=** directives to add hyperlinks, generate arbitrary LaTeX, and produce index entries respectively.

The **XParse** package gives us a very compact and elegant syntax for defining new commands. By combining the two, we can use *metaprogramming* to painlessly define sets of knowledge directives. For example, we could use XParse's **\NewDocumentCommand** to create **\knowAffirmedTanBookCase** and **\knowTanBookPincite** commands that automatically generate shortcuts to format running text, parenthetical, and footnote citations along with corresponding pincite shortcut creation commands as in this example, from which the preamble could be extracted into your knowledge.tex boilerplate file:

```
\documentclass{memoir}
  \usepackage{xparse}
  \usepackage[quotation,paper]{knowledge}
% Meta Commands to Recognize Citation Variants
  \NewDocumentCommand \knowAffirmedTanBookCase {%
   m m m m m m } {
    \knowledge{prepin #1}{
      text={\textit{#2} (#3)}}
    \knowledge{prepin (#1)}{
      text={(\textit{See #2}, #3}}
    \knowledge{prepin footnote #1}{
      text={\textit{#2}, #3}}
    \knowledge{postpin #1}{
      text={ [#4]), \textit{aff'd }#5 [#6]}}
    \knowledge{postpin (#1)}{
      text={ [#4], \textit{aff'd }#5 [#6].)}}
    \knowledge{postpin footnote #1}{
      text={ (#4), \textit{aff'd }#5 (#6)}}
    \knowledge{#1}{
      text={\kl{prepin #1}\kl{postpin #1}}}
    \knowledge{(#1)}{
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  }
  \NewDocumentCommand \knowTanBookPincite {m m} {
    \knowledge{#1 at #2}{
      text={\kl{prepin #1}, %
      #2\kl{postpin #1}}}
    \knowledge{(#1 at #2)}{
      text={\kl{prepin (#1)}, %
      #2\kl{postpin (#1)}}}
    \knowledge{footnote #1 at #2}{
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      #2\kl{postpin footnote #1}}}}}
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    \knowAffirmedTanBookCase{onassis v dior}%
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    {122 Misc 2d 603}%
    {{Sup Ct, NY County 1984}}%
    {110 AD2d 1095}%
    {1st Dept 1985}
    \knowTanBookPincite{onassis v dior}{604}
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  "footnote onassis v dior at 604"
\end{document}
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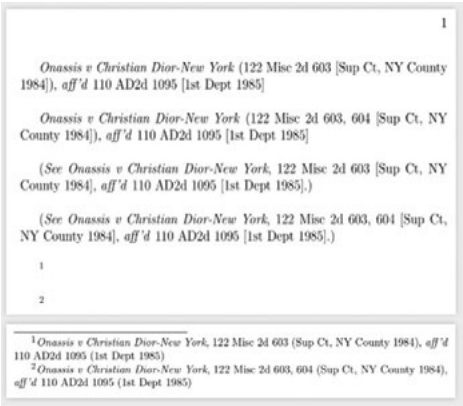
It renders as each citation in TanBook format:



1

Onassis v Christian Dior-New York (122 Misc 2d 603 [Sup Ct, NY County 1984]), *aff'd* 110 AD2d 1095 [1st Dept 1985]

Onassis v Christian Dior-New York (122 Misc 2d 603, 604 [Sup Ct, NY County 1984]), *aff'd* 110 AD2d 1095 [1st Dept 1985]

(*See Onassis v Christian Dior-New York*, 122 Misc 2d 603 [Sup Ct, NY County 1984], *aff'd* 110 AD2d 1095 [1st Dept 1985].)

(*See Onassis v Christian Dior-New York*, 122 Misc 2d 603, 604 [Sup Ct, NY County 1984], *aff'd* 110 AD2d 1095 [1st Dept 1985].)

1

2

[1] *Onassis v Christian Dior-New York*, 122 Misc 2d 603 (Sup Ct, NY County 1984), *aff'd* 110 AD2d 1095 (1st Dept 1985)
[2] *Onassis v Christian Dior-New York*, 122 Misc 2d 603, 604 (Sup Ct, NY County 1984), *aff'd* 110 AD2d 1095 (1st Dept 1985)

This same approach can be used to create styling shortcuts like "bold Tom Smith" to get **Tom Smith** versus "salutation Tom Smith" to get *Dear Mr. Smith*. This gives us a way to create a simple domain specific language for plain text styling that wouldn't confuse Word, so we could completely factor out our latex by using **\input** to inject text with implicit knowledge and no latex markup saved as .tex in word into our .tex template file for final rendering.

Use of the knowledge package could be further enhanced by using Word or Excel automation to generate knowledge directives from a firm's client and reference management databases. (E.g., Using an Excel spreadsheet to create **\knowClient** or **\knowAffirmedTanBookCase** directives.)

INSTALLING THE SOFTWARE

To get started with LaTeX, you will want to install TeXLive 2019 or MiKTeX as well as TeXstudio and LyX. Windows users may prefer the platform integration of the MikTeX distribution but both provide a full range of software. You can browse through packages and documentation on the Comprehensive TeX Archive Network (CTAN) and the TeX-LaTeX Stack Exchange.

URLS:

TeXLive 2019 <https://www.tug.org/texlive/>
MiKTeX <https://miktex.org>
LaTeX Wikibook <https://en.wikibooks.org/wiki/LaTeX>
TeXstudio <https://www.TeXstudio.org>
LyX <https://www.lyx.org>
Google Fonts <https://fonts.google.com>
CTAN <https://ctan.org>
TeX - LaTeX Stack Exchange <https://tex.stackexchange.com/ >

Cite-Seeing Part I: The Tanbook <https://www.nysba.org/Journal/2018/Oct/Cite-Seeing_Part_I__The_Tanbook/>

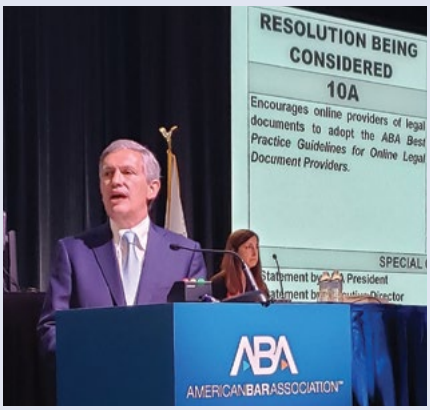
Editor's Note: Members may be interested in NYSBA's program, Microsoft Word for Professionals 2018, available at www.nysba.org/word.

NEW YORK STATE BAR ASSOCIATION
State Bar News

Best Practice Guidelines Created for Online Legal Providers

ABA adopts NYSBA-advanced resolution that promotes access to justice

By Christian Nolan



A resolution advanced by the New York State Bar Association and the New York County Lawyers Association (NYCLA) promoting access to justice by creating guidelines for online legal document providers was recently approved by the American Bar Association (ABA) House of Delegates.

By adopting the resolution, the ABA created the *ABA Best Practice Guidelines for Online Legal Document Providers*. The resolution was proposed to the ABA by NYSBA and NYCLA following months of discussion among a workgroup led by Ronald Minkoff and NYSBA immediate past president Michael Miller. The workgroup included 30 people representing 23 different ABA entities, bar groups, industry members, consumer groups, academics and others.

"Online legal documents provide cost savings and convenience for individuals and small businesses of limited means, and thus play a valuable role in promoting access to justice," said NYSBA President Hank Greenberg. "In adopting these best practice guidelines, the ABA has advanced the goals of improved access to justice, consumer protection, and support for innovative legal service delivery models.

"We are pleased that the American Bar Association supported this important resolution and urge all online legal document providers to follow these best practice guidelines," Greenberg added.

Online legal document providers, or OLPs, have become a worldwide multi-billion-dollar industry that has helped millions of people gain access to the legal services they needed and could not otherwise afford. The documents provided can assist with wills, real estate transactions, litigation and more.

However, there have been no established guidelines for OLPs to follow when they deliver their services to the public. For years, the legal profession was unsure how to address this issue until NYSBA and NYCLA took the lead. In 2017, NYCLA issued a report that concluded OLPs should be regulated by either the courts or the government. That report was later endorsed by NYSBA's House of Delegates in November 2017. Following concerns from the ABA regarding regulating the industry, NYSBA, NYCLA and the ABA formed the working group to create best practice guidelines.

The guidelines include the following:

- OLPs should provide their customers with clear, plain language instructions as to how to complete their forms and the appropriate uses for each form.
- The forms that providers offer to their customers should be valid in the intended jurisdiction.
- Providers should keep forms up-to-date and promptly account for material changes in the law.
- OLPs should notify customers of the terms and conditions of their relationship and customers should have to consent, such as by clicking on an "accept" button, to those terms and conditions.
- Providers should notify customers that the information they provide is not covered by attorney-client privilege or work product protection.

BROADBAND ACCESS

Also at the ABA House of Delegates meeting in San Francisco, Calif., President Greenberg spoke in support of a resolution, subsequently adopted by the ABA, urging Congress and state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by assuring proper broadband access is provided throughout the United States.

Greenberg said, "In the year 2019, broadband access should be a civil right. Internet access is an indispens-

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Judith S. Kaye: In Her Own Words

By Joan Fucillo

"By nature, I am first and foremost a writer," said Judith S. Kaye, in the preface to her memoir, subtitled *Reflections on Life and the Law*.

Judge Kaye, who died in 2016, was a trailblazer and one of New York's greatest jurists and court administrators. She was the first woman judge and chief judge of the New York Court of Appeals. She was the longest-serving chief judge in New York history. She authored hundreds of judicial opinions and published over two hundred extrajudicial writings.

A group of co-editors – dedicated to Judge Kaye as a writer, thinker, jurist and human being – took on the task of preparing her memoir for publication and gathering some of her other writing that would best reflect the breadth and depth of her life and her devotion to the law.

"It was a labor of love," said NYSBA President Hank Greenberg, one of the co-editors.

The book is divided into three sections: memoir, selected judicial opinions, and selected articles and other writing.

Judge Kaye's daughter, Luisa M. Kaye, readied the memoir for publication. Shortly before her death,

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Chief Judge Judith Kaye

Introducing Gold/Fox: Non-Billable

By Brendan Kennedy

The New York State Bar Association is pleased to announce its newest podcast, *Gold/Fox: Non-Billable*. The show will be available this fall on all podcast platforms and the NYSBA website.

Hosted by NYSBA members, Sarah Gold and Michael Fox, *Gold/Fox: Non-Billable* came to fruition thanks to a working relationship and friendship that has developed over the course of many years and many NYSBA committee meetings.

"Our commentary during meetings has given us a reputation. We're often referred to as the 'Statler and Waldorf' of NYSBA," said Fox, in reference to the pair of old, cantankerous Muppet characters. "So when we were discussing new ideas for NYSBA programming that could have a large reach, we said let's give podcasting a shot."

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Michael Fox and Sarah Gold

4 questions and a closing argument

Member spotlight: Aleece Burgio

Burgio is special counsel at Barclay Damon. She lives and works in Buffalo.

What advice would you give a young lawyer just starting her or his career?

When you're in law school, it can be overwhelming trying to choose a specific area to practice in. Then, when you get into practice, you might find out you don't even like the type of law you chose. That's okay. By eliminating what you don't like, you'll be able to figure out what you do like. It might take a few years, but, in the long run, you'll be the happiest. Don't feel like you're stuck settling if you don't like the type of law you're practicing.

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

I think I would have started my own business. What I enjoy most about my job right now is working with passionate entrepreneurs, whether I'm helping them form their own cannabis company or collaboratively problem-solving. Knowing I play a role in bringing innovative visions to life is very rewarding.

If you could practice in a different area of the law other than your current area, what would it be?

Renewable energy. I think it's incredibly important to invest in resources such as wind, solar and hydropower to ensure long-term energy sustainability. I've really enjoyed learning about the work my colleagues on Barclay Damon's renewable energy team do in partnering with individuals at the forefront of these kinds of green projects.

What is your dream vacation?

Visit Cape Town, South Africa!

Lawyers should join the New York State Bar Association because . . .

There are tons of resources to help advance your career and your industry knowledge. If you're able to, I recommend joining a committee – it helps you dive into lesser-known types of law you might not have explored otherwise. Being a part of the NYSBA Cannabis Committee [Burgio is its co-chair] from its infancy has been so rewarding. I've also found that the more involved you become, the more connections you can establish within your legal community. If you're active and engaged, you can go from attending NYSBA CLEs to presenting them.

JUDITH S. KAYE: IN HER OWN WORDS

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Judge Kaye began working with an editor to create a "more conventional" autobiography. Luisa Kaye, seeing the stylistic disconnect between edited and unedited portions of the manuscript, returned the manuscript to its original form. This, she believes, honors her mother's thought process and best preserves her voice.

Hon. Albert Rosenblatt, for seven years Kaye's colleague on the bench and a longtime friend, edited the section on judicial opinions. Reviewing the opinions was, in Rosenblatt's words, "a frolic through a field of plenty," but choosing which ones to include was harder. He took as his guide what he knew – or guessed – to be Judge Kaye's own preferences.

Greenberg, who clerked for Judge Kaye from 1988 to 1990, maintained close ties with the judge. His selection of articles from her extensive archive of extrajudicial writing ranges from law-review type pieces to advocacy pieces on women and children to the state constitution's role in protecting individual rights.

BEST PRACTICE GUIDELINES CREATED FOR ONLINE LEGAL PROVIDERS

continued from page 55

able element to closing the justice gap in rural areas in New York and across the nation."

Greenberg's remarks come on the heels of NYSBA's announcement this summer of the creation of the Task Force on Rural Justice to examine the state of rural law practice in New York.

To read the ABA's resolution regarding OLPs, the guidelines and accompanying report, please visit nysba.org/abaresolution0819/.

Lawyer-to-Lawyer Referral

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MCI USA
Attn: Holly Klarman, Account Executive
307 International Circle, Suite 190
Hunt Valley, Maryland 21030
holly.klarman@mci-group.com
410.584.1960

The New York Matrimonial Trial Handbook, Kindle edition, by Joel R. Brandes is the perfect companion to have in court during a trial. Electronic and print editions are available online at www.nysdivorce.com, and at Bookbaby, Amazon, and other bookstores. Joel R. Brandes is the author of Law and the Family New York, 2d (9 volumes) and Law and the Family New York Forms (5 volumes).

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Attorneys- refer stockbroker fraud or other securities and commodities matters to a law firm with a history of obtaining significant recoveries for investors. Christopher J. Gray, P.C. has substantial experience representing investors in arbitration proceedings before the Financial Industry Regulatory Authority and the National Futures Association and in litigation in the state and federal courts. Cases accepted on contingent fee basis where appropriate. Referral fees paid, consistent with applicable ethics rules. Call or email Christopher J. Gray to arrange a confidential, no-obligation consultation.

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INTRODUCING GOLD/FOX: NON-BILLABLE
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Gold is the founder of Gold Law Firm in Albany where she works with local small for-profit and not-for-profit businesses to help them with legal issues. Fox is an assistant professor of business law at Mount Saint Mary College in Newburgh, NY and assistant adjunct professor of law at Columbia Law School.

The Non-Billable podcast will speak to people of interest, who are practicing attorneys or those who hold law degrees and work in non-traditional careers.

"We like the idea of highlighting what lawyers do with their degrees beyond the office and the courtroom," said Gold. "With so many law-related podcasts out there, we want to be the podcast that gives lawyers a chance to talk about what motivates and keeps them grounded."

Gold is a self-described 'car-person,' watching open wheel racing, detailing her cars and going to car shows in her free time. She is also into video games, books, board games and is a former *Jeopardy* champion. Fox loves to travel, watch classic movies and read fiction and non-fiction historical works, having recently read *The First Conspiracy* on a recent vacation.

Set to launch on every podcast platform in September, the podcast will start out as bi-monthly. The first episode features an interview with NYSBA's 118th President and host of *Miranda Warnings,* David Miranda. Future episodes include conversations with New York Court of Appeals Associate Judge Leslie Stein, Albany Empire Co-Owner Dan Nolan and Greenberg Traurig Associate Kelly McNamee.

"We're always on the lookout for lawyers with interesting paths to the law and unique hobbies," said Fox. "So, if you're reading this and want to reach out, tweet to us and maybe you can be the next guest on *Gold/Fox: Non-Billable*."

Gold/Fox: Non-Billable will be available on Spotify, Google Play, the Apple Podcast app and NYSBA's website.

Digital Marketing for Solo and Small Firms – How to Reach and Be Relevant to Potential Clients

By Deborah E. Kaminetzky

Especially in competitive markets, attorneys need to attract and retain clients in order to stay in business. Traditionally, attorneys used to get most of their clients through referrals or perhaps advertisements in the yellow pages or, more recently, through television commercials and advertisements in general circulation and specialty print publications. Another popular choice has long been the lawyer referral service offered by the New York State Bar Association, which matches clients with attorneys who have the appropriate skills to handle their cases. And, of course, there is the old standby – word of mouth. While all of these choices remain relevant today, the internet has opened up a new way for potential clients to find legal services – without speaking to anyone or divulging their secrets. Especially with consumer-based law, many potential clients will go straight to the internet rather than ask around and let others know that they have a need for an attorney. This is the reason it is so important to pay attention to digital marketing trends. Lately, even when someone *is referred* to you, they vet you online prior to calling. Attorneys should be aware of their online presence which most likely includes a website, some directory listings, perhaps a blog and some social media pages. It goes without saying that prior to implementing any internet marketing the ethics rules should be consulted.

First, a few marketing terms.

Organic reach – when you or your firm show up naturally, without an advertisement either in response to a query when someone is searching the internet or in a social media feed.

Sales funnel – the process which leads a potential client toward becoming a client. The idea is that there are many more people at the beginning of the process than actually become clients. First you need your ideal clients to know that you exist (awareness), then you need to get them to your webpage (interest), and ultimately to call or email for a consultation and sign a retainer (action).

Blog – an informational online page or website that has a conversational style.

SEO – Search Engine Optimization – the likelihood of your content being found online, how relevant your content is to people's questions.

Voice Search – people searching for everything from restaurants to attorneys speaking into their device rather than typing.

Analytics – data on measuring the effectiveness of advertising and marketing.

Live Chat – a pop-up window offering to help a user on your website.

CHANGES IN ONLINE MARKETING

Some social media platforms have changed their algorithms. You used to be able to post on your page and

Deborah E. Kaminetzky is the founding member of Kaminetzky Law & Mediation, P.C. located in Long Beach, New York. Ms. Kaminetzky is a member of the New York State Bar Association and serves on the Law Practice Management Committee, Nassau County Bar Association (where she served as Chair of the Practice Management & Technology Committee), National Association of Divorce Professionals (Currently serving as Social Media Chair) and New York State Council on Divorce Mediation (Publications Committee). Deborah is a frequent speaker and published writer on topics including matrimonial law, estate planning law, small business law, fee arbitration, commercial leasing, tax law for flow through businesses, technology and social media use, and legal ethics.

reach at the very least the people who liked your page. This gave solo and small firms the ability to advertise by using what is known as "organic reach." This was a game changer in that it was free, it only required someone who knew how to post, and some time. Smaller firms could delegate this to a junior attorney, paralegal or pay a marketing manager to do this for them at a fairly low cost. Now, according to an article in *Social Media Today* on May 17, 2019, Facebook will be showing less of what they consider shallow content which impacts what is known as organic reach. If you are paying for advertisements[1] or boosts[2] of your content, you also want to be sure it is something that is a conversation starter. There is also a difference between boosting a post and putting in a paid advertisement. The cost of the advertisements depends on a bidding system not unlike pay per click, although usually less expensive. Advertisements will often allow you to customize and test out your ad on a look alike audience of your choice to see which content will be more relevant to the potential clients you are trying to reach. This means that smaller firms, in addition to creating the post and taking the time, may also have to pay if they want their content to be seen by a wider audience. This could be a game changer for a solo practitioner or even a small firm with a limited advertising budget.

WHAT STILL WORKS

There are still ways to market effectively for a very low cost. For SEO purposes, your website or blog is still an effective way to show up organically online and it is something you should own. If you are not sure whether you actually own your website and domain, check into it. Some trends in SEO are that people are using more voice search these days with their phones as well as devices such as Alexa and AI such as Siri or Cortana. That means that they are speaking their queries rather than using keywords, and if you want your website to appear in answer to their question you need to have the right answers. This is known as a long tail keyword. People generally speak differently than they type. They might type in "Estate lawyer near me." They might say, "Who do I go to to have a will done?" or "Need a lawyer to do an estate plan who has evening hours." Remember when

you learned how to do legal research and you could do it with Boolean or natural language? There is a similarity with online search.

Another helpful and fairly inexpensive thing to implement is getting an SSL certificate for your website. Not only will it make it more visible online it will not warn the potential client that your site is unsafe, and really, why would a potential client trust an attorney with their information if a warning pops up?

Sending out a firm newsletter using software such as Constant Contact or MailChimp is another way to push out content out to people with whom you have already interacted. The wonderful thing about email marketing is that you already own your list. "But people don't read those" you say. Let's say that you have a list of 2000 contacts that you have honed and continually updated over the years. When you send out your newsletter, there are analytics that show how many people opened the email, how many clicked through to articles, pages on your website etc. You can even see exactly who looked at what which can help you plan for future newsletters. Granted, some people will not open it at all, some will open it days later, a few will unsubscribe. On average you should have a 20-30% open rate which on a 2000 contact list is 400-600 contacts. At the very least everyone who receives the email is reminded that you exist and may think of you for a referral.

Lastly, informational videos on your website and on your social media channels (not to mention all the live capabilities these days) are still an inexpensive way to drive traffic to your website.

HOW CAN YOU TELL IF IT'S WORKING?

If you think all of this is too much work and you are skeptical, remember, all of these marketing activities have the goal of getting potential clients to your website. If you are not already using analytics to measure and track the traffic on your website you should start now. Having this information is invaluable to see if any of your marketing efforts are actually working. You want to be sure that the time you or your staff are spending are productive. You also want to be able to track your ROI "return on investment" for any paid advertising. The information gleaned from analytics will help you decide how much time and how much money to spend. Getting potential clients to your website however is not the end of the marketing funnel.

HOW DO I GET THEM TO TAKE ACTION?

Once the potential client is on your website there is still something you can do to motivate them to contact you. Many potential clients look at several different attorneys when searching for representation. What can make the difference between you and another attorney? Even with the internet age, people like good old-fashioned customer service. They like it in the middle of the night and on weekends too. So how can a solo or small firm attorney who needs sleep compete? Believe it or not, Live Chat can be invaluable. Many potential clients will be doing their research nights and weekends when the office is closed, but they can still feel that you care about customer service. There are several live chat options out there at varying price points. Some offer the live chat software but not the agents, so you have to provide agents to chat with potential clients or have someone in your office be responsible for the interaction. Some providers offer live chat software as well as the agents to interact at varying price points. There are some providers that cater to the legal industry and train their agents in legalese and protocol so that you can be assured that they are not giving out legal advice when they should not. Even then you may want to give a carefully scripted flow chart of responses so that you have control over the types of conversations that happen. Some of the live chat companies have a flat fee with a certain amount of "leads" included in the flat fee. Make sure to determine when interviewing a live chat provider exactly what their definition of a lead is to be sure that you understand what you will pay for.

CONCLUSION

Implementing even one new trend in digital marketing can be effective in getting your telephone to ring. Don't feel that you have to implement them all – or all at once; in fact, one at a time will give the beginner a much better idea of whether the chosen platform is working. One thing you can count on is that the landscape for marketing going forward is an ever changing one and the New York State Bar Association Law Practice Management Section will continue to bring you the latest information to help your practice. Like, comment, share!

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1. Facebook ads are accomplished through ad manager, which is a much more complicated process and also costs more. There is a lot more than can be accomplished with an ad. Facebook has several different ad formats which are not available as a boost (see below). The ability to select an audience is significantly more robust in ad manager. There is also the possibility to do what is known as A/B testing with a "look alike" audience so that you can decide which ad to place. Facebook ads also require a privacy policy on your website, which many small law firms do not have. For gaining actual clients, Facebook ads are likely more effective, though also more costly.

2. Facebook boost is taking a post you have already published on your page, such as an article or event, and paying a fee to have it show up in other people's feeds who are not already members of or following your page. It is basically extending the organic reach. There is an ability to select the audience by demographics and geography and to budget how much money to spend over a certain time period. Boosting is easier to do, but it is significantly less precise (and arguably less effective) than an ad for sales, but may be effective for growing your fan base, which is people who will like your page.

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

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

DEAR FORUM:

I am an attorney practicing civil and criminal law here in New York. I have been approached by my millennial client who is employed by a large bank. She suspects, but is not sure, that her employer, in conjunction with government authorities, is conducting an investigation of her and others in her division for potential violations of banking laws. In an effort to prepare for the defense of my client who may be facing both civil and criminal exposure, I have asked her to try and obtain information regarding the full scope of the investigation. Naturally, I have advised her to avoid creating any "paper trail" of her efforts and so have instructed her to stick to just spoken conversations with her various professional colleagues in an effort to "see what they know and have heard."

My client suggested that she could also communicate using a message app that would auto self-delete the text as soon as it is read by the recipient. I never heard of such a thing but my client showed me one of these apps and it worked great. I am concerned that one might say that using such an app intentionally is a way to destroy evidence. However, it would seem to me that such an app is just like spoken communication, unless it's recorded, leaving no record other than the parties' recollections. Please give me some guidance.

Sincerely,
Teki Challenged

DEAR MR. CHALLENGED:

It seems that you are concerned about potential criminal or civil liability if your client's investigation efforts are obtained by her employer or governmental investigators, and we are certain that is something many lawyers are concerned about. While you've not heard of such apps before, they are becoming more and more common – Snapchat, Wickr, Telegram, Confide and Gmail Snapmail all allow users to create messages that will self-destruct within a certain period of time after they are opened. The younger generation views such apps as the older generation views a phone call; after the phone call, the conversation vanishes into the ether, whereas after the app message is typed out, and read, it too vanishes into the ether, after a time predetermined by the sender of the message – 60 seconds, five minutes, a day, or after the app is closed. Some apps can notify the sender if the recipient takes a screenshot of the communication; others block the recipient's ability to even take a screenshot.

It is a close question whether such inquiry even implicates ethics rules, other than the duty, under New York Rule of Professional Conduct ("Rule") 1.1, to give competent legal advice. If it is a binary issue – either it is legal to use self-destructing messaging apps or it is not – then the attorney discharges his duty by simply advising the client that it is legal under the circumstances, or that it is not. However, having been consulted by a client for legal advice, it is incumbent upon the attorney to inquire why she seeks such advice, so that the attorney can competently advise her whether it is lawful to use such apps. After obtaining that information, there may be a clear yes/no answer, or it may no longer be a binary issue. Additionally, Rules 3.4 ("Fairness to Opposing Party and Counsel") and 8.4(d) ("Conduct Prejudicial to the Administration of Justice") may be implicated.

Certain regulated industries make the use of such apps flatly illegal. For example, banking, publicly traded companies, federal contractors, etc. are all subject to rules requiring the retention of documents, including, of course, electronic communications. (*See, e.g.*, 18 U.S.C. § 1519, 17 CFR § 240.17a-4(b)(4), and 17 CFR Part 210 of Sarbanes-Oxley regs.). Executive branch employees may not use ephemeral communications. (*See* National Archives and Records Administration Act, 44 U.S.C. 2101 et seq.) Of course, that would only apply to the business of that industry – there is no rational, logical reason that would preclude an employee in that industry from using her own smart phone with such an app to make dinner plans with a work colleague.

Documents related to hiring, evaluation, training, safety, complaints, procedures, retention, and immigration status of employees must be preserved, in order to deter or prevent discrimination and promote workplace safety. Thus, using such apps to discuss potential employees, or to communicate with references, is illegal. (*See* Civil Rights Act of 1964; Executive Order of 1965, No. 11246; Immigration Reform and Control Act of 1986).

In addition, the failure to preserve such records may, in the event of litigation, result in a missing document charge or, worse, a striking of the party's pleading. Accordingly, advising your client that she may use such apps when she is engaged in litigation or when litigation is reasonably likely, would implicate Rule 3.4, which provides that a lawyer shall not "(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce . . . [nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal." If the proposed communications are the subject of current or reasonably anticipated litigation, the client should, at a minimum, be advised to only discuss those issues with her counsel, as there is no way to assure that such communications will truly remain secret; her counterparty may be subpoenaed to testify about the communications or may find a workaround to save the communication by notetaking or using another device to photograph the communication. And she should be advised of the risks of a missing document charge or the striking of pleadings if she nonetheless engages in such communications.

Moreover, advising her to use such apps when engaged in litigation, or when litigation is reasonably anticipated, may implicate Rule 8.4(d), as it may be deemed to be conduct prejudicial to the administration of justice. "A lawyer or law firm shall not … engage in conduct that is prejudicial to the administration of justice."

In *Waymo v. Uber*, U.S. Dist. Ct., Northern Dist. of Cal., Docket No. 17-cv-00939, discovery sanctions were issued against Uber, whose executives used the self-destructing message apps Wickr, Telegram and Signal to communicate. Uber had hired an executive away from Google's Waymo subsidiary, which had been created to develop self-driving cars. Litigation ensued, in which Waymo accused Uber of stealing its trade secrets. In an order dated January 29, 2018 (Docket Entry 2585), Federal Judge Alsup held that an adverse inference could be drawn against Uber at trial for its use of such messaging apps, and failure

to preserve the messages sent and received using those apps. "Uber's use of ephemeral messaging may be used to explain gaps in Waymo's proof that Uber misappropriated trade secrets or to supply proof that is part of the res gestae of the case (like the due diligence report)." (*Id.* at 5). Moreover, at a bench hearing, Federal Judge William Alsup stated that attorneys who fail to turn over evidence of such communications may be found to have committed legal malpractice. (*See* Paresh Dave & Heather Somerville, *Uber's Use of Encrypted Messaging May Set Legal Precedents*, Reuters, Nov. 29, 2017).

As a *general* proposition, it would be unwise, if not unethical, to advise anyone working in any of these sectors – publicly traded companies, financial institutions, governmental employees, health and safety communications, and the like – that it is acceptable to communicate using self-destructing emails regarding the business of such sectors. To be sure, an attorney should absolutely advise the client against using such communications where it is known that their revelation would be germane to litigation. As a matter of best practices for e-discovery preservation, once on reasonable notice of potential litigation, an attorney should advise their client to disable the automatic deletion of ephemeral communication and institute a "litigation hold." Thomas J. Kelly & Jason R. Baron, *The Rise of Ephemeral Messaging Apps in the Business World*, The National Law Review, April 23, 2019, citing The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process (Public Comment Version, Dec. 2018), *available at* https://thesedonaconference.org/publications.

During discovery, it is now routine for parties to inquire about the use of such apps, and, while the messages may no longer exist, the mere fact of the use of these apps may be used to paint a picture of furtiveness intended to hide the truth.

But is that always the case? What if the client is a whistleblower, who has information regarding illegal conduct on the part of her company or governmental agency? First, we note that regardless of any confidentiality agreement or non-disclosure agreement, there is no societal interest that protects against the disclosure of criminal conduct (save for the societal interest in permitting those who have committed crimes to speak with their counsel, etc.), and thus such confidentiality and non-disclosure agreements are void, to the extent that they purport to bar such disclosure. (*See* 7 Williston Contracts §15:8.)

Second, we note that it is well established that information regarding criminal activities cannot be considered "confidential," save for the traditional sense that a client's privileged communications with her attorney (or her spouse, clergyman or doctor for that matter) about a past crime are privileged. If the whistleblower has information that her company or governmental agency has broken or is breaking the law, it is simply not "confidential" information; she may freely disclose it. See *Restatement (Third) Agency* § 8.05, *comment c*: "[A]n agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime. An agent's privilege to reveal such information also protects the agent's revelation to a private party who is being or will be harmed by the principal's illegal conduct." As crime, by definition, harms the public generally, the principle stated in the *Restatement* is arguably too narrow for our democratic system: If a crime has been committed or is being committed, it is the public that is harmed, not just a private individual. So what if the client wishes to communicate anonymously, through the Fourth Estate, the media, about illegal conduct of a company or governmental agency? Is it ethical to advise the client – who does not wish her identity to become known for risk of retaliation – to use ephemeral messaging apps to communicate with the media to get the story out? As the communications are legal, it is thus ethical to advise the client to communicate using ephemeral messaging apps.

And what if the client has brought or is contemplating bringing a discrimination lawsuit against her employer? Would it be appropriate to advise her that she may communicate with her co-workers using ephemeral messaging apps in order to gather evidence? Attorneys always ask their clients to provide them with evidence to support their claims. The use of ephemeral messaging apps, however, subjects the client to the possibility that she will be accused of conspiring with co-workers to concoct a story and questioning regarding the use of such apps at deposition is becoming routine. If the client uses such apps to communicate with co-workers, it must be assumed that it will be disclosed and that she will be depicted by her adversary as duplicitous and conspiratorial in front of a jury. In accordance with Rule 1.1., the duty to provide competent counsel, the client should be advised of such risks.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

In order to attract new clients in the cryptocurrency space, I raised the prospect of accepting cryptocurrency as payment for legal fees with our firm's management committee. I think that offering clients a cryptocurrency payment option will make us more attractive to some clients that are participating in the growing cryptocurrency marketplace and help present ourselves as a technologically savvy and knowledgeable law firm.

If our firm decides to accept cryptocurrency as payment for legal fees, are there any ethical issues we should be aware of before proceeding? Are there any prohibitions on a firm accepting cryptocurrency payments? Is the payment of cryptocurrency by a client to a law firm for legal services already rendered the equivalent of a wire payment? Are there any specific requirements for holding the client's cryptocurrency in our law firm trust accounts? At some point, could we require a client to pay with cryptocurrency? Are there any other issues concerning cryptocurrency payments that we should consider?

Sincerely,
Al T. Coyne

UPDATE TO MAY 2019 FORUM ON INADVERTENT DISCLOSURE

We wanted to update you on a recent ethics opinion that was published after our May 2019 Forum on the same topic went to press (Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., May 2019, Vol. 91, No. 4). In our May 2019 Forum, we discussed an attorney's obligations when the attorney receives inadvertently produced material. (*Id.*) On May 16, 2019, the New York City Bar Association Committee on Professional and Judicial Ethics issued Formal Opinion 2019-3 on this very topic. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-3 (2019). The Committee opined that after notifying the sender of the inadvertently produced materials pursuant to Rule 4.4(b), and subject to any rules, agreements, or court orders to the contrary, "[i]f using the inadvertently sent information would reasonably be expected to advance the client's objectives and the law permits its use, then Rules 1.2(a) and 1.4 direct the lawyer to consult with the client about the risks and benefits of using the information. The client's desire to use the information should be treated by the lawyer as controlling when the failure to do so would constitute a failure 'to seek the objectives of the client through reasonably available means permitted by law and these Rules' under Rule 1.1(c), and/or would 'prejudice the rights of the client' under Rule 1.2(e)." (*Id.*) "[I]f the lawyer and the client have a fundamental disagreement over whether to use the inadvertently disclosed information, the lawyer may be permitted or required to withdraw from the representation depending on the circumstances." (*Id.*) As the opinion noted, there may be many reasons why an attorney would be disinclined to use the inadvertently disclosed information including a lawyer's perceived "higher professional duty." (*Id.*) Should you come across inadvertently produced materials, we recommend reading this opinion as you consider your ethical obligations.

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Thoughts on Legal Writing from the Greatest of Them All: Antonin Scalia and Bryan A. Garner — Part II

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we continue our focus on Antonin Scalia and Bryan A. Garner's preeminent book, *Making Your Case: The Art of Persuading Judges*. In Part II of this two-part column, we address Scalia and Garner's suggestions on writing persuasively and using an effective writing style.

PERSUASIVE-WRITING TECHNIQUES

"The overarching objective of a brief is to make the court's job easier."[1]

Acquire a good desk reference. A good desk reference on proper English usage separates good lawyers from great lawyers. "Essentially, a usage guide is a compilation of literary rulings on common language questions: What's the difference between *consists of* and *consists in*?"[2] Scalia and Garner recommend the fourth edition of William Strunk and E.B. White's *The Elements of Style* and Norman Lewis's *Better English*.[3]

Spend time "getting" your arguments.[4] Review each fact and how it correlates to a legal claim or defense. "Don't start writing until you've turned the case over in your mind for days," they explain, because "[n]ew ideas may occur to you as you read the leading cases and scholarly authorities."[5] Take time to think about your adversary's case — not just your affirmative case.[6] And avoid producing a draft too soon; you can shut off alternative approaches during your deliberative process.[7]

Outline the brief. Avoid using key words as topic sentences in your outline. Rather, using full sentences "has three advantages: (1) it helps you understand your own organization at a glance; (2) it often flushes out redundancies, weak links, and inconsistencies; and (3) once you've completed it, it allows you to feel as though the brief is halfway written."[8] Outlining can also help you identify weak arguments.

"Sit down and write. Then revise. Then revise again. Finally, revise."[9] Writing can be hard to start, but force yourself to stick to your schedule. Start with the question presented, then the body of your arguments, and then the statement of facts. Then write your introduction and conclusion. Finally, write the summary of your argument. "Many judges find the summary of the argument the single most important part of a brief, so don't omit this part — and give it the attention it deserves."[10] Put the draft aside for some time in between each read-through.[11] It's helpful to get some good lawyer friends who know nothing about the case to read your draft. They can "spot gaps and deficiencies" you wouldn't perceive.[12]

"Advise the court by letter of significant authority arising after you've filed your brief."[13] Keep track of developments in your field. Bring to the court's attention any new legislation or new rulings from governing authorities that support your case. Even if they support your adversary's case, you should bring it to the court's attention by letter, with a copy to opposing counsel. Keep your letter to one page.

State the questions presented up front. Put on the first page what the court must resolve.[14] It's the first thing the court will see. "Follow it religiously — even in memorandums in support of motions."[15] "Many advocates fail to appreciate that the outcome of a case rests on what the court understands to be the issue the case presents."[16]

The Statement of Facts "is narrative rather than argument."[17] A Statement of Facts describes the facts and the proceedings to date. Don't omit a crucial fact or misstate a fact. "Nothing is easier for the other side to point out, and nothing can so significantly damage your credibility."[18] The Statement of Facts must also be persuasive. Advance your objective "by your terminology, by your selection and juxtaposition of the facts, and by the degree of prominence you give to each."[19] By doing

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so, you'll "amplify the facts that suggest your desired outcome by placing them prominently in the narrative."[20]

Keep your argument logical and brief. Remember two points when writing your argument: "(1) keep your eye on the ball; (2) be brief."[21] First, write down the "syllogism that wins your case."[22] Every aspect of your argument must support your syllogism. Second, your argument must be brief. Thus, "a brief that is verbose and repetitious will only be skimmed; a brief that is terse and to the point will likely be read with full attention."[23] Brevity means entirely eliminating weak points, unnecessary elaboration, and phrases that "that add nothing but length."[24]

Conclude with more than just a request for relief. Be ambitious. Include the request for relief, but "preface that with a true conclusion to your argument — one or two paragraphs encapsulating your winning syllogism in a fresh and vivid way."[25]

WRITING STYLE

> *"Literary elegance, erudition, sophistication of expression — these and all other qualities must be sacrificed if they detract from clarity."*[26]

"Value clarity above all other elements of style."[27] Blunt, straightforward legal writing is the most persuasive. Avoid "puffed-up, legalistic language."[28] "[N]ever use a word that the judge may have to look up."[29] Clear legal writing makes it harder for your adversary to mischaracterize your arguments.[30] Your opponent won't be able to distort your words. And the court won't be confused.

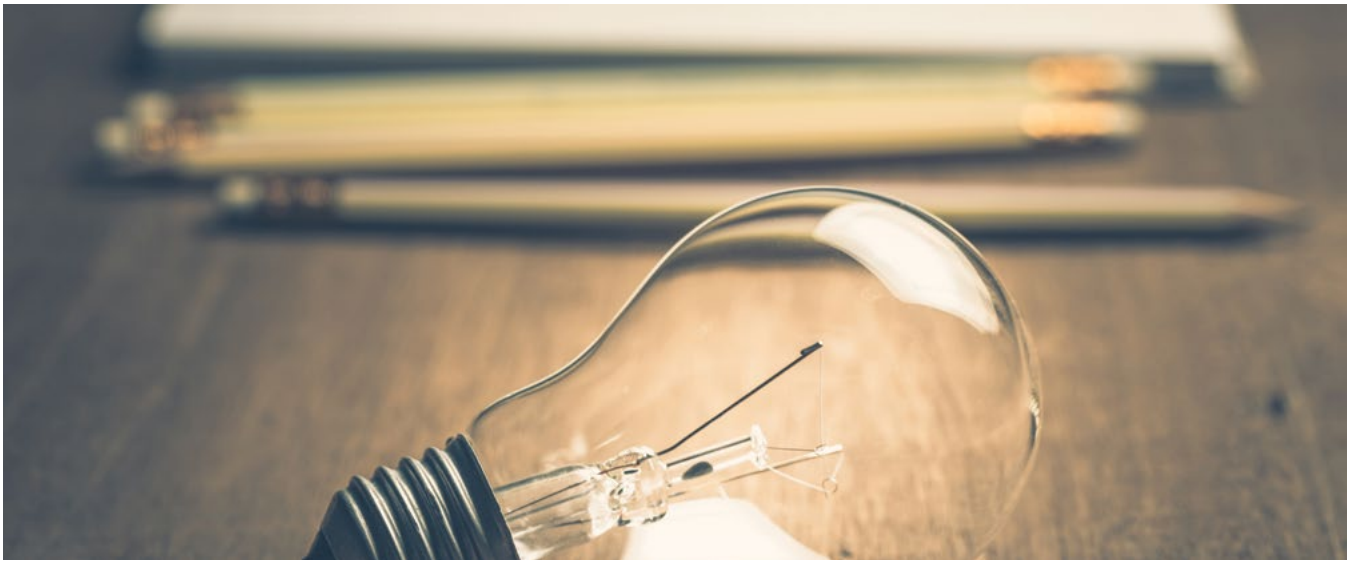
Signpost your arguments. Use guiding words to help the reader follow your arguments — between and within paragraphs.[31] "These words and phrases turn the reader's head, so to speak, in the direction you want the reader to look."[32] For example, using the word "but" tells your reader that your "next thought will somehow qualify the point just made."[33]

Give examples to clarify abstract concepts. Just as your words need to be clear, so do your abstract concepts. One way to clarify difficult concepts is to give the judge examples. For example, the reader probably won't understand a description of the interpretative canon of *noscitur a sociis*. But in giving this example to your reader — "pins, staples, rivets, nails, and spikes" — the reader will know that "nails" don't refer to fingernails.[34]

"Consider using contractions occasionally — or not." Scalia and Garner differ on whether lawyers may use of contractions in their legal writing. According to Garner, lawyers may contractions that enhance the natural flow of writing. Contractions shouldn't be used in every single sentence, but should be used when, in speaking, they'd be spoken naturally.[35] Scalia contends that contractions have no place in legal writing. They serve no benefit and can often offend judges. So, he thought, nothing will be gained, only lost, by contracting.[36]

"Swear off substantive footnotes — or not."[37] Garner and Scalia offered opposing viewpoints on using substantive footnotes. Garner rails against substantive footnotes. If your argument isn't important enough to include in the text, he says, then it doesn't belong in your brief. [38] Some courts have even noted that they won't consider arguments raised exclusively in a footnote.[39] But Scalia supported the use of substantive footnotes because they can support an argument. Substantive footnotes can provide a space for rebuttal to weak counterarguments.

Use the parties' names. Avoid referring to the parties by their "status in the litigation (plaintiff, respondent,



etc.)."[40] This will confuse a judge who might be reading a long brief. Also, this "can make the record on appeal confusing if status-names are used in the briefing and argument at each level."[41] Don't try to "depersonalize the opposing party" by calling it the "Defendant," either. The court will likely be annoyed at your attempt to personalize your client by using this tactic.[42]

Use bold and *italics* sparingly; and never underline. "Don't overuse italics; don't use bold type except in headings; don't use underlining at all."[43] First, when "too much is overemphasized, nothing is."[44] Playing with word order can emphasize the word you're italicizing. For example, "instead of writing 'She held a *knife* in her hand,' write 'What she held in her hand was a knife.'"[45] Second, save bold type for headings only. You don't want to distract the reader by overemphasizing a word in your brief. Underlining is a "crude throwback."[46] When italicizing was unavailable, writers used underlining. Thus, "[n]obody using a computer in the 21st century should be underlining text."[47]

Cite cases accurately. Never distort a case to fit the facts. Doing so will make you look bad, especially if opposing counsel brings it to the judge's attention.[48] Even if a case marginally matches the facts, say so. "Explain why the difference is insubstantial" and shouldn't affect the outcome.[49] Use the accurate conventional introductory signals when citing. After one bad citation, a court will become suspicious about the accuracy of all the citations.

Cite sparingly. A brief isn't "a treatise, a law-review article, or a comprehensive *Corpus Juris* annotation."[50] Citing too many cases will distract the reader. The court doesn't care about how many cases you cite, but how well you use them.[51] Citing one case in your argument for a noncontroversial point is enough. There's no need to show off to the court. But if the argument is central to your case and will probably be contested, "cite the case but [also] concisely describe its facts and its holding."[52] And "follow that description by citing other governing cases."[53]

Use proper typography. Poor typography will hinder the persuasiveness of your brief. That's why "a brief that is ugly in typeface, with crowded lines, will not invite careful perusal."[54] If the court in which you're filing has no printing requirements, refer to the United States Court of Appeals for the Seventh Circuit's website for guidance on typography.[55]

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

1. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 59 (4th ed. 2008).
2. *Id.* at 63.
3. *Id.*
4. *Id.* at 69.
5. *Id.*
6. *Id.*
7. *Id.* at 70.
8. *Id.*
9. *Id.* at 80.
10. *Id.*
11. *Id.* at 81.
12. *Id.*
13. *Id.* at 101.
14. *Id.* at 82.
15. *Id.* at 83.
16. *Id.*
17. *Id.* at 93.
18. *Id.*
19. *Id.* at 94.
20. *Id.*
21. *Id.* at 98.
22. *Id.*
23. *Id.*
24. *Id.* at 99.
25. *Id.* at 100.
26. *Id.* at 107.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 108.
31. *Id.* at 110.
32. *Id.* at 111.
33. *Id.* at 110.
34. *Id.* at 112.
35. *Id.* at 116.
36. *Id.* at 118.
37. *Id.* at 129.
38. *Id.* at 130.
39. *Id.* at 131.
40. *Id.* at 121.
41. *Id.*
42. *Id.*
43. *Id.* at 122.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 123.
49. *Id.*
50. *Id.* at 125.
51. *Id.*
52. *Id.* at 126.
53. *Id.*
54. *Id.*
55. *Id.*

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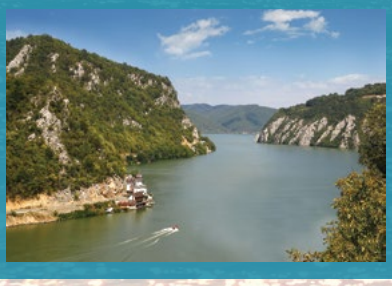

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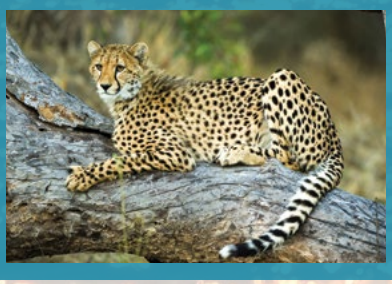

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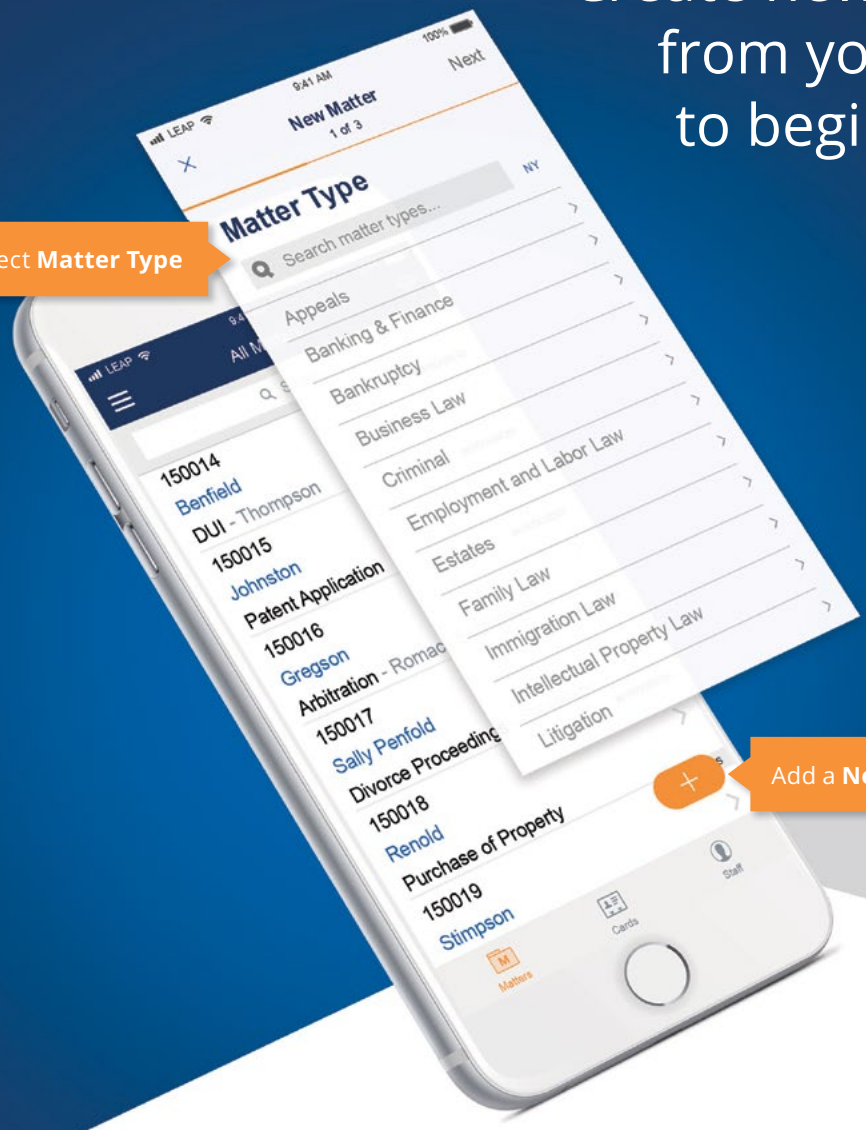

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