# NEW YORK STATE BAR ASSOCIATION NYSBA November 2019 YOL. 91 | NO. 8





**New York Law** as the Gold Standard

Andre R. Jaglom with Michael W. Galligan

**Building a Virtual Bar Center** Henry M. Greenberg

Street Art: Is Copyright for "Losers©™"? A Comparative Perspective on the French and American Legal Approach to Street Art

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by Henry M. Greenberg

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# Change Is the New Normal



onstant change is the new normal. This is as true for lawyers as it is for society at large. Just as change is the law of life, it has become the life of law practice. Indeed, the legal profession has experienced more change over the past 20 years than it did over the last two centuries.

I went to law school in the Dark Ages — the 1980s, before Al Gore invented the internet. We knew nothing of cell phones or email or social networking. We did legal research using books, not computers. We wrote legal briefs and memos on typewriters.

When I graduated from law school, the newest, most mind-blowing technology was the fax machine.

Fast forward to the present. Today, the world creates as much information every 48 hours as it did from the dawn of civilization to the dawn of the millennium. Soon, the average personal computer will have as much processing power as the human brain.

In 2005 – a lifetime ago, it seems – author and *New York Times* columnist Thomas Friedman published *The World Is Flat*, referring to the revolutionary changes in commerce brought about by new technologies.

That technological revolution did not just affect commerce. The same seismic changes in communication that made this "flattening" possible have permeated every aspect of our lives.

Time has accelerated. Social media is ubiquitous and demands instant response. Work hours are 24/7, 365 days of the year, and businesses are always on call. There are no breaks, there are no pauses. The world never rests.

Because the law is a mirror of society, changes in society impact the law. And the technological changes that revolutionized the way the world communicates have had a profound impact on lawyers.

Clients expect immediate responses to their questions. They demand cost-effective and efficient service. Before they speak with us, they have armed themselves with information about their matter and the relevant law – information they could not access in the pre-Google days.

To meet their legal needs, we must meet our clients where they are — not where we once were or where we wish them to be. The only way we can do that is by embracing the technological revolution and letting it work for us. Lawyers either adapt to change or risk becoming irrelevant. Make no mistake, change is the new normal.

For millennial lawyers, harnessing and leveraging change — especially technological change — is second nature. But today, all lawyers need these skills. This is not optional. It is our professional obligation as lawyers. And it is a business obligation to our practices.

#### A VIRTUAL BAR CENTER

Not only must lawyers and law firms change, so too must the organizations that represent them. Bar associations must reimagine how they deliver services to members. When our members look for the tools, resources and CLEs they need, they turn to the cloud. We need to be there, too.

That is why the New York State Bar Association is making deep investments in technology. We are building a virtual bar center to welcome members wherever they

#### PRESIDENT'S MESSAGE

reside, however they work, in whatever field they practice. The strength and relevancy of NYSBA depends on our accessibility and the ease with which members can get what they require.

#### **NYSBA'S GLOBAL REACH**

New York is the economic and legal capital of the world. New York State law, and New York lawyers and judges, are globally recognized as the gold standard in the profession. Likewise, NYSBA is a global force. We are widely regarded as the world leader among bar associations; our reputation is unmatched.

Some 330,000 attorneys are licensed to practice in New York. More than 140,000 – over 40 percent – live or practice outside of the state, and more than 26,000 live outside the United States.

While these attorneys are not physically inside the state, they have a professional tie to New York, and need New York law and connections. NYSBA is expanding globally to meet their needs.

We have launched a quarterly e-newsletter – *NYSBA Global* – with articles of interest to international attorneys. We are offering more CLE programs in areas of international law and practice. We are building relationships with international bar associations, law firms, and law schools. In November, our International Section is holding a global conference in Tokyo.

#### NYSBA LOCAL: A NEW OUTREACH

But our efforts aren't just on the global scale. New York lawyers – from Montauk to Niagara Falls – need NYSBA as well, especially those who practice in rural communities.

Forty-four of New York's 62 counties are rural. While attorneys clustered in cities have ready access to technology and professional resources, rural lawyers often face a different experience. Our virtual bar center will make it easier for rural attorneys to get the CLE, tools, resources, connections and communities they need.

Our new Task Force on Rural Justice – chaired by Justice Stan L. Pritzker and Taier Perlman – is looking at the issues particular to rural lawyers, including the expansion of broadband access. In the year 2019, broadband access should be a civil right. It is indispensable to closing the justice gap in rural areas.

#### **TECHNOLOGY AND THE BAR**

Technology makes it possible for NYSBA to serve New York lawyers everywhere. But technology is not a panacea and will not meet every challenge facing the legal profession. It is, however, a facilitator of the changes we must make and a necessary tool to remain relevant in the digital age.

So, we must embrace change and technology.

It can help our practices, foster communication and expand access to justice. It can empower us to do the public good. And, it can help us be better lawyers.

HENRY M. GREENBERG can be reached at hgreenberg@nysba.org

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# TEST YOUR KNOWLEDGE

a) Most disabilities are a result of	on-the-job injury and freak accident
b) The average long-term disabilit	y lasts less than a year.
	TRUE or FALSE
c) Social Security covers the majo	rity of long-term disability claim
e) Social Security covere and	TRUE or FALSE

#### **DID YOU KNOW...**

All three statements above are FALSE. And all three represent common — and potentially costly — myths about disability. The TRUTH is that the loss of income due to a sudden illness or injury happens more often, costs more and lasts longer than you might think.

As an NYSBA member, you can apply for up to \$10,000 a month in Group Long-Term Disability benefits at competitive member-only rates that are not available to the public.

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#### Answer key:

- a) Musculoskeletal disorders and illnesses such as heart attack, cancer, and diabetes cause the majority of long-term disabilities, not freak accidents or injuries.1
- b) The duration of the average long-term disability claim is nearly 3 years (34.6 months.)<sup>2</sup>
- c) 64% of initial Social Security Disability claims applications were denied in 2018.<sup>2</sup>
- 1,2 https://disabilitycanhappen.org/disability-statistic/
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By Henry M. Greenberg



this article.

ver its 143-year history, the New York State Bar Association (NYSBA) has frequently adapted to meet the needs of members and the legal profession and do the public good. Time and again, we have expanded operations and broadened our outlook, as dictated by the needs of the day. Once again, the time for change is upon us.



In the past, change meant expanding NYSBA's brickand-mortar presence either through relocation of our headquarters or overhauling physical space. Major moves and ambitious renovations of the Bar Center on Elk Street signaled new beginnings and an expansion of NYSBA's role as the leader for lawyers across the state and nation.

Today, the digital revolution has transformed the way people communicate and do business. This necessitates a completely different kind of expansion for NYSBA. Now we must rebuild our technology and digital operations and build a "virtual" bar center.

More specifically, we must overhaul NYSBA's operating systems, by adding state of the art e-commerce technology, enhancing the quality and reach of our communications capacity, and digitizing all publications. We must



create a bar center where attorneys across the street and around the world are just a click away from accessing NYSBA's services and benefits.

#### **CAUTIONARY TALES**

Organizations that fail to meet the digital challenge proceed at their peril. Consider, for example, the fate of Kodak and Blockbuster Video.

Kodak was once near-synonymous with cameras, film, and picture-taking. Photos were termed "Kodak moments" in the company's advertising.

Kodak was also the home of a world-renowned research and development center for photography. In the early 1970s, its laboratory invented digital photography. But the company buried it because of its highly profitable film business. Years later, Apple invented digital photography and revolutionized how we take pictures. Kodak, by contrast, went bankrupt.

Like Kodak, Blockbuster video stores were once ubiquitous. When a movie was newly released to video, customers flocked to the stores. Now, Netflix, Hulu, Amazon, and other services provide customers instant access to thousands of movies and television shows from the comfort of their homes or handheld devices. Only one Blockbuster store is left – in Bend, Oregon.

These cautionary tales are instructive. They show what NYSBA must do going forward – and quickly.

There was a time when admission to the New York bar meant membership in NYSBA. Membership numbers rose consistently through 2012. In the last six years, however, NYSBA experienced a 10% decline in membership. Today, only 35% of New York admitted lawyers are NYSBA members.

The primary reason for this trend is clear. The world communicates and connects through social media and the internet. It looks for answers – and solutions – in the cloud. The value of NYSBA's content, CLE programming and products has not changed. What has changed is the way people want to get it – quickly, efficiently and online, with 24/7 availability and easy-to-use websites.

However, NYSBA's digital infrastructure has not kept pace with the communication revolution. For too long we have relied on a website infrastructure that was built in 1998. This has hamstrung NYSBA's ability

to analyze data and communicate, in real time, with members and potential new members. Much-needed, high-quality content and information has been difficult for members to access or is hidden from their view behind a paywall.

#### MEETING THE DIGITAL CHALLENGE

NYSBA is meeting the digital challenge head on. We are developing a robust online presence by digitizing our archives, moving more content outside of paywalls, and posting breaking legal news to our website, blog, and social media platforms. We will enhance our members' experience through the acquisition of sophisticated e-commerce technology to make CLE registration and product purchases quick and easy.

NYSBA has assembled a team of information technology and website experts to guide our digital transformation. They are installing best-of-breed software and technology systems to better serve members' needs and optimize staff productivity. They are also redesigning our website to make it more user-friendly and provide a more intuitive experience.

#### OTHER CHALLENGES

A digital overhaul is not enough. Building a digital bar center requires more than acquiring state of the art software and technology. It also requires reimagining and transforming the ways NYSBA serves its members.

A new Special Committee on Association Structure and Operations is examining ways to improve the overall effectiveness and functioning of NYSBA in our technology-driven world. Another new special committee, on Strategic Communications, is developing a plan to create more consistent messaging and content targeted to member needs and interests - no more email onslaughts! And, our Finance Committee is also

#### Building the Bar Center - A History of NYSBA Headquarters

- NYSBA was founded in 1876 by an act of the New York State Legislature. The Association and the Legislature continue to enjoy strong mutual ties.
- Our first headquarters were in the old New York State Capitol building. Visiting the State Capitol? Look for the commemorative NYSBA plaque hanging in the main hallway on the first-floor Senate side of building!
- We eventually outgrew the Capitol and moved several times in the early 20th century - first to a three-room office at 112 State Street in 1928, then to a slightly larger office at 90 State Street in 1933, and finally to an elegant, three-story brick Federalstyle building at 99 Washington Avenue in 1951.
- The rising number of attorneys and NYSBA members – led us to search for a permanent and suitably-sized headquarters in the mid-1960s. Governors' Row – a collection of historic rowhouses, including a former residence of Franklin Delano Roosevelt, on Elk Street adjacent to the Court of Appeals and across the street from the State Capitol – was the perfect location.
- But the move to our current headquarters wasn't easy - historical buildings nationwide were being torn down in a spasm of urban renewal, and Alba-

- ny Mayor Erastus Corning III objected to the sale of the properties to NYSBA. Would a Battle of Elk Street be fought?
- -• NYSBA and the City of Albany reached a compromise - the historical edifices and character of certain rooms within the townhouses would be retained, but NYSBA could expand within and behind the rowhouses to build a modern home for the Association.
- Under the leadership of the illustrious past NYSBA President Robert MacCrate, our 22,000 members raised \$1.6 million in 1967 - over \$12 million in 2019 - to build the bar center at 1 Elk.
- The dedication of the new bar center took place on September 24, 1971, with Governor Rockefeller as the guest speaker.
- The modern bar center occupies 2-6 Elk Street. 1 Elk, despite being our address, was demolished and is now the small yard adjacent to the rowhouses
- Another round of expansion in 1986 costing \$6.8 million, or \$15 million in 2019 – added more office space and completed the modern headquarters that exists today.



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# A digital overhaul is not enough. Building a virtual bar center also requires rethinking and transforming the ways NYSBA has always done business.

working on a long-term fiscal plan, paying attention to ways to cut costs, grow outside income, and ensure that dues and pricing stay reasonable.

Moreover, we are taking a proactive approach to diversifying NYSBA. New York State 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 together in communities – large and small – urban, suburban, and rural. NYSBA needs to reflect this diversity in its leadership, membership, and staff.

#### A VIRTUAL BAR CENTER: ACCESSIBILITY

All NYSBA members will benefit from the virtual bar center. Member preferences have been a driving force in this endeavor – and soon they will have a better, faster, and easier time getting the content they need, and more choices in how they access it.

President Hank
Greenberg and Task
Force chair Dean
Aviva Abramovsky
with Olli, the selfdriving electric
shuttle at the
University at Buffalo



The number of New York lawyers who live and work outside of New York is rising. Of the 330,000 New York admitted attorneys, 140,000 reside outside of the state, and more than 26,000 live outside the United States.

NYSBA has implemented a new initiative called "NYSBA Global" to reach out to the ever-growing number of New York lawyers who live and work across the nation and around the globe. These lawyers need what NYSBA offers — most importantly, resources to stay current and connected to New York law. To serve them effectively, we must ensure they are only a click away from connecting with colleagues around the world and from getting the CLE credits, information, and tools they need. A virtual bar center will do that.



The virtual bar center will be a boon to rural lawyers across the state, as well. It will give them quick access to CLEs, tips, and communities, where they can connect with other lawyers to ask questions and exchange ideas, no matter where they live and practice.

#### THE FUTURE IS BRIGHT

NYSBA is on the cusp of a great transformation. In the past, whenever we met the challenges of the day, our association grew and prospered. We will do so again today and secure our future for generations to come. We owe nothing less to our members, the legal profession, and the public.

New York Law as the Gold Standard Choice for Global Business Contracts

By Andre R. Jaglom with Michael W. Galligan<sup>1</sup>



Andre R. Jaglom is a partner in the New York firm of Tannenbaum Helpern Syracuse & Hirschtritt LLP and Co-Chair of its Corporate and its Franchise, Distribution and E-Commerce Practice Groups. Drew is the current Chair of the NYSBA Business Law Section, a former Chair of the NYSBA International Section, and a member of the NYSBA Executive Committee.

Jamaican rum maker and a Mexican liquor distributor walk into a bar. Funny thing is, it's the New York Bar. When a Jamaican distiller needed to negotiate a contract for the distribution of its rums in Mexico, why did it engage a New York lawyer to negotiate and draft the contract? Because, before they had agreed on any of the commercial terms, the two international businesses involved had agreed that they wanted their relationship to be governed by New York law.

Empirical research suggests that this is not unusual. The substantive benefits to international and domestic businesses of New York law and New York courts and arbitral tribunals have made it a common choice for business contracts around the globe. A study of choice of law and forum clauses in contracts reported in SEC filings by public companies in 2002 found that almost half chose New York law, three times the number choosing the next closest state, Delaware.<sup>2</sup> The authors of a similar study of international contacts observed, "Received wisdom is that English and New York law dominates international business transactions."3 At least anecdotally, New York thus competes well with English law as the preferred choice for international agreements, despite England's substantial head start that results from the many British Commonwealth countries and former British colonies - including our own! - that have a more than passing familiarity with English law. Where that head start is absent, New York does even better. Central American lawyers, for example, are reported to prefer New York law to govern international agreements.4

The reasons for the preeminence of New York are plain: "New York offers international commercial businesses, investors and co-venturers, as well as exporters and importers around the world, the choice of one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere to govern their transactions and investments. New York law includes an almost inexhaustible set of rules and precedents covering a wide spectrum of business transactions, ranging from purchases, sales and leases of goods, property rights and business interests, to business collaborations, partnerships, and joint ventures."5

Equally important, New York law is guided by the intent of the parties, as expressed in the words they chose in the contract, making the results predictable and certain. The New York Court of Appeals reaffirmed this principle just this year in 159 MP Corp. v Redbridge Bedford.6 As former New York Court of Appeals Judge Howard A. Levine observed in discussing that decision, "The majority held that this text-based means of interpreting contracts was "[i]n keeping with New York's status as the pre-eminent commercial center in the United States, if not the world."7 Quoting a decision by the late Chief Judge Judith Kaye, herself a leading advocate for New

York law and arbitral fora, Judge Levine added, "The New York approach, the cases hold, 'imparts stability to commercial transactions . . . . [A] nalysis that begins with consideration of extrinsic evidence of what the parties meant . . . unnecessarily denigrates the contract and unsettles the law."8

Thus, "New York contract law is private-party driven. It provides a broad framework for honoring, interpreting and enforcing agreements shaped and negotiated by private parties without attempting to dictate the content of such agreements . . . . New York courts are loathe to substitute their judgment for the business decisions of parties to commercial transactions."9 Instead, New York places great emphasis on the written word, and the specific words the parties chose to express their intent. New York requires many types of commercial contracts to be in writing, going beyond the practice of many civil law jurisdictions. But few practitioners would disagree that this merely embodies best practices for commercial relationships. And New York contract law will not consider evidence of prior negotiations and representations between parties in construing agreements, nor will it consider collateral agreements where the parties have included an "entire agreement" or "merger" clause in the contract. New York law requires that written contracts be interpreted according to the words chosen by the parties and will consider oral evidence of intent only if the written terms "are so ambiguous that cannot reasonably be construed on their own."10

In short, parties have freedom of contract, and New York will enforce the terms upon which they agree.

Moreover, New York imposes a high standard of conduct on contracting parties. New York law incorporates the implied covenant of good faith and fair dealing into all contracts. At a minimum, this imposes a duty of honesty in commercial dealings, and often a duty to act in accordance with commercial standards of fair practice in the trade. 11 As Judge Benjamin Cardozo famously wrote about the duties business partners and co-venturers owe to each other, "something more than the morals of the market place is required in the relations of business partners to each other" and "only the punctilio of an honor most sensitive" would suffice.12

New York also honors the parties' bargain, even in the face of economic hardship. Such hardship alone will not excuse performance of the agreement, unless performance is rendered impossible by an event that negates a basic assumption of the parties and was unanticipated and unforeseeable, so that the parties could not have been expected to address it in the contract. 13 The standard for sales contracts under the Uniform Commercial Code is somewhat less strict; there may be some relief available when performance has become "impracticable." 14 But consistent with the philosophy of leaving to the parties

# The New York International Arbitration Center: A New York State Bar Association Global Success Story

#### By Christian Nolan

New York is ranked as the third most popular place in the world for international arbitrations, according to the International Chamber of Commerce.

And by a landslide, New York is the most frequently used venue in the United States for international arbitrations, based on 2018 statistics released by the American Arbitration Association's International Centre for Dispute Resolution.

New York's success in the international arbitration market is – in no small part – due to the success of the New York International Arbitration Center (NYIAC) located in the heart of Manhattan.

In 2011, the New York State Bar Association Task Force on New York Law in International Matters called for the creation of a permanent center for international arbitration in New York. By the spring of 2013, NYIAC opened its premier facility through private funding from NYSBA's Dispute Resolution and International sections, as well as many other market-leading law firms.

Located at 150 East 42nd St., the nonprofit organization is a prime destination for international arbitration hearings, mediation proceedings and conferences of all kinds. NYIAC provides world-class hearing rooms, breakout rooms and other amenities for arbitrations of any size, including large and multi-party arbitrations. The facility has full technological capabilities, such as high-tech video conferencing and simultaneous interpretation for a seamless experience. This allows the parties and counsel to focus on the matters at hand.

NYIAC also serves as a valuable resource to the international arbitration community worldwide by providing arbitration resources, such as alert memos on important issues within international law, a case law library of U.S. arbitration-related decisions impacting the practice at the state and federal level, a diversity corner, a weekly calendar of arbitration events in New York and around the world, institutional rules and model clauses, and other research. NYIAC also sponsors numerous programs that inform the community about hot topics in international arbitration and they coordinate with United Nations representatives to bring the latest arbitration-related developments at the UN to New York-based practitioners.

"NYIAC has played a unique role in developing New York as a seat for international arbitration and the selection of New York law for international contracts," said Edna Sussman, NYIAC chair and an independent

arbitrator and mediator. "The statistics demonstrate the success NYIAC has achieved in accomplishing these objectives.

"The years have proven the wisdom of NYSBA's Task Force on New York Law in International Matters' recommendation that a center be established for international arbitration," Sussman continued. "That vision, transformed into a reality, has accomplished every goal. We look forward to continuing our engagement with the global international arbitration community and our New York-based practitioners as we build upon NYIAC's successes."

Through the success of NYIAC in New York, the U.S. rose to the third most frequently chosen locale for arbitration in 2018— behind only Paris and London, according to the International Court of Arbitration of the International Chamber of Commerce (ICC). Eighty new ICC cases were seated in the United States, an increase of 33% from 2015 with more than half of new cases nationwide being seated in New York City. This was a significant jump in just a year, as New York was ranked sixth in 2017. Additionally, in contracts with a U.S. choice of law, at least half selected New York governing law, confirming New York's well-known predictability and fairness.

The American Arbitration Association's International Centre for Dispute Resolution similarly reports New York's dominance, as 993 new cases were filed with them in 2018 involving 1,828 parties from all over the world with claims valued at \$8.2 billion. New York's case load dominated by a significant margin with 324 cases in New York followed by Miami with 132, Houston with 34 and Los Angeles with 22.

"There has long been an 'I Love New York' campaign in the international community in New York, as the global epicenter of business and commerce," said Rekha Rangachari, NYIAC's executive director. "NYIAC's place within this community is special, offering a gathering point for all within the international law arena. It is both our privilege and pleasure to work at broadening our reach, with several collaborative agreements with leading international arbitral institutions, as we create best practices in our shared space."

For more information about NYIAC, please visit nyiac.org, email info@nyiac.org or call 917-300-9550.

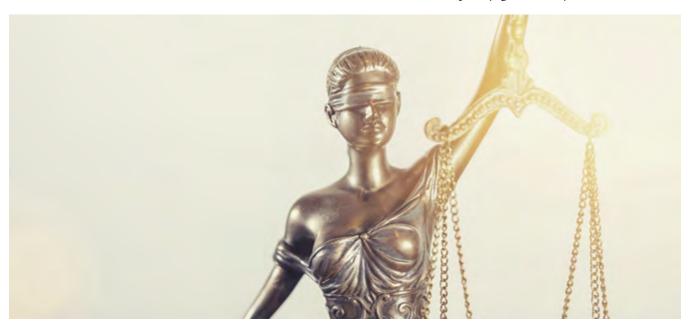
the terms of their relationship, they may provide in the contract for adjustments in the face of a fundamental change in circumstances, so long as the circumstances and bases for making such adjustments is stated clearly. Similarly, *force majeure* clauses excusing parties from performance as a result of circumstances beyond their control will be honored – but only in circumstances of the type expressly set forth in the contract as excusing performance. <sup>16</sup>

Finally, New York offers excellent resources for the resolution of contract disputes. New York has established the Commercial Division of the New York State Supreme Court in counties with significant commercial caseloads, with judges whose sole responsibility is the resolution of commercial disputes. These judges thus have broad commercial experience and can give undivided attention to commercial disputes without being diverted to handle criminal, matrimonial, family and other matters. The Commercial Division rules are designed to be efficient and effective, and to expedite resolution of cases. Non-U.S. litigants often are fearful of the expense of litigation in the U.S., particularly the costs of the far more extensive discovery and disclosure generally permitted in the U.S. in contrast to other jurisdictions. The Commercial Division has implemented rules that limit discovery and adopted the notion of proportionality of discovery to the matter involved in the case.<sup>17</sup> Agreements of the parties in the contract to limit discovery will likely be honored as well. In addition, parties can agree to waive jury trial and awards of consequential, special, and punitive damages. The U.S. federal courts sitting in New York are also highly regarded, although the dispute must meet one of the tests for federal jurisdiction, such as a question of U.S. federal law, of international law recognized by the U.S. (such as construction of a treaty to which the U.S. is a party), or diversity of citizenship of the parties

as defined by federal law,<sup>18</sup> as well as the venue requirements, which generally would require New York to be the residence of the defendants, where a substantial part of the events giving rise to the claim occurred, or where a substantial part of property that is the subject of the action is located; or, if there no such judicial district meeting those requirements, anywhere a defendant is subject to personal jurisdiction.<sup>19</sup>

New York also offers excellent options for arbitration. New York and federal law will enforce agreements to arbitrate in the same manner as any other contractual provision. Many of the leading arbitral institutions around the world have offices, and often headquarters, in New York, including the International Court of Arbitration of the International Chamber of Commerce, the International Centre for Dispute Resolution, the CPR International Institute for Conflict Prevention and Resolution, and JAMS and JAMS International. In addition, as an international commercial and legal center, New York can offer panels of distinguished arbitrators and former judges, with fluency in many languages. Parties may choose their arbitrators or arbitral institutions, as well as the procedural rules that will govern the arbitration, including discovery and disclosure rules. The New York International Arbitration Center in New York City offers state-of-the art facilities for international arbitrations.<sup>20</sup>

New York has made it easy for parties to choose New York law to govern their commercial contract. If the agreement involves at least \$250,000, New York law may be chosen, whether or not the agreement has anything to do with New York.<sup>21</sup> And of course, parties may also choose New York law where there is such a relationship to New York, whether of a party or the subject matter of the agreement. Similarly, the parties may choose a New York state court forum for any commercial dispute where the contract is expressly governed by New York law and



involves not less than \$1 million, regardless of any other connection to New York.<sup>22</sup> And where judicial relief is sought in the Commercial Division in New York County in aid of an international arbitration or to confirm or vacate an international arbitration award, the New York courts have designated a single justice to decide such disputes to provide for greater consistency and predictability and to expedite resolution.<sup>23</sup>

In sum, New York offers a sophisticated predictable body of commercial law that respects the expressed intention of the parties, and a range of highly qualified dispute resolution methods for the effective and efficient determination of commercial issues. For that reason it is both the logical and the popular choice of law for commercial contracts, both within the United States and for parties around the globe.

- 1. Michael W. Galligan is a partner (Trusts & Estates, Tax and Immigration) at Phillips Nizer LLP. He served as member of the New York State Bar Association Task Force on New York Law in International Matters and is a past Chair of the NYSBA International Section and a past member of the NYSBA Executive Committee. His comprehensive earlier articles form the foundation for this far briefer summary on the subject. For greater detail, and a comparison of New York law with that of other jurisdictions, see the following articles: Michael Galligan, Why Choose New York Law? 9 N.Y. Dispute Resolution Lawyer 39 (NYSBA, Spring 2016, No. 1) ("Galligan 1"), https://www. phillipsnizer.com/sitefiles/24176/nysba-nydisputereslaw-whychoosenylaw-mwg-2016. pdf; and Michael Galligan, Choosing New York Law as Governing Law for International Commercial Transactions, 26 Int'l Law Practicum 79 (NYSBA, Autumn 2013, No. 2) ("Galligan 2)" https://www.phillipsnizer.com/sitefiles/24299/article-nysba-intllawpracticum-autumn2013-galligan.pdf. See also Choose New York Law For International Commercial Transactions, NYSBA Dispute Resolution Section and New York International Arbitration Center, https://www.nysba.org/Sections/Dispute\_Resolution/ Dispute\_Resolution\_PDFs/Choose\_New\_York\_Law\_For\_International\_Commercial\_ Transactions.html.
- 2. Theodore Eisenberg and Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly Held Companies' Contracts*, 30 Cardozo L. Rev. 1475 (2009), https://scholarship.law.cornell.edu/cgi/view-content.cgi?article=1203&context=facpub.
- 3. Gilles Cuniberti, The International Market for Contracts: The Most Attractive Contract Laws, 34 N.J. Int'l. & Bus. 455, 516 (2014), http://scholarlycommons.law. northwestern.edu/njilb/vol34/iss3/. This study of choice of law provisions in contract dispute before the International Court of Arbitration of the International Chamber of Commerce in 2007-12 found no comparable dominance of any single jurisdiction, with 11% of the contracts governed by English law, 10% by Swiss law, and 4% by U.S. State law, of which over half chose New York law. It is worth noting, however, that this sample was necessarily skewed. Choice of forum is related to choice of law, and the ICC - a European based institution – is less likely to be chosen as a forum for interpreting New York law than English or Swiss law, so that one would expect New York choice of law provisions to be substantially underrepresented. Indeed, the authors reference a pending study of arbitrations in Singapore and Hong Kong – both with ties to the British Empire and English law - where preliminary indications are that parties choosing to arbitrate in those jurisdictions "virtually never provide for the application of Swiss law, but often provide for the application of English law or the law of the seat of the arbitration (i.e. either Singapore or Hong Kong law)." *Id.* at 516, n.187. Studies of choice of law provisions will necessarily be distorted if they look only at contracts adjudicated in
- 4. Ignacio Andrade Aycinena and Claudia Pontaza, *The New York Law as the Choice of Law in Central America Contracts*, https://nyiac.org/nyiac-core/wp-content/uploads/2019/07/THE-NEW-YORK-LAW-AS-THE-CHOICE-OF-LAW-IN-CENTRAL-AMERICA-CONTRACTS.pdf.
- 5. Galligan 1 at 39.
- 6. 33 N.Y.3d 353 (2019).
- 7. Howard A. Levine, '159 MP Corp.': Grateful That Majority Rejected Dissent's Radical Approach, N.Y.L.J. (Sept. 6, 2019), https://www.law.com/newyorklawjournal/2019/09/06/159-mp-corp-gratitude-for-majority-rejecting-dissents-radical-approach/ (subscription required).
- 8. Id., citing W.W.W. Assoc's. v. Giancontieri, 77 N.Y.2d 157, 162–63 (1990) (Kaye, J.).
- 9. Galligan 1.
- 10. Id.
- 11. Galligan 1.
- 12. Meinhard v. Salmon, 249 NY 458, 463-64 (1928).

- 13. Glen Banks, New York Contract Law: A Guide for Non-New York Attorneys (NYSBA 2014) § XI.1, citing Stewart v. Stone, 127 N.Y. 500 (1891) (destruction of factory by fire excused non-performance of contract to manufacture butter and cheese); Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900 (1987) (impossibility does not excuse performance where event inability to renew required insurance could have been guarded against by contract).
- 14. N.Y. Uniform Commercial Code § 2-615(a) excuses "[d]elay in delivery or non-delivery . . . if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic regulation or order whether or not it later proves to be invalid." See also Banks, supra, § XI.4.

It is worth noting that the United States is a party to the United Nations Convention on the International Sale of Goods (the "CISG"), which therefore is incorporated into New York law when it is applicable. As a result, a contract between parties in two countries that are both parties to the CISG will be governed by the CISG and not Article 2 of the New York Uniform Commercial Code, unless the applicability of the CISG is expressly disclaimed. This can have consequences for questions of contract formation, interpretation and performance, and should be carefully considered. *See generally* Galligan 1 at 43.

- 15. See Banks, supra, § XI.12 and Galligan 1 at 42.
- 16. Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900 (1987) ("The principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned").
- 17. Rules of the Commercial Division of the Supreme Court, 22 NYCRR § 202.70, http://ww2.nycourts.gov/rules/trialcourts/202.shtml#70.
- 18. 28 U.S.C. § 1332
- 19. 28 U.S.C. § 1391.
- 20. See Galligan 1 and https://nyiac.org/.
- 21. N.Y. General Obligations Law § 5-1401.
- 22. N.Y. General Obligations Law § 5-1402.
- 23. Administrative Order of the Administrative Judge for Civil Matters, 1st Judicial District (Oct. 3, 2013), http://www.nycourts.gov/courts/comdiv/ny/PDFs/Commercial%20International%20Arbitration.Admin%20Order.10-3-13\_1.pdf.



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# Anxiety: A Slippery From Normal to Disorder



# Slope and ... Back Again?

"If you can't explain something simply, you don't understand it well enough."

— Albert Einstein, physicist

I have found that if I ask for help on a project or carrying that third cup of coffee back to the team, people are generally supportive and not only willing, but happy to help. It's simple, short, measurable help; help that is easily digestible. People respond to cries for help with what they know, and, in the case of mental health, that generally results in not much that is helpful. People's advice can be sensible and their sentiment sincere, but if someone is sliding down the slippery slope toward mental disorder, they are generally unable to interpret any advice or support as being tangible. Oftentimes it happens slowly; it is easy to shrug off as a bad day. But, when a bad day turns into a bad week and then a bad month, maybe even a bad year, the recipient of that advice becomes unable to process it and, in many cases, will even perceive such advice as a threat, worsening the situation. So how do you help someone who is having a mental health crisis? Perhaps understanding it well enough is a first step to being able to explain it simply.

#### SLIDING DOWN THE SLIPPERY SLOPE

I slid down this slippery slope as far as I could go until I finally put up the surrender flag and have since been climbing back up the slope, closer to the top, where my mens sansa (healthy mind) resides. It is difficult to admit, difficult to talk about. As an attorney, a professional, a native New Yorker, a musician, a mother, a wife, a trusted advisor, a leader, I perceived this slide as a sign of weakness, a failure. I feared it, resisted it, and denied the slow corrosion as I inched my way down the slope, misplacing a piece of me with each slip. I resisted because I am a strong woman, I have grit, and I can handle anything, and all of this is true. But, I also have fears, insecurities, and doubts. We all do, but sometimes a perfect storm develops and we find ourselves lost at sea without adequate navigation to get us safely back to calm waters. And, when we are engulfed in these stormy seas with no relief in sight, and we don't know how to navigate away from the danger, we hope to be rescued. But there is a remote chance of such rescue. You can ask for it, and people can try to give it, but not many know how to actually provide it effectively.

My journey was a long, slow one. It didn't happen overnight; it built up subtly, over time, with each stress creeping in on top of the previous one before it had a chance to vaporize and provide some breathing room. It started while I was working in a high-octane environment, managing my workload well. But in a few short years, the practice's business tripled and our team couldn't keep up with the increased demand. The stresses grew, and relationships became contentious. As time went on, I could feel my brain changing, my social interactions reduced, and my time off becoming non-existent. Critical thinking became a luxury and, after a while, my days became merely a string of rote and reactive decisions, my main hope being to survive the day. The joy of the intellectual challenge had all but disappeared. I had an appendectomy and was responding to emails on the gurney on my way to surgery. My husband had a heart attack, and I worked from his hospital room. Two months later, a young man I mentored, who had moved to France, died in a car accident on his way home from work, leaving his young wife to raise their five-month-old son alone. I flew to Paris, working on the plane and taking calls in between the funeral and the burial. Two months later, I had to put down my chubby, old, long-time companion, Spike the cat. There was no time to grieve for any of this, there was no time to dwell, there was no time to process any of the feelings that accompanied these events.

I asked for help, explained the workload was too much, and while this was acknowledged, time passed and no relief came. I became depressed, withdrawn, hopeless, overwhelmed. I asked for guidance, made suggestions to alleviate some of the stresses for the team and ultimately myself, but nothing changed. I began to feel isolated; how could one go through all of these events and not have any time to process them? But when I returned from France, it was work as usual. No buffer, no words of kindness, no relief in my workload.

I knew something had to change, but I didn't have the energy or the mindset to do anything about it. I thought I was just burnt out from chronically overworking and it would pass if I went on vacation, but it didn't. I thought about resigning, but then needed a plan for next steps, which I was incapable of envisioning. I was actually just

hoping someone would come along and save me. Eventually, I was able to transition to another role but it came with a steep learning curve. In normal circumstances, I would have risen to the occasion, but things were not normal. To compound the situation, the transition coincided with a major and unanticipated house renovation that was not going as planned, and I couldn't focus on learning my new responsibilities as I was being called upon to continually make decisions for the contractors.

All these things snowballed over months, years, until I slid down the slope so far I couldn't navigate my way back. I was emotionally paralyzed, and then one day I broke. The holidays were upon us, it was just past the anniversary of the accident in France, and we were preparing for family get togethers, and like a pin in a balloon, I burst. It didn't happen on the day I received the news that I had to schedule a biopsy, as well as being informed of a poor work performance review (not a surprise now). It happened a few days later, when I was told I would not be attending an annual leadership conference, which I always looked forward to as it provided an opportunity to connect with colleagues from across the country. I started crying and couldn't stop for days. Not only was my health, my family and my mind suffering, but I had sacrificed it all for nothing; now my career, the career that I had given so much to, was imploding. I felt completely and utterly rejected, small, deficient, ashamed, not valued. It was at this point, I had no choice but to admit that I can't handle everything, at least not on my own, and I took leave and sought help from professionals whose diagnosis was that I had Generalized

Anxiety Disorder.1

#### **NEXT STEPS**

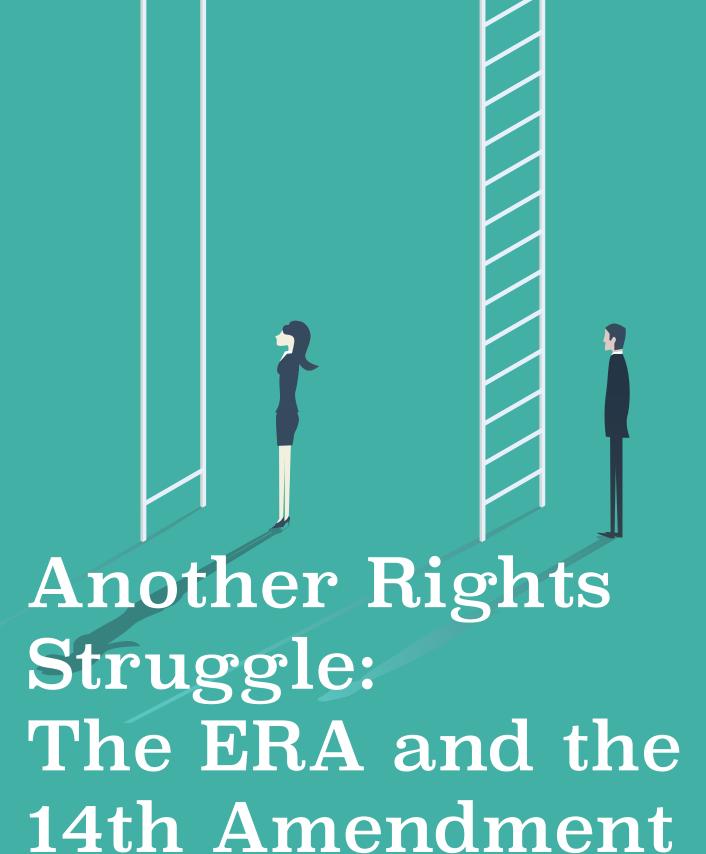
As I said earlier, this is hard to admit and it is difficult to discuss, but if I could find myself so far down the slippery slope, incapable of navigating my way back, I had to figure out how I got there, what I could have done to prevent it, and what others could have done to help, or it would all be one awful experience with no bright outcome.

With this in mind, and with a lot of work, I've built skills in recognizing the need for staying present and giving yourself little bits of time every day, as this will actually increase your focus and productivity and is absolutely not a waste of time. Yoga and meditation are great tools for facilitating this. I've learned that valuing yourself, and really believing it, prevents you from discrediting your needs so things don't get overwhelming. And I've learned that helping people understand what mental health issues and burnout are, why they occur, and how they can help, makes it less uncomfortable, less taboo, less shameful. Because the more you understand, the simpler it is to discuss.

People really do want to help, so in order for you, the reader, to know what you can do, it is to simply understand that a person sliding down the slippery slope cannot always recognize where they are. They need candid conversations that are not threatening. They need support and encouragement, not isolation. Try asking what they think they need and help them get it. Don't tell them they are getting in their own way, or that things will pass; this is dismissive and exacerbates their feelings of inadequacy. Recognize that what they are going through is real, and tell them. Maybe it is just time off, maybe it is a new assignment that allows them to shine and boosts their spirits, maybe it's just listening. But making believe it will go away and maintaining the status quo is likely not going to help them, and, if it is a work situation, it will not help the organization either. Morale will sink, and the effects can ripple to other coworkers. After all, the individual is not suddenly a bad employee; they are just stuck in a bad place. Providing real help will be reciprocated with real gratitude, and you won't lose a valuable resource, you'll gain a stronger leader. Educate yourself so the conversation is simpler.

Personally, I am learning there are better ways to "handle" things so that I thrive rather than survive. I am learning what caused me to take the long, slow, painful slide and how to recognize the signs earlier and explain them to myself simply. Because, I now know that the simpler I can explain it, the better I understand it. I am an attorney, a professional, a native New Yorker, a musician, a mother, a wife, a trusted advisor, and a leader, and if I can navigate all of that, I can navigate this too. The seas will never be calm for anyone all the time; education and empathy will better equip us for knowing how to navigate them when things get choppy so we can avoid getting lost at sea.

<sup>1.</sup> National Institute for Mental Health, *Anxiety Disorders*, https://www.nimh.nih.gov/health/topics/anxiety-disorders/index.shtml (Aug. 7, 2019).



By Peter Siviglia

Peter Siviglia is the author of, among other books and articles on legal subjects (and even a book of poetry), Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating, Thomson Reuters, supplemented annually.

Editor's Note: The push for the Equal Rights Amendment that would guarantee women equal standing in our society has been going on for more than five decades. The outcome is still far from certain, largely because supporters and opponents have engaged in a protracted standoff over just what the U.S. Constitution provides by way of protections against discrimination under the 14th Amendment. Indeed, at one point during the 1970s, when the ERA was largely viewed as likely to win ratification, the Harvard Civil Rights Law Review published an article in opposition, while the Yale Law Review published an article in support. The Supreme Court was divided, too, with the late Justice Scalia opposed (although he conceded there was no constitutional protection for women) and Justice Ruth Bader Ginsburg in support, on the grounds that whatever gains women might make through legislation could be amended or rescinded by future leaders, whereas a constitutional amendment would provide more permanent protections.

What follows is one view on this issue - an issue that may well find new life given the strict anti-abortion laws enacted in Alabama and Missouri, which are viewed as the first volley in the movement to overturn Roe v. Wade. The author, Peter Siviglia, an expert of contract law and a regular contributor to this Journal, compares the protections afforded under the 14th Amendment and the proposed Equal Rights Amendment and concludes that the ERA is redundant. While other legal minds have grappled with this issue, Mr. Siviglia offers his own perspective – that the 14th Amendment "can and should be applied universally." We remind readers that the author speaks for himself and not this Journal, and his views are presented here solely as a legal discussion.

A terrible implication resides in sanctioning sexual discrimination alone: What of discrimination based on skin color, ethnicity or religious belief?

#### THE CASE FOR UNIVERSAL APPLICATION OF THE 14TH AMENDMENT

1. The 14th Amendment to the United States Constitution provides, in part, that "[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws."

The United States Supreme Court in Bolling v. Sharpe (1954) ruled that this mandate also applies to the federal government.

- 2. The 14th Amendment applies only to government action, including action by governmental entities. The amendment does not apply to actions by individuals, businesses, or other non-governmental entities. Nevertheless, under powers granted by other provisions of the Constitution - for example, the power to regulate interstate commerce (Article 1, Section 8) and the power to lay taxes to provide for the general welfare (Article 8, opening paragraph) - the federal government has been able to impose bans on discriminatory practices by private entities over which it has power to regulate or to which it provides funding. But these prohibitions are not universal.
- 3. The judiciary is a part of government. The final judgement of a court has the effect of a law that is binding on the parties to a dispute.
- 4. Now, as Mr. Jaggars would say, let me "put this case": A woman sues her employer in state court because her pay is less than a male employee doing the same job and with whom she has equal or better credentials. There is no state or federal law that applies. If the court denies her claim, does she not have a legitimate claim under the 14th Amendment that the state has denied her equal protection of the law?
- 5. If that woman's claim under the 14th Amendment is legitimate, does not, then, the denial by any court of any claim by "any person" against any entity or individual based on discrimination on account of sex, sexual orientation, skin color, ethnicity, or national origin constitute the basis for a legitimate claim under the 14th Amendment to the Constitution that the state has denied that person equal protection of the law?
- 6. If the answers to the questions under items 4 and 5 are "yes," then the 14th Amendment can and should be applied universally to protect against discriminatory practices by individuals, businesses and other non-governmental entities.
- 7. Although, arguably, "substantive due process" under the Fifth and 14th Amendments supports affirmative answers to the foregoing questions, I have not addressed that consideration because I do not believe that additional support is needed.

#### THE ERA: A BRIEF EXAMINATION

The proposed Equal Rights Amendment to the United States Constitution is both ill-conceived and unnecessary. The relevant portions of the proposed amendment read:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 3. This article shall take effect 2 years after the date of ratification.

An effective date two years following ratification? Does that mean that discrimination based on sex is sanctioned during that period? Of course not. What, then, thwarts the argument? Well the good old equal protection clause of the 14th Amendment, which reads in pertinent part: "No State shall . . . deny any person within its jurisdiction equal protection of the laws."

**NOTE:** Although the text of the equal protection clause applies only to the states, the United States Supreme Court in *Bolling v. Sharpe* (1954) ruled that the mandate also applies to the federal government.

Further, the 14th Amendment is amplified by the Civil Rights Act, which prohibits discrimination based on, among other things, sex.

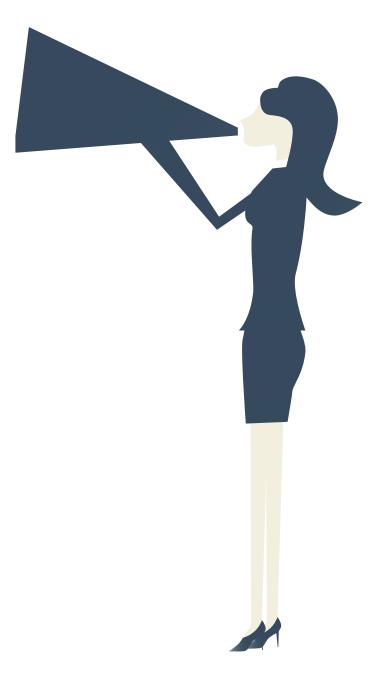
Well, if the equal protection clause of the 14th Amendment and the Civil Rights Act forbid, as they expressly do, discrimination based on sex during that two-year gap before the ERA would become effective, then surely they protect against such discrimination at all times, relegating the ERA to needless redundancy.

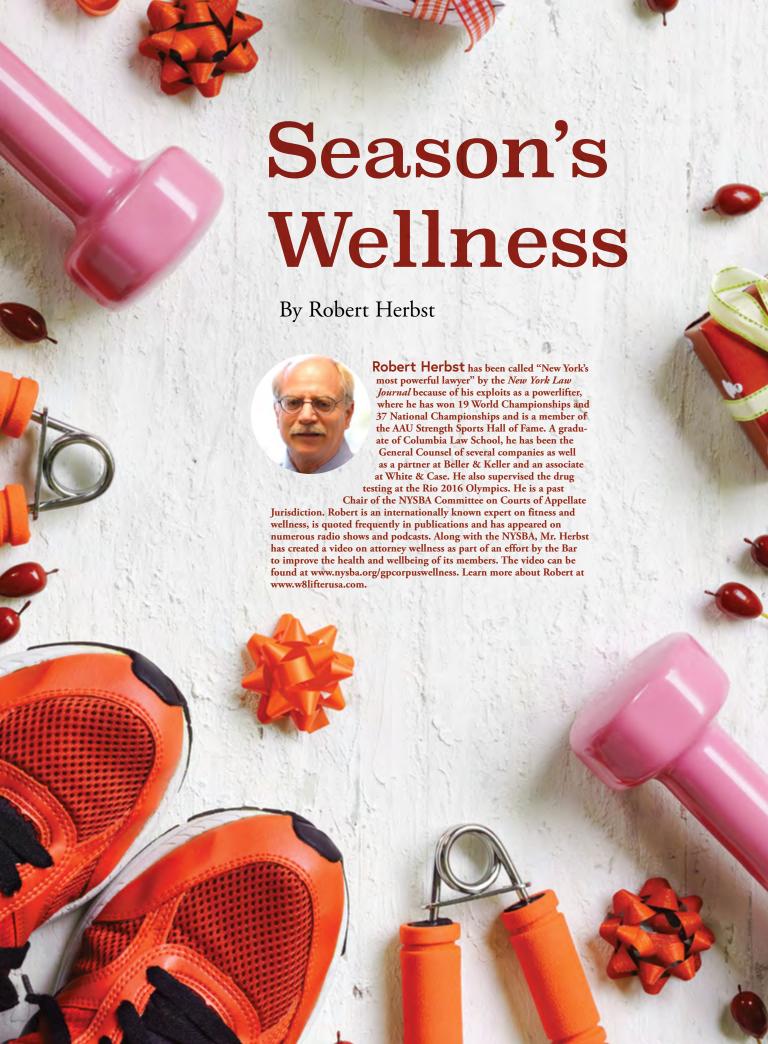
But redundancy and a delayed effective date are not the only problems with the ERA. A terrible implication resides in sanctioning sexual discrimination alone: What of discrimination based on skin color, ethnicity or religious belief? An implication arises that discrimination based on those characteristics is acceptable. Again, though, the simple, unqualified, comprehensive equal protection clause of the 14th Amendment, amplified by the Civil Rights Act, which expressly targets those other issues, erases the implication.

With regard to the sexual discrimination cases now pending before the Supreme Court, some might say that the issue depends on the meaning of word "sex." No, not entirely.

Surely the right to privacy, inferred by the Court under the 9th Amendment, guarantees the individual's right to sexual orientation, be it gay, lesbian, bisexual, transgender. Thus, any conduct which abridges that right clearly violates the equal protection clause of the Fourteenth Amendment. The ERA is unnecessary, impoverished over-legislation. If the proponents of the ERA would look beyond the mirror that reflects only their concerns, they might propose – though unnecessary – an amendment that would read along the following lines:

The mandate of the 14th Amendment to the effect that no State shall deny any person within its jurisdiction equal protection of the laws forbids, without limitation, discrimination and the denial and abridgement of rights based upon sex or sexual orientation, skin color, ethnicity or national origin, or religious belief.





Ah, the holidays. That magical time of year after Thanksgiving when deals have to close and fees have to be collected by 11:59 on December 31st. What lawyer doesn't have memories of filing with the SEC with Dick Clark on in the background, or signing hundreds of documents as Corporate Secretary to complete the reorg while the rest of the executive team was away skiing? All of this pressurized work is played out against a backdrop of familial and social obligations, media pumping holiday cheer, and the ready availability of way too much sugar and alcohol. What better time to take care of your most important client – yourself?

There is the immutable fact that the work needs to be done. Also, we may need to attend those holiday parties for client relations, or to stay in a relationship, or because we might actually enjoy them. At the same time, we need to take care of our health so that we wake up on January 1 ready to tackle the New Year. As a veteran of many Christmas Eve conference calls, here are some useful tips to stay well.

It is hornbook law that lawyers should take care of themselves throughout the year by exercising, staying properly hydrated, eating a nutritious diet, and getting enough sleep.<sup>1</sup>

Exercise is particularly important during stressful periods such as the holidays, as it will help you relax from the effects of the fight or flight reflex and reduce stress. It will reduce your blood pressure, heart rate, and blood sugar and cause your brain to produce endorphins, which will make you feel happier and less anxious. If you have been exercising regularly throughout the year, you may want to cut back in light of the time constraints around the holidays. Trying to force full workout into your schedule should not add to your stress. A successful strategy is to exercise hard between Labor Day and Thanksgiving to take advantage of the cooler temperatures and to raise your metabolism to prevent autumnal weight gain. Then decrease frequency or intensity from Thanksgiving through New Year's to allow your body to heal and enable you to deal with the demands of the season. It is all right to skip the gym to go to a holiday party. The rest will refresh your mind so that you will be eager to return to the gym or road come January. Just make sure you return to the gym or road.

If you have not been exercising, the holidays are the perfect time to start. Get up from your desk and do some stretches. Take a walk for half an hour and enjoy the cold air and look at the decorations. The exercise will make you more productive. It will also be a good start on your New Year's resolution to exercise.

It is also important to stay hydrated. The relative humidity in a heated office is lower than that of the Sahara Desert. Sitting in your office all day will dehydrate you enough to cause lowered blood volume and higher blood pressure, as well as fatigue, difficulty concentrating, headaches, and impaired memory. If you drink alcohol at a party, that will dehydrate you further. Do not wait until you are thirsty to drink water. By then you are already dehydrated and your body is just letting you know. Instead, you should drink water throughout the day until your urine is clear or slightly yellow tinged. By making sure you are hydrated, you will help yourself stay sharp, fresh, and alert.

Drinking water will also help you prevent holiday weight gain. If you drink water before a party or big holiday meal, you will feel fuller and will be less likely to overeat.

Your hunter-gatherer body wants to store fat during the fall and winter. Don't let it. You can still enjoy holiday festivities while managing what you eat. Eat a breakfast every day of protein, carbs, and fat such as eggs with toast or oatmeal and fruit. This will keep your blood sugar level and give your brain the energy it needs to work hard. Stop having pastries delivered to the conference room. Cut out the 500-calorie grande coffees. If you need a mid-afternoon pick me up, go outside and take a walk or have tea with lemon or eat a good quality, lowsugar protein bar. You can enjoy holiday treats at a party, but have a small meal beforehand with some protein such as chicken or fish. You will feel satisfied and will want to eat fewer sugar cookies. If you have been exercising, your elevated metabolism will burn those cookies off, especially if you can squeeze in some end of the year workouts.

Realistically, at year-end there are not enough hours in the day to get the recommended seven and a half hours sleep. Getting enough sleep is important as it helps in many ways from enabling your body to recuperate from exercise, to improving memory, to preventing obesity, so you should do the best you can until crunch time. Getting five hours or less a night is not sustainable and has the equivalent impact as having two drinks. Take a 20-minute power nap in the afternoon to make you more alert and improve your ability to keep churning away.

With some self-care to exercise regularly, stay hydrated, eat a balanced diet, and get enough sleep, you will be able to accomplish what you need to do and maybe even enjoy that most wonderful time of the year.

<sup>1.</sup> Herbst, Attorney Wellness in a Nutshell, NYSBA Journal 16–19 (Aug. 2019), https://www.nysba.org/Journal/2019/Aug/Attorney\_Wellness\_in\_a\_Nutshell/.

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

What Lawyers
Must Know-Part II

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



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n Part I of this series (91 N.Y. St. B.J. 35 (Sept./Oct. 2019)), we compared, in outline form, prior landlordtenant law with New York's new Housing Stability and Tenant Protection Act of 2019 (HSTPA). In this article, we discuss HSTPA's rent-regulation provisions.

Most see HSTPA's passage on June 14, 2019, as a tectonic shift in New York rent regulation and landlord-tenant law and procedure, a shift that alters the balance of power between landlords and tenants. But the agreement ends there. Reception to the new law has varied among the different factions, ranging from triumphant celebration to apocalyptic prediction.

Rent regulation has a long history in New York. Early rent controls were born out of the post-WWI housing crisis. FDR revived them during WWII. The current rent-stabilization system began in 1969. It has compounded in complexity with each successive wave of legislation as power has changed hands in Albany. Those unfamiliar with the tangled history of New York's rent laws can be forgiven for not understanding the furor surrounding their newest addition.

The new law has introduced legal questions that will generate litigation for years. While historic in its scale, the language of the Act of 2019 is sometimes unclear. A federal lawsuit that claims that the new law violates the U.S. Constitution has already been filed in the United States District Court for Eastern District of New York.<sup>1</sup>

Much of the clamor has focused on the rent-regulation changes that will be the focus of this article. Other sweeping and structural changes enacted by the Act of 2019, which affect everything from security deposits to the day-to-day procedures of eviction proceedings and plenary actions in Upstate and Downstate New York, are equally deserving of attention. They will be discussed in another edition of the Journal, when this series concludes with Part III.

The authors take no position in the debate that has sprung up around the Act of 2019, but present both sides' positions vigorously for context and clarity and to shed light on some of the new law's ambiguities and possible consequences.

#### THE END OF THE SUNSET PROVISION; THE EXPANSION OF RENT STABILIZATION

A hallmark of New York's rent regulation is that it always included a sunset provision, a date by which the Legislature must renew the rent laws to prevent their expiration. Each time the laws neared expiration, stakeholders in this perennial struggle had an opportunity to convince lawmakers that the housing emergency has improved or that the laws should be revisited and tightened or loosened in response to economic and societal influences.

For landlords, the repeal of the sunset provision with HSTPA's passage ruptures a safety feature of the rentregulation system. Landlord advocates contend that tenants have set fire to the house and then pulled the ladder up after themselves. For tenants, repeal of the sunset provision eliminates a perpetual, existential threat to rent regulation and is justified by New York's long-lasting shortage of affordable housing. For many tenant advocates, the sunset provision allowed landlords to water down protections in each renewal by leveraging tenants' fear that the law would not be renewed.

The sunset provision allowed the rent laws to ebb and flow over time with changing housing conditions (but mostly, in 1993 and 1997, with legislation that favored landlords). The repeal of the sunset provision means that the laws will remain at a historical high-water mark, until the next time there is political consensus among the Senate, Assembly, and the Governor. Every three years, however, the New York City Council will revisit whether a housing emergency still exists.

Although rent-stabilization coverage was previously limited to New York City and some localities in Nassau, Rockland, and Westchester counties, Albany concluded in its legislative findings that due to a reduced availability of federal subsidies, shortage of housing accommodations, increased cost of construction, and other inflationary factors, people not protected by rent stabilization are "being charged excessive and unwarranted rents and rent increases."2 "To prevent speculative, unwarranted and abnormal increases in rent," the new law extends stabilization coverage to all New York State counties where local legislatures determine that an emergency exists.

Critics view an expansion of rent stabilization as overreaching and unnecessary. One pragmatic weakness that has been cited is that the expansion of rent stabilization will be overseen by local boards, appointed by the New York State Division of Housing and Community Renewal (DHCR), and that DHCR might lack the resources and staff to oversee these fledgling boards in implementing complex rent-stabilization laws.

New York's new rent law appears to be just the first in a wave of rent-control regulations gathering on both the East and West coasts. In February, Oregon became the first state to enact statewide rent-control measures. California was fast on its heels with a rent-control law limiting rent increases to five percent plus inflation. Washington state, as well as cities like Philadelphia, Chicago, Providence, and Denver, are considering similar protections.

A rash of studies and articles have challenged rent control's rationale. A 2018 New York Times article reported that "economists from both the left and right are in almost universal agreement that rent control makes housing problems worse in the long run."3 The Washington

Post concurred with a September 21, 2019, editorial, *The Economists Are Right: Rent Control is Bad*, arguing that "[t]he economists are right, and the populists are wrong. Rent-control laws can be good for some privileged beneficiaries, who are often not the people who really need help. But they are bad for many others."<sup>4</sup>

The pragmatic counterargument from rent-stabilized tenants, more than a million strong in New York City

alone, is that for those who have a rent-stabilized apartment, the limitations on rent and prohibitions on being evicted without just cause are a matter of survival.

Housing is one of the few essential needs in which the immediacy of the government remedy does not match the

urgency of the need. In the case of health care or food, government solutions like Medicaid and food-assistance programs provide a solution today. For housing, government options like homeless shelters and years-long waiting lists for housing and vouchers can be dire. Academics might have the luxury of advocating policies that ease the underlying housing shortage. But tenant advocates reject this approach on the principle that the perfect is the enemy of good. And while not all renters might ultimately benefit from regulation, it has the benefit of providing a solution now to millions of people, including many who vote. With rent regulation, the Legislature can provide a ready-made policy solution, with the rare satisfaction in politics of providing immediate results, all without raising taxes.

FEWER STABILIZED APARTMENTS WILL BE DEREGULATED: LUXURY DEREGULATION AND VACANCY INCREASES HAVE BEEN ELIMINATED; COOP AND CONDO CONVERSIONS WILL BE RARE

In 1993, the rent laws were amended to include highrent and high-income deregulation (luxury deregulation) provisions, permitting apartments with rents above a certain threshold (\$2,774.76 under the prior law) to be removed from rent stabilization when they become vacant or the tenants' income rose by a certain amount (\$200,000 under the prior law). Since 1997, landlords have also benefitted from a 20% rent increase during vacancies, as well as a longevity bonus of 0.6% a year if there had not been a vacancy for eight or more years. The new law abolishes luxury deregulation and eliminates both these increases based on vacancies. It also expressly bars the New York City Rent Guidelines Board (RGB) from adopting vacancy increases.

Tenants praise the elimination of luxury deregulation, which they have long criticized as a loophole that fueled tenant harassment by unscrupulous landlords trying to obtain prized vacancies and which led to the loss of an estimated 170,000 rent-regulated apartments.<sup>5</sup>

Tenants further view the elimination of vacancy increases as removing a significant financial motivation for hightenant turnover, susceptible to abuse and contrary to

the aims of rent stabilization. Without vacancy increases, though, landlords in some instances might find it difficult to justify incurring the fees and expenses of eviction proceedings, even for nuisance tenants, illegal subtenants, or tenants who use a regulated apartment as a pied-à-terre.

Rarely will landlords under HSTPA pay occupants cash for keys to move.

Landlords point out that to the extent that stabilization laws are premised on a housing shortage, evictions enforce the law and create vacancies. Because fewer evictions will mean fewer vacancies, this will, landlord advocates suggest, exacerbate the housing shortage that stabilization was meant to prevent.

Landlords also contend that far from being a loophole, luxury deregulation and vacancy increases were lawfully baked into the system's economics. Landlords and lenders have relied on these provisions for a quarter century in buying, financing, and operating stabilized buildings. Like the mix of affordable housing provided with tax incentives like the 421-a program, in which owners can offset decreased rents from affordable housing with revenue from market apartments, luxury deregulation permits owners to make owning stabilized buildings a viable investment. Landlords argue that protecting "luxury" apartments and "high income" tenants runs contrary to the policy objectives of the rent law: that abolishing luxury deregulation permits the possibility of a tenant with a \$1M annual income living in a \$10,000/ month rent-stabilized apartment. Rent stabilization was intended in part to protect the most vulnerable from being dislocated from their homes. But, landlords opine, eliminating high-income deregulation does not further this purpose, because it permits tenants whose incomes afford them many housing options to occupy the limited stabilized housing available.

Considered separately from tenant income, however, the fact that an apartment has high rent is perhaps an unreliable indicator that the people occupying the apartment do not need the protections of rent stabilization. A \$3,500/month 3-bedroom apartment might be occupied by families or roommates pooling their resources. But

Housing is one of the few essential

needs in which the immediacy of the

government remedy does not match

the urgency of the need.

this logic might falter when you reach the example of a tenant's occupying a \$4,000 per month 1-bedroom rentstabilized apartment. Tenants respond that this is a rare example, far from representative of the stabilized housing stock. Factual disputes of this nature would be more readily resolved by more granular data on the housing stock within the stabilization system, so that the Legislature - and potential developers of residential housing - can determine whether supply matches demand and calibrate their decisions accordingly.

HSTPA calls for greater DHCR reporting requirements, such as statistical data on the number of regulated units by county, the number of units with preferential rents, and the number of overcharge complaints processed and granted. HSTPA does not call for more particularized information regarding, for example, the number, and average rent, of 3-bedroom apartments. Thus, whether \$4,000 per month one-bedroom stabilized apartments are more like exotic birds or common pigeons might go unanswered unless the Legislature imposes even greater reporting requirements.

Although HSTPA abolished the 20% vacancy and the longevity increases, it remains unclear whether a "renewal" increase is permitted for a vacancy lease. DHCR guidance since HSTPA's enactment provides that "[w]hen a tenant signs a vacancy lease, they can choose between a 1 or 2-year option and the allowable increase is set by the local rent guidelines board."6 Landlords that choose to follow DHCR's guidance, however, worry that they do so at their peril. Those familiar with the landmark Roberts v. Tishman Speyer Props. L.P.7 and the ensuing tempest of litigation that followed in its wake need no reminding that courts are willing to overrule DHCR guidance.

Historically, owners have also been able to exempt stabilized apartments from rent stabilization as part of the General Business Law's condominium and co-operative conversion process. The new law imposes significant limitations on this process, eliminating the eviction-plan option and increasing the purchasing percentage required for non-eviction plans from 15% to 51%. The co-op/ condo exemption was viewed as exacerbating the housing crisis by allowing the conversion of affordable housing to apartments that few can afford. But this exemption gave some regulated tenants the option of home ownership and a greater voice in how their buildings are operated. Attaining the requisite 51% will be extremely difficult, foreclosing to some regulated tenants this route to home ownership.

In an apparent attempt to reduce any confusion surrounding the status of units deregulated before HSTPA, the new law provides that apartments lawfully deregulated before to June 14, 2019, will remain deregulated. The law is unclear, however, about how to determine the date of deregulation. In the case of apartments claimed

to be luxury deregulated based on a high-rent vacancy, for example, it is unclear whether the triggering event is the date of the vacancy by the last stabilized tenant, the date of completion of any renovations necessary to raise the rent to the requisite threshold for deregulation, or the date of the first fair-market lease. The stakes are high for landlords and tenants alike; these questions will be litigated.

HSTPA removes many options for landlords to deregulate or raise rents for stabilized apartments. But it has not closed all avenues to realize these objectives. Enterprising landlords will now consider substantial rehabilitation, which permits the exemption from rent stabilization of an entire building if 75% of building-wide and individual apartment systems have been replaced in a building in a substandard or seriously deteriorated condition. Similarly, landlords might apply for a demolition eviction, which permits recovering an unlimited number of stabilized apartments if the landlord seeks in good faith to demolish them to build a new building.

Vacancy increases and increases based on capital improvements (discussed below) are no longer on the table for landlords. But the "first-rent rule" might still be used to raise legal rents by an unlimited amount if the perimeter walls of the apartment have been substantially altered.8 Landlords might also raise economic infeasibility as a defense to a Housing Part repair proceeding;9 try to convert units or buildings to and from commercial use; and apply to DHCR for an "alternative hardship" increase if they do not maintain an annual gross building rental income exceeding operating expenses by 5%. Under the inexorable pull of profits, landlords will test the outer boundaries of all legal options to maximize rent.

#### PREFERENTIAL RENTS

Preferential rents, in which a tenant is charged a rent lower than the legal rent, are widespread in New York City. When a landlord cannot find a tenant willing to pay the full legal rent for an apartment, landlords often charge a lower, or preferential, rent to avoid losing rent while the apartment remains vacant. Under the prior law, landlords could preserve the right to charge the higher legal rent when the lease expired, provided that the first lease in which the preferential rent was charged allowed the landlord to eliminate the preferential rent at lease expiration.

Preferential rents have long provoked the ire of tenant advocates, who believe that preferential rents have allowed landlords to raise rents by hundreds of dollars in some cases, even as the RGB has set historically low renewal rates in recent years, sometimes forcing out tenants who did not understand the preferential rent or appreciate its temporary nature. Tenants also argue that landlords used preferential rents to mask wrongdoing,

allowing them improperly to hike the legal rent while avoiding tenant overcharge challenges. After four years, the landlord could rescind the preferential rent, force the tenant out, and in some cases even deregulate the apartment – and any improper increase would be beyond the statute of limitations. Landlords dispute these contentions, arguing that preferential rents allow them simply to charge a lower rent than what they are legally permitted to charge and that the tenants' argument calls for higher rents for stabilized tenants.

HSTPA now makes preferential rents permanent while tenants remain in their apartment. All rent increases for lease renewals must be based on the preferential rent. 10 If an apartment becomes vacant, the landlord may charge a higher, legal regulated rent to the incoming tenant.

Once the tenant with the preferential rent moves out, the landlord need no longer offer a preferential rent. Still, some landlords will prefer to leave apartments vacant than to re-lease them indefinitely below the legal rent to which they are entitled. This phenomenon is already widespread in the commercial context, where many storefronts remain empty as landlords avoid committing to long-term leases while they hold out for a tenant willing to pay a higher rent. Landlords warn that the resulting warehousing of stabilized apartments will worsen the housing shortage. Tenants respond that preferential rents are not philanthropic: landlords offer them because they serve the landlord's own economic interest. These economic interests will, tenants say, dictate that landlords continue to offer lower preferential rents rather than lose rent while apartments sit vacant.

One criticism both landlords and tenants level at HSTPA's preferential-rent provisions is that the new law is unclear about whether the limitations on preferential rent apply to lease-renewal offers made before HSTPA was enacted but which are effective after June 14, 2019.

#### INVESTMENT IN BUILDING IMPROVEMENTS (IAIS AND MCIS)

#### Background and History

The former rent regulations provided financial incentives for landlords to improve rent regulated buildings, which in many cases are many decades old, by allowing them to recoup the cost of improvements and for a return on investment in the form of permanent rent increases. The law provided for investment in the building in the form of Major Capital Improvements (MCIs) and, in apartments, as Individual Apartment Improvements (IAIs). These capital expenditure provisions were available in New York City's first rent-stabilization code, which were drafted by a real-estate industry group in 1969 and were later enacted into state law in 199311 as lawmakers grappled with an epidemic of neglected and derelict buildings

abandoned by landlords in the 1970s and 1980s, even as rental vacancy rates consistently hovered below 3%.12

MCIs' rent increases are based on the actual cost of the improvement, often an installation of new equipment servicing the entire building, such as a new boiler or plumbing - repairs to old equipment do not qualify. Owners must apply to DHCR for approval for MCIs and, if approved, the rent increases are apportioned among the building's tenants on a per room basis. Prior to the recent changes, owners of smaller buildings with 35 or fewer apartments could recoup their MCI costs over an eight-year amortization period, and owners of larger buildings with 36 or more apartments were given a nine-year amortization period. Annual rent increases were capped at 6% in New York City and 15% in the rest of the state.

No prior application or approval was necessary for an IAI (unlike for MCI rent increases), and tenant consent to the improvements was required only if the apartment was occupied. Owners could increase the monthly rent by 1/40th of the cost of the improvements in buildings with 35 or fewer apartments and 1/60th in buildings with 36 or more apartments. Tenant advocates note, though, that however severely the new law restricts recoupment, the old law allowed a landlord to recoup costs quickly (for a 1/40th) and then continually earn profit by allowing it to be collected again each month and to collect it in multiples by allowing it to be added to the legal rent, upon which increases were taken.

#### Changes Under the 2019 Law

Under the new law, the recoupment periods for MCIs have been lengthened to 12 and 12 ½ years, respectively; a 2% annual cap has been imposed; and the rent increases are now temporary and must be removed from the rent after 30 years. There is also an element of retroactivity: The 2% cap is made effective to MCI orders granted as early as June 16, 2012. DHCR is required to establish a schedule of reasonable MCI costs and more stringent rules for improvements, such as excluding cosmetic improvements, imposing energy efficiency requirements, and not permitting MCI in buildings with 35% or fewer rent regulated tenants. DHCR is now directed to inspect and audit 25% of MCI applications,

The new law caps the cost and number of IAIs for the first time, permitting no more than three separate IAIs, with a total aggregate cost of no more than \$15,000.00, within a 15-year period. HSTPA also reduces the increases to 1/168th and 1/180th, respectively.<sup>13</sup> Like MCI increases, IAI rent increases are now temporary; they must be removed from the rent after 30 years. Additionally, owners may raise the rent only if they first remove all hazardous and immediately hazardous violations in the apartment or the building, depending on which increase is sought.

#### REACTIONS FROM LANDLORDS AND **TENANTS**

Tenant groups and advocates argue that MCI and IAI programs undermine the rent-regulation system - that, at best, IAIs encourage unnecessary or cosmetic improvements that gentrify communities but do not ameliorate the housing crisis. At worst, tenant groups argue, they reward fraud, as landlords take exorbitant rent increases with no oversight over the work or the validity of costs beyond the tenants themselves, who might not know or understand their rights. An additional tenant concern is that landlords use these increases to deregulate stabilized apartments and thus decrease the already-scarce affordable housing stock.

Similarly, tenants argue that although DHCR approval is required for MCIs, the agency lacks the personnel to do more than rubber-stamp MCIs; that MCIs are for building essentials that should be provided as part of the rent tenants already pay; and that the resulting buildingwide rent increases have caused the very hardship and dislocation of tenants and families that rent regulation is intended to prevent.

For example, if the rent for a two-bedroom apartment in a 30-unit building is \$2,000 and the landlord performs \$15,000 in qualifying IAIs while the apartment is vacant, the rent can be raised \$375 to \$2375 (and the apartment could also be removed from rent stabilization at the next vacancy). Tenants argue that a \$375 increase (and for lower-income and rent-burdened tenants, even smaller increases) in the rent represents a hardship, representing a nearly 20% increase in the rent, placing it out of reach to a large swath of people who could otherwise have afforded a \$2000 apartment, and that the rent revenue from stabilized buildings is already a sufficient profit motive without additional rent increases for capital expenditures. According to the RGB's 2019 Income and Expense Study, the profits of the owners of stabilized apartments have increased for 13 consecutive years, reaching an alltime average high of \$540 per month from apartment leases in 2017.14

Landlords counter that far from reforming the MCI and IAI programs, the new law eviscerates these programs, discouraging landlords from making desperately needed capital infusions into stabilized buildings that can be upward of a century old. Investment in stabilized buildings will be economically unsustainable, landlord groups contend, because landlords will be forced to wait as long as 12 1/2 years to recoup the cost of MCIs and as long as 15 years for IAIs. Landlords argue that they are already obligated to perform ordinary maintenance and repairs, with no increase in rent, as these were already excluded from IAIs and MCIs, and that they are operating buildings at a loss as the RGB-approved renewal increases since 2015 have hit a 50-year low, with a 1.5% increase for 1-year renewals recently approved by the RGB, despite the RGB's own data reflecting that costs increased by 4.9%.

Landlords caution that the changes to the MCI and IAI programs will trigger a downward spiral of declining property values and dilapidated buildings. The rentstabilization laws do not require that landlords lease stabilized apartments, and some of New York's largest landlords have already threatened to warehouse vacant rent-stabilized apartments because, they allege, HSTPA has limited the profit they can collect from these units.

Landlords also cry foul that the retroactive element of the 2% cap unjustly penalizes landlords who relied on then-existing law. They point out that it can already take years for DHCR to decide an MCI application and that HSTPA's approach will delay the process only further, making it even less likely that improvements to the housing stock will be made in the future.

Turning again to the example of the 2-bedroom apartment above, the landlord in a 15-year period could perform no more than \$15,000.00 in improvements, with the landlord's only incentive being a maximum rent increase of \$89.29. At best, it will take an owner 14 years to recoup its costs. Tenant advocates argue (we have heard) that a landlord's return on an investment under the old law was 30% but that even a 1/168th recoupment still amounts to a 7% annual return.

For landlord and tenant alike, the amendments to the IAI provisions have created a number of open questions. For example, because rent increases based on IAIs are now temporary, it is unclear whether any IAI increase should be included in the base rent when renewal increases are calculated. Additionally, significant ambiguity remains about the effective date of the new IAI provisions. The Clean Up Bill attempts to clarify the issue by stating that the cap on IAIs applies to the first IAI after June 14, 2019. But it remains unclear whether the costs of improvements already incurred for an apartment in mid-renovation on June 14, 2019, would be counted toward the \$15,000.00 cap or grandfathered in under the prior law.

HSTPA also does not clarify the timing of the requirement that all hazardous and immediately hazardous violations be cleared for an MCI application to be granted. That could be interpreted to require dismissal of the application or simply a delay while the landlord addresses the violation.

HSTPA calls for greater scrutiny and DHCR oversight over MCIs and IAIs, including provisions requiring that DHCR set a schedule of costs for MCIs and audit 25% of applications to confirm that the work was completed. HSTPA further requires that all IAIs be reported to DHCR and maintained in a "centralized electronic

retention system" so they can be tracked. DHCR must establish systems and guidance for landlords. The New York City Housing Court will ensure that Housing Maintenance Code (and other health-and-safety codes) issues are properly adjudicated and that the warranty of habitability is maintained. Yet neither the Code nor the warranty require a landlord to provide new fixtures or appliances. Some landlords will not hazard the risk of investing in renovations and new equipment while compliance with the IAI and MCI provisions of rent stabilization remains an uncertain proposition.

One potential effect of this part of HSTPA, say landlord advocates, is that it will create a disparity between modern, unregulated housing and older, regulated housing - a market-wide equivalent of the "poor doors" prevalent for low-income residents of luxury buildings.

#### OVERCHARGE PENALTIES ARE STEEPER; THE "SAFE HARBOR" PROVISION HAS BEEN **ABOLISHED**

A defining feature of the stabilization laws is that DHCR does not, under ordinary circumstances, play an active role in approving or supervising the rents registrations that landlords must file annually. Instead, the stabilization system relies on tenants to exercise their right to file an overcharge claim within the statute of limitations, either as an overcharge complaint before the DHCR, in a plenary overcharge action, or as a defense in a nonpayment or to use and occupancy in a holdover proceeding. The rent-stabilization laws also penalized unscrupulous landlords by allowing tenants to collect treble damages going back two years if the overcharge was found willful.

Landlords did not have to defend the rents charged indefinitely. DHCR and the courts were not permitted to examine the rent history beyond four years, subject to exceptions like fraud. Landlords also had "safe harbor" from treble damages if, within the landlord's time to answer an overcharge claim, the landlord refunded any overcharge and adjusted the rent.

The new law extends the statute of limitations on overcharge claims from four to six years and increase the treble-damages period from two to six years. 15 This dramatically increases a landlord's potential liability for rent overcharges. Although the statute previously made treble damages discretionary, HSTPA provides that treble damages are now mandatory if the overcharge is found willful. Similarly, awarding attorney fees, costs, and interest are non-discretionary if a landlord is found to have overcharged a tenant.

The four-year lookback period had become riddled with exceptions even before HSTPA went into effect. But not only does the new law eliminate the lookback period altogether, it directs the court or DHCR to consider all available rent history "reasonably necessary" to their

determination. The prior law required owners to maintain their records for four years, moreover, and the new law extends this time period to six years and requires that records of MCI and IAIs be kept indefinitely. An owner's failure to maintain records triggers an unlimited lookback period.

The safe-harbor provision has also been eliminated and, for the first time, treble damages might be imposed on a landlord whose rent is proper and whose only failure was not properly filing a rent registration. Under prior law, tenants had the option of filing an overcharge complaint with DHCR or in court. In practice, many courts would rely on the doctrine of primary jurisdiction to relegate these claims to DHCR, where the time to process a complaint can take years. The new law allows tenants to choose their forum and forbids a court to interfere with that choice.

Tenants applaud these changes as long overdue, arguing that the existing system of enforcement, which provides for minimal oversight, 16 allows the fox to guard the henhouse, and that steep penalties are an indispensable deterrent to landlord abuse. Owners condemn the new measures as unjustly punitive, arguing that they cast such a wide net that even unintentional overcharges, based on a misunderstanding of bafflingly complex laws, could meet with harsh sanctions. They also argue that owners that wish to return an unintentional overcharge must do so at significant risk since the safe-harbor exception has been eliminated. Landlords further warn that rentstabilized buildings with problematic or even incomplete rent histories could become toxic assets, avoided by purchasers and lenders alike, given the uncertain potential liability and the high costs of reviewing decades of (sometimes unavailable) rent histories.

On both sides of the fence, the new law has created confusion regarding overcharge claims. The rent-overcharge provisions expressly apply to any claims pending or filed on and after June 14, 2019. In some cases, though, overcharge claims have been pending in DHCR for years. DHCR has already notified the parties in some pending overcharge cases that pre-date the recent changes to the law that they must provide records going back six years. Owners argue that this works an injustice, penalizing them for DHCR's delay and retroactively expanding their liability; that the new law does not increase DHCR's obligation to review or approve landlords' registrations but instead focuses on penalizing imperfection. Landlords fear that HSTPA makes them strictly liable for any deviation from the registration process and rewards tenants even if they are no worse off than if the landlord had complied with the requirements.

Recent decisions have enforced HSTPA in pending overcharge claims. In 3440 Broadway BCR LLC v. Greenfield, 17 Housing Court found that HSTPA applies in a pending nonpayment proceeding and that the statute of limitations or prior case law requiring a showing of fraud did not limit the tenant's discovery request for documents going back 18 years. In 699 Venture Corp. v. Zuniga, 18 Housing Court relied on HSTPA to grant discovery going back 23 years, although, since 1997, the law required only that records be kept going back four years. Housing Court determined that, considered together, HSTPA and the amended CPLR 213-a indicate the Legislature's intention that courts and the DHCR review the entire rent history, if necessary, to find the most reliable rent registration.<sup>19</sup>

In Arnold v. 4-6 Bleecker St. LLC, Supreme Court had already determined that the Rent Stabilization Law protected the tenants and that the default formula would determine any overcharge, but the court now found that HSTPA mandates that the overcharge calculations be amended to include six years for both overcharge and treble-damages claims.<sup>20</sup> In Fuentes v. Kwik Realty LLC, however, which the First Department decided after HST-PA's enactment, the Court applied the four-year statute of limitations and the prior law in excusing the landlord's failure to maintain records of an IAI, because "there is no requirement under the statute that such records be maintained indefinitely."21

A number of Housing Court decisions have limited HSTPA's application and declined to reopen cases already decided.<sup>22</sup> But in *Dugan v. London Terrace Gardens, L.P.*, decided in mid-September 2019 by the First Department less than two months after its decision in Kwik Realty, the Court determined that the tenants' overcharge claims should be deemed "pending" under HSTPA and that the expanded statute of limitations should be applied, even though the tenants were granted partial summary judgment on their claims in 2017. The First Department in Dugan also denied the owner's claim that applying HSTPA violated due process, noting that the Legislature expressly applied HSTPA to pending claims, giving it "an exceedingly strong presumption of constitutionality." In 560-568 Audubon Tenants Assoc. v. 560-568 Audubon Realty LLC, Supreme Court, New York County, on renewal, vacated its prior decision dismissing the complaint and finding that DHCR was better suited than the courts to determine rent-regulation issues, because the action was pending on appeal and HSTPA changed the law relating to primary jurisdiction.<sup>23</sup>

In one case, Housing Court invoked HSTPA's expanded lookback period to re-open a case a year after it was settled by so-ordered stipulation, based on a claim that the rent records were unreliable.<sup>24</sup>

HSTPA's retroactive application will be hotly contested. Court interpretations might can down to this: The courts will interpret HSTPA's ambiguous aspects strictly if they find that those aspects have a penal nature to them. Conversely, the courts will interpret HSTPA's ambiguous aspects liberally if they find that those aspects have a remedial nature to them.

This series on HSPTA of 2019 will continue in a forthcoming edition of the Journal with the Act's non-regulation

- 1. Comm. Hous. Improv. Prog., Rent Stabilization Assoc. of N.Y.C., Inc. v. City of New York (E.D.N.Y. 2019).
- 3. Conor Dougherty, Why Rent Control is a Lightning Rod, N.Y. Times, Oct. 13, 2018, B2,
- 4. https://www.washingtonpost.com/opinions/rent-control-is-back-and-thatsbad/2019/09/21/31abb05c-dbdb-11e9a688-303693fb4b0b\_story.html (last visited Oct.
- 5. Latrice Walker, Assemblywoman Walker: New Yorkers Should Never Be Priced Out of Their Homes, https://nyassembly.gov/mem/Latrice-Walker/story/81748 (last visited
- 6. DHCR Fact Sheet #26, Guide to Rent Increases for Rent Stabilized Apartments.
- 7. 13 N.Y.3d 270, 918 N.E.2d 900 (2009).
- 8. See, e.g., 300 W. 49th St. Assoc. v. N.Y.S. Div. of Hous. & Community Renewal, 212 A.D.2d 250, 253, 629 N.Y.S.2d 194 (1st Dep't 1995).
- 9. See Gerald Lebovits & Deborah E. Fisher, HP Proceedings: The Tenuous Nature of the Economic-Infeasibility Defense, 1 Landlord-Tenant Prac. Rep. 1 (Oct. 2000), available at works.bepress.com/gerald\_lebovits/70/.
- 10. 10. HSTPA provides an exception to this new rule for buildings (1) subject to rent stabilization by virtue of a regulatory agreement with a government agency and (2) which receive federal project-based rental assistance, N.Y. Law.
- 11. Rent Regulation Reform Act of 1993 (L. 1993, ch. 253).
- 12. According to U.S. Census Bureau Housing and Vacancy Surveys conducted in New York City.
- 13. IAIs must also be performed by a licensed contractor, and any outstanding hazardous or immediately hazardous violations must be cleared to be eligible for an IAI rent increase. IAIs still do not require prior DHCR approval. DHCR must establish, by June 14, 2020, a centralized electronic retention system to document IAIs.
- 14. https://www1.nyc.gov/assets/rentguidelinesboard/pdf/ie19.pdf (last visited Oct. 2, 2019).
- 15. As the First Department decided on October 1, 2019, "[t]he Rent Stabilization Code requires that a 'base date' be established for calculating the legal regulated rent for an apartment (see 9 N.Y.C.R.R. 2522.6(b)(2)). Generally, the legal regulated rent is the rent registered with . . . [DHCR) for the apartment six years before the overcharge proceeding was commenced (CPLR 213–a)." Simpson v. 16–26 E. 105, LLC, 2019 N.Y. Slip Op. 07026 (1st Dep't 2019) (discussing HSTPA at note 1).
- 16. DHCR's Tenant Protection Unit performs audits and investigations to ensure compliance with the rent regulations, but only a small percentage of stabilized units receive
- 17. 64 Misc. 3d 1217(A), 2019 N.Y. Slip Op. 51194(U) at \*2 (Civ. Ct., N.Y. Co.
- 18. 64 Misc. 3d 847, 853 (Civ. Ct., Bronx Co. 2019).
- 20. 2019 N.Y. Slip Op. 32453(U) (Sup. Ct., N.Y. Co. 2019).
- 21. 174 A.D.3d 483, 486 (1st Dep't 2019).
- 22. See, e.g., 400 E. 58 Owner LLC v. Hernsson, https://casetext.com/case/400-e58-owner-llc-v- herrnson, L&T Index No. 771000/18 (Civ. Ct., N.Y. Co.); 315 Jefferson LLC v. Dominguez, 2019 N.Y. Slip Op. 29255, 2019 WL 3884587 (Civ. Ct., Kings County 2019). In both cases, the tenant's overcharge claim was dismissed before June 14, 2019. The tenants later sought to re-open their cases after HSTPA's passage.
- $23.\,$  2019 N.Y. Slip Op. 29285 (Sup. Ct., N.Y. Co. Sept. 12, 2019) (HSTPA "not only overrules case law holding that DHCR has primary jurisdiction over rent overcharge claims, but it affords tenants their choice of forum. Consequently, as plaintiffs have chosen to have their rent overcharge claims brought in this court, their action may not be dismissed in favor of the claims being heard by DHCR.") (citation omitted).
- 24. SF 878 E. 176th LLC v. Grullon, 65 Misc. 3d 171, 2019 N.Y. Slip Op. 29201 (Civ. Ct., Bronx Co. 2019). Other helpful Housing Court decisions interpreting HSTPA's overcharge provisions include Gold Rivka 2 LLC v Santiago, 2019 N.Y. Slip Op. 51341(U) (Civ. Ct., Bronx Co. 2019); 1068 Winthrop St. LLC v. Zimmerman, 2019 N.Y. Slip Op. 29288 (Civ. Ct., Kings Co. 2019); Ollie Assoc. LLC v. Santos, 2019 N.Y. Slip Op. 51085(U) (Civ. Ct., Bronx Co. 2019); Dani Lake v. Torres, 2019 N.Y. Slip Op. 51383(U) (Civ. Ct. Bronx Co. 2019).

# Street Art: Is Copyright for "Losers®TM"?

A Comparative Perspective on the French and American Legal Approach to Street Art

By Louise Carron

#### INTRODUCTION

"Copyright is for Losers©™" was spray-painted by the (in)famous street artist working under the name of Banksy. Street Art is the latest artistic movement that fascinates the masses. Graffiti was born millennia ago, with the earliest examples on the walls of the Lascaux Caves in France, in Pompeii or in Ancient Egypt. More recently, it stemmed from a desire to express oneself on the walls of urban neighborhoods, like New York in the 1970s. Graffiti art is usually confused with Street Art, but the "tag," the artist's signature, must be distinguished

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from the "graffiti," a term originally given by authorities to encapsulate the vandalous act of writing on a wall. Today, "graffiti" often refers to unauthorized artworks that are word-based, and which encapsulate tags, throwups (bubble letter works, consisting of one color for the outline and another for the fill), stencils, sticker art, and wheat-paste art.

It is almost impossible to make a complete typology of Street Art, which from a legal perspective is defined as an art that is public, ephemeral, and free: "public," because it is an art made by the people for the people, is inspired by local culture, and speaks to local communities; "ephemeral," because the artists act in full knowledge and expectation that their works will be destroyed by the elements, public authorities or passersby; and "free," because the artists do not expect any financial reward. Rather, they view their works as gifts to the public. Today, the visual aesthetics of Street Art interest not only gallery owners and auction houses, but also photographers, advertisers, publishers, and tourists. Conversely, against this rise of a new form of artistic expression, modern-day legal systems view Street Art as vandalism. Usually punished under criminal statutes, it is perceived as the infringement upon the monopoly granted to property owners, i.e., the sacrosanct right to peacefully use one's property

without the interference of others. For street artists, however, it is an act of creation.

"Against this backdrop, it is curious that modern-day graffiti has been so hastily condemned as vandalism when history has viewed it as a form of artistic expression and a part of society's cultural capital." Street Art was and is still used as an avenue to express discontent, but it must thrive in an illegal context, which is evident from the numerous unauthorized reproductions or sale of graffiti and murals in books, marketing campaigns, films or even on clothes. Most infringers defend their actions with the argument that the artwork was illegally created and available in public spaces, and therefore the artist waived any kind of right as an author, making the piece free to reproduce. However, this is supported neither by copyright law nor moral rights theory in either France or the United States.

Although they have different approaches as to the reasons to award copyright protection to works of art, both legal systems grant the street artist with a variety of rights in works. France—a pioneer in terms of granting copyright protections to authors—perceives works as the extension or mirror of the author's personality, under a "social" approach to protect the fruit of the artist's labor.<sup>2</sup> By contrast, the United States views copyright as a way to "promote the Progress of Science and the useful Arts."3 This distinction is visible when it comes to moral rights: the French social approach requires that the author and the work be protected simultaneously against attacks by others, in perpetuity, whereas the United States economic approach is purely utilitarian, to incentivize creation and investment.4 American visual artists had to wait until 1990 to be specifically awarded moral rights, albeit far more limited and less protective than the French Intellectual Property Code.5

Given the circumstances, it is not surprising that street artists have had difficulty seeking copyright protection for their works, considering the constant obstacles they face in theory and in practice, including others using their works for advertising purposes, painting over them, or removing the works to donate or sell them for profit. This article therefore analyzes Street Art as it is addressed today under French and United States laws in order to assess whether the creators of illegal works, i.e., those who create without the authorization of the property owner, can still claim rights over their artworks. Doctrinal debates also argue over the need for a sui generis status to fill this legal loophole: would this be possible and, if so, would it be advisable?

#### I. STREET ART'S UNCERTAIN LEGAL **STATUS**

The current legal context applicable to Street Art appears unsuitable. On the one hand, it is an act of destruction

punishable by law; on the other hand, it is an act of creation protectable under copyright law.

#### A. AN ACT OF DESTRUCTION PUNISHABLE **BY LAW**

#### 1. STREET ART AND CRIMINAL LAW

Most Street Art is still illegal in the eyes of the law, as it qualifies as vandalism, or the voluntary deterioration of public or private property—except in the case of an agreement between the owner of a building and an artist.

In France, article 322-1 of the Criminal Code specifically defines degradation of property as a misdemeanor. The extent of the damage and the medium are important elements of the infraction, along with aggravating circumstances when the property is a cultural property or historical site.6 As this is a question of fact, a French court may look at different factors to assess the damage, including the medium used by the artist, to lower the penalty, especially if the act is reversible and made to disappear. By contrast, New York law defines vandalism by the dollar amount of the damage caused to another's property,8 which is an easier task for the court, as it only has to follow the thresholds provided by the law, without having to assess the extent of the damage to the property.

In the United States, the right to property is a fundamental right, and harm to private property is punished under state law. What distinguishes the different states is the way in which they seek to prevent Street Art: some cities, such as San Francisco, have a very strict no-graffiti policy,9 some restrict the sale of aerosols to minors, and others require the property owners to undertake the costs of erasing or taking down Street Art, regardless of whether they find aesthetic or commercial value to the works.

#### 2. STREET ART AND PROPERTY LAW

In civil law, Street Art raises two issues. On the one hand, under general property law, a trespasser cannot reclaim a fixture attached to the property. 10 Therefore, it seems that the street artist cannot be considered the owner of a physical work created on a medium owned by another. On the other hand, does the owner of the walls make that person the owner of the work as well? Therefore, who owns Street Art?11 Despite philosophical differences concerning the types of property rights in France, where there is one absolute and undivided property right, and in the United States, where there is a "bundle" of property rights that can strain one piece of land, 12 there are three similar mechanisms to claim ownership of the piece: (a) abandonment, (b) gift, and (c) accession.

a. Abandonment. Abandoned property, as opposed to lost or mislaid property, is "voluntarily forsaken by its owner."13 It belongs to the one who occupies it. Lost property is defined as property that has been "invol-

untarily parted with through neglect, carelessness, or inadvertence,"14 and still belongs to the owner. A piece of Street Art cannot be classified as lost, because the artist voluntarily created it on another's property and left it there in full awareness of his or her actions. As defined in American law, abandonment requires a unilateral intent to transfer the property to an indifferent recipient. 15 Such intent cannot be inferred from the work itself, and the finder will have to prove that the artist effectively intended to abandon the work and never reclaim it.16 It should also be noted that "mere nonuse or lapse of time does not, in itself, constitute abandonment." 17

- b. *Inter vivos* gift. Street Art may be classified as an *inter* vivos gift to the proprietor, or to the public. However, both French and American law require that the donor effectively delivers the gift to another living person, who then accepts it.<sup>18</sup> In the case of Street Art, aside from works created by commission or request, most pieces are created without a determined donee, and without the effective acceptance by the latter. Therefore, most Street Art cannot be treated as a gift.
- c. Accession. The mechanism of accession is "the acquisition of title to personal property by its conversion into an entirely different thing by labor bestowed on it or by its incorporation into a union with other property."19 In France, the theory of incorporation finds two applications: (1) when two movable things are attached, the degree of control over the whole depends on the degree of attachment;<sup>20</sup> (2) when a movable thing is attached to an immoveable thing (e.g. a building), the owner of the land becomes owner of the whole.<sup>21</sup> By contrast, American law does not care about the medium where the property is affixed, rather, it focuses on the manner of fixation. If the accessory cannot be "identified and severed without injury to the original property,"22 the owner of the principal becomes the owner of the whole. Applied to Street Art, accession is the mechanism most likely to favor the owner of the property onto which the piece was affixed. This was adopted in the British case of The Creative Foundation v. Dreamland Leisure Ltd. to say that "Art Buff," a piece by Banksy, belonged to the landlord, and not the tenant of the building, the latter of whom had removed a section of the wall on which the mural was painted and arranged for it to be shipped to New York to be sold.<sup>23</sup>

However, very few street artists assert property of the physical work, because it is created for the community or the public. Others circumvent the problem by using methods that prevent the work from being "affixed" to another's property: in particular, Reverse Graffiti or "clean-tagging" is a technique where the artist removes dirt from a wall or from the ground to create something without using paint or paste. Nonetheless, artists may also claim the intellectual property in their works.

#### B. AN ACT OF CREATION: THE COPYRIGHTABILITY OF STREET ART

Comparing the conditions for copyright protection in France and the United States reveals that Street Art should be eligible in copyright protection. Since the harmonization started by the Berne Convention,<sup>24</sup> substantial conditions require the work or "oeuvre" to be (1) original and (2) fixed. In both France and the United States, copyright is affixed to the work from the point of creation without any formalities required,25 but in the U.S. it must be registered with the Copyright Office before the copyright owner can bring a lawsuit and be entitled to statutory damages and legal fees.<sup>26</sup> This is one element that distinguishes France and the United States, in that American artists face extra steps before being entitled to enforce their rights.

#### 1. Original Works

Originality, although mentioned in the law, is a notion defined by the courts in both France and the United States.<sup>27</sup> In France, it traditionally means that the work carries the personality of the author. In the United States, originality "is a very low bar for the author to hurdle."28 "Original" is understood as originating from the author, as an independent creation, i.e., not copied, which presents a minimal degree of creativity.<sup>29</sup> As applied to the visual arts, originality requires that the work depict more than the stereotypes of an artistic genre—at least according to France case law.<sup>30</sup> This is a factual matter: some simple "tags" may not be original enough, especially when they only consist of one word or surname, but the line is fairly easy to cross.

#### 2. Fixed works

A work is fixed when it is more than a simple idea.<sup>31</sup> It must exist in a tangible medium of expression so as to be perceived, reproduced, or communicated. The ephemeral aspect of Street Art has no impact on its copyrightability: as long as it is affixed to a wall or any other medium, this is enough to be "fixed" in the copyright sense. We can compare the Ninth Circuit case where a garden was not considered to be a fixed tangible medium,<sup>32</sup> as opposed to the 5Pointz case, where more than the 40 pieces were protected even though they were not intended to last, as most were meant to be covered by other artists in the future. As they existed in a "more than a transient" medium, however, they were not ephemeral.<sup>33</sup> This is a factual question that rests within the power of the court, which will ultimately assess the artistic medium used by the artists.

#### 3. Illegality

Not all Street Art can qualify as "works," but for those that do, the plain text of the law does not make the legality of the creation as a pre-requisite for copyright protection. It is noteworthy that, unlike trademarks,34

copyright in France and the United States are not preceded by illegality or immorality. Under the doctrine of ex turpi causa non oritur actio (no action arises out of an immoral act), courts might be reluctant to award copyright protection to pieces resulting from vandalism, because the artist acted with the mens rea for the mischief. However, in 1999 the French criminal court held that a pornographic film fell under the scope of copyright protection;35 similar cases were heard in the Fifth and Ninth Circuits of the United States. It would seem logical to apply the same rationale to Street Art: where, from the point of view of mores, pornography is an indecent practice, Street Art may be perceived as similarly unlawful. Nonetheless, those who engage in it may find it proper, and the illegality or immorality of the performance should not prevent them from claiming copyright protection.<sup>36</sup> Recent cases revolving around Street Art accentuate the legal void without addressing it. Thus, the issue arises whether a unique status for Street Art should and could be implemented.

# II. PROS AND CONS OF CREATING A SPECIFIC STATUS FOR STREET ART

What makes this void so complicated to fill? "Unfortunately, art and artists have no special prerogatives from the perspective of law and law enforcement, which emanates from that portion of social consciousness that for the most part is insensible to aesthetic values." <sup>37</sup>

Art and law are often viewed as incompatible: one celebrates creativity, the rebellious act, revolution, whereas the other prefers that which fits into predetermined definitions, which respects the rules and conventions.<sup>38</sup> Art philosophers observe a recent phenomenon under the name of "artification," the process by which "people do or make things that gradually come to be defined as works of art."<sup>39</sup> Similarly, Street Art evolved into a socially acceptable, critically acclaimed, and attractive leisure: street artists want to be famous, collectors want to own a Banksy, individuals want to discover new pieces. Given this recent acclaim, we are confronted with whether legal thinkers could and should work on the creation of a *sui generis* status for Street Art.

# A. PROS: THE IMPOSSIBLE EXERCISE OF COPYRIGHT IN STREET ART

If a work of Street Art is found to be original and fixed, the street artist could claim rights in his or her works, which would limit the physical property owner in the use of the property, akin to an easement imposed by law. The exercise of such rights is hindered by factual complications, which only accentuates the need for a legal framework. This section will be devoted to laying out why Street Art should be awarded a specific protection.

#### 1. Street Artists' Rights in Theory

In theory, street artists are awarded two kinds of rights that the artist can assert: (a) patrimonial (or economic) rights and (b) moral rights.

a. **Patrimonial rights**. Patrimonial rights over an original work of authorship include the reproduction<sup>40</sup> and distribution rights.<sup>41</sup>

Street artists have the right to authorize the reproduction of their works. Artists are often appreciative when their works are photographed by passersby and amateurs, but not in cases of commercial appropriation.

The distribution right may be relevant for those whose works are stolen and sold on the art market, like Banksy. The right gives the author the prerogative to decide if and how his or her work should enter the market. "Illegal" Street Art is not made to be sold, therefore those who steal works and sell them infringe upon the author's distribution right. Additionally, in Common Law countries, the sale of stolen property is void *ab initio*,<sup>42</sup> this is not the case in France, where only the buyer can choose to rescind the sale.<sup>43</sup>

A special mention to the *droit de suite* should be made here. The right to resale royalties originated as a purely French notion, <sup>44</sup> which then became a European right, <sup>45</sup> but not one recognized under federal protection in the U.S. It grants the artist with the right to a percentage of the proceeds of the resale of his or her work on the art market. Until recently, California was the only state with a similar right, <sup>46</sup> but the Ninth Circuit basically reduced it to nothing in July 2018. <sup>47</sup> As applied to Street Art, which represents a growing part of the art market, <sup>48</sup> this means that street artists cannot claim any royalties when their art is taken down from their original locations and subsequently sold in the U.S. Although bad for artists, this is beneficial to dealers and auction houses.

b. **Moral rights**. French *droit moraux* are inherent to the status of author and last in perpetuity; in the United States, the federal Visual Artists' Rights Act (VARA) awards some moral rights to visual artists, which are far more limited in time and in scope.<sup>49</sup>

They first include the right of attribution or authorship, which allows the author to claim the paternity of a work, to use a pseudonym, or to remain anonymous.<sup>50</sup> Street artists can invoke such a right whenever anybody reproduces or reuses the work. In the United States, it also includes the right to refuse to be associated with the work when it has been modified or mutilated in a manner prejudicial to the author's honor or reputation.<sup>51</sup>

Another moral right is the right of integrity, i.e., the right against destruction of one's work.<sup>52</sup> In the United States, there is an additional condition: the work must achieve the status of "work of recognized stature," which is a question of facts, testimonies, and perception by the

community of artists, professionals, and connoisseurs. In this case, the artist must be given a 90-day notice prior to the destruction of his or her work.<sup>53</sup> It should be noted that modification of a visual work of art through the passage of time or the inherent nature of the material is not sufficient to claim the right of integrity: applied to Street Art, which is supposed to be ephemeral, only a willful, deliberate conduct to distort, mutilate or otherwise modify the piece would be actionable. The 5Pointz case recently clarified the scope of this right as applied to Street Art: the property owner of a building that was turned into a gigantic "Street Art Mecca" in Queens, New York, had whitewashed the structure without proper prior notice to the artists, who had been allowed to use the walls as a medium for 20 years. The artists claimed that the white washing was willful and deliberate. The federal court for the Southern District of New York awarded the artists \$6.5 million in statutory damages, and in relying on experts, and deciding that despite their temporary aspect, ruled that 45 out of 49 works had become works of recognized stature, which is currently on appeal.<sup>54</sup> Although these were authorized and curated works, this was a great win for street artists, whose art is finally becoming recognized as such.<sup>55</sup> However, this decision may discourage property owners to lend walls to the artistic community, in fear that they may never regain full ownership, which was the artists' claim in the 5Pointz case.

#### 2. Street Artists' Rights in Practice

In reality, however, street artists are facing complications to claim copyright in their works through the framework mentioned above.

a. Practical complications. This is first due to a lack of laws and cases directly applicable to their situation. Many cases are settled, and artists are not always capable of going before a judge to claim their rights. In a case against H&M, a Los Angeles street artist tagging under the name of Revok sought to prevent the fast-fashion giant from using one of his works in Brooklyn, New York as a background for an online marketing campaign, to which H&M responded with a lawsuit.<sup>56</sup> It argued that the artist acted with full awareness of its illegality, and therefore waived any right in his work. After the outrage from the artistic community, the case ended with an apology from H&M's CEO. Other artists constantly face such problems, but do not have the financial or material resources to bring the case before a court. Instead, they often utilize social media as a platform for their causes and rely especially on help from the artistic community to respond first. Furthermore, by going before a judge, they risk being sued for vandalism, malicious mischief or trespass, and may also have to reveal their real identities.

b. Legal complications. Second, moral rights are not necessarily adapted to Street Art: the right of integrity

implies that the artist is allowed to take down his or her work before it is destroyed. However, what if the art cannot be removed without damage? This was invoked by the owner of 5Pointz, and it could have been resolved in his favor had he been more respectful of the artists. In English v. BFC,57 the court refused to prevent the destruction of a community garden where street artists had illegally created a mural. The artists sought to invoke the right of integrity, but the court declined to create a precedent where unsanctioned Street Art could block the destruction of the property to which it is affixed. However, the court later narrowed the rule to works that cannot be removed without damage.<sup>58</sup> Removability will depend on the technique used by the artist; in any case, VARA does not afford an artist with the right to "insist that his art be preserved or maintained in its original location or context."59 In France, this question has never been clearly addressed.

In view of the above, French and American artists have very few legal protections against theft, destruction, or misappropriation of their works. However, there is another argument to be made that Street Art also should not be confined within the rigid boundaries of the law.

#### **B. CONS: THE INSTITUTIONALIZATION OF** STREET ART

Taking a step back to look at the bigger picture, the question rises as to whether Street Art should be granted a sui generis protection. For example, Street Art may already fall within the scope of freedom of speech and institutionalizing the movement may not be sensible.

#### 1. Street Art and Freedom of Artistic Expression

Freedom of speech was consecrated in Europe, France, and the United States, and all proclaim the principle that those who create and speak are participating in the marketplace of ideas that is indispensable to a democratic society.<sup>60</sup> As long as Street Art falls within the boundaries of accepted speech, it should be protected. Unfortunately, most restrictions around Street Art are content-neutral and subject to intermediate scrutiny, in that they restrict the time, place, and manner of expression; in Members of City Council v. Taxpayers,61 the United-States Supreme Court ruled that a local ordinance forbidding commercial street signs on public streets was substantially related to the city's interest in avoiding visual clutter. As applied to Street Art, there might be enough to argue that private owners have the right to keep uncommissioned art on their property, and that the Supreme Court ruling conflicts with such right.<sup>62</sup> In practice, state laws restricting Street Art are sometimes viewed as overly broad and "create an impediment to artistic freedoms and unduly criminally punishes the artist."63 In France, freedom of speech focuses on the message within: a graffiti or tag with an abusive, defamatory, xenophobic or pornographic content is punishable by criminal law;64 other offenses

that require a writing may be constituted by a graffiti, including threats,65 insults66 or incitement to hate.67

#### 2. Judicialization of Street Art

Defined as "the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies,"68 this author believes that the judicialization of Street Art should not be encouraged. Defenders of the "Negative Space" theory of Intellectual Property (IP) believe that Street Art is thriving in a world with limited norms and should stay that way. 69 In the words of Elizabeth Rosenblatt, a low-IP treatment is particularly adapted to an activity "(1) when creation is driven by rewards not reliant on exclusivity; (2) when exclusivity would harm further creation; (3) when there is high public or creator interest in free access without harm to creativity; and (4) when creators prefer to reinvest scarce resources in further creation than in protection or enforcement of intellectual property, i.e., when there is a higher cost of protecting or enforcing exclusivity than benefit to pursuing infringers."70 Street Art is well suited in such a low-IP environment, in view of its public and non-exclusive aspects.

Street Art is first and foremost an ephemeral creation. Encouraging the protection of a work bound to disappear seems illogical. Artists act in full knowledge of the risks of its evaporation; those who want to save graffiti from destruction, as admirable their intention might be, is negating the work's essence and the artist's intentions.<sup>71</sup> While some artists may want their art to be preserved for future generations, all of them act in full awareness that the work will probably be destroyed. As it is quasi-impossible to assume all street artists' intentions, it should not be necessarily inferred that they wish that their art end up in a gallery, museum or private collection.

Second, and stemming from the first point, Street Art is supposed to be a public creation. However, we can now observe a shift from the streets to the galleries; uncommissioned pieces are sometimes found at auction or in museums, and a growing number of street artists are organizing their own exhibits.<sup>72</sup> Creating a sui generis status would only accelerate the institutionalization of the movement, which is denounced by a majority of artists and purists. Some would rather destroy their works than let the public capitalize on them.<sup>73</sup> Street Art is highly site-specific, akin to Richard Serra's Tilted Arc:74 the artist chose an exact location because passersby would be able to see the piece and interact with it. Confining Street Art to legal checkboxes and behind doors should not be encouraged. It is art made for the *streets*, not for the walls of a museum.

Third, the Street Art community has been acting outside the traditional boundaries of the law: the judicialization of Street Art could annihilate the thrill and dangerousness of the creative process. While some artists happily work on commission, thereby receiving pay for their works and acting within the law, others would rather destroy their works than see them appear on the traditional art market. In less drastic methods, some refuse to sign or authenticate their works, which makes it harder for museums or galleries to accept them. Such is the case for Pest Control, Banksy's certification board, which refuses to authenticate Street Art pieces because the art was not created for commercial purposes. The community of street artists is a self-regulated community, with real collaboration among members. Art is a world where inspiration comes from others; a strict legal regime would only impede artistic expression and the freedom to create.

#### CONCLUSION

In spite of possible sanctions, Street Art is stronger than ever; it disrupts preconceived aesthetic norms and wreaks havoc on the straightforward application of the law. "Economic incentives are not necessary to motivate the creation [...]. The evidence of this is on the streets, where street art continues to flourish in a norms-based, low-IP world."75 Artists use new ways of creating and maintaining their reputation, and of protecting their rights, mainly through social networks, such as Instagram.

The aforementioned issues regarding Street Art underline the need for adapting the law to contemporary social changes and artistic value, but it is not clear that the creation of a specific status for Street Art could solve those problems. A specific status is likely to assess the aesthetic merits of a creation and of the artist. However, this assessment should not be the role of a court. In 5Pointz the court relied on the testimonies of members of the artistic community and experts to determine whether each work has attained the necessary "recognized stature" under VARA. However, it must be careful not to evaluate the artistic value of the work.

The legal vacuum surrounding Street Art may be filled by distinguishing between intrinsic and extrinsic legality: if the message of the work is illegal, e.g., inciting to violence or hate, pornographic, or defamatory, this could be an obstacle to copyright; however, the fact that it is created illegally should not prevent the work from being protected, but would grant the artist with restricted rights in his or her work. Another approach could be the categorization of Street Art as an artistic collective good, where no one could keep it or sell it, and over which the author would not have any right (including copyright). This, however, would deprive the artist of any right in his or her intellectual creation, which would therefore set Street Art outside the scope of copyrightability. In any circumstance, it is essential to protect freedom of artistic expression, and in particular to give property owners the choice to keep the Street Art piece. Whether France and the United States are ready to implement such individualistic rights will depend upon the willingness of street artists and property owners to cooperate.

- 1. B. Elias, Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection, 7 No. 5 Landslide 48, (2014 2015).
- 2. French Intellectual Property Code, art. L. 111-1.
- 3. U.S. Const., Art. 1, Sec. 8.
- 4. See D. Hunter, Intellectual Property, Oxford University Press, 2012, pp. 16-17.
- 5. Visual Artists' Rights Act, 17 U.S.C. § 106A (2018).
- 6. French Criminal Code, art. 322-1 to 322-3-1.
- 7. Lower criminal court of Paris, SNCF v. Monsieur Chat (October 13, 2016).
- 8. N.Y. Penal Law § 145.00-12.
- 9. San Francisco Public Works Code, art. 23.
- 10. I Am Jur 2D Accession and Confusion § 5, 502.
- 11. See, e.g., P. Salib, The Law of Banksy: Who Owns Street Art?, 82 U. Chi. L. Rev. 2293 (2015).
- 12. 6 3C Am. Jur. 2D Property § 1. The "bundle" of property rights refers to the Common Law perception of property as a partition of various entitlements that can be separated and assembled, including the right of possession, control, exclusion, enjoyment, and disposition, as opposed to the Civil Law definition of property, which is unitarian, where property equals full ownership.
- 13. I AM. JUR. 2D Abandoned, Lost, and Unclaimed Property § 4. See also, French Civil Code, art. 539 and 713.
- 14. Id. at § 13.
- 15. P. Salib, The Law of Banksy: Who Owns Street Art?, 82 U. CHI. L. REV. 2293 (2015).
- 16. See French High Court, (May 10, 2005), no. 04-85.349, Bull. crim. no. 145, p. 526: the fact that a letter was torn apart and thrown away was insufficient to prove the owner's intention to abandon the letter.
- 17. I Am. Jur. 2D Abandoned, Lost, and Unclaimed Property § 10.
- 18. 38 Am. Jur. 2D Gifts § 6; French Civil Code, art. 894.
- 19. I Am. Jur. 2D Accession and Confusion § 1.
- 20. French Civil Code, art. 564.
- 21. French Civil Code, art. 555
- 22. I Am. Jur. 2D Accession and Confusion § 1.
- 23. The Creative Foundation v. Dreamland Leisure Ltd., 11 Sep 2015 [2015] EWHC 2556 (Ch).
- World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, Paris (Sept. 6, 1886).
- 25. French Intellectual Property Code, art. L.111-1.
- 17 U.S.C. § 411. See also M. Ralstin, Six Things You Must Know About Copyrights in Street Art, Art Law Journal (2014), available at https://alj.orangenius. com/6-copyrights-street-art/.
- 27. 17 U.S.C. § 102(a)
- 28. D. Hunter, Intellectual Property, Oxford University Press, 2012, p. 33.
- 29. Feist Publications, Inc. v. Rural Telephone Service Co., 111 S.Ct. 1282 (1991).
- 30. Paris Court of Appeal (May 7, 2014), no. 13/06889.
- 31. 17 U.S.C. § 102(a).
- 32. Kelley v. Chicago Park Dist., 635 F.3d 290, 303 (7th Cir. 2011).
- 33. Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212 (E.D.N.Y. 2013).
- 34. French Intellectual Property Code, art. L. 711-3, b; 15 U.S.C. § 1052.
- 35. Crim (September 28, 1999), no. 98-83.675.
- 36. Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 858 (5th Cir. 1979) ("[the Copyrights Act 1909 contains] no explicit or implicit bar to the copyrighting of obscene materials, and as therefore providing for the copyright of all creative works, obscene or non-obscene, that otherwise meet the requirements of the Copyright Act."); Jartech, Inc. v. Clancy, 666 F.2d 403, 405-06 (9th Cir. 1982).
- $37.\,$  J. T. Serra, Graffiti and U.S. Law, Trespass: A History of Uncommissioned Urban Art, Taschen, 2010, p. 313.
- 38. J. Merryman, A. Elsen, S. Urice, Law, Ethics and the Visual Arts, New York, Kluwer Law International, 5th ed., 2007, pp. xxv-xxvi.
- 39. R. Shapiro and N. Heinich, When Is Artification?, Contemporary Aesthetics, Special Volume, Issue 4 (2012), *available at* https://quod.lib.umich.edu/c/ca/7523862. spec.409?view=text;rgn=main.
- 40. French Intellectual Property Code, art. L. 122-4; 17 U.S.C. § 106(1).
- 41. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society ("Copyright Directive"); 17 U.S.C.  $\S$  109(a).
- 42. S. Grover, The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study, 70 Tex. L. Rev. 1431 (1991).

- 43. French High Court, (March 9, 2005), no. 03-14.916.
- 44. French Intellectual Property Code, art. 122-8.
- 45. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.
- 46. California Resale Royalties Act, Civil Code section 986.
- 47. Close v. Sotheby's, Inc., No. 16-56234; The Sam Francis Foundation v. Christie's, Inc., No. 16-56235; The Sam Francis Foundation v. eBay Inc., No. 16-56252. 2018 WL 3322222 (9th Cir. July 6, 2018). See also E. Ashley, Case Review: Droit de Suite . . . Not So Sweet, Center for Art Law (2018), available at https://itsartlaw.com/2018/09/27/droit-de-suite-not-so-sweet/.
- 48. See Artprice 2018 Contemporary Art Market Report, available at https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2018/artists-prices.
- $49.\;\;17\;U.S.C.\;\S\;106A(b);$  VARA only protects "works of visual arts," the rights are exclusively owned by the artist, and are unassignable.
- 50. French Intellectual Property Code, art. L. 113-6.
- 51. 17 U.S.C. § 106A(a)(1)(2).
- 52. French Intellectual Property Code, art. L. 121-1; 17 U.S.C. § 106A(a)(3)(B).
- 53. 17 U.S.C. §113 (d)(2).
- 54. Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212 (E.D.N.Y. 2013).
- 55. See also L. B. Richardson, *The Making of the Moral Rights Case: The Factual and Legal Background of the 5Pointz Trial*, Center for Art Law (2017), available at https://itsartlaw.com/2017/11/05/the-making-of-the-moral-rights-case-the-factual-and-legal-background-of-the-5pointz-cases/; L. Bérichel, Around the Block Ruling in 5Pointz, Center for Art Law (2018), available at https://itsartlaw.com/2018/04/10/around-the-block-ruling-in-5pointz/#\_edn2.
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- 57. English v. BFC & R East 11th St. LLC, No. 97 Civ. 7446 (S.D.N.Y. Dec. 3, 1997).
- 58. Pollara v. Seymour, 150 F. Supp. 2d 393 (N.D.N.Y. 2001).
- 59. C. Smith, Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's 'Negative Space' Theory, 24 DePaul J. Art, Tech. & Intell. Prop. L. 259, 270 (2014).
- 60. See, e.g., J. S. Mill, On Liberty, 1859 (all individuals have the ability to think critically, and taking into account unpopular opinions helps finding the truth; no voice should be muffled, and no opinion should be imposed only because it is believed by a majority.).
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- 62. L. Mettler, Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property, 111 MICH. L. REV. 249 (2012).
- 63. J. T. Serra, Graffiti and U.S. Law, Trespass: A History of Uncommissioned Urban Art, Taschen, 2010, p. 312.
- 64. French Criminal Code, art. 227-24.
- 65. French High Court, Criminal Chamber (March 31, 2016), no. 15-82.417.
- 66. Court of Appeals of Saint-Denis de la Réunion (November 24, 2015), no. 12/01256.
- 67. Court of Appeals of Versailles (March 21, 2012), no. 10/00095.
- 68. R. Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, Annual Review of Political Science, 11, no. 1 (2008), p. 94.
- 69. See, e.g., C. Smith, Street Art: An Analysis Under U.S. Intellectual Property Law And Intellectual Property's 'Negative Space' Theory, 24 DePaul J. Art, Tech. & Intell. Prop. L. 259 (2014).
- 70. E. Rosenblatt, A Theory of IP's Negative Space, 34 Colum. J.L. & Arts 317, 342 (2011).
- 71. See, e.g., K. Turan, 'Saving Banksy' investigates the tension between the ethos of street art and a desire to preserve it, Los Angeles Times (2017), available at http://www.latimes.com/entertainment/movies/la-et-mn-saving-banksy-review-20170115-story.html.
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- 73. See, e.g., A. Shaz, Sotheby's 'Bansky-ed' as painting 'self-destructs' live at auction, The Art Newspaper, (Oct.5, 2018), available at https://www.theartnewspaper.com/news/sotheby-s-banksy-ed-as-painting-self-destructs-live-at-auction: about "Girl with a Balloon" (2006), the frame of which concealed a shredder which the artist activated when the hammer struck down for a price just below £1 million at Sotheby's in London.
- 74. Serra v. United States, 847 F.2d 1045 (2d Cir. 1988).
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# Revision of the "Error in Judgment" Charge in Medical Malpractice Cases Is Long Overdue

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tried my first medical malpractice case on behalf of a plaintiff more than 30 years ago. That is when I was first introduced to a portion of the standard New York Pattern Jury Instruction (PJI) charge in medical malpractice cases, a charge that has continued to delight defense counsel, anger plaintiffs' counsel, and most important, confuse jurors, for decades. Although the charge has been modified slightly over the years, in its present form, it remains both confusing and internally inconsistent. As contained in the 2019 PJI Edition, PJI 2:150 states in pertinent part:

A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.

The legal premise behind the charge is simple enough to understand. For example, patient P is properly diagnosed by doctor D with a medical condition X. Doctors universally agree there are two (or more) acceptable treatments for condition X, either surgical treatment A or medication B. Either is within the standard of care and both have their advantages and disadvantages. Under the law, if doctor D recommends surgical treatment A and the result is not great, doctor D cannot be held liable to patient P under the theory that had medication B been recommended instead of surgical treatment A, patient P would have had a better outcome.

The current charge accurately describes this theory except for the phrase "an error in judgment." In the early 1990s I wrote to a judge who then served on the PJI Committee and argued that these four words took an otherwise comprehensible charge and made it nonsensical. Actually, back then, the charge included the word "mere" before "error in judgment," so it was even worse. I explained if a doctor chooses one of two or more acceptable treatments he or she has not committed an error of any kind. Error is defined as "a mistake" or "the state or condition of being wrong in conduct or judgment." Doctor D did not make a mistake and was not wrong in recommending one of two acceptable treatment options. The judge politely replied that he and his colleagues on the Committee were not inclined to modify the charge.

As the years passed and I prosecuted more medical malpractice cases, I noticed when deposing defendant doctors they had been instructed to insert the word "judgment" into as many answers as possible to argue later that the charge should be given even in circumstances where it clearly should not. I used to joke that if these depositions were likened to a drinking game so that attendees had to drink every time the word "judgment" was used, no one would be able to stand without assistance at the end of the deposition. Entertaining as this was in theory,

it created a serious problem. With deposition transcripts replete with the word "judgment," trial judges could at times be persuaded to give the charge to the jury in situations very different from those the drafters of the charge and the law intended.

One of the great myths under which lawyers and judges have been conditioned to operate is that jurors can listen for an hour to the charge provided by the trial judge and absorb every word. There is virtually no other setting in our society where people are expected to simply listen to long, complex instructions once and understand, retain, and apply these instructions flawlessly. This is an inherent weakness of our system that no one wishes to address, other than the occasional suggestion that the instructions be provided to the jurors in written form after it is read to them. With this in mind, when jurors hear "a doctor is not liable for an error in judgment" in a case based upon an allegation that the doctor did err, it is one phrase that sticks. Most jurors remember that part of the charge when given and mistakenly believe that doctors are not liable for their errors. Actually, an error in judgment by a physician or anyone else is the definition of negligence, just as a motorist who makes a bad judgment that he or she can beat a traffic light and causes a collision is, by definition, negligent. This charge gives doctors much more than the one free bite granted your average dog. In fact, when mistakenly interpreted, which it frequently is, the charge grants doctors unlimited free bites because they are permitted an infinite number of "errors in judgment" without consequence.

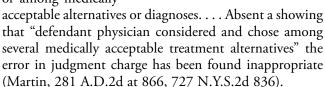
Even prior to my letter requesting the charge be modified, some trial judges understood the rule and refused to use the problematic phrase in the proposed charge. In Spadaccini v. Dolan,1 the First Department upheld a verdict for the plaintiff in a case where the trial judge refused to utilize the phrase "mere error in judgment" holding that "[s]uch a charge under the facts presented would have been unwarranted" because the underlying case did not involve a choice by the physician between multiple reasonable alternatives. Similarly, in Grasso v. Capella,2 the Second Department refused to overturn a verdict in favor of the plaintiff on the ground that the judge refused to give the charge: "There was no evidence that the defendant, a surgeon, had to consider or choose among medically-acceptable alternatives regarding the treatment of the plaintiff. Accordingly, under the circumstances of this case, the defendant was not required to exercise the type of medical judgment that would warrant the 'error in judgment' charge."

Later, the Fourth Department began to reverse defense verdicts where the charge was improperly given. In Martin v. Lattimore Road Surgical Center, the Court, citing Spandaccini, reversed, stating: "In this case, however, the evidence simply raised the issue whether defendant deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, and there was no reason to give an error in judgment charge with respect to defendant's manner of stitching the incision."<sup>3</sup>

A year later, the Court of Appeals entered the discus-

sion in *Nestorowich* v. *Ricotta*, <sup>4</sup> sending a strong message to trial courts that this charge should not be given haphazardly:

The **Appellate** Divisions, as well certain other jurisdictions, have embraced an "error in judgment" charge [citations omitted]. As it has developed, the charge has been appropriate in instances where parties present evidence of a choice between or among medically



This limited application of the error in judgment charge preserves the established standard of care. Broader application of the charge would transform it from a protection against second-guessing of genuine exercises of professional judgment in treatment or diagnosis into a cloak for professional misfeasance. The doctrine was intended to protect those medical professionals who, in exercising due care, choose from two or more responsible and medically acceptable approaches. A distinction must therefore be made between an "error in judgment" and a doctor's failure to exercise his or her best judgment. Giving the "error in judgment" charge without regard for this distinction would otherwise relieve doctors whose conduct would constitute a breach of duty from liability.

Despite this clear admonition, some trial courts continued to inappropriately give the charge, resulting in reversals and retrials.<sup>5</sup> However, after *Nestorowich*, most trial judges have been more thoughtful and have declined to give this charge where it is not appropriate. But this has not stopped defendants from requesting the charge even where it is clearly inappropriate. The fact that seasoned attorneys continue to request the charge in circumstances where it is clearly unwarranted and makes a defense verdict vulnerable on appeal illustrates the power of the

words "an error in judgment." For this reason, the word "judgment" continues to be one of the most common words used by a defendant doctor during his or her deposition and trial testimony.

The current PJI charge has also been modified from

what it was when I first criticized it, removing the word "mere" that formerly modified "error" and clarified, providing a better explanation of its intent to convey a choice between one of two or more acceptable alternative treatments. Yet, the phrase "error in judgment" remains and continues to contradict the rest of what the jury is told about the doctrine. The jury is still instructed a doctor cannot be held liable

for an "error in judgment" which remains an obviously confusing and incorrect instruction of the law.

To reduce juror confusion, unjust outcomes, reversals and retrials, it is time to drop the offending five words from the existing charge, just as the trial judge in *Spadacinni* chose to do 40 years ago. This amendment is long overdue. When the offending phrase is removed, the charge becomes clear and provides the jury with the appropriate instruction to apply when the facts of the case warrant it:

A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.

The fact that these words have remained in the charge for decades does not justify keeping them. Removing them will put a stop to the mischief and added burden to the parties and the court system they continue to cause.

- 1. 63 A.D.2d 110 (1st Dep't 1978).
- 2. 260 A.D.2d 600 (2d Dep't 1999).
- 3. 281 A.D.2d 866, 866 (4th Dep't 2001).
- 4. 97 N.Y.2d 393, 399-400 (2002).
- 5. Vanderpool v. Adirondack Neurosurgical Specialists, P.C., 45 A.D.2d 1477 (4th Dep't 2007); Anderson v. House of Good Samaritan Hospital, 44 A.D.3d 135, 140–42 (4th Dep't 2007); Rospierski v. Haar, 59 A.D.3d 1048 (4th Dep't 2009).





By Hon. Brandon Sall



Hon. Brandon R. Sall has been Surrogate Judge of Westchester County since 2015. Prior to 2015, he was the managing member of Sall, Geist, Schwarz & Jellinek, PLLC (2014) and a partner in Sall & Geist from 2012 to 2014, where he focused on trusts and estates and real estate law and had a significant transactional and litigation practice. Judge Sall was general counsel to the Westchester County Public Administrator between 2002 and 2015.

his past year Chief Judge Janet DiFiore announced an initiative to apply Alternative Dispute Resolution (ADR) processes to all civil cases throughout New York State. In her February 2019 State of Our Judiciary Address, Chief Judge DiFiore highlighted the need for a formal expansion of ADR, noting that "Court congestion and delay make litigation more expensive, which limits access to justice." In advancing an early, presumptive ADR program, the chief judge urged practitioners to "think outside the limitations and constraints of past, dated protocols and practices," citing the substantial benefits to parties of working to find their own solutions and partial solutions to disputes, when possible. This initiative aligns closely with a mediation program established in the Westchester County Surrogate's Court, which has implemented mediation as a way to resolve cases. Mediation has proven to be an effective, appropriate and successful method of resolving a variety of contested matters in Surrogate's Court.

When a dispute arises about a decedent's estate, full-scale litigation, complete with multiple court filings, extensive discovery proceedings, depositions, and hearings, tends to be the first choice of the parties. However, I have heard it said that litigation for the average estate is also "too expensive to be affordable." I would add that this financial cost is not the only downside, as the adversarial nature of litigation tends to result in tremendous damage to the relationships between the parties. A litigationbased approach to dispute resolution often results in a solution that has high economic and emotional costs, but which may not actually serve the best interests of any of the parties. Since courts are limited in the solutions they can craft and the relief which can be granted, accordingly, a judicial decision may not address the underlying family conflict or fully resolve the dispute.

While litigation is sometimes the only viable option to resolving a dispute, my preference as Surrogate is to divide assets, not families. Along with matrimonial and Family Court litigation, emotions run high in Surrogate's Court litigations. Frequently, the parties in a Surrogate's Court matter have recently lost a close relative and are now fighting another relative over an inheritance. While on their face these disputes seem as if family members are fighting over property, the parties frequently are sorting out old issues of sibling rivalry and dominance. Second marriages, blended families, and family businesses can all add to the angst and animosity. Once a patriarch or matriarch of a family has given up control or passed away, adult children are often left in a position of ambiguity or, worse, contrary beliefs about their rightful roles. Disputes even arise when there is little or no wealth at stake. Indeed, beneficiaries still disagree about issues such as the disposition of sentimental personal property or who should be the guardian of minor children. In many cases when a dispute arises, it is because the parties lack trust in the selected fiduciary, don't fully understand the processes of Surrogate's Court, are not certain about the extent of their rights, interests, or duties, or don't believe that their interests are being adequately protected. While sometimes the disagreements can seem trivial, a conflict can trigger strong feelings of being disrespected or devalued.

Enter the mediation model. The creation of our mediation program started almost two years ago when we formed a stakeholder group made of court staff, trusts and estates attorneys, law schools, mediators and the staff at the Westchester & Rockland Mediation Centers (CLUSTER, Inc.). This group met frequently to develop a program that we thought would achieve the most success in our court.

While our court personnel and the trusts and the attorneys in our stakeholder group were perhaps most familiar with "evaluative" mediation, since such is a process modeled on settlement conferences held by judges and court attorneys/referees, our stakeholder group decided that "facilitative" mediation was generally the better approach for our mediation program. In evaluative mediation, mediators are more likely to make recommendations and suggestions and to express opinions. Instead of focusing primarily on the underlying interests of the parties involved, evaluative mediators may be more likely to help parties assess the legal merits of their arguments and make fairness determinations. In facilitative mediation, a neutral person meets with parties to a dispute to support them to have a constructive conversation about their concerns. The mediator structures a process to assist the parties in reaching their own settlement. The mediator asks questions, helps to validate parties' points of view, searches for the interests underneath the positions taken by parties, and assists the parties to find and analyze options for resolution. The facilitative mediator does not make recommendations to the parties, give advice or opinion as to outcome, or make predictions as to what will happen in court. Rather than imposing a solution, a facilitative mediator works with the parties to explore the interests underlying their positions. Facilitative mediation allows parties to vent their feelings and fully explore their grievances. The mediator is in charge of the process, while the parties are in charge of the outcome.

Since our voluntary program was introduced to our litigants, we have referred 44 matters to mediation, 30 of which have completed the process, resulting in 14 fully settled cases, four partially settled, 10 that did not settle in mediation (but a few of which settled almost immediately upon returning to court) and two that were declined for mediation. Furthermore, most of the settled cases actually resolved all the disputes between the parties, thus obviating the need for further proceedings. Soon our program will become presumptive, removing the burden from counsel of having to convince their clients that mediation is appropriate and not a weak response to a litigious adversary. In fact, attorneys have been an integral part of the success of our program, working cooperatively with our stakeholder group, accepting the process and representing parties in the mediation process.

The desire to resolve the conflict and preserve the family relationship should be deeply embedded in our courts. Our program has been successful because the preservation and reparation of the family relationship was at the forefront of its design. I look forward to continuing to expand the program, to receiving ongoing input from the stakeholders, and to ensuring the program continues to meet the needs of the litigants we serve.

# Remembering Judith

A Colleague Responds to Judith S. Kaye: In Her Own Words
By Robert S. Smith





Robert S. Smith served as an Associate Judge of the Court of Appeals from 2004 to 2014. He is now head of the appellate practice at Friedman Kaplan Seiler & Adelman LLP.

udith Kaye completed the writing, but not the editing, of her autobiography before she died. She had begun, her daughter tells us in a prefatory note, to rearrange her narrative into chronological order, but had not finished the job. Her children, finding it presumptuous to finish it for her and "too weird" to publish the unedited and edited sections together, decided to go back to the original manuscript, in which, it seems, the sections appear in the order Judith felt like writing them. Chapter 9 is "The Afterlife" (about her life after retiring from the bench). Chapter 10 is "From Day One Through Law School."

The Kaye children made the right decision. The result is a funny combination of order and spontaneity that, to my mind, is characteristic of Judith herself, who did her demanding jobs (including autobiography-writing) with business-like efficiency and spontaneous human warmth.

The book consists of a memoir of about 100 pages, followed by a 350-page collection of her writings – judicial opinions, articles and speeches. Probably few readers will go through the whole thing in order from beginning to end, and many may prefer to read even the memoir in the way Judith wrote it, by going haphazardly to whatever appeals them at the moment. The readers will include many who loved and admired Judith (a group of which I am a proud member) and many who agree with most of her views on law and other subjects (that's not me). It will include friends and co-workers from various times and places, and among those will be the dozen or so still living, of whom I am one, who were her colleagues on the New York Court of Appeals.

For us and for many others, the best thing about the book is that it brings so much of Judith back. There she is, in the distinctive, graceful written prose of which she was quietly but intensely proud. Her preface begins: "By nature, I am first and foremost a writer." She began her career as a journalist and went to law school, she tells us, only because she thought it might get her a decent job

with some newspaper or magazine. As a judge she had a talented staff to draft writings for her, but I'm sure none ever left her desk without her personal touch. She kept an eye on her colleagues' writing too, because she thought part of the Chief Judge's job (as though she didn't have enough else to do) was to make sure that everything that came out of the Court – not just what we said, but how we said it – was of at least respectable quality. The first time I drafted an opinion for the Court, she was gracious with compliments, as she always was, but she suggested that I change the first sentence to the active voice. That moment came back to me as I sat down to write this review, first beginning "The writing, but not the editing... was completed," then changing to the form Judith would, rightly, have preferred.

Another bit of Judith that comes back in reading her memoir is the depth of her feelings, both of joy and sadness, and her willingness to share them. She makes her readers understand how much she adored three things – her family, her career on the Court, and life itself – and how painful it was for her, in her last decade, to lose Stephen, her beloved husband of more than 40 years

But nothing comes back more strongly, nothing seems more a part of Judith to me, than the kindness of her heart. Her unfailing warmth to her colleagues - including those, like me, who sometimes took an unworthy delight in thwarting her powerful will - was more than professional courtesy, or even a sense of a common calling. She went out of her way to be kind to, and she truly cared about, everyone she came in contact with, including the courthouse employees whose job it was to drive cars or empty wastebaskets, clerks in stores and waiters in restaurants, and a person of borderline sanity who loved her and followed her everywhere. In this memoir, her strongest feelings of pride seem to be attached not to her extraordinary professional achievements, but to the actual good she has done for human beings: jurors whose service she labored, through her Jury Project, to make pleasant and rewarding; sufferers from mental illness and drug addiction who were given a second chance by the "problem-solving courts" she fostered; the children cared for at the "children's centers" established in the state's courthouses for kids of people who had to be in courtrooms.

# But nothing comes back more strongly, nothing seems more a part of Judith to me, than the kindness of her heart.

("While I cannot swear that our marriage was absolute perfection . . . it came pretty close"), to face mandatory retirement after a quarter-century on the Court ("Then the curtain came down. Thud.") and to receive a devastating diagnosis ("The statistics on stage four lung cancer are grim"). But the memoir is more joyful than sad, and even when it is sad it is not depressed or depressing. She survived Stephen by nine years, her retirement by seven and her diagnosis by five, and I doubt there was a moment when she even thought about lying down, literally or figuratively, to wait for the end. Writing of her first five years back in private life, as a partner at a highpowered law firm, she says that she is "enormously busy and productive," and everyone who knew her in those years knows it is true. "I can honestly say," she writes of those same years, that she has "passions, purposes, projects . . . that could happily make up the last day of my life." In her eulogy for her mother, Luisa Kaye described finding her mother's remains in bed on that last day: "She was sitting up."

She was a tough woman, but she was a soft touch, for children especially. I remember her calling me to agonize about a termination of parental rights case in which I was writing an opinion: she wanted to know which result would give the child involved, a girl called Annette, a better chance at happiness (an unanswerable question). The Adoption Now Program she established reduced by 50 percent the number of children awaiting adoption in New York. It was this that led Judith's and my colleague Judge Victoria Graffeo to say (I am quoting, from memory, remarks made at one of the many tributes to our Chief when she retired): "Her real legacy is not in the New York Reports. It is in the children who have parents today because of Judith Kaye." Certainly, that is not Judith's only legacy. But reading this memoir did not shake my feeling that none better reflects the finest qualities of this great judge.

Judith S. Kaye: In Her Own Words: Reflections on Life and the Law, with Selected Judicial Opinions and Articles, edited by NYSBA President Henry Greenberg, Luisa M. Kaye, Marilyn Marcus, and Albert M. Rosenblatt, is published by SUNY Press (2019).



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# **State Bar News**

# Success for NYSBA's 2019 Legislative Program

By Sandra Rivera

The New York State Bar Association's legislative program had great success in 2019. From the list of our state legislative priorities, the following major reforms were enacted:

- Reform of the criminal discovery laws. The new law modernizes and makes the criminal discovery rules and process fairer. Before the new law, unless a criminal defendant was fortunate enough to be charged in one of the counties where the district attorney had rejected restrictive discovery according to the statute and maintained an "open-file" policy, his or her lawyer would have been unable to fully advise the defendant about the strength of the prosecution's case and to help fully assess his or her options.
- Reform of the election law to enhance voter participation. In order to reverse the downward trend in voter participation, NYSBA advocated changes to the law relating to voter registration and voting practices to make it easier to register and vote. Some of these changes would modernize the registration process, allow pre-registration of 16- and 17-year-olds, early voting, and same-day registration.

#### Success on "Defense"

In addition to success regarding those affirmative proposals, NYSBA effectively "played defense" in defeating the proposed increase of the biennial attorney registration fee, which the governor wanted to help fund indigent criminal defense programs.

NYSBA has a strong history of support of those defense programs. However, providing indigent criminal defense is a constitutional mandate, a state obligation and a societal responsibility, and it should therefore be supported by the state's general fund, not by a surcharge on lawyers.

NYSBA's leadership strongly objected to that proposed increase, which in effect would have been a targeted tax on attorneys.

The Legislature rejected the proposed fee increase.

#### Success on Other Affirmative Legislative Proposals

In addition to NYSBA's legislative priorities, the program includes issues of extreme import to particular sections and committees, who have sought NYSBA's approval of affirmative legislative proposals (ALPs). NYSBA's Department of Governmental Relations worked alongside the sections and committees to seek passage of the ALPs by the Legislature and signature by the governor.

The following bills in NYSBA's legislative program passed both houses of the Legislature:

- S.300 to amend the estates, powers and trusts law and the N.Y. Surrogate's Court Procedure Act in relation to making technical corrections to ensure conformity with marriage equality.
- A.795 to amend the N.Y. Surrogate's Court Procedure Act in relation to the granting of letters of administration and letters of administration with will annexed.
- A.434 to amend the business corporation law in relation to atten-



Sandra Rivera

dance of a meeting of shareholders by remote communication.

• A.2009-B, Part ZZ to amend tax law and reform the enforcement tool for collection of delinquent New York state tax liabilities by authorizing the suspension of a tax debtor's driver's license. The taxpayer may demonstrate that suspension of the driver's license will cause him or her undue economic hardship.

Rivera is chair of NYSBA's Committee on State Legislative Policy.



# 5 questions and a closing argument

# Member spotlight: Christopher R. Riano

#### What do you find most rewarding about being an attorney?

Being an attorney offers each of us the unique privilege of working to protect people in moments of immense complexity and hardship in their lives. Regardless of a lawyer's specific expertise, the work we do includes within it a secondary responsibility and reward, no less important than the protection of one's client, which is to preserve and protect the institution of the law itself. The scale of the obligation and public trust this work entails is extraordinarily humbling.

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

I have been the lucky recipient of brilliant advice and counsel from several more seasoned attorneys during my career. Each of them has displayed a similar trait: My mentors pushed me beyond the limits of what I thought I was ready for. From the prosecutor who supervised me while I conducted my first major jury trial while I was still in my second year of law school, or my late dean who convinced me that I should teach law to complement my practice, to my most recent mentor, who empowered me to run an important state agency. I have found that oftentimes mentors can help serve as the bridge between different parts of your legal career, helping you make connections you did not see or think were possible. It is why I would argue it is critical that

those of us who have been the beneficiaries of such generous guidance take on the responsibility to serve as mentors ourselves.

#### What advice would you give young lawyers just starting their career?

Find a part of the law you are passionate about and dedicate yourself to that area even outside of your practice. My work teaching constitutional law has never felt like work. whether I am in the classroom at Columbia University or helping to teach civics to a group of high school students. By finding an area of law that is personally enriching, I have been able to constantly reconnect with what motivated me to be a lawyer in the first place. Always find a way to give back to your community. It is one of the central imperatives of our profession.

#### What or who inspired you to become a lawyer?

While I was an undergraduate student at Columbia, I served as a university senator and in that capacity was elected as the chairman of the Student Affairs Committee, which represents the entire student body. I loved being able to co-facilitate the interplay between students, faculty, staff, alumni, and the administration, and in doing so ensuring that the priorities of all these multiple stakeholders were reflected in the policies and rules we crafted for the entire university community.



Riano is assistant counsel to N.Y. Governor Andrew Cuomo and public scholar of constitutional law. He lives and works in Manhattan.

#### What is something that most people do not know about you?

At 19 years old, I packed up two suitcases and took the train to New York City with only \$400 in my pocket and a dream to work as a model in the fashion industry. While I worked hard and was extremely lucky to find enough work to make ends meet, I often look back and think that my decision to do that was probably one of the riskiest choices I have ever made. Yet, the modeling industry taught me more about hard work, grit, determination, self-awareness, and the importance of believing in yourself than almost anything else has in my life.

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

We bear the great responsibility to be the guardians of our clients and ultimately the rule of law. And we have a duty when tasked with such an important obligation to work together in order to execute our charge to the best of our collective abilities no matter what area of law we choose to practice.

## **New State Statutes**

The list below is intended to provide NYSBA members with information on legislation that has been enacted into law during 2019. This selection of Chapters of the Laws of 2019 is organized by statute and in alphabetical order.

For a more complete, updated list of Chapters of 2019, please go to the following web site: http://www.nysba.org/2019ChaptersandVetoes(PDF).

Also, for all bills that passed both houses of the New York State Legislature, including those bills that have not yet been delivered to the Governor for his consideration, please go to the following site: http://www.nysba.org/2019PassedBothHouses(PDF).

#### **Current Status of Bills**

Finally, you can view the bill status, bill text, and sponsor's memo, by inserting the Bill Number and selecting the appropriate options ("Status," "Text," and "Sponsors Memo") adjacent to the "Bill No." input box at the link below:

http://public.leginfo.state.ny.us/menuf.cgi.

AGRICUL	AGRICULTURE AND MARKETS LAW (RESULTS COUNT = 6)		
Bill No.			
A216	Relates to the care of animals Last Act: 08/08/19 signed CHAP.149		
A6019A	Provides for the expansion of the production of fresh fruits and vegetables by community gardens Last Act: 09/13/19 signed CHAP.272		
A7053	Relates to the confinement of companion animals in unattended motor vehicles under conditions that endanger the health or well-being of an animal Last Act: 07/31/19 signed CHAP.137		
S2044	Relates to the department of agriculture and markets making available information concerning minimum guidelines for vegetation management plans in a manner that is pollinator friendly Last Act: 08/29/19 SIGNED CHAP.203		
S5532B	Relates to the prohibition of the declawing of cats Last Act: 07/22/19 SIGNED CHAP.107		
S5756	Relates to diesel fuel grade posting requirements Last Act: 09/13/19 SIGNED CHAP.303		
ALCOHO	ALCOHOLIC BEVERAGE CONTROL LAW (RESULTS COUNT = 4)		
A7131	Relates to an exemption for certain property from the prohibition of alcohol sales within a certain distance from a church Last Act: 09/13/19 signed CHAP.280		
A8026	Relates to the filing of notifications with municipalities Last Act: 08/30/19 signed CHAP.222		
S4812B	Relates to the sale of alcoholic beverages for consumption at the New York state fair; repealer Last Act: 08/16/19 SIGNED CHAP.174		
S6462	Relates to an exemption for certain property from the prohibition of alcohol sales within a certain distance from a church Last Act: 08/30/19 SIGNED CHAP.239		
BANKING	LAW (RESULTS COUNT = 3)		
A92A	Relates to the obligations of banks and financial institutions during the sale of a mortgage subject to an application for modification Last Act: 08/14/19 signed CHAP.166		
A1940	Increases number of withdrawal transactions from basic banking accounts for account holders sixty-five years of age or older from eight to twelve Last Act: 09/13/19 signed CHAP.260		
A3235	Relates to assessment of the record of performance of banking institutions in helping to meet the credit needs of local communities  Last Act: 09/13/19 signed CHAP.264		

CIVIL PR	CIVIL PRACTICE LAW AND RULES (RESULTS COUNT = 6)		
A1945	Establishes a time period in which an action to recover damages for injury arising from domestic violence must be brought Last Act: 09/04/19 signed CHAP.245		
S1264	Relates to the admissibility of images, maps, locations, distances, calculations or other information for a web mapping service Last Act: 08/30/19 SIGNED CHAP.223		
S1868	Exempts parties liable for failure to obey or enforce domestic violence orders of protection or temporary orders of protection from limited liability provisions Last Act: 08/21/19 SIGNED CHAP.180		
S2451	Establishes extreme risk protection orders as a court-issued order of protection prohibiting a person from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun Last Act: 02/25/19 SIGNED CHAP.19		
S6395	Relates to judgment by confession Last Act: 08/30/19 SIGNED CHAP.214		
S6536	Relates to the statute of limitations for certain crimes related to fraudulent practices Last Act: 08/26/19 SIGNED CHAP:184		
CIVIL RIC	HTS LAW (RESULTS COUNT = 2)		
A2665A	Establishes the right of tenants to call police or emergency assistance without fear of losing their housing Last Act: 09/13/19 signed CHAP.263		
S1650	Requires places of public accommodation, resort or amusement that operate televisions during regular hours of operation to provide closed captioning on certain televisions upon request Last Act: 09/13/19 SIGNED CHAP.295		
CORREC	TION LAW (RESULTS COUNT = 3)		
A2285	Relates to personal phone calls for inmates in certain circumstances Last Act: 09/13/19 signed CHAP.261		
A6849	Relates to permitting legislative staff to visit correctional facilities Last Act: 09/13/19 signed CHAP.274		
S6154	Relates to the designation of a substitute jail for programmatic purposes Last Act: 09/13/19 SIGNED CHAP.305		
CRIMINA	L PROCEDURE LAW (RESULTS COUNT = 5)		
A7128	Relates to treatment programs and treatment court during interim probation supervision Last Act: 09/13/19 signed CHAP.279		
S2440	Provides for the timeliness of commencing criminal and civil action for sexual offenses committed against children Last Act: 02/14/19 SIGNED CHAP.11		
S6550	Relates to proceedings against juvenile and adolescent offenders Last Act: 08/30/19 SIGNED CHAP.240		
S6574	Relates to statutes of limitations for certain sex crimes Last Act: 09/18/19 SIGNED CHAP.315		
S6614	Relates to vacating records for certain proceedings Last Act: 07/29/19 SIGNED CHAP.132		
DOMEST	DOMESTIC RELATIONS LAW (RESULTS COUNT = 3)		
A460	Relates to adoption by a petitioner where such petitioner's parentage is legally-recognized Last Act: 09/16/19 signed CHAP.258		
S2836C	Relates to restrictions on a sex offender's custody of a child Last Act: 08/22/19 SIGNED CHAP.182		
S3756	Waives the state fee for marriage licenses for active duty members of the armed forces and authorizes towns and cities to elect to waive their fees for marriage licenses and certificates Last Act: 08/20/19 SIGNED CHAP.177		

EXECUTIVE LAW (RESULTS COUNT = 17)		
A3425	Relates to expanding the scope of unlawful discriminatory practices to include public educational institutions Last Act: 07/25/19 signed CHAP.116	
A4204	Prohibits discrimination against religious attire Last Act: 08/09/19 signed CHAP.154	
A4467A	Relates to the reporting of domestic violence incidents Last Act: 08/08/19 signed CHAP.152	
A5975	Amends the definition of pregnancy-related condition to include lactation as a possible way of determining if an individual possesses such condition Last Act: 09/13/19 signed CHAP.271	
A6571A	Includes the lake of Drew within the definition of "inland waterways" for the purposes of waterfront revitalization Last Act: 09/13/19 signed CHAP.273	
A6963A	Includes the Ferguson, Moyer, Mud Creek, Ninemile Creek, Oriskany, Reall, Sauquoit, Six Mile Creek, and Wood Creek as creeks within the definition of "inland waterways"  Last Act: 09/13/19 signed CHAP.278	
A7051	Relates to the definition of a "child victim" and to awards for certain child victims Last Act: 08/21/19 signed CHAP.178	
A7079	Relates to victim compensation for unlawful surveillance crimes Last Act: 08/21/19 signed CHAP.179	
A8054	Relates to expanding the scope of unlawful discriminatory practices to include public education institutions Last Act: 07/25/19 signed CHAP.118	
A8414	Relates to minority and women business enterprises; extends the provisions of article 15-a of the executive law; provides for punishment for fraud related to minority and women business enterprises Last Act: 07/15/19 signed CHAP.96	
A8421	Relates to increased protections for protected classes and special protections for employees who have been sexually harassed Last Act: 08/12/19 signed CHAP.160	
S1040	Relates to domestic violence; repealer Last Act: 08/20/19 SIGNED CHAP.176	
S1047	Prohibits discrimination based on gender identity or expression and includes offenses regarding gender identity or expression under the hate crimes statute Last Act: 01/25/19 SIGNED CHAP.8	
S2449	Establishes the municipal gun buyback program and municipal gun buyback program fund Last Act: 07/31/19 SIGNED CHAP.139	
S5444	Relates to participation in the address confidentiality program Last Act: 08/01/19 SIGNED CHAP.141	
S6209A	Prohibits race discrimination based on natural hair or hairstyles Last Act: 07/12/19 SIGNED CHAP.95	
S6594	Relates to increased protections for protected classes and special protections for employees who have been sexually harassed Last Act: 08/12/19 SIGNED CHAP.161	
FAMILY C	COURT ACT (RESULTS COUNT = 3)	
A6593	Extends the effectiveness of certain provisions of chapter 329 of the laws of 2009, relating to removing special powers granted to the society for the prevention of cruelty to children Last Act: $08/09/19$ signed CHAP.155	
S6475	Relates to adjustment of juvenile delinquency cases by local departments of probation in the family court Last Act: 09/13/19 SIGNED CHAP.310	
S6560	Relates to the establishment and modification of child support orders and increases the annual service fee for child support services Last Act: 09/13/19 SIGNED CHAP.313	

## **State Bar News**

INSURANCE LAW (RESULTS COUNT = 7)		
A7080A	Relates to motor vehicle key and key fob replacement contracts Last Act: 09/06/19 signed CHAP.247	
S642	Relates to the issuance of broad form coverage by the joint underwriting association Last Act: 07/03/19 SIGNED CHAP.70	
S659A	Enacts the "comprehensive contraception coverage act" Last Act: 04/12/19 SIGNED CHAP.25	
S1196	Relates to artificially deflating or otherwise lowering cost data used for adjusted claims Last Act: 08/29/19 SIGNED CHAP.197	
S2039	Relates to registration fees and continuing education requirements for license renewal Last Act: 08/29/19 SIGNED CHAP.200	
S3852A	Enacts "Shannon's Law" Last Act: 08/02/19 SIGNED CHAP.143	
S4356	Relates to mental health and substance use disorder parity reporting; repeals provisions in relation thereto Last Act: 08/29/19 SIGNED CHAP.207	
PENAL LA	WW (RESULTS COUNT = 16)	
A1213	Relates to access to foreign state records concerning previous or present mental illness of applicants for firearms license Last Act: 09/03/19 signed CHAP.242	
A3974	Relates to sentencing and resentencing in domestic violence cases Last Act: 05/14/19 signed CHAP.31	
A3985	Creates the crime of staging a motor vehicle accident Last Act: 08/08/19 signed CHAP.151	
A5944	Removes references of gravity knives as a dangerous weapon from certain provisions of the penal law relating to firearms and other dangerous weapons Last Act: 05/30/19 signed CHAP.34 05/30/19 approval memo.2	
A5981	Establishes the crime of unlawful dissemination or publication of an intimate image Last Act: 07/23/19 signed CHAP.109	
A7752	Relates to the transport of pistols or revolvers by licensees Last Act: 07/16/19 signed CHAP:104	
A8174	Relates to storage of firearms Last Act: 07/30/19 signed CHAP.133	
S101A	Limits educational institutions ability to authorize the possession of a weapon on school grounds Last Act: 07/31/19 SIGNED CHAP.138	
S1414A	Establishes certain crimes relating to the criminal possession or manufacture of an undetectable firearm, rifle, or shotgun Last Act: 07/30/19 SIGNED CHAP.134	
S2374	Establishes an extension of time of up to thirty calendar days for national instant background checks Last Act: 07/29/19 SIGNED CHAP.129	
S2448	Prohibits the possession, manufacture, transport and disposition of rapid-fire modification devices Last Act: 07/29/19 SIGNED CHAP.130	
S2450A	Relates to requirements for the safe storage of rifles, shotguns and firearms; repeals sections of law related thereto Last Act: 07/30/19 SIGNED CHAP.135	
S4202	Prohibits the manufacture, transport, shipment or possession of an undetectable knife Last Act: 08/06/19 SIGNED CHAP.146	
S6160	Relates to local and state law enforcement's access to records of applications for licenses of firearms Last Act: 09/03/19 SIGNED CHAP.244	
S6573	Relates to affirmative defenses for certain homicide offenses Last Act: 06/30/19 SIGNED CHAP.45	
S6579A	Relates to vacating records for certain proceedings and modifies the definition of smoking Last Act: 07/29/19 SIGNED CHAP.131	
REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RESULTS COUNT = 1)		
S4182	Relates to inspecting, securing and maintaining vacant and abandoned residential real property Last Act: 08/14/19 SIGNED CHAP.168	

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# LAW PRACTICE MANAGEMENT

THE BUSINESS OF LAW



# Is Your Networking Stale?

### By Carol Schiro Greenwald

Tany successful networkers get into networking ruts without even realizing it. They do what they've always done, but don't feel the time spent was valuable. Their networking group meetings seem flat. They attend to catch up with friends. The strategic reasons they joined the group and the opportunity to pursue goal-related ideas seem less relevant. Their strategic networking has gone stale.

What has changed? When networking goes stale, where does the problem lie? How is the health and vitality of a group dependent on the behavior of group members? This article discusses this interdependency and the role of group members in setting the character of the groups they belong to.

Carol Schiro Greenwald, Ph.D. is a marketing and management strategist, trainer and coach. She works with professionals and professional service firms to structure and implement growth programs that are targeted, strategic and practical. Her book, Strategic Networking for Introverts, Extroverts and Everyone in Between (American Bar Association, Law Practice Division, January 2019) explains how to strengthen he effectiveness of

professionals' networking activities.

#### KEEP THE "STRATEGIC" IN NETWORKING

Effective, efficient networking begins with your goals. The places you go to network, the people you choose to network with and the issues you discuss with them should all be related to your objectives. The general purpose of networking is to create trust-based relationships through shared encounters and activities. Business networking adds the word "strategic" to signify a focus on

identifying and pursuing specific relationships that will introduce you to new ideas and people who want your services and can help you move forward.

Networking is an important strategy for attorneys and other professionals because we humans are basically just another category of animal. Since Neanderthal days, humans have survived by participating in collaborative, team efforts. Then and now, before adding someone to our team, we want to assess the person in the flesh, evaluate their behavior and decide if they would be a trustworthy addition to our world.

Networking creates friendships. Strategic networking activities build reputations and lead to business. It takes time that might be spent on other pursuits. To use networking time efficiently, the best networkers keep the strategic element of their networking front and center. Instead of relying on random acts of lunch, they focus on specific networking activities designed to move them toward their goals.

#### HOW CAN YOU IMPLEMENT "STRATEGIC"?

Good networkers begin with a set of well researched goals. They identify a target niche and try to define it as narrowly as possible in order to keep the required research to a manageable size.

For example, Joe is an intellectual property attorney who focuses on pharmaceutical companies' products. Within pharmaceuticals, his real sweet spot is cancer drugs. By narrowing his focus to this one set of drugs, he limits the number of possible product lines and companies he needs to be familiar with. He also limits the number of trade and professional associations relevant to these clients.

To focus his in-person networking, he joins two of his clients' primary associations as well as his own bar association, the IP bar association and his state's bar. He is also a member of two local networking groups whose members offer complementary resources and potential opportunities for referrals and work.

All the specific initiatives and activities Joe undertakes are designed to educate these varied audiences about the benefits of using his knowledge and experience to minimize their problems or maximize their opportunities. He has been a speaker on the target's business associations' panels, a contributor to an industry blog and podcast series, author of white papers distributed through his firm's website and a go-to lawyer when journalists are writing about these drugs.

After about two years of successful networking in these venues, Joe's leads, referrals and branding opportunities decrease. Joe reviews his goals and his networking strategy. They still seem appropriate. What he doesn't see is that he has stopped doing the preparatory work before meetings, following up rigorously, and initiating business-related conversations. He is coasting, welcoming friendships, and not working the room with his business goals in mind.

Joe doesn't see the relationship between his behavior and the relevance of his group. Joe is not alone. Groups take on the personality of the members. When too many members decide to coast along and heed the siren call of friendship the nature of the group reflects this change.

#### MEMBERS SET THE PERSONALITY AND PURPOSE OF THE GROUPS THEY BELONG TO

There is a symbiotic relationship between a group member's focus of attention and a group's dynamic. Often, when networking initiatives and groups fail it is because the collaboration sizzle fades away. A friendship focus can smother business exchanges, because the former requires only that you show up, while the latter takes time to think about and prepare for.

When too many people attach more value to group friendships than to group business development, business networking groups lose vitality. Of course, the emphasis on friendship versus work is not usually an either/or: it is a continuum.

When members notice a slide toward fun rather than purpose, they can reverse it. Members create groups that mirror their own intentions. It is members' enthusiasm, energy and drive that create group dynamism.

Members need to take responsibility for the health of their networking groups. The best networkers know it is better to give than to receive because what goes around, comes around. The magic networking phrase, "How can I help you?" generates inter-connections that fuel successful groups.

Once networkers understand their responsibility, they need to secure their groups' vitality by refocusing on their business reasons for joining the group. These fall into two main categories: individuals' pre-meeting preparations and their enthusiastic participation at group events.

#### PRE-MEETING PREPARATIONS

You can just go to a meeting or plan to go to a meeting. Planning begins with consideration of the value of an activity in the context of your goals. Why do you want to attend a meeting? To learn about a new topic? To listen to the speaker? To meet interesting people in the audience?

Going to meetings is time intensive even if you don't prepare for it. You have to spend time to get to the location, then one to three hours for the activity, and more time to get back to your office. If you do prepare for the meeting that could add another hour as could time spent doing follow-up. So, there needs to be an affirmative answer to the question: How does this activity move me toward my goals?

#### LAW PRACTICE MANAGEMENT

After you decide to go, the proactive networker will research the group (if it is not one of his regular ones), the speakers, the attendees, and the topic. To research the speakers and attendees:

- Look at their LinkedIn and/or firm profiles in order to see if you want to make an effort to spend time with them during the event. Take note of the connections between them and your rationale for going to the activity.
- Many groups list the attendees on their website. Review the list looking for friends, acquaintances and people you would like to get to know.
- Once you identify people you want to connect with, send them an email asking to meet with them. If the person is a stranger, you may want to add why you want to meet them, what commonalities you share.
- If you know people in the group, you may also connect ahead of time with one or two to be sure to connect, sit next to them, etc. By reaching out ahead of time, you give more weight and value to your initiative.

In terms of the subject matter to be discussed, consider how it is relevant to your work. Google current articles on the topic. Reading ahead gives you an advantage in terms of subject matter discussions at the meeting. Since people tend to equate the networking behavior, they encounter with work behavior should they hire you, a bit of time spent brushing up on issues to be discussed burnishes your reputation as a diligent, prepared, knowledgeable professional.

Then take preparation one step further by creating a "conversation agenda." This has three parts:

- 1. Think of two or three questions you would like to ask apropos of the topic and/or related to those you have connected with ahead of time. Write down two or three questions to raise in conversations. By planning these ahead of time, you are likely to ask more penetrating questions.
- 2. Prepare two or three subject matter topics that you would like to discuss. Run through possible conversations in your mind so that once at the meeting you know that you have a conversation starter.
- 3. Finally, tying back to the reason you decided to spend time to attend the activity, determine how you will define and measure success.

Preparing the agenda often makes it easier for introverts to attend events because the preparation gives them a sense of safety: questions to ask, information to share. Extroverts find that preparation keeps them from flitting through a room by giving them a reason to have more in-depth conversations with preselected attendees.

#### AT THE MEETING

Energy comes from the attention people pay to meeting discussions and conversations and the caliber of the conversation. The responsible networker can add value in several ways:

- When you go around the table and everyone says who they are and what they do, listen closely and think about how what you know, who you know or what you do can help them meet their goals.
- Ask interesting questions.
- When talking with people at the meeting ask "How can I help you?" or "Where does your best business come from?" or "Who would you like to meet?" As you think about your resources that can help someone else, you will be dispersing the cooperative energy that charges a meeting.
- When your turn comes to introduce yourself try to make your comments strategic. Offer a short story that illustrates the benefits of what you do, who your clients are and what crisis led them to you. This will tie others' perceptions of you to the kind of work illustrated in the story, and will suggest the kind of situation you are looking for.

Often you will want to make plans to continue a discussion or get to know someone better in a separate meeting.

- Make sure to plan one or two future meetings with individuals you talk to. Instead of the common one-on-one get-together, suggest a triad where adding a third person you both want to know better can lead to interesting opportunities.
- Or suggest that you each review the other's LinkedIn list and select someone you would like to meet. Then you both bring the identified person to your meeting. Conversations can be lively, personal and very targeted because you each know two of the people at the table well enough to highlight the possible connections.
- If someone you had hoped to see did not attend the meeting, you can contact the person and offer to catch them up on the meeting.

Initiatives between group meetings are so important to a group's vitality that most groups have a section of the meeting called "thank you's and leads wanted" where people share whom they met with and who they want to meet. When there are many thank you's and lead requests it emphasizes the purpose of the group and the energy in the room rises like a hot air balloon.

#### **FOLLOW-UP**

Follow-up is important for the success of both the individual networker and the group. First, in terms of the individual, you should add notes to your contacts system as soon as possible after you return to the office because the further the notetaking is from the event, the harder it is to remember details. And details are critical.

For example, if you learned of an important personal event in someone's life you will want to note it so you can send an appropriate message at the proper time. If you heard of a work-related opportunity you want to write down all the details to help you be precise when you follow up.

You also may want to note idiosyncratic points, such as what someone wore or ate or is reading. All the details over time coalesce into a multifaceted picture of the person.

As you go about networking in other venues, you should keep in mind the resources people have requested. Think of group members as resources for people they don't know yet. By keeping group members top of mind you are adding to the group's strength.

You can also further you own strategy and build up your groups by bringing guests to meetings. Bringing a guest can help the person and also the group. Guests add new topics, insights and ideas to group discussions.

#### **SUMMARY**

The strength of your networking is affected by the venues in which you network. This is especially true if you have joined a group as part of a strategic networking plan focused on your goals. Members need to be cognizant of the need to resist the siren-like call of friendly fun and continue to be strategic about business-focused networking. It is the responsibility of networkers who join groups as part of their strategic plan to stay engaged, attend to their networking preparation and follow-up details, and continually work to create meaningful relationships within the group.



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

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#### **DEAR 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

#### **DEAR AL T. COYNE:**

As its popularity continues to grow, an increasing number of law firms have begun to consider accepting cryptocurrency, and particularly bitcoin, as payment for legal fees. Cryptocurrencies are digital assets that are designed to be used, like any currency, as a medium of exchange to purchase goods and services. Unlike traditional government currency, however, cryptocurrencies are not regulated by a central banking system, but instead typically rely on a public ledger that permanently records each and every transaction. As a result, many regard the cryptocurrencies as providing an innovative alternative to traditional currency, and accepting cryptocurrency as legal fees may be an effective way for practitioners and law firms to signal their modernization and technological prowess.

However, it is important to note at the outset that not all cryptocurrencies are created equal. While bitcoin has emerged as the most successful and widely used cryptocurrency, the popularity of this new technology has resulted in the release of hundreds of different others, the vast majority of which are poorly understood and highly illiquid and risky. Therefore, in keeping with most commentators and ethics opinions in this area of the law, this article will primarily focus on ethical concerns relating to bitcoin.

Formal Opinion 2019-5 of the New York City Bar Association Committee (NYCBA) on Professional and Judicial Ethics (the "Committee") tells us that law firms are not prohibited from accepting bitcoin as payment for legal services. See id. ("where the client is simply given the option of paying in cryptocurrency . . . the fee arrangement is, in our view, an ordinary one"); accord Neb. Advis. Op. No. 17-03, Sept. 11, 2017 ("[T]here is no per se rule prohibiting payment of earned legal fees with convertible virtual currency since it is a form of property.") Specifically, the Committee has opined that so long as payment by bitcoin is optional to the client, the transaction is "an ordinary one" that is not subject to New York Rule of Professional Conduct 1.8(a), which governs "business transactions" between attorneys and clients and subjects them to higher scrutiny. The Committee reasoned that where payment by bitcoin is optional, "the lawyer is simply agreeing as a convenience to accept a different method of payment but the client is not limited to paying in cryptocurrency if it is not beneficial to do so. The lawyer and the client do not have to resolve terms as to which they may have different interests." Id. Under this scenario, a client's payment by bitcoin for legal services already rendered is arguably no different, ethically speaking, than a foreign client paying their legal bill in foreign currency, or as your question correctly presumes, a wire transfer. See Ronald D. Rotunda, Bitcoin and the Legal Ethics of Lawyers, Verdict, Legal Analysis and Commentary from Justia, November 6, 2017 (hereinafter "Rotunda, Bitcoin and the Legal Ethics of Lawyers") ("Why treat bitcoin so differently from other forms of payment? For example, there is no ethics issue if you drafted a simple contract for a foreign visitor and she offered to pay €500 instead of \$590 in cash. You can accept the Euros or not. There is always the issue [of] whether the fee is reasonable, but that is not a function of the manner of payment.")

Lawyers who accept bitcoin and other cryptocurrencies for legal fees must also take into account several ethical and other issues. For example, under Rule 1.5 of the New York Rules of Professional Conduct (RPC), an attorney may not charge a client an excessive or illegal fee. RPC 1.5. While this rule applies to all forms of payment, unique considerations arise with cryptocurrency, which has historically experienced "extraordinary price fluctuations." Kevin LaCroix, Why Law Firms Should Never Accept Their Fees in Cryptocurrency, The D&O Diary, June 11, 2018 (hereinafter "Lacroix, The D&O Diary"). By way of example, in August 2017, the cost of one bitcoin was approximately \$4,764. One year later in August 2018, that price increased to around \$7,013.97, and even further to around \$9,487.96 in August 2019. Bitcoin Price Index from August 2017 to August 2019 (in U.S. dollars), Statista (last visited Sept. 11, 2019). Given these significant price fluctuations, "an arrangement for payment in bitcoin for attorney services could mean that the client pays \$200 an hour in one month and \$500 an hour the next month, which the client could very easily allege as unconscionable. Conversely, if the market value of the digital currency used as a payment quickly fell, the attorney would be underpaid for services." Neb. Advis. Op. No. 17-03, Sept. 11, 2017. To help address this risk and ensure compliance with the RPC, attorneys who accept bitcoin as payment should do so while continuing to measure their fees in U.S. dollars. See id.; RPC 1.5.

With respect to your question about holding a client's bitcoin in your law firm's trust account, New York ethics opinions provide little guidance. See NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) (declining to address "whether, and how, a lawyer may properly hold cryptocurrency in trust"). Nevertheless, the RPC and relevant commentary provide some insight. First, strictly speaking, an attorney cannot presently hold bitcoin, or any cryptocurrency, in a law firm trust account in accordance with his or her ethical obligations. RPC 1.15 requires such accounts to be held at regulated banking institutions that provide dishonored check reports, such as national and state banks and credit unions. However, these banks currently do not store cryptocurrencies, which is considered more akin to property by both federal regulators and the Committee. See Devika Kewalramani & Daniel P. Langley, Two Sides of the Same Coin: Bitcoin and Ethics, New York Law Journal, July 24, 2018 (hereinafter "Kewalramani, Two Sides of the Same Coin") ("The Internal Revenue Service categorizes virtual currency as 'property' for federal tax purposes, while the Securities and Exchange Commission characterizes some cryptocurrencies as securities and others as not."); NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) ("In light of [its] complexities, cryptocurrency (despite its name) is presently treated more likely property than currency."). Ethics committees and practitioners from other jurisdictions have noted similar restrictions. See Neb. Advis. Op. No. 17-03, Sept. 11, 2017 (opining that "unless converted to U.S. dollars, bitcoins cannot be deposited in a client trust account"); Herrick K. Lidstone, Jr. & Erik K. Schuessler, Accepting Cryptocurrency as Payment for Legal Fees, Ethical and Practical Considerations, Colorado Lawyer, May 2019 (noting that cryptocurrency "cannot be deposited" into client trust accounts in accordance with Colorado Rules of Professional Conduct because "cryptocurrency is considered property, not currency").

Nevertheless, given that bitcoin and other cryptocurrencies are treated as property, New York attorneys are "presumably allowed under the rules to store cryptocurrency in trust," as RPC 1.15 "permits an attorney to hold a client's property in trust as a fiduciary, provided it is not misappropriated or commingled." Kewalramani, Two Sides of the Same Coin; see also Roy Simon, Simon's New York Rules of Professional Conduct Annotated, at 158 (2019 ed.) (opining that a lawyer may hold a client's bitcoin in trust); accord Neb. Advis. Op. No. 17-03, Sept. 11, 2017 ("It is permissible to hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to [the Nebraska Code of Professional Conduct.]"). Nevertheless, attorneys should be mindful of the licensing requirements for holding bitcoin in trust on behalf of another. Specifically, 23 N.Y.C.R.R. § 200 (2015) requires that "a person or entity storing, holding, or maintain custody or control of Virtual Currency on behalf of others to obtain a Bitlicense," imposing, in turn, "additional scrutiny involving reporting duty, technology controls, record-keeping requirements." Kewalramani, Two Sides of the Same Coin. While no license is needed for attorneys that merely accept bitcoin as payment for prior legal services, for many practitioners, these additional requirements may tip the scales against holding a client's bitcoin in trust. See 23 N.Y.C.R.R. § 200(c)(2) (2015) (exempting "merchants and consumers that utilize Virtual Currency solely for the purchase or sale of goods or services" from licensing requirement).

More importantly however, while it may be possible and even permissible to hold a client's bitcoin in trust, doing

#### ATTORNEY PROFESSIONALISM FORUM

so is probably not advisable at this time. As some practitioners have noted, the above-mentioned historic volatility in the value of cryptocurrency simply makes it a bad fit with the concept of law firm trust accounts:

[O]ne issue is that cryptocurrency appreciates in value over time, unlike cash, so lawyers who accept it from clients may decide they don't want to spend or liquidate.

This is not a problem if a lawyer accepts it as payment for a bill. In that case, the firm can do what it wants with it. But if cryptocurrency is accepted as a retainer, which is money that's placed into a trust and is client money until earned by the lawyer, the situation gets trickier. "Cryptocurrency does not fit with the model for trust funds—lawyers should not accept cryptocurrency as trust money," [Matthew] Roskoski, [general counsel of Latham and Watkins] said.

Melissa Heelan Stanzione, Client Cryptocurrency Payments May Pose Ethical Risks for Lawyers, Bloomberg Law, March 11, 2019 (hereinafter "Stanzione, Client Cryptocurrency Payments").

There are, however, some commentators who believe that these concerns are overblown. Professor Roy Simon has observed that "New York lawyers are not required to deposit fees into a trust account unless they have specifically agreed with their clients that they will do so," and that the risk of fluctuating valuations might be less unique than some think. Simon, Simon's New York Rules of Professional Conduct Annotated, at 158 (noting that a lawyer who holds bitcoin in trust "is not responsible for [its] appreciation or depreciation . . . any more than a lawyer is responsible for fluctuation in the price of an antique painting or gold jewelry"); see also Rotunda, Bitcoin and the Legal Ethics of Lawyers ("It's a business decision, not a question of legal ethics, if the informed client and the lawyer agree to shift the risk of volatility to the lawyer."). Regardless of the risk that an attorney may assign to holding a client's bitcoin in trust, "a prudent lawyer will explain the risks to the client and will not hold the Bitcoin in a trust account in cryptocurrency form if the client is unwilling to accept the risks of price volatility." Simon, Simon's New York Rules of Professional Conduct Annotated, at 158.

In addition, attorneys also should consider whether holding a client's bitcoin in trust is subject to RPC 1.8(a), which addresses business transactions between attorneys and clients and, where applicable, requires that the transaction be fair and reasonable, with material terms explained to the client in a manner that can be reasonably understood, and written advisement to the client regarding the desirability of seeking independent legal advice in connection with the transaction. RPC 1.8(a); see NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) (to

determine whether a transaction is subject to RPC 1.8(a), the attorney should consider whether the transaction is a business transaction over and above the ordinary payment of legal services, whether the lawyer and client have different interests in the transaction, and whether the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction).

Given the multitude of ethical and practical concerns that arise with holding a client's bitcoin in trust, the most prudent course of action is to obtain the client's consent to immediately convert the bitcoin so that it can be held in U.S. dollars.

With respect to your question of whether your law firm could require a client to pay their legal bill with bitcoin, the short answer is yes, but doing so carries additional ethical obligations under the RPC. Specifically, the Committee has opined that where a law firm requires a client to pay in bitcoin, the fee arrangement does become subject to RPC 1.8(a). NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019); RPC 1.8(a). According to the Committee, this heightened scrutiny is appropriate because bitcoin and other cryptocurrencies are "presently treated more like a property than currency," which in turn raises various complexities "that the lawyer and client would be required to negotiate including the type of cryptocurrency being used, the rate of exchange, and who will bear responsibility for any processing fees." NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019). The Committee opined that as a result of these complexities, the transaction becomes more akin to a business transaction than the ordinary payment of legal fees. Id. It also stressed the increased risk of diverging interests under the circumstances, since an attorney that requires payment by bitcoin might have an incentive "to delay or speed up the representation" depending on its fluctuating market value. Id.

As noted above, transactions within the strictures of RPC 1.8(a) must be "fair and reasonable," and the attorney is required to provide written disclosures to the client that describe the material terms of the transaction in a manner than can be reasonably understood and advise as to the desirability of seeking independent legal counsel for the transaction. See Stanzione, Client Cryptocurrency Payments ("1.8(a) is scary because [the] deal has to be 'reasonable' and 'fair'. . . . How should the lawyer judge a reasonable value for cryptocurrency? The lawyer should recite in the agreement what the fairness considerations are like the risks of depreciations, for instance."); Lacroix, The D&O Diary ("Merely pinpointing the appropriate price for a cryptocurrency is challenging . . . Mark-up's and manipulations can thrive.").

These RPC 1.8(a) considerations are diminished, by comparison, where payment by bitcoin is merely optional. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) ("Where the client is simply given the option of paying in cryptocurrency . . . . the fee agreement is, in our view, an ordinary one where the lawyer is simply agreeing as a convenience to accept a different method of payment but the client is not limited to paying in cryptocurrency if it is not beneficial to do so. The lawyer and the client do not have to resolve terms as to which they may have differing interests.").

Finally, law firms considering whether to accept bitcoin also should carefully research the tax implications associated with bitcoin transactions, not to mention the technological and recordkeeping infrastructure that each transaction demands. Lacroix, The D&O Diary ("It's not as if a law firm's controller can stroll across the street and convert cryptocurrency to U.S. dollars, record the data in a firm's accounting software, and be back in time for a partnership meeting . . . [T]he law firm must identify a reliable and trustworthy financial institution to safeguard the cryptocurrency (some sort of digital wallet) and convert the cryptocurrency upon demand.").

As you can see, regulators and ethics committees have not yet fully addressed all of the implications of accepting bitcoin as a form of payment for legal fees. Just like many other cutting-edge issues that we as lawyers face every day, in the end it is up to us as professionals to carefully examine the ethical, regulatory, practical, and other risks associated with this new technology in order to ensure full compliance with our obligations.

Sincerely, The Forum by Vincent J. Syracuse, Esq. (syracuse@thsh.com); Maryann C. Stallone, Esq. (stallone@thsh.com); Carl F. Regelmann, Esq (regelmann@thsh.com); Maxwell W. Palmer, Esq (palmer@thsh.com) Tannenbaum Helpern Syracuse & Hirschtritt LLP Dana V. Syracuse, Esq. (DSyracuse@perkinscoie.com) Perkins Coie LLP

#### QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

#### **DEAR FORUM:**

My firm is advising a client on a large and sensitive commercial transaction. Early one day, at an hour when few people are in the office, I overheard a loudspeaker-phone conversation between Portier (the partner in our firm who is leading this assignment) and Neuergedanke (a well-known personality in the finance field), who had called Portier. Neuergedanke was excitedly describing the outlines of a significant additional idea that he has to enhance the value of the transaction for our client. Portier cut Neuergedanke off and told him to get lost and not to get anywhere near the transaction, the parties or their advisers. I was surprised because Neuergedanke's innovations are known generally to have real value. Then, later that day, I heard Portier casually mention to another of our own lawyers in the firm's cafeteria that he needed to sit down with him to try to reverse-engineer something.

It bothers me that we may not be serving the client's interests as well as we should, and it bothers me that Portier may be taking advantage of Neuergedanke if the reverse-engineering is designed to steal the idea. What duties do I have to the client and to my firm, both as things stand now and if I am asked later to work on this transaction? If I should be speaking up, how do I handle the matter of just how I heard about all this?

Sincerely, Les Ismore

#### **UPDATE TO AUGUST 2019 FORUM ON** VIRTUAL OFFICES

In our August 2019 Forum on "virtual law offices" (VLO), we advised that "[w]e should all be on the lookout for the inevitable changes that we expect will occur as this area of the law continues to evolve" (Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., August 2019, Vol. 91, No. 6). We weren't kidding! Within days of that Forum going to press, the Appellate Division First Department reversed a decision we discussed and held that membership in the NYCBA's VLO program may satisfy the physical presence requirement for a law office under Judiciary Law § 470, but only if the attorney takes advantage of the program's services. Marina Dist. Dev. Co., LLC v. Toledano, 174 A.D.3d 431, 432 (1st Dep't 2019). The First Department held that the attorney in that case, however, did not sufficiently use the VLO program's services to meet the Judiciary Law § 470 requirement because there was no evidence that he used the physical New York office space and his letterhead directed replies to his Philadelphia office. Id. As always, stay tuned . . .

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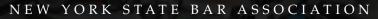
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# Thoughts on Legal Writing from the Greatest of Them All: Benjamin N. Cardozo



(GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For her research, he thanks Raila Brejt (Fordham School of Law), his judicial

"The masters are content to say, 'The elect will understand, there is no need to write for others."1

Benjamin Nathan Cardozo, an Associate Justice of the United States Supreme Court who before that was the New York State's Chief Judge, is known for his legal essays, writing style, and influence on the American legal system.<sup>2</sup> He was born in 1870 in New York City.<sup>3</sup> At age 15, he attended Columbia College and then Columbia Law School, from which he never graduated.<sup>4</sup> He was admitted to the New York bar after working at his brother's law firm. 5 Cardozo was appointed to Supreme Court in 1932 to succeed Oliver Wendell Holmes, Jr.6 He served until his death in 1938.7

Cardozo is remembered for writing judicial opinions that redefined the law, such as MacPherson v. Buick Motor Company<sup>8</sup> and Palsgraf v. Long Island Railroad Company.<sup>9</sup> Due to his lasting impact on American common law, his opinions are still cited frequently. 10 The brilliance of his works has led to the phrase "He's no Cardozo" to refer to individuals of lesser ability. 11

Yet commentaries on Cardozo's writings are mixed. 12 Seventh Circuit Judge Richard A. Posner extolled Cardozo as one of the greatest American judges. 13 But Yale Law Professor Leon S. Lipson famously compared Cardozo's opinion writing to a "thaumatrope," a device that creates an optical illusion. 14 An anonymous essayist later identified as Second Circuit Judge Jerome N. Frank<sup>15</sup> wrote that Cardozo emphasized the judicial virtue of clarity but found Cardozo's own writing confounding. 16 In Frank's scathing commentary, he distinguished Cardozo's scholarly ability from Cardozo's fascination with writing like old English judges. <sup>17</sup> But New York Chief Judge Judith S. Kaye admiringly wrote that Cardozo's writings displayed his "gift to articulate" the law persuasively, "in words that fix the principle forever."18

Cardozo's 1925 Yale Review article, Law and Literature, explores judicial-opinion writing; it might more accurately have been titled How to Write a Judicial Opinion. 19 Cardozo wrote the article to instruct judges on writing opinions, but he devoted two pages to lawyers' persuasive writing. The article's significance led to its simultaneous re-publication upon Cardozo's death by Columbia, Harvard, and Yale's law reviews.<sup>20</sup>

#### **STYLE**

"I think, not merely that style is not an evil in the Sahara of a judicial opinion, but even that it is a positive good, if only it is the right style." 21

Form and substance are inseparable. Cardozo worried that judges misunderstand the interplay between judicial style and substance. Form isn't a manner of decorating substance; it's the vehicle to convey substance, he explained. Writings like the tightly worded Code of Napoleon are stylized by the stringency of their words.

Choose the level of details to make the decision clear. Cardozo declared that the "sovereign virtue" of literary style for judicial writing is "clearness."22 Belaboring details detracts from clarity. But, he wrote, too many generalities will lead to omissions. "The picture cannot be painted if the significant and the insignificant are given equal prominence."23

Know that your words will be twisted. Cardozo noted that judges must permit themselves a margin of error and avoid the temptation to over-qualify statements to shield against potential errors. After a lawyer writes a brief dissecting a judge's opinion, the judge will see "the limitations of the power of speech, or, if not those of speech in general, at all events [their] own."24 Regardless of fault, "[o]ne marvels sometimes at the ingenuity with which texts the most remote are made to serve the ends of argument or parable."25 Cardozo told judges to study old opinions to avoid repeating old mistakes.

Clearness alone will not suffice. To write clearly, Cardozo explained, a judge needs "persuasive force," "sincerity and fire," "the mnemonic power of alliteration and antithesis," or "the terseness and tang of the proverb and the maxim."26 Clear writing, he argued, benefits from literary devices to facilitate reading and understanding.

Humor is controversial. Humor can bring the law to life, making it approachable to the less legally inclined

public.<sup>27</sup> Judges may use humor when it's "inherent in, relevant to, or complements the subject."28 But humor targets litigants who came to the court seeking justice without giving them a way to respond.<sup>29</sup> Additionally, humor suggests to its targets that they weren't heard.<sup>30</sup> Dean William L. Prosser argued that the bench is no place for levity; litigants await decisions that affect their intimate interests.<sup>31</sup> Humor is justified only by its success, Cardozo stressed. Attempting humor as the framework for writing the opinion is a risky decision. Cardozo "preach[ed] caution."32

The architectonics, or the structure of the opinion, directs the reader. Cardozo instructed judges to begin opinions with a short issue statement that readers will confront throughout the opinion. Judges, he advised, should follow up their issue statements with an outline of the full, but only the essential, facts. They should avoid facts that're merely decorative or coincidental, Cardozo taught. If the facts are laid out proportionally, the conclusion will flow inevitably.

#### **CLASSIFYING JUDICIAL WRITING**

"The movement from premise to conclusion is put before the observer as something more impersonal than the working of the individual mind."33

Cardozo discussed six types of judicial writing: "magisterial or imperative"; "laconic or sententious"; "conversational or homely"; "refined or artificial"; "demonstrative or persuasive"; and "tonsorial or agglutinative."

Cardozo branded magisterial or imperative as the highest type of judicial-opinion writing. This style is written with the calm confidence of authority and is unadorned with illustration or analogy. Such an opinion descends straight to the conclusion and skips the intermediate steps. Cardozo noted that judges don'tt need to justify their writing when they're "the mouthpiece of divinity." 34 Cardozo demonstrated this type with quotations from Chief Justice John J. Marshall, who composed forcible statements without "blurred edges or uncertain lines."35

For changing areas of the law, this unapologetic writing style may be ill suited. Cardozo quoted Justice Louis D. Brandeis as writing that "[t]he process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation."36

Cardozo explained that the laconic (curt) or sententious (judgmental) type, and the conversational or homely type, blend into each other at different degrees. The laconic or sententious is useful when the law becomes too complex to fit into neat maxims. The conversational or homely type uses statements that feel so common to reality that they seem too obvious to reject, Cardozo

argued. These writing styles often include statements that make the audience feel included in the deliberation process. Precise word choice can impress emotional value on the reader.

For writing that requires "delicate precision," <sup>37</sup> Cardozo felt that the refined or artificial type can be helpful. But Cardozo warned that using this type cavalierly risks "preciosity or euphuism," or an overly affected, elaborate, or refined piece of writing.

For a well-researched, almost scientific, feel, the demonstrative or persuasive type uses the illustration, analogy, history, and precedent that the magisterial or imperative form rejects.

Cardozo urged judges not to write opinions using a succession of precedential quotations followed by a short concluding paragraph to assert that the conclusion is inevitable from the precedent cited. This is the epitome of the tonsorial (clipped, conclusory) or agglutinative (cut-and-paste, glued together) style.

Dissents are often stylistically looser than majority opinions, Cardozo observed. The writer of a majority opinion fears that attorneys will take dicta out-of-context. Dissenters, however, must be given freedom to speak to the future and say their piece on the matter.

#### "ARGUMENTS AT THE BAR"

"There is, of course, no formula that will fit all situations in appellate courts or elsewhere." 38

Cardozo's article focuses on judicial-opinion writing, but it concludes by offering advice on what one shouldn't do when arguing in court:

Don't deconstruct multiple decisions consecutively — it's tiring to the audience.

Don't over emphasize the intricacies of the evidence.

Don't try to re-teach the judges; they're set in their ways.

Don't let your argument become long-winded.

Don't take a case to make it great. A case becomes great by what society makes of it, not from some intrinsic quality.

And don't let an adverse judgment get you down: "Many a gallant argument has met the same unworthy fate," <sup>39</sup> Cardozo philosophized.

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

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- 2. Judith S. Kaye, *Cardozo: A Law Classic*, 112 Harv. L. Rev. 1027, 1030–31 (1999) (book review) [hereinafter *A Law Classic*].
- 3. Judith S. Kaye, Benjamin Nathan Cardozo (1870-1938) Court of Appeals 1914-1932 Chief Judge 1927-1932, 6 Jud. Notice 3, 3 (2009).
- 4. Id. at 4.
- 5. *Id*.
- 6. Id. at 11.
- 7. Id.
- 8. 217 N.Y. 382 (1916).
- 9. 248 N.Y. 339 (1928).
- 10. David A. Logan, The Man in the Mirror, 90 Mich. L. Rev. 1739, 1741 (1992).
- 11. A Law Classic, supra note 2, at 1045; R. Perry Sentell, Jr., Juristic Giants: A Georgia Study in Reputation, 34 Ga. L. Rev. 1311, 1329 (2000) (Essay).
- 12. Logan, supra note 10, at 1740.
- 13. Id. at 1739-40.
- 14. Leon S. Lipson, The Alleghney College Case, 23 Yale L. Rep. 8, 11 (1977).
- 15. Logan, supra note 10, at 1740, n.3.
- 16. Anon. Y. Mous, The Speech of Judges: A Dissenting Opinion, 29 Va. L. Rev. 625, 637–38 (1943).
- 17. Id. at 629-30.
- 18. A Law Classic, supra note 2, at 1037
- 19. Cardozo, supra note 1, 48 Yale L.J. at 490.
- 20. Id.
- 21. Id. at 491.
- 22. Id.
- 23. Id. at 492.
- 24. Id.
- 25. Id.
- 26. Id. at 492 93.
- 27. Adalberto Jordan, Imagery, Humor, and the Judicial Opinion, 41 U. Miami L. Rev. 693, 697–701 (1990).
- 28. Gerald Lebovits, The Legal Writer, *Judicial Jesting: Judicious?*, 75 N.Y. St. B.J. 64 (Sept. 2003), *available at* https://works.bepress.com/gerald\_lebovits/40/.
- 29. Gerald Lebovits, Alifya V. Curtin, & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 Geo. J. Legal Ethics 237, 239, 271–78 (2008) [hereinafter *Ethical Judicial Opinion Writing*].
- Susan K. Rushing, Is Judicial Humor Judicious?, 1 Scribes J. Legal Writing 125, 133 (1990).
- 31. Ethical Judicial Opinion Writing, supra note 29, at 272.
- 32. Cardozo, supra note 1, 48 Yale L.J. at 502
- 33. Id. at 493.
- 34. Id. at 495.
- 35. Id. at 494.
- 36. *Id.* at 495
- 37. Id. at 499.
- 38. Id. at 506.
- 39. Id.

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