NEW YORK STATE BAR ASSOCIATION

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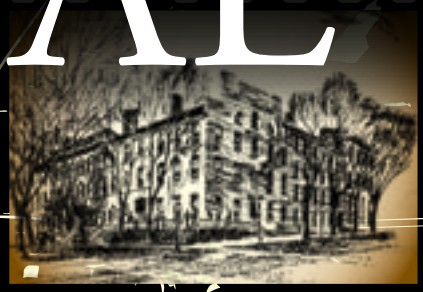

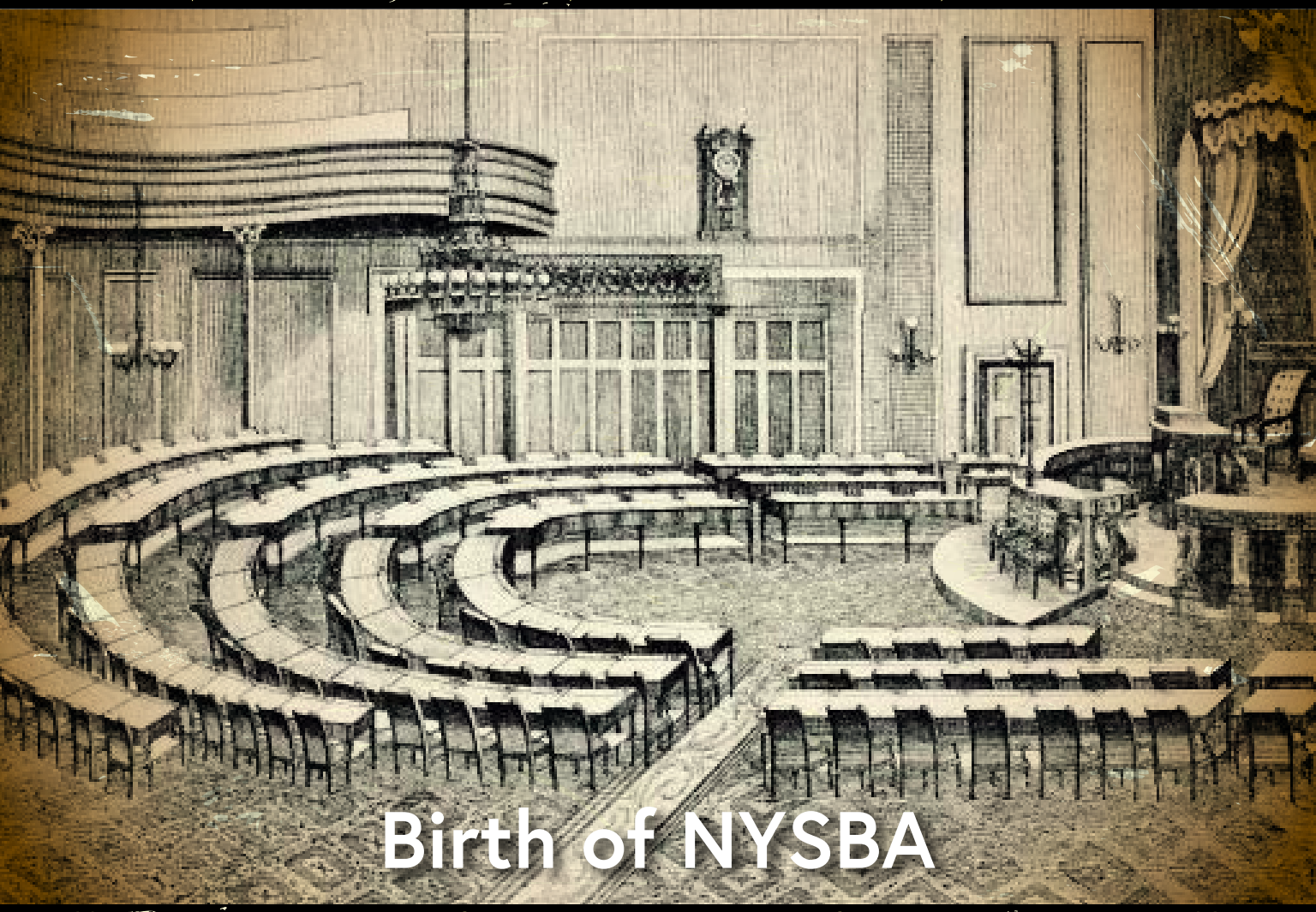

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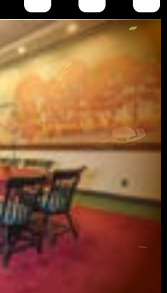

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T. ANDREW BROWN

NYSBA Seizes the Moment, Maintains Relevance as World Changes

As the greatest bar association in the world, we are in a unique position to shape the law and the profession for generations to come. As my term as New York State Bar Association president comes to an end, I see a bright future in which our association becomes more relevant than ever as it continues to seize the moment.

This attitude is shaped by who we are as a bar association and our history, but it also evolved during the pandemic. The pandemic taught us to embrace change at a pace that seemed unimaginable just a few short years ago as we upended years of established practice to meet the needs of our members during a time of unprecedented crisis.

Our responses to the pandemic and the unprovoked attack by Russia on Ukraine demonstrate just how valuable our organization is and how we can continue to meet the moment head-on.

Our Ukrainian Task Force has been meeting regularly during these troubled times, coming up with ways to assist asylum seekers and refugees, and outlining methods for documenting war crimes. We have activated our network of international chapters to provide legal guidance to newly relocated refugees and those desiring to flee. We have also trained hundreds of lawyers who want to help Ukrainian citizens file for temporary protected status to live in the United States.

NYSBA must always be ready to serve, to guide those in need and share our expertise across borders, both real and imagined. But to do so, we must recommit to our long-established values.

First, we must not only acknowledge the importance of diversity at all levels and within all the association's activities but also commit to having our organization reflect the lawyers we serve. We must also use the association's status to advocate for systemic change that will allow more people of color to pursue a legal career.

Second, we must never lose touch with generational changes in the practice of law, the legal profession, legal education and evolving workplace dynamics. We must be at the leading edge of the profession so that we can provide best practices, bridge generational divides and maintain our position as an invaluable resource.

Next, if the pandemic has taught us anything, it is that we must meet our audience where it's most convenient for them. Our virtual CLEs have won recognition for being easy to access, timely and deeply informative.

Most critical to maintaining our relevance is to never abandon the guiding principle of this organization, which is to apply knowledge and experience in the field of law to promote the public good.

A key piece of that is the work NYSBA does to connect our members with worthwhile pro bono activities. Whether it is helping refugees from Afghanistan and Ukraine navigate immigration law or assisting the formerly incarcerated in expunging marijuana convictions, we should always direct our members to the causes where their expertise will do the most good.

Our task forces, working groups and Sections have exemplified the approach of providing expertise to advance the public good while simultaneously seizing the moment.

During my time as president, these groups have done exhaustive research and produced groundbreaking

reports that will have a lasting impact on the profession for years to come.

That work is being done regularly by our committees and task forces. But I am particularly proud of the work of our Task Force on Racial Injustice and Police Reform, our Task Force on Attorney Well-Being and our Working Group on Question 26 of the New York Bar Application. The task force on the bar application explored ways that asking bar applicants about law enforcement encounters discriminated against people of color.

I also look forward to seeing the results of the important work being done by the Task Force on Racism, Social Equity and the Law and the Task Force on the Post-Pandemic Future of the Profession. I appointed these task forces, but their efforts will continue beyond my term.

Yes, I served as president for just a single year, but one year during the pandemic, in an era of political turmoil, has left an indelible impression that will guide me in my future endeavors. And I want to share the lessons I've learned with my successors.

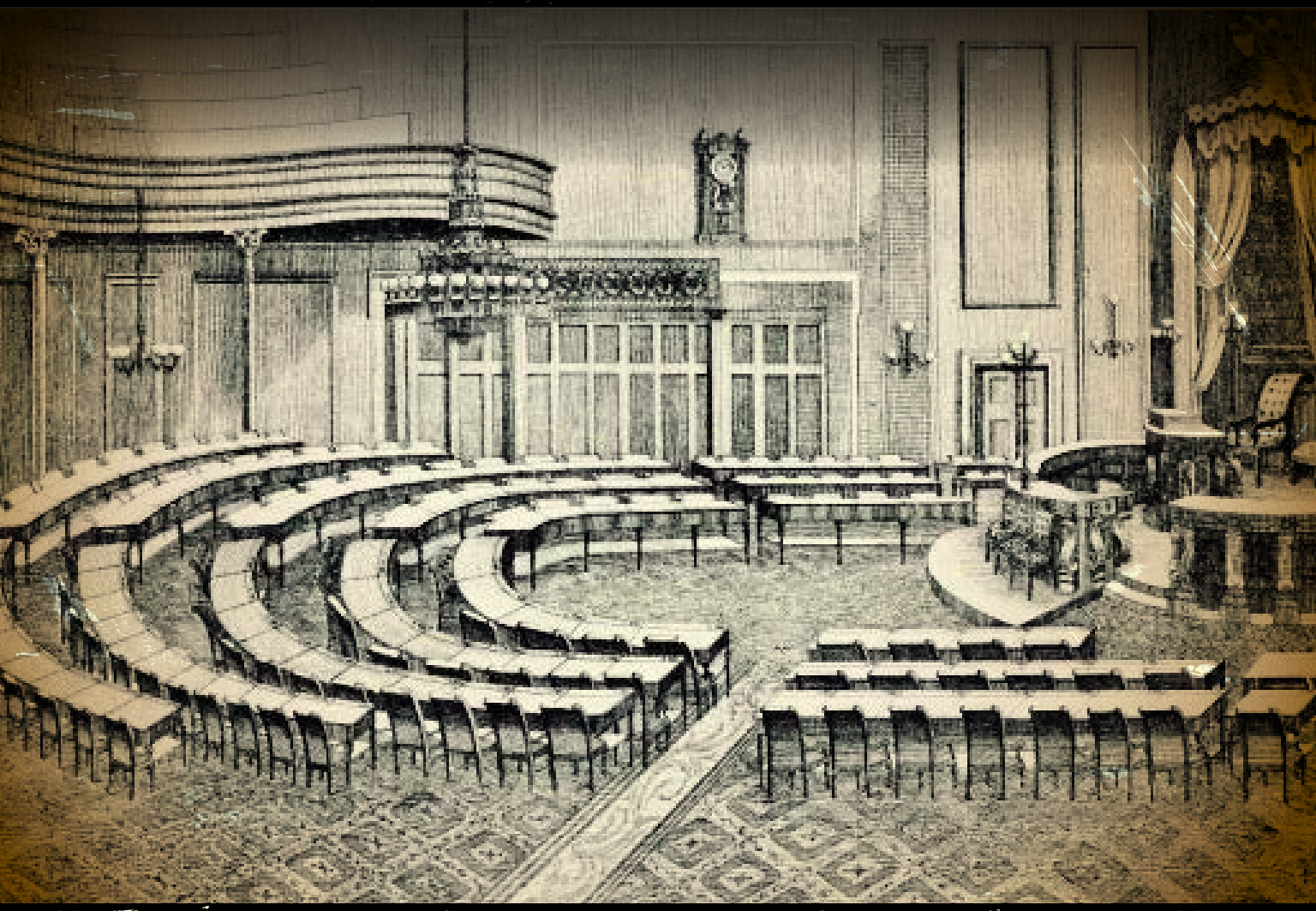
To our future leaders, I say: never doubt our ability as an organization to effect change, never second-guess action that will serve the greater good. Never hesitate to bring our organization's influence, expertise and honor to bear on the side of the righteous and good.

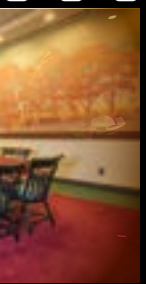
Whatever the future holds, the New York State Bar Association will stand as a shining beacon of the rule of law, meeting new challenges undeterred and unbowed.

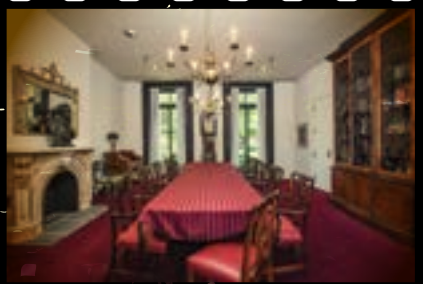
T. Andrew Brown can be reached at abrown@nysba.org.

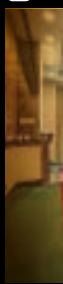
The Birth of the New York State Bar Association

By Henry M. Greenberg









1876 was an eventful year. The Centennial of American Independence was celebrated. Alexander Graham Bell patented the telephone and the Brooklyn Bridge was under construction. Mark Twain's inventor, Samuel L. Clemens, published "The Adventures of Tom Sawyer." And the Battle of Little Big Horn, where George Armstrong Custer made his "Last Stand," was fought in the Montana territory.[1]

1876 was a historic year for the legal profession, too. On a late November afternoon, the New York State Bar Association was born. Bar associations existed before then, but most served mainly social purposes.[2] While lawyers had previously joined together on a statewide basis, those efforts did not produce durable organizations.[3] The Association was the nation's first state bar capable of legislative advocacy, developing public policy proposals and continuing legal education. It remains the oldest and largest voluntary state bar association in continuous existence.

The Call for a Statewide Bar Association

The apparent impetus for the Association's formation was a story appearing in the Albany Law Journal, which had the largest circulation of any legal periodical of its time.[4] On the front page of the June 26, 1875 issue, the Journal called for the establishment of a state bar in New York.[5] In 1870, when the Association of the Bar of the City of New York was formed,[6] the prospect existed that, through its efforts, other local bar associations, and ultimately a state bar, would be organized.[7] But the City Bar had not taken the initiative. The Journal's editor, Isaac Grant Thompson, believed that lawyers of the state should be "combined in an organic whole,"[8] which, as a collective force, could "do much in directing legislation on matters of jurisprudence, in improving the law and in advancing the best interests of the profession."[9]

Elliott Fitch Shepard answered the Journal's call to action.[10] Shepard was a public-spirited lawyer and pillar of the community in New York City.[11] Mildly eccentric and immensely wealthy, he represented the New York Central Railroad and several other large corporations but devoted his later years to editing a newspaper he owned, the Mail and Express. He was tall and dignified, with a pleasant expression and manner, and addressed as "Colonel," the rank to which he rose in the Union Army during the Civil War.[12] No single person founded the Association. But no one did more than Shepard to make it happen.[13]

Facing Page
Above: The Assembly chamber of the old state Capitol, where 91 delegates met on Nov. 21, 1876 to form the New York State Bar Association

Below: The New York State Bar Association headquarters today at 1 Elk Street

On Oct. 12, 1875, Shepard introduced a resolution at a City Bar meeting to appoint a committee "to investigate and report upon the feasibility and desirability of taking initiatory steps toward organizing an Association of the Bar of the State of New York."[14] The City Bar adopted the resolution, and Shepard was appointed chair of a five-person committee.[15]

Shepard and his colleagues leapt to action.[16] First, the committee surveyed lawyers throughout the state on their views about creating a state bar. A letter containing 16 questions was sent to 1,300 lawyers, approximately one-half of whom practiced outside New York County. There were then an estimated 6,000 to 7,000 lawyers in the state (approximately the same number of physicians).[17]

The committee's first question was: "Do you favor generally the formation of a State Bar Association?" The response – 306 to 4 in favor – was a nearly unanimous vote of approval. In response to another question, 239 lawyers named Albany as the proper place for permanent headquarters, and 21 named New York City. A variety of answers were given to questions about admission fees, dues and meetings. The question generating the sharpest difference of opinion was whether members should be selected by local bar associations or whether all members of the profession should be able to join irrespective of their connection to a local bar. Sixty-four answered that local bars should select members, while 187 indicated that lawyers should be eligible even if local bars did not choose them. Finally, 253 lawyers said they would join a state bar if one were formed.[18]

In December 1875, the Shepard Committee issued a report recommending that the City Bar "take initiatory steps toward the formation of a State Association."[19] The report cited the example of England's Inner and Middle Temple, and Lincoln's and Grey's Inns, as voluntary organizations that contributed to "the high character of the English Bar."[20] The committee did not opine on how members should be selected, leaving that question to the future organization to settle when constituted.[21] It did, however, maintain that a state bar would result in the improvement and elevation of lawyers, by giving them an opportunity to "be heard on the higher topics of the rights of persons, the administration of government, the security of property, the philosophy of jurisprudence, the history of the law, the suggestions of progress, the victories of reform."[22]

To organize and establish a state bar, the committee recommended holding a "convention"[23] composed of delegates from New York's eight judicial districts (as then constituted).[24] The proposed plan was for the City Bar to invite each judicial district to select 20 delegates and 20 alternates for the convention. About 100 lawyers were

New York's old state Capitol, on the north side of State Street, east of Eagle Street

expected to attend the convention, giving it a representative character.[25]

On the evening of Dec. 14, the Shepard Committee report was presented at a meeting of the City Bar held at its headquarters on 7 West 29th St.[26] Many prominent members attended the meeting, chaired by the City Bar's president, William M. Evarts, a former U.S. attorney general and future U.S. secretary of state and U.S. senator.[27] The members voted to adopt the committee's report, but tabled a resolution implementing its recommendations until the City Bar's next meeting.[28] That occurred on April 11, 1876, when Shepard moved for adoption of the resolution. The motion carried and Shepard's Committee was tasked with organizing the convention.[29]

As word spread about the convention, so too did support for establishing a state bar.[30] The New York Times reported that "[t]he project for the formation of the State Association seem[ed] to have taken deep root among the members of the legal profession,"[31] and had "the endorsement of all the leading Judges and lawyers of the State."[32] In March 1876, the Times inked an editorial arguing that a state bar was necessary to remedy "many irregularities and evils" that "can never be amended except by a unified effort among the better members of the profession." A state bar could, for example, "rais[e] the standard of admission to the profession" and to stem the "flooding" of "half prepared young lawyers . . . which has prevailed for the last few years," the Times observed.[33]

Organizing the Convention

The Shepard Committee set to work organizing the convention. In addition to inviting judicial districts to appoint their representatives, the committee had to choose a place and time for the convention, prepare an agenda, recruit leaders, devise a committee structure and draft foundational documents.[34]

The judicial districts promptly responded to their invitations. On May 30, lawyers in the 3rd Judicial District convened in Albany to select delegates and alternates.[35] Over the summer, meetings were held by the 1st Judicial District in New York City,[36] the 2nd Judicial District in Brooklyn[37] and the 5th Judicial District in Syracuse.[38] The other judicial districts did likewise.

The convention was scheduled for Nov. 21 in Albany, in the old state Capitol. Designed by noted architect Philip Hooker and completed in 1809 with a three-story portico, it was an impressive venue.[39]

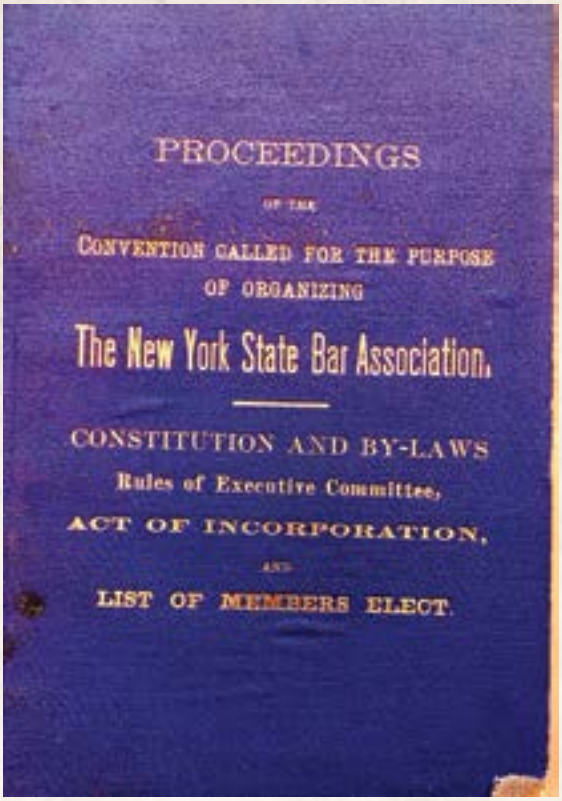
As the convention drew near, America was in turmoil over the presidential election on Nov. 7 between New York Governor Samuel J. Tilden and Ohio Governor Rutherford B. Hayes.[40] Tilden won the popular vote by a decisive margin. But Hayes' allies challenged the returns in four states that would determine the majority vote of the electoral college. Congress appointed an electoral commission which, by a single vote, gave the election to Hayes. The final electoral college tally of 185 to 184 came only a few days before Hayes' scheduled inaugural in 1877.[41]

The Association Is Formed

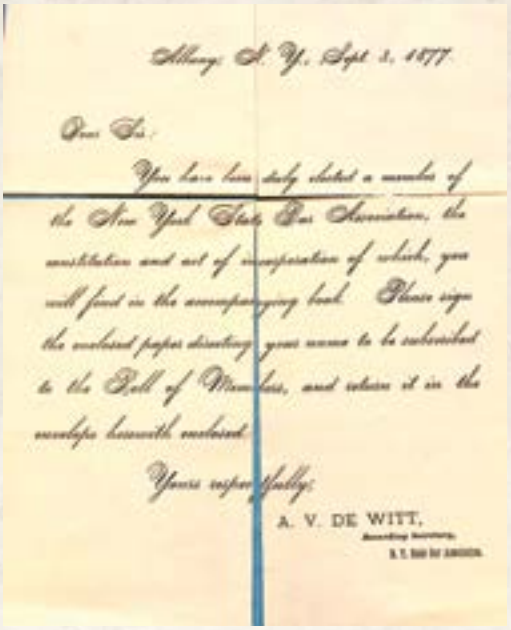
Ninety-one delegates assembled in the Assembly Chamber of the venerable old Capitol on Nov. 21, 1876.[42] "[S]eldom," it was remarked, "had there gathered together so many leading members of the Bench and Bar."[43] The delegates came from every region.[44] The Times described them as representing, "in an unusual degree, the learning and culture of the Bar of the State."[45]

Shepard called the meeting to order at 3:30 p.m. and moved that William C. Ruger from Syracuse serve as temporary chairman.[46] Ruger was the first president of the Onondaga County Bar Association (founded the year before) and "one of the strongest and best equipped lawyers" in the state.[47] In 1882, he became the Association's fourth president, and was elected later that year to chief judge of the Court of Appeals.[48] One newspaper endorsement of his candidacy posed the rhetorical question: "Thus standing the recognized head of the bar of the State of New York, who is more fit to sit at the head of the highest court of the state?"[49]

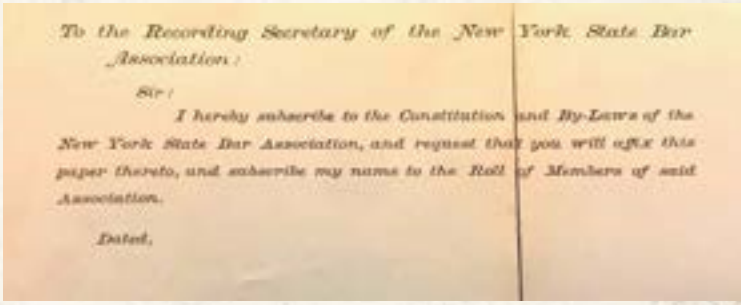
Upon taking the chair, Ruger briefly addressed the convention, and the roll of delegates and alternates was called.[50] Someone suggested a committee be appointed to propose a resolution forming the Association. But that was unnecessary; the delegates were ready to vote. Thus, a motion was made and carried that it was "expedient . . . a State Bar Association be now formed."[51] Eight delegates, representing each of the judicial districts, were



The 1877 Blue Book containing the proceedings of the New York State Bar Association's organizing convention and foundational documents



An 1877 invitation to join the New York State Bar Association



An 1877 membership acceptance form

then selected as vice presidents of the convention, along with three secretaries.[52]

Clifford A. Hand, a founding member of the City Bar,[53] moved that a committee be formed to draft a constitution and bylaws.[54] Debate ensued as to the size of the committee, with some wanting every county in the state represented.[55] Horatio Ballard, a prominent Cortland County lawyer and former New York secretary of state, strongly supported Hand's motion, which was approved, and a 16-person committee formed, composed of two delegates from each judicial district.[56] The delegates discussed the manner of conducting further business and, without coming to closure, the convention adjourned until the evening.[57]

The convention reconvened at 7:30 p.m., with a larger attendance than in the afternoon.[58] Shepard, on behalf of the Committee on Constitution and Bylaws, reported a draft constitution, which was read out loud by Rockland County Judge Andrew E. Suffern.[59] The delegates went through the draft article by article and, after amending 12 of 22 articles, adopted it.[60]

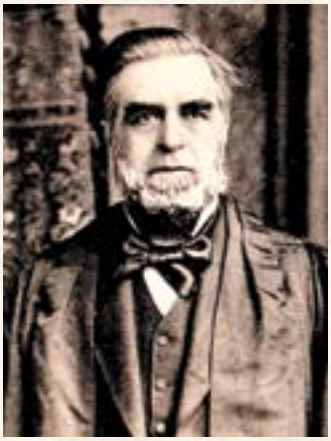
The constitution provided that any lawyer in good standing, admitted to practice in the state for three years, was eligible for membership.[61] All Court of Appeals and federal judges in New York, as well as state Supreme Court justices, would be honorary members.[62] Annual elections would be held for president, treasurer, recording secretary, corresponding secretary and vice presidents from each judicial district.[63] The Association would be managed by an Executive Committee consisting of three members from each judicial district.[64] Five standing committees were established: Admissions, Grievances, Law Reform, Prizes, and Legal Biography.[65] An annual meeting would be held in Albany on the third Tuesday of November,[66] and an admission fee of $5 was established, with yearly dues of $5.[67] (dues remained at that level until 1928, when they rose to $6.[68]).

The Nominating Committee proposed the following slate of officers:

- President, John K. Porter
- Treasurer, Rufus W. Peckham
- Recording Secretary, Abraham Van Dyck De Witt
- Corresponding Secretary, Edward Mitchell
- Vice President, First District, Charles W. Sandford
- Vice President, Second District, John J. Armstrong
- Vice President, Third District, Samuel Hand

John K. Porter, the first president of the New York State Bar Association

Elliott Fitch Shepard, chair of the committee that recommended and planned the formation of a statewide bar association in New York



William C. Ruger, chair of the 1876 organizing convention, who later served as president of the New York State Bar Association (1883) and chief judge of the Court of Appeals (1883-1892)

Sanford E. Church, chief judge of the Court of Appeals, who spoke at the first Annual Meeting in 1877

- Vice President, Fourth District, Platt Potter
- Vice President, Fifth District, William C. Ruger
- Vice President, Sixth District, Horatio Ballard
- Vice President, Seventh District, James L. Angle
- Vice President, Eighth District, Myron H. Peck[69]

This was a legal dream team in 1876. As for the officers, Porter was "one of the greatest American advocates"[70] and a former judge of the Court of Appeals.[71] He was involved in many of the famous cases of the era, including the prosecution of Charles J. Guiteau, who assassinated President James J. Garfield in 1881.[72] The Albany Law Journal observed that Porter "comes nearer to being a genius than any other man at our bar."[73] Peckham, the son of a deceased Court of Appeals judge, later held a seat on that court as well as the U.S. Supreme Court.[74] De Witt was a prominent lawyer and civic leader in Albany.[75] Mitchell, the treasurer of the City Bar, "was a leading lawyer of his time,"[76] later serving as an assemblyman, New York City parks commissioner and U.S. attorney for the Southern District of New York.[77]

The pedigrees of the vice presidents were equally dazzling. Samuel Hand (the father of Learned Hand, a legendary jurist of the 20th century) was a former judge of the Court of Appeals,[78] and Ruger a future chief judge.[79] Sandford was a Civil War Union general;[80] Angle, a Supreme Court justice from Rochester;[81] Armstrong, a Queens County judge;[82] Ballard, a former statewide elected official, assemblyman and district attorney;[83] Potter, an ex officio judge of the Court of Appeals,[84] Supreme Court justice and legal scholar;[85] and Peck, one of the ablest attorneys in Genesee County.[86]

The convention elected the officers' slate, in addition to an Executive Committee and the chairs and members of the other standing committees.[87] Shepard chaired the Committee on Prizes; the other chairs were Peter S. Danforth, a Supreme Court justice from Schoharie County (Admissions);[88] John F. Seymour, a prominent lawyer from Utica whose brother, Horatio, was a former New York governor (Grievances);[89] Matthew Hale, one of Albany's "foremost lawyers" (Law Reform);[90] and Abraham X. Parker, a former member of the state Assembly and Senate and future congressman (Legal Biography).[91]

The convention had done everything necessary to form the Association. Ruger, as convention president, retired, and the convention permanently adjourned so that the newly formed Association could assemble with President Porter in the chair. Porter immediately convened the Association's first meeting, with the officers taking their seats.[92]

Greeted with applause, the 58-year-old Porter, bespectacled and mustachioed with a theatrical speaking style,[93] delivered a "particularly happy" address.[94] He thanked

the members for their expression of confidence and said that the honor of serving as president was beyond anything that could be bestowed by executive favor or the suffrage of the people. He paid tribute to the nation's lawyers and predicted a useful future for the Association.[95]

A few remaining issues were addressed. The Executive Committee was directed to take the necessary steps to incorporate the Association.[96] An offer by the Albany Law Journal to act as the Association's official publication was referred to the Executive Committee.[97] Shepard proposed an annual writing prize on behalf of 25 lawyers from the 1st Judicial District.[98] That offer was accepted, making it the first action taken by the Association apart from matters of formal organization.

The meeting concluded just before 1 a.m.[99] The delegates had "laid down an historic record."[100]

There being no rest for the weary, the Executive Committee, with Porter as its chair, convened later that morning at Congress Hall Hotel, adjacent to the old Capitol. The Executive Committee appointed a subcommittee to draft rules and regulations, fixed the quorum requirement for its future meetings, adopted the Association's bylaws, and appointed the Albany Law Journal the official publication of the Association.[101] A subcommittee was appointed to draft and lobby for legislation incorporating the Association.[102]

The First Year

The Association's first year was devoted to organizational matters, with the Executive Committee doing most of the work.[103] In 1877, the Executive Committee met in person five times[104] and transacted most business by correspondence.[105] At its Jan. 13, 1877 meeting, the Executive Committee adopted rules and regulations for itself,[106] amended the bylaws[107] and authorized Porter to designate people to call the first meetings of standing committees.[108] It also selected a new chair for the Grievance Committee, Hamilton Fish Jr. (a future speaker of the state Assembly and congressman), and appointed Chauncey M. Depew (general counsel for the New York Central Railroad and a future U.S. senator) to the Committee on Prizes.[109]

On May 2, the Legislature passed Chapter 210 of the Laws of 1877, entitled "An Act to Incorporate the New York State Bar Association."[110] It transformed the voluntary Association established at the convention into a body corporate. Section 1 recited that the Association was "formed to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the profession, and to cherish the spirit of brotherhood among the members thereof."[111]

The act's reference to "brotherhood" was drawn from the Association's constitution[112] and reflected the reality that the law was an all-male profession. Women were then barred from practicing law in New York. In 1886, Governor David B. Hill (who, at the time, was also the Association's president)[113] signed legislation removing restrictions on the admission of women.[114] But it took the Association another 15 years to admit its first woman member and a century to elect a woman president.[115]

The Executive Committee's July 18 meeting was especially productive. Members convened at the United States Hotel in Saratoga Springs (then the most luxurious resort town in the U.S.) and worked through an agenda dominated by proposals from Shepard.[116] The chairs of the Committees on Admissions and Prizes delivered reports.[117] Also, planning began for the upcoming "annual meeting,"[118] at which substantive reports would be delivered by the Grievance Committee on the unauthorized practice of law,[119] and the Committee on Law Reform on a Code of Civil Procedure being considered by the Legislature.[120]

Like any fledging membership organization, the Association sought to attract dues-paying members.[121] At first, the results were disappointing. On Dec. 15, 1876, Treasurer Peckham mailed a letter to 160 officers and committee members appointed at the convention, advising that they could accept membership simply by paying the "$5 admission fee now, and the $5 annual dues for 1877, any time before May 1st, 1877."[122] But only 20 people responded in the first few months.[123] By April 1877, the situation was not much improved.[124]

One obstacle was the labyrinthine process for electing members prescribed by the bylaws as well as regulations established by a 32-member Committee on Admissions.[125] To become a member, a lawyer needed to be "admitted" as if to a private club.[126] A candidate had to be nominated by at least one member residing in the same judicial district as the candidate. A committee of members in that district would examine the candidate's credentials. Only if the district committee unanimously approved the candidate could his name be forwarded to the Executive Committee for approval.[127]

This process perplexed many[128] and was criticized by the Albany Law Journal, which argued that "[e]very member of the bar in good standing should be entitled to admission."[129] In a stinging editorial, the Journal wrote: "We have read the bylaws of the Association several times over and have dwelt with peculiar interest upon that relating to admission, and yet we are no more able to tell, off-hand, how to get into the Association than Ali Baba was to tell how to get out of the robbers' cave."[130]

To streamline the admissions process, the Executive Committee eliminated an "obstructive regulation"[131] and mailed to over 1,000 "members elect" a "Blue Book"

containing a list of their names as well as the proceedings of the organizing convention, and the texts of the constitution, bylaws, and Executive Committee rules and regulations.[132] Accompanying the Blue Book was a letter informing recipients of their election to the Association and a document to be completed and returned that would secure placement on the Roll of Members.[133]

These efforts bore fruit. In the fall, there was a surge of new members.[134] By November, 356 members paid the $5 admission fee, with many also paying their annual $5 dues.[135] The Association "began its work with a large and distinguished charter membership."[136]

The First Annual Meeting

The Association's first Annual Meeting took place on the afternoon of Nov. 20, 1877, once again in the Assembly Chamber of the old Capitol.[137] It was the largest meeting of New York lawyers ever held.[138]

Following an invocation, President Porter delivered an address on the Association's common purposes and aims.[139] A person who heard it reminisced 20 years later: "No one who was present when President Porter first called the Association to order will forget the thrill awakened by his address."[140]

Repeatedly interrupted by applause, Porter said the Association was designed for "noble ends" – to be "of practical benefit" to the profession and public.[141] He challenged the members to rise to the occasion:

> Do we, in our day and generation, owe any duty to the profession and to the state? . . . Is it not our duty to add to the effective forces of the state in all the agencies of human progress and improvement? Is it not in our power to exercise a healthful influence upon each other? . . . The influence of our profession in the next generation depends on a large degree on the manner in which we fulfill our duty.[142]

Porter believed that lawyers could only meet the challenges facing the profession by working together:

> We are strengthened by association with each other. The standard of professional integrity and honor is elevated by mutual intercourse, and by the consciousness that our own status is determined by the enlightened judgment of our brethren. The weight of the profession in the community and its influence upon public affairs are greatly increased when it is known that the ends that they aim to promote are not those of personal ambition, or individual rivalry, but such as are identified with the general good, the advancement of the highest interest of society, the perfecting of our system of jurisprudence, the maintenance of public order and the stability of private rights.[143]

Porter stressed that the Association's obligation to the profession and public "reached far beyond the present generation." He envisioned a day when future generations would remember the founders of "an institution identified with the development of jurisprudence and with the permanent interests and prosperity of the state."[144] "Let us trust," he said, "that this Association may endure, and that it may exercise a collective and permanent influence."[145]

After Porter's address, the meeting turned to the election of new honorary members. Motions were unanimously approved to elect the chief justice and associate justices of the U.S. Supreme Court, other judges, and the vice president of the United States, William A. Wheeler, a New York lawyer. Perhaps still smarting over New York Governor Tilden's defeat the year before, a motion to elect President Hayes, members of his cabinet and others was referred to the Committee on Admissions.[146]

Treasurer Peckham reported that the Association's receipts totaled $3,355.70, and disbursements were $1,500, leaving a balance of $1,855.70.[147] Chairs of the standing committees delivered reports,[148] and papers were read on domestic relations law[149] and proposed changes in probate procedure.[150]

Loud applause greeted the appearance of the chief judge of the Court of Appeals, Sanford E. Church.[151] His assignment was to present the Post-Graduate Prize to Walter R. Howe, the 27-year-old author of the winning essay, "The Legal Relations of Capital and Labor." This was a controversial subject selected for contestants by the Committee on Prizes.[152]

First logo of the New York State Bar Association, which remained in use until 1969

It was the Gilded Age: an era of rapid economic expansion, accompanied by labor strife, income disparity and political agitation.[153] Shepard, the committee's chair, was "one of the major conservatives of his day."[154] He opposed strikes, believing that the modern corporation was "one of the greatest blessings of the nineteenth century, and a distinguishing mark of its civilization."[155] In his committee report, he said that "if the result of the presentation of this topic should be a calm, learned, comprehensive and judicious treatise, recalling the attention of the people to the legal principles which underlie and regulate the contract between the employer and the employed, the Association would have done a notable good to the whole community."[156] But not everyone agreed. In editorials published before the Annual Meeting, the Albany Law Journal decried the committee's chosen subject as "not such a one as a purely legal association would care about having discussed,"[157] and hoped that "subjects more completely legal in their nature than the present one, may be designated hereafter."[158]

Artist's rendering of the Delavan House restaurant, where members dined during the Association's first Annual Meeting

Before presenting the prize – a generous $250 – Chief Judge Church made a brief address. A man of "commanding stature, robust physique, and distinguished presence,"[159] he expressed gratification with the Association's formation and confidence it would meet with public favor. He said the Association would "tend to produce cordiality of feeling among the members, and between the profession and the bench," and "repress evil practices and elevate the standard of education and conduct." Then, channeling the criticism of the Committee on Prizes, Church offered the following "caution" in the Association's management:

> That it confine itself strictly to its legitimate object of reforming abuses, and elevating the professional standard, and refrain from interfering with matters foreign to them. If it will do this, it will be eminently successful; if not, dissension will be engendered, and it will likely fail.

The members broke out in applause.[160]

Shepard made a proposal that the Association's corporate seal bear an image of Chancellor James Kent's head and the motto "Deus Optimus Maximus Legislator Solus," Latin for "God, Utmost and Greatest, the Sole Legislator."[161] The proposal was referred to the Executive Committee, which, several months later, opted instead for a seal with two concentric circles, inserting between the inner and outer circles the words "New York State Bar Association" at the top and "1876" at the bottom. In the center was a scroll bearing the Latin word "Justicia," meaning Justice.[162] The seal doubled as the Association's logo, which remained in use through 1969.

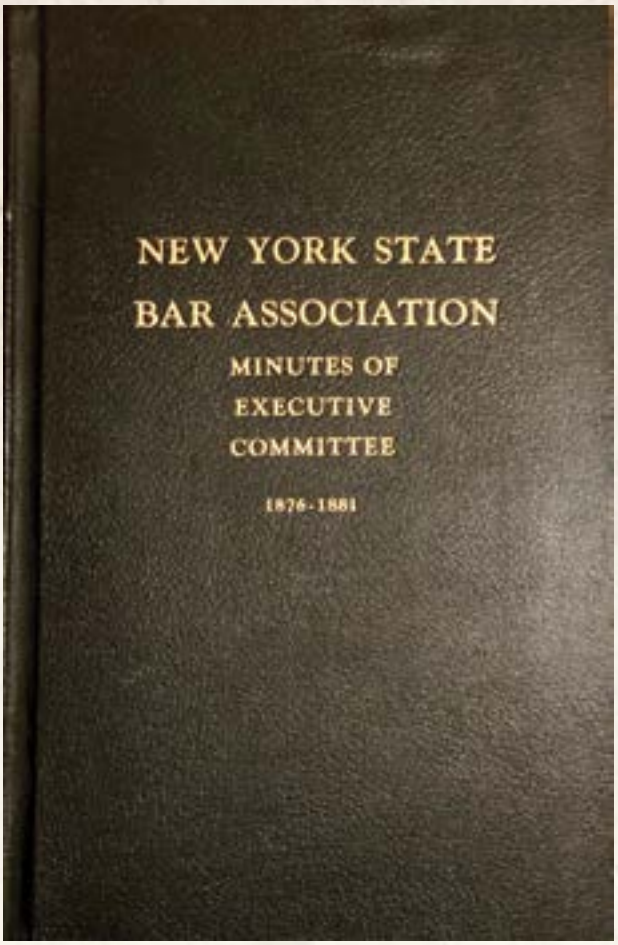
The meeting adjourned and the members went to dinner at Albany's Delevan House. Delighted over the Annual Meeting's success,[163] prominent lawyers, politicians and Supreme Court justices from around the state feasted on a sumptuous meal. The head waiter remarked to a reporter: "It is not often so large a company of prominent judges and lawyers gather at dinner as are here now."[164]

The host of worthies that established the Association built better than they knew. In just two years, the Association was poised to move from strength to strength. As the Executive Committee reported at the Annual Meeting: "The machinery is in thorough working order; and if the leading members of the profession in the state will direct its energies, much may be accomplished."[165]

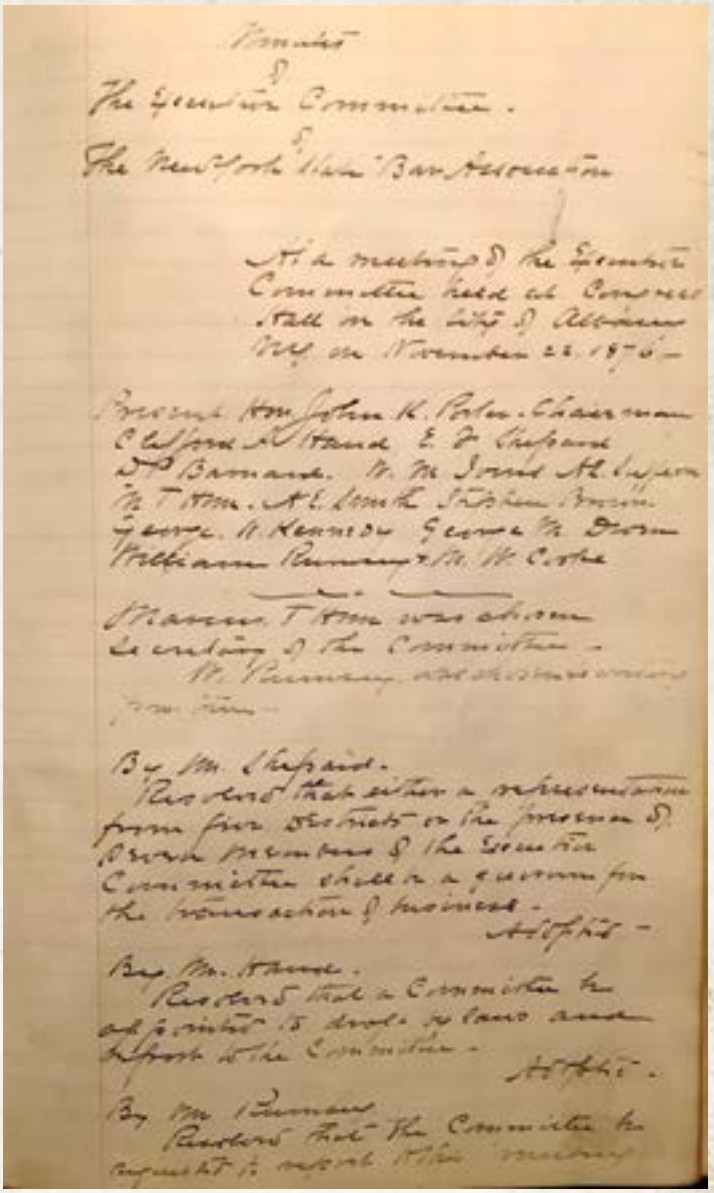
In the years that followed, Porter's vision was realized. The Association has endured and had a collective and permanent influence. The delegates who assembled in the old state Capitol in 1876 would be amazed by the Association's current technological capacity and programming; impressed by its efforts to do the public good; and inspired by the spirit of collegiality among the members. Indeed, for 145 years the Association has protected the citizenry's rights and shaped the development of the law, by serving as a resource for all three branches of government.

The founders justly hold a place of honor in the Association's long and rich history. Their example is one that the present generation may refer to with pride and gratitude.

Henry M. Greenberg is a shareholder at Greenberg Traurig. He served as president of the New York State Bar Association from 2019 to 2020.



A bound record of Executive Committee minutes from 1876-1881



Handwritten minutes of the Executive Committee's first meeting on Nov. 22, 1876

Endnotes

1. *See* Richard White, The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865–1896, 288, 303–05, 680–81 (2017) (hereinafter Republic for Which It Stands); William H. Rehnquist, Centennial Crisis: The Disputed Election of 1876, 7–8 (2004) (hereinafter Disputed Election of 1876); David McCullough, The Great Bridge: The Epic Story of the Building of the Brooklyn Bridge (1972).

2. *See* Lawrence M. Friedman, A History of American Law 495 (3d ed. 2005) (hereinafter History of American Law) ("For most of the nineteenth century, no organization even pretended to speak for the bar as a whole, or any substantial part, or to govern the conduct of lawyers. Lawyers formed associations, mainly social, from time to time; but there was no general group until the last third of the century."); Phillip J. Wickser, *Bar Associations,* 15 Cornell L. Q. 390 (1930) (discussing history of bar associations from colonial era to early 20th century).

3. State bar associations were formed in New Hampshire in 1873, Iowa in 1874 and Connecticut in 1875, but each, in their original incarnations, were short-lived or ineffective. *See* History of American Law, *supra* note 2, at 496 (noting that the Iowa association had a "brief span of life"); A.J. Small, Bibliographical and Historical Check List of Proceedings of Bar and Allied Associations 7 (1923) ("An early New Hampshire State association was organized August 14, 1873, the last meeting begin held August 16, 1878, it apparently having had an existence of about five years": "On May 27, 1874, the lawyers of Iowa formed an association and held annual meetings until 1881. A new association was organized in 1895") and 25 (Connecticut Bar Association did not hold regular meetings until 1910).

4. Kermit L. Hall, David S. Clark & James W. Ely, The Oxford Companion to American Law 244 (2002).

5. 11 Alb. L.J. 405 (June 26, 1875).

6. For a history of the City Bar's founding, *see* George Martin, Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870–1970 (1997) (hereinafter Causes and Conflicts); Albert P. Blaustein, *New York Bar Associations Prior to 1870,* 12 Amer. J. of Legal Hist. 50, 50–51 (1968).

7. 12 Alb. L.J. 353 (Dec. 4, 1875) (quoting first address of City Bar's executive committee).

8. 13 Alb. L.J. 171 (March 11, 1876). *See also Isaac Grant Thompson,* in 3 New York State Bar Association, Reports 29–32 (1880).

9. 11 Alb. L.J. at 405. In a similar vein, the Journal wrote in December 1875: "For the sake of the profession such an organization is every way desirable. But beyond and above this, for the sake of the state – for the sake of jurisprudence – the administration of justice – such an association is necessary." The Journal observed that the bar in England was an "important Factor of the government," whereas in New York lawyers were "divided and dispersed" and not a "collective force." 12 Alb. L.J. at 353.

10. Shepard was a City Bar member and chairman of its Special Committee on the Municipal Code. 11 Alb. L.J. 227 (April 3, 1875).

11. *See Mrs. Elliott Fitch Shepard,* in Prominent Families of New York: Being an Account in Biographical Form of Individuals and Families Distinguished as Representatives of the Social, Professional and Civic Life of New York City 504 (Lyman Horace Weeks, ed., 1898) (hereinafter Prominent Families).

12. *See Elliott F. Shepard Dead – Expires At His Home After Taking Ether. Had Given No Indication Of Serious Illness – But Evidently Had The Possibility Of Death In Mind – His Family At His Bedside – A Peculiarly Eccentric Character – Politician, Editor, And Religious Enthusiast – Often Amusing, But Always In Earnest,* N.Y. Times, 1893, at p. 1, col. 7; Shepard, *Elliott F.,* in 1 The National Cyclopedia of American Biography Being the History of the United States 159–60 (1893) (hereinafter *Shepard, Elliott Fitch*); Shepard, Elliott Fitch, in 39 New American Supplement to the New Werner Twentieth Century

The New York City Bar's headquarters on West 29th St. near Fifth Ave., where the City Bar voted to initiate formation of a state bar association

Congress Hall Hotel, adjacent to the old state Capitol, where the first Executive Committee meeting occurred

Edition of the Encyclopedia Britannica 74 (1905); *Elliott F. Shepard,* in Proceedings of the New York State Bar Association, Seventeenth Annual Meeting 211–13 (1894) (hereinafter *Elliott F. Shepard)*. Shepard's fortune was attributable, in part, to his wife, Margaret, the granddaughter of Cornelius Vanderbilt, the famous shipping and railroad tycoon. *See generally,* T.J. Stiles, The First Tycoon: The Epic Life of Cornelius Vanderbilt (2009).

13. *See* Jack Henke, Lawyers and the Law in New York: A Short History and Guide 26 (1979) (hereinafter Lawyers and the Law) ("Elliott F. Shepard, a noted lawyer, set in motion the committees, subcommittees, boards and appointees that, after laboring for a full year, brought together ninety-one delegates in the Old Capitol building in Albany to set up the state bar association."). Shepard was the Association's fifth president, serving in 1884.

14. 1 New York State Bar Association, Reports 2 (1878) (hereinafter 1 NYSBA Reports). This volume – the Association's first annual report – was published under the supervision of the Executive Committee. *See* New York State Bar Association, Minutes of Executive Committee 1876–1881, at 28, 34 (hereinafter Minutes of Exec. Committee); 2 New York State Bar Association, Reports 53 (1879) (hereinafter 2 NYSBA Reports); The New York State Bar Association, 17 Alb. L.J. 435 (June 1, 1878). The Association published annual reports through 1968, making them available to law libraries throughout the nation.

15. 1 NYSBA Reports, *supra* note 14, at 2 ("The president [of the City Bar] appointed the committee as follows: Elliott F. Shepard, Albert Matthews, Clifford A. Hands, Hamilton Odell, R. W. De Forrrest. After a few months' service, Mr. De Forest resigned, and Mr. Cadwallader E. Ogden was appointed in his place on the committee."); Francis Bergan, *History of the New York State Bar Association – A Century of Achievement,* 48 N.Y. St. B.J. 514, 516 (1976) (hereinafter *A Century of Achievement*) (quoting minutes of City Bar's October 12, 1885 meeting).

16. The Shepard Committee's work is detailed in its report issued in December 1875. The report was printed in full in the New York Daily Register, Vol. IX, No. 90, at 737–38 (April 17, 1876) (hereinafter *Committee Report*).

17. *Committee Report, supra* note 16, at 737; 1 NYSBA Reports, *supra* note 14, at 2.

18. *Id.*

19. *Committee Report, supra* note 16, at 737; *see also* 12 Alb. L.J. 385 (Dec. 18, 1875) (reporting on issuance of Shepard Committee report).

20. *Committee Report, supra* note 16, at 738.

21. *Id.* at 737.

22. *Id.* at 738.

23. In the 1870s, an organizing convention was a well-known instrument of establishment and part of New York's tradition of holding constitutional conventions to develop fundamental law. For example, the Constitutional Convention of 1867 reorganized the state's judicial system, recasting the Court of Appeals into its modern form. *See* Francis Bergan, The History of the New York Court of Appeals, 1847–1932, 90–91 (1985).

24. New York is currently divided into 13 Judicial Districts. N.Y. Jud. Law § 140.

25. *Committee Report, supra* note 16, at 737.

26. 1 NYSBA Reports, *supra* note 14, at 2; *Committee Report, supra* note 16, at 737; *The Bar Association; Shall The Courts Be Reformed? Proposed Reorganization of The Courts—Report Of The Committee Appointed To Consider The Matter—The State Bar Association Proposition,* N.Y. Times, Dec. 15, 1875, at p. 7, col. 1 (hereinafter *The Bar Association*).

27. *See* Causes and Conflicts, *supra* note 6, at 23–27 (describing character and career of William M. Evarts).

28. *The Bar Association, supra* note 26, at p. 7, col. 1.

29. *See Committee Report, supra* note 16, at 737 (noting City Bar adopted report on April 11, 1875); 13 Alb. L.J. 279, 280 (April 22, 1876) (reporting on City Bar's adoption of report); Bergan, *A Century of Achievement, supra* note 15, at 518 (quoting minutes of April 11, 1876 City Bar meeting).

30. *See, e.g., A State Bar Association,* N.Y. Times, March 3, 1876, at p. 4, col. 3 (hereinafter *A State Bar Association*) (reporting that establishment of state bar was supported by "a number of lawyers of the highest standing in the central portion of the state").

31. *The State Bar Association,* N.Y. Times, Nov. 3, 1876, at p. 2, col. 3 (hereinafter *The State Bar Association*).

32. *The State Bar Association: Convention for Its Formation to Meet at Albany on Tuesday Next—Some of the Delegates Who Will be Present,* N.Y. Times, Nov. 20, 1876, at p. 8, col. 4. *See also* L. B. Proctor, *Secretary's Report,* in Proceedings of the New York State Bar Association, Twentieth Annual Meeting 70 (1897) (hereinafter Twentieth Annual Meeting) ("The Association went into operation under the approval of the judiciary, a large representation of the bar of the State, State officers and members of the Legislature.").

33. *A State Bar Association, supra* note 30, at p. 4, col. 4.

34. *See The State Bar Association,* N.Y. Times, *supra* note 31, at p. 2, col. 3 (reporting that Shepard Committee sent notices to delegates and alternates regarding the date, time and location of the Convention); Bergan, *A Century of Achievement, supra* note 15, at 515 ("It seems probable that there had been preliminary work done in the City Bar."); Causes and Conflicts, *supra* note 6, at 132 ("Sheppard and his colleagues planned a convention to be held at Albany"); Lawyers and the Law, *supra* note 13, at 26.

35. 13 Alb. L.J. 406 (June 3, 1876).

36. *New York Herald,* June 30, 1876, at 8; *A State Bar Association,* N.Y. Times, June 29, 1876, at p. 10, col. 4; *see also* Causes and Conflicts, *supra* note 6, at 132 ("The first district, New York County, was represented by twenty members of the [City Bar], led by Shepard.").

37. *A State Bar Association,* N.Y. Times, July 18, 1876, at p. 8, col 6.

38. Albany Evening Journal, June 26, 1876.

39. *The State Bar Association,* N.Y. Times*, supra* note 31, at p. 2, col. 3; Douglas G. Blucher and W. Richard Wheeler, A Neat and Plain and Modern Style: Philip Hooker and His Contemporaries, 1765–1836, 96–100 (1993); Deborah S. Gardner & Christine G. McKay, Of Practical Benefit: New York State Bar Association, 1876–2001 10 (2003) (hereinafter Of Practical Benefit).

40. *See* Edwin F. Russell, *Our 100th Birthday (1876-1976)*, 48 N.Y. St. B.J. 512, 512–13 (Nov. 1976) (hereinafter *Our 100th Birthday*) ("excitement [over the presidential election] was in the air, particularly in New York State, during the time when our State Bar Association was born").

41. Disputed Election of 1876*, supra* note 1; Bret Baier, To Rescue the Republic: Ulysses S. Grant, The Fragile Union, and the Crisis of 1876, 241–96 (2022). Hayes was sworn-in as U.S. President on March 3, 1877. *Id.*

42. 1 NYSBA Reports, *supra* note 14, at 4–10.

43. *State Bar Association. A Permanent Organization. Proceedings Of Yesterday's Convention at Albany—The More Prominent Gentlemen Present—The Appointment Of Committees,* N.Y. Times*,* Nov. 22, 1876, at p. 5, col. 3 (hereinafter *A Permanent Organization*).

44. Of Practical Benefit, *supra* note 39, at 9–10; Martin W. Cooke, *View of the New York State Bar Association as Seen from the Standpoint of Its Twentieth Anniversary,* in Twentieth Annual Meeting, *supra* note 32, at 139.

45. *A Permanent Organization, supra* note 43; *see also* All Sorts, *Albany Morning Express,* Nov. 22, 1876, at p. 1, col. 3 (describing Convention delegates as a "company of very learned and grave men").

46. 1 NYSBA Reports, *supra* note 14, at 11; *A Permanent Organization, supra* note 43.

47. 26 Alb. L.J. 261, 261 (Sept. 30, 1882). For a history of the Onondaga County Bar Association, *see* https://www.onbar.org/about-us/history (last visited March 10, 2022).

48. *For Chief Judge,* Waterloo Observer, Sept. 27, 1883 (reporting on Ruger's nomination by the Democratic party to run for Chief Judge and election earlier that month to be Association President); *see also* Suzanne Aiardo, *William Crawford Ruger,* in The Judges of the New York Court of Appeals: A Biographical History, 226–31 (Albert M. Rosenblatt ed., Fordham Univ. Press 2007) (hereinafter Judges). The general election of 1882 resulted in high office for another Association leader, Grover Cleveland, the vice president for the 8th Judicial District, who was elected governor of New York, on his way to becoming U.S. president a few years later. *See* 7 New York State Bar Association Reports 100 (1884) ("At the last election, the people took up its [Association's] President, the Hon. William C. Ruger, and made him the Chief Judge of the State; and they took up its Vice-President for the Eight Judicial District, the Hon. Grover Cleveland, and made him Governor of the State.") (quoting Elliott F. Shepard).

49. *Wm. C. Ruger,* Ontario Messenger, Sept. 28, 1882.

50. 1 NYSBA Reports, *supra* note 14, at 11; *A Permanent Organization, supra* note 43.

51. 1 NYSBA Reports, *supra* note 14, at 17; *see also A Permanent Organization, supra* note 43 ("The proceedings of the convention opened with a suggestion that a committee be appointed to offer a proposition for the consideration of those present; but it was set aside, and a resolution adopted to the effect that in the opinion of the gentlemen present that it was advisable to organize a 'State Bar Association.'"). The motion to form the Association was made by Judge John J. Armstrong of Queens. 1 NYSBA Reports, *supra* note 14, at 17.

52. 1 NYSBA Reports, *supra* note 14, at 11–17, 23.

53. Gerald Gunther, Learned Hand: The Man and the Judge 15–16, 40, 56, 61–64, 69 (1994) (hereinafter Learned Hand). Clifford A. Hand was Learned Hand's uncle. *Id.*

54. 1 NYSBA Reports, *supra* note 14, at 17.

55. *A Permanent Organization, supra* note 43.

56. *Id.* ("Mr. Ballard, of Cortland, thought the idea of forming a Bar Association, was one of the noblest projects possible, and he warmly advocated the proposition of Judge Hand, whose motion was agreed to."); 1 NYSBA Reports, *supra* note 14, at 17–18.

57. 1 NYSBA Reports, *supra* note 14, at 17–18; *A Permanent Organization, supra* note 43.

58. *A Permanent Organization, supra* note 43.

59. 1 NYSBA Reports, *supra* note 14, at 18; *Death of Judge Suffern,* Peekskill Democrat, March 19, 1881. The draft Constitution was clearly prepared in advance of the Convention, presumably by the Shepard Committee.

60. 1 NYSBA Reports, *supra* note 14, at 19–20.

61. *Id.* at 27 (Ass'n Const., art. III).

62. *Id.* at 28 (Ass'n Const., art III).

63. *Id.* (Ass'n Const., art. IV); *see also id.* at 33 (Ass'n Const., art. XXI).

64. *Id.* (Ass'n Const., art. IV).

65. *Id.* at 28–29 (Ass'n Const., art. VII, VIII, IX, X, XI and XII). The Committee on Legal Biography "was an important instrument in the 'cherishing' of the spirit of brotherhood. Its task was to produce biographical sketches of deceased members of the bar. By celebrating 'the lives and characters' of distinguished lawyers, the Association hoped to inspire its members, and all the state's lawyers, to lead worthy professional lives." Of Practical Benefit, *supra* note 39, at 11.

66. 1 NYSBA Reports, *supra* note 14, at 32 (Article XVIII). The Association subsequently changed the date of the Annual Meeting to January. *See* Russell, *Our 100th Birthday, supra* note 40, at 513 ("In 1884 the date was changed again to the Third Tuesday in January. Finally, the date of the Annual Meeting was the Association was set, as it is now, to the last Friday in January.").

67. 1 NYSBA Reports, *supra* note 14, at 33 (Article XIX).

68. Russell, *Our 100th Birthday, supra* note 40, at 513.

69. 1 NYSBA Reports, *supra* note 14, at 20.

70. 45 Alb. L.J. 329 (April 16, 1892).

71. Porter served as an associate judge of the Court of Appeals from 1865 to 1867. *See* Albert M. Rosenblatt, *John Kilham Porter,* in Judges, *supra* note 48, at 994–98; Grosvenor P. Lowrey, *John K. Porter,* 4 The Green Bag 45 (Aug. 1892) and *John K. Porter,* 4 The Green Bag 438 (Sept. 1892).

72. *See* Charles E. Rosenberg, The Trial of the Assassin Guiteau 82–83 (1968).

73. *Three Great Advocates,* 12 Alb. L.J. 4 (July 3, 1875); *see also* N.Y. Times, April 12, 1892, at p. 4, col. 2 (eulogy for Porter stating that his death "removes from the bar of New-York almost the last of a famous and remarkable school of lawyers").

74. Peckham served as an associate judge of the Court of Appeals from 1887 to 1895, and an associate justice of the U.S. Supreme Court from 1895 to 1909. *See* Megan W. Bennett, *Rufus W. Peckham Jr.*, in Judges, *supra* note 48, at 232–38. Peckham's father, Rufus W. Peckham, Sr., was an associate judge of the court from 1870 to 1873. *See* Megan W. Bennett, *Rufus W. Peckham Sr.*, in Judges, *supra* note 48, at 154–59.

75. *See Obituary – Abraham Van Dyck Dewitt,* Albany Argus, March 24, 1912, at p. 7, col. 4; *Abraham Van Dyck De Witt*, in New York State Men: Biographic Studies and Character Portraits 89–90 (Frederick S. Hill, ed., 1906).

76. *See Edward Mitchell*, in Prominent Families, *supra* note 11, at 407.

77. *See Edward Mitchell* in The Association of the Bar of the City of New York Yearbook, 1910, 140–43 (1910); *Edward Mitchell Dead –Was a Well Known Lawyer – Graduate and Trustee of Columbia,* N.Y. Evening Post, Feb. 15, 1909, at p. 10, col. 5.

78. Samuel Hand served as an associate judge of the Court of Appeals in 1878. *See* Joshua Jacobson, *Samuel Hand,* Judges, *supra* note 48, at 192–97; Learned Hand, *supra* note 53, at 3–7. Hand was the Association's second president, serving from 1879 to 1880. His son, Billings Learned Hand, was a judge of the U.S. Court of Appeals for the Second Circuit from 1924 to 1951, often considered the greatest American judge to never sit on the U.S. Supreme Court. *See* Learned Hand, *supra* note 53.

79. *See supra* notes 46 to 49 and accompanying text.

80. *See An Old Militia Leader. – Death Of Major-Gen. Sandford. His Varied Experience in the Citizen-Soldiery – A Veteran of The National Guard –The Story of His Military Career,* N.Y. Times, July 26, 1878, at p. 5, col. 5.

81. *See Sudden Death at Rochester – Hon. James L. Angle Passed Away Yesterday,* Owego Daily Record, May 5, 1881, at p. 1, col. 5.

82. *See Judge Armstrong Dead,* Queens Co. Sentinel, Oct. 21, 1886.

83. *See Horatio Ballard,* N.Y. Herald, Oct. 9, 1879, at p. 12, col. 2.

84. Judges, *supra* note 48, at 1005.

85. *See Judge Platt Potter,* Albany Morning Express, Aug. 13, 2021, at p. 5, col. 5; *The Hon. Platt Potter,* Albany Argus, Aug. 12, 1891, at p. 8, col. 4.

86. *Lawyers Spoke About Mr. Peck—In His Death the Genessee County Bar Lost One of Its Best Members,* Batavia Daily News, May 18, 1910, at p. 8, col. 2.

87. 1 NYSBA Reports, *supra* note 14, at 20–23.

88. *See Obituary – Judge Peter S. Danforth,* Albany Argus, Jul 19, 1892, at p. 7, col. 4.

89. *See John Forman Seymour, Utica Weekly Herald,* Feb. 25, 1890, p. 4, cols. 2–3; *John F. Seymour – Death of a Prominent and Honored Citizen of Utica,* Rome Daily Sentinel, Feb. 24, 1890. Seymour's brother, Horatio, served as governor of New York from 1853 to 1854 and from 1863 to 1864. He was the Democratic Party nominee for president in the 1868 presidential election, won by Ulysses S. Grant.

90. *See Death of Hon. Matthew Hale –One of Albany's Foremost Lawyers Passes to the Great Beyond,* Albany Argus, March 26, 1890, at p. 11, col. 4. Hale was the Association's ninth president, serving in 1890.

91. *See Government Lawyers,* 3 Current Comment and Legal Miscellany 17–18 (Jan 15, 1891) (bio of Abraham X. Parker).

92. 1 NYSBA Reports, *supra* note 14, at 23; *A Permanent Organization, supra* note 43.

93. *See* Causes and Conflicts, *supra* note 6, at 132 * ("Porter had a theatrical style in court and was involved in a number of the famous causes of his day."); 12 Alb. L.J. at 4 ("If we were called upon to point out [Porter's] . . . most prominent and potent characteristic, we should say it is his dramatic power").

94. *The State Bar Association,* Albany Morning Express, Nov. 22, 1876.

95. *A Permanent Organization, supra* note 43.

96. 1 NYSBA Reports, *supra* note 14, at 23.

97. *Id.* at 24.

98. *Id.*; *State Bar Association – Permanent Organization, and Institution of a Prize,* Albany Evening Times, Nov. 22, 1876 (setting forth written proposal for the Post-Graduate Prize).

99. 1 NYSBA Reports, *supra* note 14, at 24; *A Permanent Organization, supra* note 43.

100. Bergan, *A Century of Achievement, supra* note 15, at 515.

101. Minutes of Exec. Committee, *supra* note 14, at 1–5 (minutes of Nov. 22, 1876 Executive Committee meeting describing adoption of Association's Bylaws and appointment of committee to make recommendation as to need for further revisions); N.Y. Times, Nov. 23, 1876, at p. 1, col. 6 (reporting on Nov. 22, 1876 meeting); N.Y. Evening Post, Nov. 23, 1876, at p. 1, col. 5 (same); 1 NYSBA Reports, *supra* note 14, at 45–48 (text of Association's Bylaws).

102. The subcommittee consisted of John K. Porter, Elliott F. Shepard, Clifford A. Hand, Marcus T. Hun and Esek Cowen. Minutes of Exec. Committee, *supra* note 14, at 2; 1 NYSBA Reports, *supra* note 14, at 51.

103. 1 NYSBA Reports, *supra* note 14, at 65–66 (report of the Executive Committee read at Annual Meeting on Nov. 20, 1877); *see, e.g.,* Minutes of Exec. Committee, *supra* note 14, at 13 (minutes describing Executive Committee on May 30, 1877 vote by correspondence on a resolution).

104. The Executive Committee met in person on January 13 in Albany; July 18 in Saratoga Springs; October 16 in New York City; and November 19 and 20 in Albany. *See* Minutes of Exec. Committee, *supra* note 14, at 1–23 (minutes of Executive Committee meetings in 1876); 15 Alb. L.J. 37, 51 (Jan. 20, 1877) (reporting on Jan. 13, 1877 meeting); 16 Alb. L.J. 109, 121–22 (Aug. 18, 1877) (reporting on Nov. 19, 1877 meeting); 16 Alb. L.J. 269, 288 (Oct. 20, 1877) (reporting on Oct. 16, 1877 meeting); 17 Alb. L.J. 109, 121–22 (Aug. 18, 1877) (reporting on July 13, 1877 meeting); Bergan, *A Century of Achievement, supra* note 15, at 515–16 (summarizing Jan. 13, May 30, and July 18, 1877 meetings).

105. *See* 1 NYSBA Reports, *supra* note 14, at 65 (Executive Committee originated system for the transaction of its own business, which was to a great degree conducted by correspondence); *see also* 15 Alb. L.J. 37, 51 (Jan. 20, 1877) (reporting on Jan. 13, 1877 meeting when Executive Committee adopted By-law authorizing district committees to do business by correspondence).

106. 1 NYSBA Reports, *supra* note 14, at 45–48 (text of Executive Committee's Rules and Regulations); Minutes of Exec. Committee, *supra* note 14, at 6–8 (minutes of Jan. 13, 1877 meeting at which Executive Committee adopted its Rules and Regulations).

107. *See, e.g.,* Minutes of Exec. Committee, *supra* note 14, at 9, 10 (minutes of Jan. 13, 1877 meeting at which Executive Committee amended the Association's bylaws).

108. Minutes of Exec. Committee, *supra* note 14, at 6–8 (minutes of Jan. 13, 1877 Executive Committee meeting); 1 NYSBA Reports, *supra* note 14, at 65; 15 Alb. L.J. at 51.

109. Minutes of Exec. Committee, *supra* note 14, at 10 (minutes of Jan. 13, 1877 Executive Committee meeting); Bergan, *A Century of Achievement, supra* note 15, at 516. *See Hamilton Fish* in Biographical Dictionary of the American Congress 1774–1996, 1030 (Joel D. Treese, ed., 1997); *Chauncey M. Depew Dies of Pneumonia in His 94th Year,* N.Y. Times, April 5, 1928, at p. 1, col. 7.

110. 1877 N.Y. Laws Ch. 210, *reprinted in* Vol I. NYSBA Reports, *supra* note 14, at 51–53; *see also* 16 Alb. L.J. 1, 20 (July 7, 1877) (reporting on passage of Act); 15 Alb. L.J. 133, 134 (Feb. 24, 1877) (reporting on introduction in Legislature of bill to incorporate Association).

111. 1877 N.Y. Laws Ch. 210, § 1. The Act also provided, among other things, that the existing Constitution, Bylaws and Executive Committee Rules and Regulations were to be those of the corporation; the officers and committees of the voluntary association became the officers and committees of the corporation; and Executive Committee members became trustees of the corporation. *Id.* § 3.

112. *See* 1 NYSBA Reports, *supra* note 14, at 26 (Ass'n Const., art. II) (setting forth objects of the Association, one of which objects was "to cherish a spirit of brotherhood among the members thereof").

113. David B. Hill was the Association's sixth President, serving from 1885 to 1887. Of Practical Benefit, *supra* note 39, at 15.

114. 1886 N.Y. Laws Ch. 425; David B. Hill, *Governor Hill's Address as President of the State Bar Association, January 18, 1887,* in Proceedings of the New York State Bar Association, Tenth Annual Meeting 38, 40 (1887). This legislation was drafted by Kate Stoneman, the first woman lawyer admitted in New York State. Of Practical Benefit, *supra* note 39, at 14–15.

115. In 1901, Kate K. Crennell of Rochester became the first woman member of the Association. *See Kate K. Crennel* in Proceedings of the New York State Bar Association, Thirty-Second Annual Meeting 429–30 (1909). The Association's first woman president, Maryann Saccomando Freedman, was elected in 1987. Of Practical Benefit, *supra* note 39, at 135.

116. Minutes of Exec. Committee, *supra* note 14, at 14–18 (minutes of July 18, 1877 Executive Committee meeting); 16 Alb. L.J. at 121–22 (reporting on July 18, 1877 Executive Committee meeting).

117. Minutes of Exec. Committee, *supra* note 14, at 14; 16 Alb. L.J. at 121–22.

118. Specifically, the Executive Committee established a "Committee on Arrangements" and gave it a lengthy to-do list. Minutes of Exec. Committee, *supra* note 14, at 14–15; 16 Alb. L.J. at 121; *see also* 16 Alb. L.J. 288 (Oct. 20, 1877) (Porter appointed members of Committee on Arrangements on Oct. 16, 1877).

119. Minutes of Exec. Committee, *supra* note 14, at 17–18; 16 Alb. L.J. at 122.

120. Minutes of Exec. Committee, *supra* note 14, at 17; 16 Alb. L.J. at 122. In 1877, the Legislature "enacted . . . "a voluminous, intricate Code of Civil Procedure, replacing the short, simple 1848 code." Robert Allen Carter and James D. Folts, *Statutes and Statutory Revision,* The Encyclopedia of New York State 1473, 1475 (Peter Eisenstaedt & Laura-Eve Moss, eds., 2005).

121. *See* 1 NYSBA Reports, *supra* note 14, at 65 (summarizing measures taken by Executive Committee regarding membership over the course of its first year).

122. *See* 15 Alb. L.J. 73, 90 (Feb. 3, 1877) (quoting letter from Peckham). The "election" of these members-elect occurred by operation of Article III of the Constitution. 1 NYSBA Reports, *supra* note 14, at 27 (Ass'n Const., art. III).

123. 15 Alb. L.J. at 90.

124. *See Members of the State Bar Association*, 15 Alb. L.J. 261, 278 (April 7, 1877) (noting that current list of members was "not a very lengthy one – not nearly so lengthy as it ought to be").

125. The Committee on Admissions consisted of four members, one from each judicial district, all of whom practiced in New York for at least ten years. *See* 1 NYSBA Reports, *supra* note 14, at 29 (Ass'n Const., art. VII). The Committee on Admissions first met on January 30, 1877, in Albany, at which meeting it adopted regulations governing the admissions process. *Id.* at 66 (report of the Committee on Admissions at first Annual Meeting).

126. Of Practical Benefit, *supra* note 39, at 11.

127. 1 NYSBA Reports, *supra* note 14, at 29 (Ass'n Const., art. VII) and 39–40 (Ass'n bylaws, art. VI); *Admission to the State Bar Association,* 15 Alb. L.J. 89, 89 (Feb. 3, 1877).

128. *See* 1 NYSBA Reports, *supra* note 14, at 66 (stating that the initial proposals for members' admission that came before the Committee on Admissions "were all defective in not complying with the requirements of article 6 of the bylaws, and the secretary was directed to return them for correction").

129. 13 Alb. L.J. 423 (June 17, 1876).

130. 15 Alb. L.J. at 278. Ali Baba is a fictional character in *Ali Baba and the Forty Thieves,* a folk tale from the book One Thousand and One Nights.

131. *See* 16 Alb. L.J. 341 (Nov. 17, 1877) (noting "large accession of members during the past two months"); 1 NYSBA Reports, *supra* note 14, at 65 (summarizing measures taken by Executive Committee regarding membership over the course of its first year), 66–67 (describing amendment to bylaws); Minutes of Exec. Committee, *supra* note 14, at 9 (minutes of Jan. 13, 1877 meeting at which Executive Committee reduced Committee on Admission's quorum requirement from 17 to 5); 15 Alb. L.J. 37, 51 (Jan. 20, 1877) (reporting on reduction to quorum requirement).

132. *See* 16 Alb. L.J. 229, 248 (Oct. 6, 1877) (describing contents and "attractive" form of Blue Book and its circulation to "a very large number" of lawyers listed therein); 2 NYSBA Reports, *supra* note 14, at 65 (referencing Executive Committee's supervision of Blue Book's publication); Minutes of Exec. Committee, *supra* note 14, at 2 (minutes of July 18, 1877 Executive Committee meeting stating that Shepard presented a new edition of Blue Book containing legislative act of incorporation and listing members of the Association); 16 Alb. L.J. 109, 121–22 (Aug. 18, 1877) (same).

133. Letter from A. V. De Witt to Members-Elect (Sept. 3, 1977). Some lawyers who received the solicitation asked the Albany Law Journal: "[W]hat advantage will membership in this society be to me?" The Journal answered that "every respectable attorney in the State" should join the Association because it was in their personal interest. The Journal explained that the Association would work to make the business of law lucrative and ensure unethical lawyers were punished and the unauthorized practice of law stopped. The Association would also do the public good, because only when lawyers act in unison could they effectively contribute to "securing an honest, a learned and an able bench." 16 Alb. L.J. 214 (Sept. 29, 1877).

134. *See* 16 Alb. L.J. 341 (Nov. 17, 1877) ("the wisdom of the executive committee in practically abrogating the obstructive regulation as to election of members has been thoroughly demonstrated by the large accession of members during the past two months.").

135. 1 NYSBA Reports, *supra* note 14, at 68 (Treasurer Peckham report at first Annual Meeting).

136. L.B. Proctor, *Secretary's Report,* in Twentieth Annual Meeting, *supra* note 32, at 297.

137. 1 NYSBA Reports, *supra* note 14, at 55, 57; *The State Bar Association. The Annual Meeting – Opinion Of The New Code –The Prize Essay On The 'Legal Relations Of Capital And Labor – Officers Elected,* N.Y. Times, Nov. 21, 1877, at p. 5, col. 1 (hereinafter *The Annual Meeting*); *State Bar Association,* Albany Daily Evening Times, Nov. 20, 2021; 16 Alb. L.J. 372 (Nov. 24, 1877); *see also* 16 Alb. L.J. 338 (Nov. 10, 1877) (setting forth order of exercises for first Annual Meeting).

138. *The Annual Meeting, supra* note 137. Every lawyer in the state was invited to attend the first Annual Meeting. 16 Alb. L.J. 338 (Nov. 10, 1877).

139. 1 NYSBA Reports, *supra* note 14, at 57–62.

140. Twentieth Annual Meeting, *supra* note 32, at 137 (quoting Martin W. Cooke, the Association's 7th president); *see also The Annual Meeting, supra* note 137 (describing Porter's address as "very interesting and eloquent"); 16 Alb. L.J. 372 (Nov. 24, 1877) (reporting that Porter's address "was received with great enthusiasm").

141. 1 NYSBA Reports, *supra* note 14, at 57; Syracuse Daily Courier, Nov. 23, 1877 (reporting that Porter's address was "listened to throughout with marked interest, and repeatedly interrupted with applause").

142. 1 NYSBA Reports, *supr*a note 14, at 59.

143. *Id* at 59–60; *see also id* at 58 ("I trust that we shall all work together in a kindred spirit, for the advancement of noble ends, tending to our common prosperity, and to the general benefit of the community.").

144. *Id.* at 58.

145. *Id.* at 61.

146. *Id.* at 62–63 (referring to Committee on Admissions proposed election of Hayes, new U.S. attorney general, the chief justice of Canada, and others, as honorary members of the Association).

147. *Id.* at 68.

148. *Id.* at 65–66 (Executive Committee report); 66 (Committee on Legal Biography report); 66–67 (Committee on Admissions report); 68–69 (Committee on Grievances report); 70–71 (Committee on Law Reform report); 72–74 (Committee on Prizes report).

149. *Id.* at 92–98. This report was issued by Elbridge T. Gerry, who was the grandson of Elbridge Gerry, a signer of the Declaration of Independence. Elbridge T. Gerry was a prominent trial lawyer, philanthropist, and bibliophile whose 30,000-volume library became the foundation of the United States Supreme Court Library. He also founded the New York Society for the Prevention of Cruelty to Children (which still operates today) and was Commodore of the New York Yacht Club. *See generally,* Shelley L. Dowling, Elbridge Thomas Gerry: An Exceptional Life in Gilded Gotham (2017).

150. 1 NYSBA Reports, *supra* note 14, at 86–89.

151. *The State Bar Association. Annual Meeting –President Porter's Address –The Business Transacted.,* Albany Evening Journal, Nov. 21, 1877, at p. 1, col. 3 ("The appearance of [Chief Judge Church and Court of Appeals Judge Charles A. Rapallo] was greeted with loud applause.").

152. 1 NYSBA Reports, *supra* note 14, at 82–83, 101–38. The Post-Graduate Prize was open to lawyers admitted to practice for five or more years and awarded annually to the contestant preparing the best essay on a subject pre-selected by the Committee on Prizes. *Id.* at 72, 76. In August 1877, the committee announced that contestants' essays should address the following subject: "The Legal Relations of Capital and Labor –the Right of the State to Interfere between Employer and Employed, and what Legislation, if any, should be had on this subject." *The Lawyers Post-Graduate Prize,* N.Y. Times, Aug. 28, 1877, at p. 8, col. 4 (announcing rules for Post-Graduate Prize, including subject of essay). The committee received and reviewed 25 essays. 1 NYSBA Reports, *supra* note 14, at 72. The winner of the 1877 Post-Graduate Prize, Walter R. Howe, pursued a career in politics and became "one of the best-known young men in New York, and he enjoyed the respect and esteem of all who knew him." *Death Of Walter Howe; Seized With Cramps While Bathing At Newport. His Body Recovered by a Searching Party – Fruitless Efforts of Physicians To Resuscitate Him,* N.Y. Times, Aug. 23. 1890, at p. 1, col. 5.

153. *See* Republic for Which It Stands, *supra* note 1, at 345–54 (describing Great Railroad Strike of 1877); *see also* Jack Beatty, Age of Betrayal: The Triumph of Money in America, 1865-1900 (2007) (a critical, indeed indignant history of the Gilded Age).

154. Julia S. Falk, Women, Language and Linguistics: Three American Stories from the First Half of the Twentieth Century 35 (1999).

155. Elliott F. Shepard, Labor and Capitol Are One 25 (10th ed.1886). *See also Elliott F. Shepard, supra* note 12, at 212–13 ("The Colonel published a pamphlet entitled 'Labor and Capital Are One,' which has been translated into various languages, and has had a circulation of more than a quarter of a million copies. In this he declared the modern corporation to be 'one of the greatest blessings of the nineteenth century, and a distinguishing mark of its civilization.' He extolled railroads in particular, deprecated strikes, and advocated arbitration in all disputes between employers and employees.").

156. 1 NYSBA Reports, *supra* note 14, at 73 (report of the Committee on Prizes delivered by Elliott F. Shepard at first Annual Meeting).

157. 16 Alb. L.J. 141 (Sept. 1, 1877).

158. 16 Alb. L.J. 310–11 (Nov. 3, 1877).

159. Megan W. Bennett, *Sanford Elias Church,* in Judges, *supra* note 48, at 141, 145 n. 11 (quoting Irving Browne, *The New York Court of Appeals, Part II,* 2 The Green Bag 321, 322 (Aug. 1890)).

160. 1 NYSBA Reports, *supra* note 14, at 82–83.

161. *Id.* at 85–86. The suggestion by Shepard that the Association's corporate seal should invoke divine law was undoubtedly the product of his deep religious faith. He was well known "as an ardent and active promoter of the scriptural observance of the Christian Sabbath." *Shepard, Elliott Fitch*, *supra* note 12, at 160. In fact, he purchased a controlling interest in a Fifth Avenue stage line in order to bring a halt to its Sunday service. In a similar vein, he placed a verse of scripture on the front page of the *Mail and Express,* the newspaper he owned and edited from 1888 until his death in 1893. *Id.*

162. Minutes of Exec. Committee, *supra* note 14, at (minutes of March 28, 1878 meeting in New York City of a special committee of the Executive Committee authorized to adopt the Association's seal); 16 Alb. L.J. at 122; 2 NYSBA Reports, *supra* note 14, at 53 (reporting on Executive Committee's adoption of seal).

163. *The Annual Meeting, supra* note 137 ("There is great enthusiasm among the Judges and lawyers over the success of this, the largest meeting of the Bar of the State ever held.").

164. *A Brilliant Company at Dinner,* Kingston Daily Freeman, Nov. 21, 1877, at p. 1, col. 4 (noting "glittering tables" and a multiple course dinner including soup and "toothsome salad," served with claret wine).

165. 1 NYSBA Reports, *supra* note 14, at 66.

Judge Ketanji Brown Jackson and the Myth of Meritocracy

By Mirna Martinez Santiago

Multiple studies have shown that diversity of experiences and thoughts actually increases the creativity, productivity and even profitability of businesses.[1] When it comes to judicial bodies, studies show that having diversity (a person of color or a woman) on a panel of judges creates different – often better – results.[2]

History has also shown us that an increase in representation on bodies of power (like the Legislature and judiciary) result in the expansion of civil rights and personal freedoms for more members of the population.[3]

So why has it taken so long for a Black woman to be nominated to the United States Supreme Court? Probably because of the circus we witnessed during Judge Ketanji Brown Jackson's confirmation hearings.

Even before she was nominated, there were complaints that President Biden's pledge to nominate a Black woman to the Supreme Court was "racist."[4] Never mind that white men are 30% of the population but make up 60% of all state judges and 80% of all federal court judges. There are currently 23 states where there are no judges of color.[5] However, nominating a Black woman – heretofore unrepresented in the entire existence of the Supreme Court – was the racist act, not the prior exclusion.

There is a graphic making the rounds on social media comparing Judge Jackson's qualifications to all sitting Supreme Court justices; she is the only judge to check off all the boxes (Ivy League education; clerked for the Supreme Court; sat on the Sentencing Commission; was a district court judge; and was a federal Court of Appeals judge). In addition, she is the only likely justice to have been a public defender for a large part of her legal career. And yet, she has been derided as "unqualified," "elitist" and "soft on crime."

The official Twitter account of the Republican National Committee posted a picture of Judge Jackson on March 22, 2022, with the initials "KBJ" crossed out and "CRT"[6] written in.[7] The Federalist Society dubbed her nomination by President Biden as an "affirmative action" pick.[8] Conservative media darling Tucker Carlson asked to see her LSAT scores – something that no other Supreme Court nominee has ever had to do – and called her nomination an attempt to "defile" the court.[9] Congressman Josh Hawley tweeted that Judge Jackson "has a pattern of letting child porn offenders off the hook for their appalling crimes, both as a judge and a policy maker. She's been advocating for it since law school."[10] This accusation is so outrageous that even the conservative National Review called it "meritless to the point of demagoguery."[11] The "soft on crime" chant is being repeated incessantly, despite the American Bar Association's unanimous rating of Judge Jackson as "well qualified" to serve on the United States Supreme Court[12] and that body's unprecedented rebuttal of claims that her sentencing was biased or favorable to criminals.[13]

So what did we learn from Judge Jackson's appointment and confirmation hearing?

First, that the myth of meritocracy is alive and well in the United States. White America tells people of color that all things are equal now and that if we only pull ourselves up by the bootstraps, we, too, can achieve the American dream. Yet, we saw a woman who has excelled her whole life – who graduated magna cum laude from Harvard University and cum laude from Harvard Law School, who clerked for Supreme Court Justice Stephen Breyer – be reduced to a few talking points about affirmative action and CRT because of the color of her skin. Apparently, "merit" can only be conferred upon those who look like those in power; thus, instead of a meritocracy, we have a "mirrortocracy."

Second, that Black women continue to be undervalued and underappreciated in the workforce. We have all seen the statistics showing women are paid less than men; what these statistics do not account for is intersectionality. While white women are paid 80 cents for every dollar paid to a white man, a Black woman is only paid 63 cents for that same dollar.[14] I raise this here because it shows a pervasive mentality – Black women are treated as less worthy. It is impossible to unsee the anger displayed by the (mostly) white legislators at the mere thought that a Black woman could enter the inner sanctum of true power that is the Supreme Court of the United States. Indeed, despite being arguably more qualified than all of the sitting justices, the gatekeepers insist on keeping the Black woman out.

This is further displayed by the microaggressive comments made by certain members of Congress regarding Judge Jackson. Senate GOP whip John Thune of South Dakota said, "She's been articulate and done a nice job in terms of her tone and demeanor," but would not be voting to confirm her nomination.[15] Senator Ted Cruz of Texas accused her of embracing critical race theory, despite having no proof to support the accusation.[16] Senator Mitch McConnell of Kentucky released a statement calling her an "activist," "soft on crime" and again misrepresented her sentencing record, stating, "The Judge regularly gave certain terrible kinds of criminals light sentences that were beneath the sentencing guidelines and beneath the prosecutors' requests."[17] (This has been debunked by multiple organizations; in particular, Judge Jackson relied on the probation officers' reports when assessing sentencing, a practice that has been deemed proper and is also used by other judges.[18])

"It is impossible to unsee the anger displayed by the (mostly) white legislators at the mere thought that a Black woman could enter the inner sanctum of true power that is the Supreme Court of the United States."

Every Black woman I spoke to had the same reaction to the nomination and confirmation hearing of Judge Ketanji Brown Jackson: initial elation at the nomination, which turned into anger at her treatment in the media and in the hearings. The word used most was "triggering." As Black women, we have all been where Judge Jackson is: doing exceptional work but being devalued and treated as unworthy; carefully measuring our words, checking our emotions and/or holding back tears, lest we be accused of being the "angry Black woman."

When New Jersey Senator Cory Booker came to speak, I realized my hands had been balled into fists for the duration of the hearing because now I released them. I waited with bated breath as he told Judge Ketanji Brown Jackson to "sit back" and catch her breath while he spoke. He told her how historic her nomination to the Supreme Court was, saying to her, "You have earned this spot. You are worthy."[19]

As Judge Jackson finally released the tears that she had been holding back, I cried with her. For that moment, she was seen as a whole person and not as an interloper, attempting to storm the gates into somewhere where she did not belong and was not wanted. It harkened back to the story Judge Jackson told of being at Harvard University, feeling

like she did not belong there, when another Black woman she did not know passed by her and whispered, "Persevere."

Even though Judge Jackson has been confirmed to sit on the Supreme Court, she will have to continue persevering. We now know she is up to the task.

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Endnotes

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2. *Diversity on the Bench*, Brennan Center for Justice, https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/diversity-bench.

3. Sophie Schuit and Jon C. Ragowski, *Race, Representation, and the Voting Rights Act*, Am. J. of Poli. Sci. 61(3), (July 2017), 513–26, https://www.jstor.org/stable/26379507.

4. Martin Pengelly, *Cruz: Biden promise to put Black woman on supreme court is racial discrimination*, Guardian, Feb. 20, 2022, https://www.theguardian.com/law/2022/feb/20/ted-cruz-biden-promise-black-woman-supreme-court.

5. Alicia Bannon and Janna Adelstein, *State Supreme Court Diversity—February 2020 Update*, Brennan Center for Justice, Feb. 20, 2020, https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update.

6. Acronym for Critical Race Theory.

7. Philip Bump, *GOP drops any subtlety in centering the Jackson nomination fight on race,* Wash. Post, Mar. 22, 2022, https://www.washingtonpost.com/politics/2022/03/22/gop-drops-any-subtlety-centering-jackson-nomination-fight-race.

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9. Charles M. Blow, *Demanding That Ketanji Brown Jackson 'Show Her Papers,'* N.Y. Times, Mar. 6, 2022, https://www.nytimes.com/2022/03/06/opinion/ketanji-jackson-tucker-carlson.html.

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It's Not 'Just a Bad Job': Identifying and Combating Labor Trafficking

By Nora Cronin and Estelle Davis

José[1] had been working construction for a number of years when COVID-19 restrictions shut down all nonessential sites. His employer wasn't willing to follow the new rules. He papered the windows of the construction site in Queens, so no one could look in and, after dropping off the workers, he locked the fence around the site, so no one could get out. The workers were not given proper safety equipment, and Jose received chemical burns on his arms – burns so severe he eventually was hospitalized and treated with morphine for the pain. When he told his employer he had been hurt, the employer made fun of him and told him to tough it out.

Violetta, a home health aide, was hired to care for an elderly man who required assistance to stand and perform basic bodily functions. She was promised $20 an hour and a private room in his home in Brooklyn. After she moved in, her pay stopped. She continued to work, caring for the man 13 hours a day, seven days a week. Her employer kept promising to pay her in the future and would give her an occasional $100 to "tide her over." Violetta felt trapped because she was employed in the same location that gave her housing. If she quit she would lose all the income she had as well as her housing, and she was fearful of looking for new housing during the pandemic.

George was hired by a restaurant on Long Island and worked his way up from dishwasher to cook. George knew he wasn't being paid minimum wage, but he was afraid of his boss. The employer would talk about his mafia connections, and how he could make somebody disappear: "I could cut off your head and throw your body in the LI Sound and no one would know."

These employers are clearly in violation of labor protection laws, among other potential illegal acts. But what elevates these situations to the crime of labor traffick-

ing is the ways in which their employers engineered circumstances so the workers felt they had no choice but to remain at their exploitative jobs. In José's case, his employer had taken a copy of his passport upon hiring and threatened to call immigration and have him deported if he did not continue working, effectively coercing him into continued employment. In Violetta's case, the fraudulent future promise of payment induced her to stay, and when she said she wanted to quit, her employer threatened her, saying she would discredit her to the placement agencies and she would not be able to obtain another job. George tried to quit multiple times, but the employer told him he had to stay: "You know what I can do to you. I know where you live." In George's case, the employer's implied and direct threats of violence induced him to stay.

Despite these threats, it may seem incomprehensible why anyone would stay in a job under such horrific circumstances. Taking into account the individual vulnerabilities can help to understand the totality of circumstances. For José, this was his first job in the United States. His boss was his only source of information about José's rights as a worker. When his boss told him he wasn't entitled to overtime because he was undocumented, José believed him. For Violetta, while she had immigration status, she had been homeless before and was terrified of being unhoused while a pandemic was sweeping the city. For George, when his employer said that George could not report what was happening because he didn't have "papers" and the cops would be on the employer's side because he is a U.S. citizen, George believed him. George knew from the news that there had been raids of immigrant workers and believed that speaking to police would open him up for arrest and deportation.

These circumstances are coupled with the more subtle mechanisms of power and control.[2] Labor traffickers often use insults to belittle workers, undermining their confidence and further subjecting them to their control, telling them things like "No one will believe you" and "No one else would hire you." Indicators of potential trafficking can include the employer instructing workers not to talk about what they are told, attempting to isolate them from information that may conflict with what the employer has claimed is true, such as: "You don't have any rights in this country." These employers often exert extreme levels of economic control as well, paying such low wages and in irregular intervals that workers cannot make regular rent payments, despite being fully employed. Trafficking victims have reported being offered substandard housing by the employer,

including an individual who lived in the unfinished basement of a bodega, with only a commercial sink for bathing; another individual slept on the floor of an auto repair shop, breathing in toxins all night. The employers compounded this insult by calling it benevolence and expecting gratitude, "I helped you; you owe me."

Both sex and labor trafficking are defined in federal and state law as involving the use of force, fraud or coercion to compel an individual to work against their will.[3] Media coverage generally focuses on cases of sex trafficking, which has historically been identified in higher numbers by law enforcement targeting commercial sex, hiding the extent to which many vulnerable workers experience forced labor. In New York, many of the larger district attorney offices have units that specialize in handling both labor and sex trafficking cases and often include a social worker. The challenge of proving a criminal case beyond a reasonable doubt should not stop those working with survivors from advocating on their behalf to get the relief to which they are entitled under the law.

For civil cases, the Human Trafficking Pro Bono Legal Center has an excellent hotline for attorneys and a database of past cases.[4] Additionally, immigrant victims of forced labor may be eligible for a U or T visa if they cooperate with law enforcement in the detection, investigation or prosecution of the crime. CAST-LA[5] has excellent training materials for attorneys on U and T nonimmigrant status.

There are a number of tools for identifying potential victims of forced labor.[6] Immigration attorneys should screen clients for past negative employment experiences, particularly when they were recent arrivals, as studies suggest a high percentage of undocumented immigrants experience one or more mechanisms of trafficking.[7]

Interviewing trafficking victims can be highly emotionally charged. It is recommended that interviewers show empathy and compassion for victims, use culturally appropriate practices and techniques that do not re-traumatize the individual. The U.S. Department of Justice Office for Victims of Crime has some excellent resources on trauma-informed practices.[8]

It is also strongly recommended to connect trafficking victims with a social services provider. Victims of forced labor, as with domestic abuse, often feel high levels of guilt and self-blame for the acts that were committed against them. A therapeutic mental health provider can help reframe the feelings of guilt victims may have about why they believed their traffickers, the feelings of self-blame that they should have known better and other trauma resulting from the manipulations of their employers.

If you suspect there is labor trafficking going on in a location, or that an individual has been labor trafficked, you can refer them to the New York State Department of Labor Division of Immigrant Policies and Affairs for an assessment.[9] If you have sufficient identifying information, and believe they meet the definition of trafficking, you can submit a victim confirmation form to the New York State Response to Human Trafficking Program.[10]

An employer's threat to call immigration to coerce an employee into continued work is not "just a bad job." It's against the law. Threatening an employee, falsely promising a future benefit or using actual force or threats of force to coerce them into employment is a crime, and lawyers have an obligation to understand these laws and advocate on behalf of those who are exploited.

This article is part of NYSBA's ongoing efforts to educate lawyers and the public on identifying victims of human trafficking and the laws that exist to help them. This article is a follow-up to the CLE presented in January 2022, "The Impact of COVID-19 on Human Trafficking in the Labor Market." The article and CLE are part of NYSBA's work in conjunction with the New York State Interagency Task Force on Human Trafficking. To access the CLE, please visit https://nysba.org/products/the-impact-of-covid-19-on-human-trafficking-in-the-labor-market.

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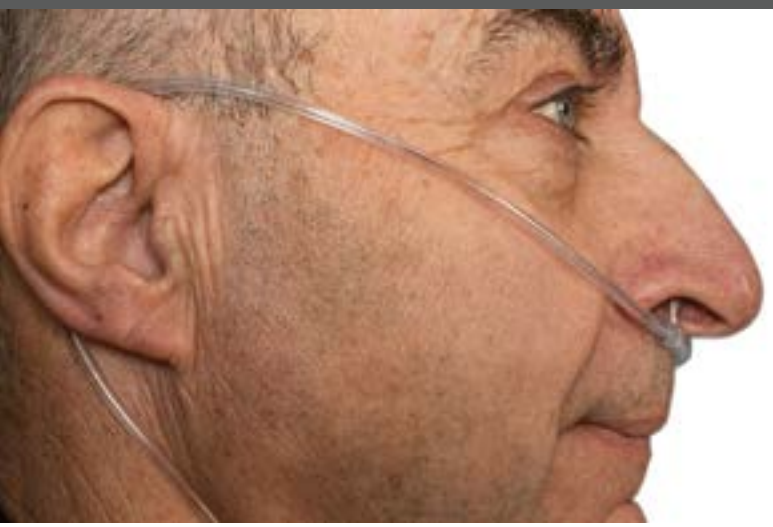
Estelle Davis serves as counsel to the Division of Immigrant Policies and Affairs at the New York State Department of Labor, managing the anti-trafficking program. In this role, she has implemented trauma-informed policies and practices for outreach, investigations, screening, and victim services.

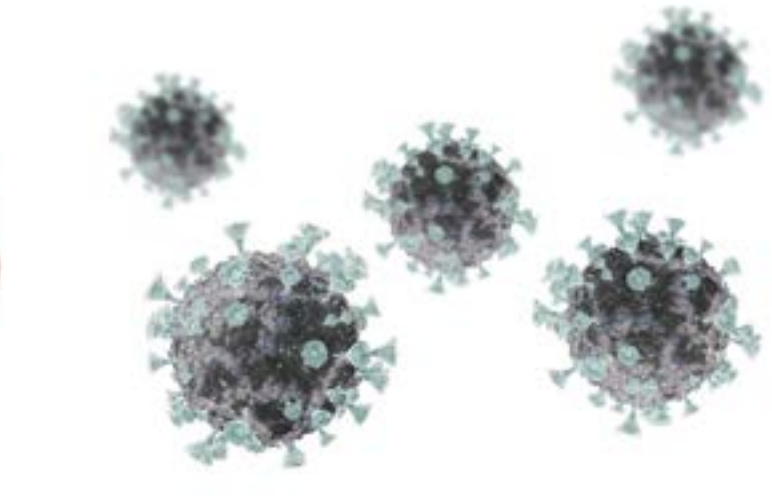
Endnotes

1. Names and details have been changed.
2. *See* Human Trafficking Hotline Power and Control Wheel at https://humantraffickinghotline.org/resources/human-trafficking-power-and-control-wheel.
3. 22 U.S.C. § 7102(9)) and N.Y. Penal Law §§ 230.34, 135.35.
4. http://htlegalcenter.org.
5. http://castla.org/training-resources.
6. *See* Vera Institute of Justice for a long and short form questionnaire at http://vera.org/newsroom/new-tool-makes-it-easier-to-identify-and-assist-victims-of-human-trafficking.
7. *See* Urban Institute Study at https://urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states.
8. https://ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing.
9. https://dol.ny.gov/human-trafficking.
10. https://otda.ny.gov/programs/bria/trafficking.asp.

A Pension Law Pandemic: The Need for a COVID-19 Presumptive Bill To Protect Disabled Front-Line Workers

By Chet Lukaszewski





New York's essential workers are in dire need of a COVID-19 presumptive law to help secure disability pension protections they are being denied. When COVID-19 first struck, and most New Yorkers quarantined, socially distanced and went remote, municipal and civil service workers were required to go to work out on the front lines, and have continued to do so ever since, thereby placing them at a greater risk for COVID-19 exposure and infection than the general public. Many have died, and many more have and continue to become seriously ill. New York could not have gotten through the pandemic without these workers. They include emergency responders like police, fire and EMS, as well as essential workers such as bus drivers, child welfare agents and maintenance personnel. The Legislature must act to protect these essential workers when they are rendered disabled for their jobs by COVID-19 by enacting a presumptive law – in keeping with those previously passed, including one for 9/11 responders – to ensure they receive the disability retirement benefits they deserve.

Numerous presumptive laws have been enacted over the years, upon the realization that specific groups of state and city workers were being disabled as a result of performing their standard job duties, but proof of line-of-duty causation was not possible in seeking disability retirement. Said laws include the "Heart Bill," the "Lung Bill," the "Cancer Bill," the "Infectious Disease Law," and the "World Trade Center Presumptive Law," as they are commonly referred to by those whom they protect (along

with several others that have smaller applications[1]). These laws offer select civil service and municipal workers who become disabled, and must apply for disability pensions, a presumption that specific disabling conditions were the result of their line-of-duty efforts. Many such workers chose their occupations based in part upon a confidence that if disabled by a line-of-duty accident, they and their families would receive disability pension protections. Not only do we owe it to those who have been disabled by COVID-19 to act now, but we must also ensure that highly qualified candidates will continue to fill these essential jobs, knowing they will never be abandoned in a time of need, and they and their families will be protected.

Since the pandemic began, thousands of front-line workers have been rendered permanently disabled for the full-duty requirements of their job titles by the permanent effects of COVID-19. Many are now being denied disability pensions. The New York City and State retirement systems are asserting there is a lack of proof that virus contraction occurred in the line of duty. Lawmakers must act, as they did in the aftermath of 9/11, when they realized that first responders were falling ill, but those getting sick could not provide absolute proof it was a result of their World Trade Center line-of-duty toxic exposures, and as they did in 2020 in response to hundreds of workers dying, with the enactment of a COVID-19 death benefits law. A presumptive pension law for front-line workers who have contracted COVID-19 must be passed to protect those who were put at risk simply by being compelled to do the work all New Yorkers rely on, and who, as a result of contracting COVID-19, are now permanently incapable of doing their jobs.

The first presumptive pension law was passed in New York in 1970, after it was demonstrated that police officers and firefighters were developing heart problems at a far greater rate than the general public; the law was and remains known as the "Heart Bill" (General Municipal Law § 207-k). The legally stated intent of the Heart Bill, which has been expanded over the years to protect other emergency service job titles like EMS and corrections, is to protect members of high-risk occupations whose work involves extraordinary job stress.[2] The law, like those that followed, creates a presumption of causation when a member of service is rendered permanently disabled for their job and must apply for disability retirement. The retirement system can rebut the presumption with "competent evidence." Nevertheless, the presumption is invaluable in assisting workers in making a causal connection between a disability and their line-of-duty efforts.

In a Heart Bill case, if a protected individual develops a disabling cardiac condition while still an active member of service, it is presumed to be the result of their employment and the omnipresent job stress it entails. If the presumption is not rebutted by the retirement system, an accidental "line-of-duty" disability retirement pension is granted.[3] The law is also applied when a member of service dies of a heart ailment while still employed and their family seeks accidental line-of-duty death benefits. As with conditions of the heart, and the other ailments for which presumptive laws were enacted, with COVID-19 there can be no absolute proof of causation. However, there is no denying that essential workers have been placed at a much higher risk for COVID-19 exposure than most "civilian" job titles and ought to be protected in the same manner as has occurred over the years in analogous situations.

The World Trade Center Presumptive Law, or WTC Law (Retirement and Social Security Law § 2(36)), offers first responders diagnosed with recognized WTC ailments such as asthma, RADS, GERD, PTSD, certain cancers and more, the presumption of a causal connection between their illnesses and their line-of-duty efforts, if they were present at the WTC site within the first 48 hours of the 9/11 attacks, when the air was the most toxic; performed 40(+) hours of line-of-duty efforts at the site or other WTC locations like the morgue or landfill, doing rescue, recovery or clean-up work, or were exposed to the WTC dust in other ways such as working on contaminated vehicles. (The WTC Law, unlike other presumptive laws, applies to active and retired members of service.) The "Lung Bill" (General Municipal Law § 207-q), which greatly mirrors the Heart Bill, was enacted when it was realized that firefighters were developing respiratory disabilities at an alarmingly high rate. The "Cancer Bill" (General Municipal Law § 207-kk) was created based upon the high rate of cancer in firefighters resulting from their exposures to carcinogens on a regular basis in their normal course of duty during their careers. The "Infectious Disease Law" (General Municipal Law § 207-p), to which a "COVID Bill" would be in a similar vein, protects EMTs, paramedics, police officers and firefighters who contract HIV, tuberculosis or hepatitis, "where the employee may have been exposed to a bodily fluid of a person under his or her care or treatment, or while the employee examined, transported, rescued or otherwise had contact with such person, in the performance of his or her duties" – a disturbingly common occurrence, which thereafter can have disastrous health consequences. New York's front-line workers are being rendered disabled by COVID-19 and are being told by their pension agencies there is no proof they contracted the virus in the line of duty. They, too, need a presumptive law to secure the pension protections they deserve.

In 2020, the Legislature enacted a COVID-19 line-of-duty death benefits law to assist the decedents of essential workers who lost their lives to COVID-19, in seeking accidental death benefits from their retirement system

(Chapter 89 of the Laws of 2020; S.8427/A.10528). However, it has not yet enacted a disability pension law for those whose health has been forever altered by the virus. The "COVID-19 Death Law" included very specific guidelines, applying only to:

> (A Retirement System) Member who died on or before December 31, 2022 (extended from December 31, 2020), or a Retiree who retired between March 1, 2020 and June 30, 2020 and died prior to September 29, 2020, where such Member/Retiree reported for work outside their home and contracted COVID-19 within 45 days after their last day of work, and whose death was caused by COVID-19 or where COVID-19 contributed to such Member/Retiree's death. Amounts payable are reduced by payments of any Ordinary Death Benefits or option benefit paid to another statutory beneficiary . . . . The deceased Member/Retiree must have contracted COVID-19 as confirmed by a positive laboratory test or as diagnosed before or after the Member/Retiree's death by a licensed, certified, registered, or authorized physician, nurse practitioner, or physician's assistant in good standing. COVID-19 must have caused or contributed to such Member/Retiree's death as documented on the Member/Retiree's death certificate. In the alternative, a licensed, certified, or authorized physician, nurse practitioner, or physician's assistant in good standing may certify within a reasonable degree of medical certainty that COVID-19 caused or contributed to the Member/Retiree's death.

The Legislature would obviously create guidelines in a COVID-19 presumptive pension law, similar to those in the death law and other presumptive laws.

Presumptive laws are essential in disability pension matters where there can be no absolute proof of causation. In each instance one was enacted, it was determined that specific individuals working in public service were being rendered disabled by specific ailments but could not prove it was a result of their line-of-duty efforts. The laws were passed to ensure those workers whose line-of-duty efforts benefit the general public are not denied line-of-duty disability retirement pensions. The Court of Appeals specifically stated in *O'Marah v. Levitt*:

> [T]he purpose of a statute providing for accident disability retirement is to assure the availability of such benefits to an employee who is permanently incapacitated as a result of injuries received in the line of duty. The statute should be so construed as to carry out the desired objective as fairly and reasonably as possible.[4]

A COVID-19 presumptive pension law would be analogous to those that have come before it.

In a disability pension matter involving state and city workers, the applicant has the burden of proving to their pension agency that they are permanently disabled for full duty, and also the cause of the disability.[5] As set forth by the Court of Appeals in *Borenstein v. New York City Employees' Retirement System*,[6] there are two stages in the disability pension application process: (1) Medical board's fact-finding process to determine the "threshold matter" of "whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service;'" and (2) the "recommendation to (an administrative board such as) the Board of Trustees as to whether the disability was 'a natural and proximate result of an accidental injury received in such city-service.'"[7] Under the *Borenstein* standard, medical boards are given great deference in determining whether an applicant is disabled for their job – the first hurdle an applicant must overcome in seeking disability retirement. Thus, only truly deserving applicants are approved for disability pensions.

If a permanent disability for full duty is found to exist, then the agencies' administrative board has the ultimate authority to determine causation, as established by the Court of Appeals in *Meyer v. Board of Trustees*[8] and *Canfora v. Board of Trustees.*[9] When such a board does not find that a member's disability is causally related to a service-related "accident," or is deadlocked on the issue, the Court of Appeals held in *City of New York v. Schoeck*[10] that the applicant is denied accident disability retirement (ADR) and, if eligible, is retired on a lesser ordinary disability retirement (ODR) pension. However, workers are often not eligible for ODR and wind up being "medically separated" (terminated under the civil service law for a medical inability to return to full duty) from service, without a pension.[11] New York's frontline workers who are rendered disabled for their jobs by COVID-19 deserve ADR pensions.

The Court of Appeals, in *Lichtenstein v. Board of Trustees,*[12] *McCambridge v. McGuire*[13] and *Starnella v. Bratton*,[14] defined an "accident" for disability purposes as a "sudden, fortuitous mischance, out of the ordinary and injurious in impact," with "sudden fortuitous mischance" being generally interpreted as "unexpected." It further established therein and reiterated, in *Walsh v. Scoppetta*[15] and *Kelly v. DiNapoli*,[16] that an "accident" must occur in the performance of one's job duties and cannot be a general risk of the work performed. It would seem that being required to go to work and being placed at risk for exposure to a never-before-seen, highly contagious, extremely dangerous virus, during a once in a lifetime pandemic, where essentially the entire country and, to a large degree, the world went into lockdown and quarantine, would fit the definition of an "accident" for disability pension purposes.

If a COVID-19 presumptive law is not enacted, many civil service and municipal workers will be left without a pension, and many others will only receive a much lower level of pension than they would if disabled in the line of duty in a more conventional and less unexpected and out of the ordinary manner than falling ill to a virus that has caused the worst pandemic in modern times. This should not be allowed to happen. As they did in the years following the 9/11 attacks, lawmakers should act to provide ADR where they might have been allowed ODR disability pension benefits or, in some cases, none at all, to essential workers who have suffered serious permanent health effects from COVID-19.

The Court of Appeals' earliest presumptive law decision, *Uniformed Firefighters Association, Local 94 v. Beekman,*[17] recognized the need for the Heart Bill and the presumption it creates to benefit emergency responders. As with the police officers and firefighters stricken by heart issues therein, current frontline workers are placed at a constant risk of contracting COVID-19 in the line of duty and have been every day they have gone to work since the pandemic started. We must not forget that at the start of the pandemic, the virus was at its most dangerous, as we knew very little about it or how to treat those who contracted it; it was the first and strongest variant; and there were no vaccines or immunities developed. Moreover, those workers have always believed that if disabled by their line-of-duty efforts, they would receive the appropriate disability pension protections.

The Court of Appeals' most recent presumptive law decision, *Bitchatchi v. Board of Trustees*,[18] instructed that the WTC Law be applied in a manner highly favorable to 9/11 responders, based upon their being put in harm's way in the line of duty and the serious health consequences that had resulted, but it also noted that retirement systems do have the power to rebut the law's presumption, so as to ensure only deserving applicants receive the protections of the law. If a COVID-19 presumptive law is passed, the retirement systems will surely have the ability to rebut the law's presumption and deny ADR in cases they feel do not fit the criteria specified therein. Perhaps the systems will be permitted to rebut by showing that the applicant was on a vacation or medical or other type of leave when contraction of the virus likely occurred. Perhaps they will have the ability to deny by establishing it is an underlying or preexisting condition by which the applicant is disabled and/or, without said condition, they likely would not have been rendered disabled by contracting COVID-19. The Legislature has the power and the experience in creating such guidelines and criteria in laws of this type to ensure that only deserving applicants will receive the intended protections and benefits. Regardless of what those might be, the time has come for a presumptive law to be enacted, as retirement systems cannot be permitted, as noted by the *Bitchatchi*

court, to deny COVID-19 disability retirement applications by relying solely on the absence of proof of line-of-duty causation.

The guidelines put in place by lawmakers will also limit the law's economic impact on taxpayers. Funding for public pension funds comes from three sources: employee contributions, employer contributions and investment earnings. Employer contributions can be seen as taxpayer monies, as that is what funds said agencies in large part. However, generally, these monies are budgeted for by employers, like police and fire departments, and other city and state agencies, and when the financial markets are strong, employer contributions are reduced as more money is generated by investments. Moreover, following the dot-com bubble "bursting" in 2000 and the financial crisis of 2008, protections were put in place and new pension "tiers" were created to mitigate the effects of financial downturns and lessen the financial burden of public pension systems on the general public. Thus, if a COVID-19 bill were enacted and additional ADR pensions were paid as a result, it would not result in a drastic tax increase and/or loss of services based upon employers' budget monies having been drawn away from operational funding to be allotted to pension contributions.

In March of 2022, a bill was introduced in the United States Senate, seeking to help those living with "long COVID" symptoms. The Comprehensive Access to Resources and Education (CARE) for Long COVID Act, referred to as the Care for Long COVID Act, seeks to expand COVID-19 "long hauler" research and improve access to treatment for those suffering from the lingering effects of the disease.[19] The bill's sponsors have said research indicates more than half of COVID-19 sufferers experience lingering symptoms, including neurological, cardiovascular, respiratory and mental health symptoms, months after their initial infection.[20] For many, their symptoms have lasted well over a year, and even longer, and the virus has resulted in permanent deleterious health effects. If enacted into law, the federal government will accelerate COVID-19 research, improve treatment efficacy, educate long haulers, medical providers and the public, facilitate information sharing and agency coordination, and develop partnerships to provide various forms of assistance to sufferers and their families. These would be excellent broad general steps in helping those whose health has been greatly impacted by COVID-19. However, the State of New York must itself act, to give direct and specific assistance to our workers who were placed in harm's way and became sick and disabled for their jobs by the virus.

Disabled state and city workers currently cannot secure disability pensions based upon the impossibility of providing absolute proof they contracted COVID-19 while on the job. Lawmakers must act to protect these individuals upon whom all New Yorkers rely, who have been rendered incapable of doing their jobs by this terrible virus. Those who went to work to serve the public during the pandemic, whose lives and health have been forever altered, deserve to receive accident disability retirement pensions. Without a presumptive pension law, it seems they likely will not. That is unacceptable and sends a dangerous message to others considering entering into such occupations, which thereby puts all New Yorkers at risk. As was done for 9/11 responders, and those in need of such protections by prior laws of its type, a COVID-19 presumptive bill must be enacted so no disabled frontline worker is denied the appropriate disability pension benefits.

Chester Lukaszewski has over 20 years of disability pension law experience. He formed Chet Lukaszewski in 2008. He has assisted hundreds of clients seeking disability retirement benefits and litigated a case in the New York State Court of Appeals that decided how the World Trade Center presumptive law should be applied.

Endnotes

1. General Municipal Law (GML) § 207k ("The Heart Bill") was amended to include certain types of strokes suffered by members of police and fire departments in certain cities, and GML § kkk was enacted to apply to Parkinson's disease for fire department members in cities with a population over one million.

2. *See Uniformed Firefighters Ass'n, Local 94 v. Beekman*, 52 N.Y.2d 463, 472–73 (1981); *see also Lunt v. Ward*, 159 A.D.2d 404 (1st Dep't 1990); *Lunt v. Kelly*, 227 A.D.2d 200 (1st Dep't 1996), *app. dismissed*, 89 N.Y.2d 981 (1997), *app. denied*, 90 N.Y.2d 803 (1997).

3. *Id.*; *see also McCarthy v. Board of Trustees*, 306 A.D.2d 156 (1st Dep't 2003); *Bitchatchi v. Board of Trustees, Et al.*, 20 N.Y.3d 268 (2012); *Ploss v. Kelly*, 113 A.D.3d 531 (1st Dep't 2014).

4. 35 N.Y.2d 595, 597 (1974).

5. *See Evans v. City of New York*, 145 A.D.2d 361 (1st Dep't 1998); *see also Archul v. Board of Trustees*, 93 A.D.2d 716 (1st Dep't 1983), *aff'd*, 60 N.Y.2d 567 (1983); *Christian v. New York City Employees' Ret. Sys.*, 83 A.D.2d 507 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 841 (1982).

6. 88 N.Y.2d 756 (1996).

7. *Id.* at 760–61.

8. 90 N.Y.2d 139 (1997).

9. 60 N.Y.2d 347 (1983).

10. 294 N.Y. 559 (1945).

11. *See also Meyer* at 144–45; *Hallihan v. Ward*, 169 A.D.2d 542 (1st Dep't 1991).

12. 57 N.Y.2d 1010 (1982).

13. 62 N.Y.2d 563 (1984).

14. 92 N.Y.2d 836 (1998).

15. 18 N.Y.3d 850 (2011).

16. 30 N.Y.3d 674 (2018).

17. 52 N.Y.2d 463 (1981).

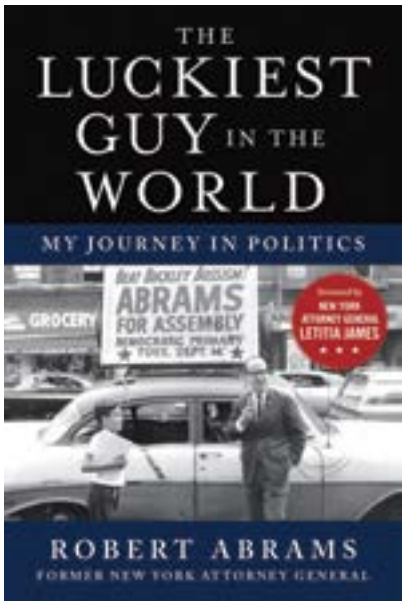
18. 20 N.Y.3d 268 (2012).

19. *Sen. Tim Kaine, Who Has Long COVID, Introduces Bill to Help Long Haulers*, Time, Mar. 3, 2022, https://time.com/6154397/tim-kaine-long-covid-19-bill.

20. Senator Tim Kaine Press Release: *Kaine, Markey & Duckworth Introduce Bill to Help People Living With Long COVID*, Mar. 2, 2022, https://www.kaine.senate.gov/press-releases/kaine-markey-and-duckworth-introduce-bill-to-help-people-living-with-long-covid.

An Interview With Robert Abrams: New York's Game Changer

David Miranda, host of the "Miranda Warnings" podcast, spoke to Robert Abrams about his years as New York State attorney general and about his recently published book, "The Luckiest Guy in the World," a memoir that takes the reader through his three decades in politics. This is an edited version of the podcast.



Abrams was elected New York State attorney general, the first Democrat to win in 40 years, in 1978. He was known as a champion of civil and consumer rights and environmental causes. In 1992, he ran in the Democratic primary for the U.S. Senate, defeating former Congresswoman Geraldine Ferraro, former Congresswoman Elizabeth Holtzman, and Al Sharpton, but ultimately losing to incumbent Al D'Amato. After leaving the attorney general post, he went into private practice, but still served several state governors in various roles. In 2009, the Justice Building in the Empire State Plaza in Albany was renamed the Robert Abrams Building for Law and Justice.

MIRANDA: You transformed the office of attorney general. Talk a bit about how you changed the role.

ABRAMS: The original role of the attorney general was to defend the king of England after he established colonies in the New World. Each colony had a lawyer representing the interests of the sovereign. After the American Revolution, the elected governor of each state appointed a lawyer to represent the state. Decades later, in New York, the constitution was changed to have the attorney general elected by the Legislature, and then in 1847 changed again to have the attorney general elected by the people.

In the 1960s and '70s, some attorneys general began their own investigations and my predecessor, Louis Lefkowitz, established civil rights, consumer and environmental bureaus.

I came to office as an activist and wanted to maximize the office for the people of the state. Let's launch major lawsuits that could return significant amounts of money to consumers and compel companies to clean up toxic waste sites that poison the environment and endanger the public well-being. Let's vigorously enforce antitrust laws exposing bid-rigging and other monopolistic practices so New Yorkers can save hundreds of millions of dollars each year by having the opportunity to buy products with maximum choice at the lowest price resulting from free and open competition. I also thought it was important to strongly enforce civil rights laws in cutting-edge cases. To do this vital work, we would need talented and dedicated lawyers and so I was committed to recruiting people on their merits. Even though I was elected, I didn't want the patronage process to prevail. For the first time in the history of the office, I appointed a director of recruitment whose mandate was to professionally evaluate the resumes we received and to conduct ongoing training programs. We never inquired into people's political affiliation and did not allow anyone working in the attorney general's office to make contributions to my campaign. Our office became a magnet for outstanding lawyers, many of whom left higher-paying jobs in the private sector.

It happened that I was in office when Ronald Reagan was elected president and he believed in laissez-faire government. He believed in getting the government off the backs of the business community. And so, he put the consumer watchdogs to sleep, the environmental watchdogs to sleep. People couldn't count on the federal government being involved in those important issues. So, as president of the National Association of Attorneys General, I reached out to other attorneys general, Republicans and Democrats, from small states and large states, and we worked together launching unprecedented multi-state investigations and prosecutions. I think we changed the office forever.

MIRANDA: As a result of the work that was done in the early '80s, attorneys general around the country are now more influential. You had a fascinating start. You were elected to the state Assembly at the age of 27. By the age of 31, in 1970, you were elected Bronx borough president. You were a reformer. You didn't come up through the political machine. How did you get involved, and how did you rise so quickly?

ABRAMS: Life is serendipitous. You can't totally plan your life. I never dreamed that I would be an elected official.

It started in an interesting way. I went to Columbia College, and I took a government course with a very prominent professor, David B. Truman. He gave each student in the class an assignment to write about our congressional district. What are the boundaries? Who lives in the district? What's the racial, ethnic, religious makeup? He also asked us to interview our representative. My congressman happened to be Charlie Buckley. He was the boss of the Bronx, a 30-year veteran of the House, the chairman of a major committee, Public Works. I tried to reach out to him by calling his district office in the Bronx but I discovered there was no district office. I

Abrams' mother and father, Ben and Dotty Abrams, in their Bronx luncheonette in 1951

Court of Appeals Judge Lawrence Cook administering the oath of office for Abrams as attorney general of New York

called his office in Washington. I left a message the first time, the second time, the third time, and no one called me back. I had to submit the paper without interviewing my congressman.

I graduated and went on to law school at NYU, and while I was there Francis Adams, a former police commissioner, invited some NYU law students to his home and said, "Look, you are all going to become lawyers, but it's not enough just to be a lawyer. You should be involved in your community. You should be involved in politics. You should try to be engaged in reform. You should try to improve your community and our society."

A couple weeks after that reception, I got a phone call from the Bronx Pelham Reform Democratic Club in my Assembly district, and they said, "We heard you went to that reception. We'd love to get you involved in a campaign." And they said, "We're challenging Charlie Buckley in the primary." I said, "Oh, that S-O-B, you got me." I worked for the candidate who was running against Charlie Buckley and it all emanated from that.

MIRANDA: Would you please talk about your unsuccessful campaign to defeat U.S. Senator Alfonse D'Amato?

ABRAMS: I wound up in a very close race on election night against D'Amato, an incumbent whose fundraising and saturation of the airwaves was overwhelming. I lost by 1% with over 6 million votes cast. It was a handful of votes that really was the margin of difference, but I'm an optimist. You don't dwell on setbacks. You've got to move forward. You put it behind you and you go forward and try to live your life, still trying to be productive. And that's what I did.

MIRANDA: Let me ask you, is there an elected leader in New York today that you would call a "Bob Abrams" type political leader? Is there someone that you feel embodies what you had?

ABRAMS: I had my own role models. I admired Bobby Kennedy. I saw him as a man who was capable of change. He wasn't sensitive to civil rights issues at first, but he shifted and became a passionate voice for the underdog. When Martin Luther King Jr. was assassinated, Bobby Kennedy was so eloquent that night, trying to keep calm in the community, showing sensitivity. I was in law school when President Kennedy got elected; a handsome man, eloquent, inspiring young people to participate in the building of our country.

I think the current holder of the attorney general's office, Tish James, is a trailblazer, the first African American woman elected to statewide office in New York. And she's maintained the great tradition of that office, keeping it as a leader among attorneys general around the country. During the Trump era, we saw the curtailment of people's rights, a cutback in environmental enforcement, a cutback in consumer enforcement and civil rights protection, and Tish James brought lawsuits to fight against that. She's shown a lot of guts, a lot of independence, and she's also shown it in terms of standing up against the governor.

Comptroller Tom DiNapoli is also a great role model. He's competent, honest, decent, independent and hard working. He's a first-rate public official.

MIRANDA: I know you're a big Yankees fan. When you were Bronx borough president in 1970, the Yankees were thinking about leaving the Bronx, and you had a role in keeping them there. Tell us about how you kept the Yankees in the Bronx when they were thinking about going to New Jersey.

ABRAMS: I ran in a primary against the party bosses, against the machine for the Democratic nomination for Bronx borough president. And I won. And I kept reading in the newspaper that the Yankees were making threats that they might leave, and we had the backdrop of the Brooklyn Dodgers and the New York Giants leaving years before, and the football Giants were threatening to leave. And I said to myself, oh my God, I'm going to become the borough president of the Bronx, and the

Abrams with Governor Nelson Rockefeller at a bill-signing ceremony in the Capitol's Red Room for one of the bills Abrams sponsored in the Assembly

Abrams providing testimony and support with activists concerning legislation allowing women the right to choose

Yankees, this world class institution, is going to leave . . . I can't have that be my legacy.

So, after I won the nomination, I called up Michael Burke, the president of the Yankees, and I said, "Mr. Burke, my name is Robert Abrams. I hope you don't feel this is audacious of me, but I just won the primary and I'm going to be elected to borough president because the Bronx is overwhelmingly Democratic. I've been reading the papers and I just want to know, is it true that the Yankees are thinking about leaving the Bronx?"

He said, "Yeah, yeah, we've got a lot of problems here and the mayor's not taking care of us." I said, "Can I come down to see you and talk about this?" And he said, "Sure." So, I met with him and heard all the grievances about how the stadium was deteriorating, how people who were coming to the stadium weren't feeling secure, how they needed more police protection, how they needed better road access, how they needed parking spaces. And he was telling me that he complained to the mayor, but nothing was ever done.

I said, "Look Mr. Burke, please, please, don't do anything precipitous. I'm going to be your ally. I'm going to fight for you." And I went down to see the mayor [John Lindsay] after the election, and I said, "I'm here to talk about the Yankees." And I laid out all the reasons why we had to do everything possible to keep the Yankees. They were an economic generator. They were a source of prestige for the city and the Bronx. It would be devastating to the Bronx if the Yankees left. And I said, "Mr. Mayor, you owe me one. I bolted the party ticket – rejected the Democratic nominee Mario Proccocino and endorsed you on the liberal party line." So I made this whole case. And by the end of the meeting, he said, "What you say makes a lot of sense." And I put a proposition on the table. I said, "So look, Mr. Mayor, the city gave a commitment to Queens to build a new stadium for the Mets. They put $24 million in the budget to build a stadium. And I think the Bronx deserves no less. Put $24 million in the budget so that we can rehabilitate Yankee Stadium and do what's necessary to give confidence to the Yankees that there's a future here as their home."

Negotiations followed and the stadium was rehabilitated, and the Yankees stayed and, obviously, they are still the most extraordinary sports franchise in the world.

MIRANDA: Can one person have an impact in bringing about change? What is your message to young people today who may be disillusioned?

ABRAMS: Margaret Mead, the great sociologist and anthropologist, said, "Never doubt that a small group of thoughtful committed citizens can change the world. Indeed, it is the only thing that ever has." I found that in my work with communities, a small group of dedicated people can make a difference and I found in my campaigns as well, that a small group of dedicated people can bring about an unexpected upset.

My message to young people today is you can't drop out; you've got to roll up your sleeves, get involved, be on the front lines, run for the school board, work on the staff of a not-for-profit – seek public office, because we need your idealism, we need your energy, we need your commitment to make this a better world.

David P. Miranda is general counsel to the New York State Bar Association. He served as NYSBA president from 2015 to 2016.

Why Law Firms Need To Make ESG a Priority

By Carol Schiro Greenwald

ESG[1] is corporate America's current social responsibility response to people's widespread fears, anxiety and feelings of discrimination. The initials stand for three nonfinancial factors that, together, "assess how an organization impacts on the environment and society."[2] It asks companies to look beyond narrow shareholder financial interests to the wider community's greater good issues.

ESG expands the idea of corporate responsibility to include the values, wishes and needs of employees, suppliers, customers and communities affected by the entity's processes and products. Law firms are part of the corporate supplier category, working with their clients to incorporate the 'S' into meaningful DEI initiatives, the 'G' into their governance, and the 'E' into measurable actions to decrease their corporate carbon footprint.

Relative Importance

ESG's importance to corporations is evident in the placement and attention given to the subject in IBM's table of contents for its summary report sent to shareholders ahead of the 2022 annual meeting. The report contains a separate section summarizing ESG initiatives, and the table of contents has a special "ESG Highlights" box showing the page numbers where key aspects of ESG are explained.[3]

However, it seems to be seen as a less important trend in the legal world, judging by its treatment in several reputable 2022 trend reports:

- The acronym ESG does not appear in the "2022 Report on the State of the Legal Market," Thomson Reuters Institute with Georgetown Law Center on Ethics and the Legal Profession.
- In the "2022 Client Advisory" from Citi Private Bank and Hildebrandt Consulting LLC, ESG is mentioned in one sentence under the "growth opportunities and challenges by practice area": "Data/technology/cybersecurity and environmental, social and governance (ESG) will be practice areas to watch." (p. 14)
- In the "2022 The Future of the Legal Industry" from Bloomberg Law, ESG is mentioned in one sentence under "In-House Legal Departments Trends." Under "From Legal Adviser to Strategic Business Partner," the last sentence says, "Moving forward as strategic partners, in-house legal departments will also be expected to prioritize diversity, equity, and inclusion (DEI) programs and environmental, social, and governance (ESG) initiatives, as these issues are becoming of critical importance to organizations." (p. 11)

Clients Want Their Law Firms To Walk the ESG Walk

The call for law firms to tackle ESG for themselves and to create integrated attorney groups to answer clients' ESG questions is coming from all sides. A key outside impetus to understand ESG comes from companies that want and need lawyers' skills to implement ESG goals. A key internal impetus is the current talent retention crisis and the need for law firm leadership to address workers' interest in shared values.

Clients and prospective clients want to see law firms "walk the walk and talk the talk." Prospective clients are "asking questions about your [the law firm] environmental practices, your ethics and your sustainable procurement practices."[4] They want to hire lawyers who have worked with ESG in their own firms to help them create their company's ESG structures and policies. "It's really important for firms to be able to say they have also integrated that [ESG] into who they are as a law firm."[5] In the 2021 Landscape Survey conducted by the Law Firm Sustainability Network, 87% of respondents said that they received RFPs that included questions about firms' environmental efforts.

Internally, the post-pandemic "Great Resignation" has led to serious talent retention issues. Lawyers and administrative staff both want more than money, even though that is being thrown at them. They want their employers to share their values about diversity and inclusion, environmental sustainability and access to justice. Law firms struggling to respond appropriately to post-pandemic employee demands for respect, transparency and shared values see ESG as a way to meet these demands.

Most law firms already have separate pieces of ESG in place, e.g., diversity efforts, local community outreach, pro bono assignments. Even before they expand their ESG initiatives, law firms can demonstrate to their corporate clients that they mirror their efforts by bringing the pieces together in a published formal statement.[6]

A broadly distributed and publicized ESG statement not only helps to retain corporate clients, often expanding work from them, it also becomes the basis for marketing efforts to add clients, as "[d]rafting a formal ESG statement would require little effort but provide a competitive advantage in attracting clients and holding firms accountable to the ideals that drive them."[7]

ESG Practice Groups

Large international firms are also being asked to create practice groups to guide clients' ESG activities, financial investment risk assessments and responses to the ever-growing crop of national and international regulations. According to a 2020 desktop survey by The Blended

Capital Group, over 50 law firms worldwide offer integrated ESG services. For example:

- Clifford Chance has an ESG board composed of lawyers from finance, M&A, employment law and litigation practice groups plus geographic representation of the firm's international network.[8] Other relevant ESG expertise areas include corporate governance, capital markets, pensions and environmental law.
- Freshfields "structured its sustainability practice to advice [sic] clients on four key areas which [the firm] sees as strategic priorities and to which the firm brings particular technical legal know-how of the laws and regulations."[9] The four areas are: climate change, sustainable finance, human rights and corporate governance.

ESG Standards, Measurements and Reporting Requirements

Norman Clark, quoted in an article in Law360, says: "One of the clearest markers of firms with a strong approach to social impact is a written strategy incorporating it into their strategic objectives."[10] These firms have thought through and can answer questions such as: What are your ESG-related goals? What targets will you go after? Where does leadership stand on this? How much time, money and resources are you willing to invest in ESG initiatives?

Many firms begin their ESG programs with sustainability efforts because the targets are obvious, low-hanging fruit that can almost immediately yield results. "The key to law firm sustainability is taking a measured approach, and systematically looking at firm functions and departments to learn where the biggest impacts can be made using measurements and engagement as a guide."[11] A growing number of education opportunities, self-assessment tools and measurement techniques are available. These include:

- The NYSBA Business Law Section's ESG Committee, tasked with educating firms about best practices for developing the two sides of ESG involvement;
- The Law Firm Sustainability Network, which provides knowledge, standards and measurements about environmental sustainability programs to law firm and law department members and the general public (one of their courses identifies the "10 elements of highly effective sustainability programs");[12] and
- The International Bar Association Law Firm Management Committee, which has produced an "ESG Toolkit for Law Firms" (2021).

The Law Firm Sustainability Network ties these efforts back to the reasons for embracing ESG:

> As sustainability continues to become increasingly more important to clients, employees and communities, it will become more integrated into law firm business strategy and planning, not only employing [sic] for cost-cutting measures and operation efficiencies, but for talent retention, client relationships and strategic advantages in the long-term growth of the firm.[13]

Law firms of all sizes, even if they don't serve ESG-motivated clients, per se, should think about incorporating some ESG goals into their mission:

> Firms that are slow to adapt to the new reality are ensuring that they will be left behind by firms that are able to align their purpose with those of their clients, employees and communities. The world is moving in one direction: more sustainability, more accountability, more responsibility. You can no longer be just left alone and pretend that nothing's happening around you.[14]

Carol Schiro Greenwald is a marketing and management strategist, trainer and coach. She is the author of "Strategic Networking for Introverts, Extroverts and Everyone in Between" (ABA, 2019) and "Build Your Practice the Logical Way – Maximize Your Client Relationships" (with Steven Skyles-Mulligan, ABA, 2012).

Endnotes

1. Definition of ESG: E stands for environmental, defined as "the effects on the physical, natural environment," such as climate change, extraction and use of raw materials, carbon emissions, waste and pollution and effects of human activity on biodiversity. S stands for social, defined as the entity's impact on employees and other communities including shareholders, suppliers and clients. It includes factors such as respect for human rights, consumer protections, data protection and privacy, diversity and inclusion, employee relations and working conditions, health and safety. G stands for governance, which includes "making sure there are systems in place to ensure accountability within a corporation." It involves factors such as involved leadership, executive compensation, board diversity, audits and tax strategy, transparency of processes and procedures, whistleblowing and anti-bribery/corruption policies.

2. Bristol Law Society, *Landmark Information: What is ESG and What Does It Mean for Law Firms*, https://www.bristollawsociety.com/what-is-esg-and-what-does-it-mean-for-law-firms.

3. IBM, 2022 Notice of Annual Meeting and Proxy Statement.

4. Jacqueline Bell, *As Social Impact Becomes the Test, Firms Asked To Step Up*, Law360.com, Nov. 1, 2021, https://www.law360.com/articles/1434747/as-social-impact-becomes-the-test-firms-asked-to-step-up.

5. *Id.*

6. *Id.*

7. *Id.*

8. Sophie Yantian, *Why ESG Is Rising to the Top of the Agenda for City Law Firms*, Legal Cheek, Aug. 27, 2021, https://www.legalcheek.com/lc-careers-posts/why-esg-is-rising-to-the-top-of-the-agenda-for-city-law-firms.

9. Natalie Runyon, *Increase in Clients' ESG Transparency Is Driving Law Firms To Create New Sustainability Practice Areas*, Thomson Reuters, June 9, 2021, https://www.thomsonreuters.com/en-us/posts/legal/esg-transparency-law-firms.

10. Norman Clark, quoted in Jacqueline Bell, *supra* note 4.

11. *Id.* at 8.

12. Gayatri Joshi, *Law Firm Sustainability: Creating a Robust Sustainability Program, 10 Elements of Highly Effective Programs*, GLA ALA Magazine-Leadership Exchange, Fall 2018, 8–14.

13. *Id.* at 14.

14. Olga Ivannikova, quoted in Jacqueline Bell, *supra* note 4.

Redefining Family: Emotional Damages and the Grieving Families Act

By V. Christopher Potenza and Alice A. Trueman

There has been a palpable movement in the courts and in the Legislature to expand damages in cases of emotional pain and anguish and wrongful death.

The New York Court of Appeals, in the case of *Greene v. Esplanade*,[1] rendered a decision in February 2021 to expand recovery rights to a grandparent under the "zone of danger" doctrine.

The case involved the tragic death of a 2-year-old child resulting from pieces of a building façade that had broken off and fallen onto the child. At the time of the incident, the child's grandmother was next to the child as debris suddenly fell from the building, and the plaintiff grandmother was herself struck by debris. The grandmother had initially filed a lawsuit based on two causes of action sounding in negligence and wrongful death. However, the grandmother moved to amend the complaint to add another cause of action based on negligent infliction of emotional distress pursuant to the zone of danger doctrine.

The zone of danger doctrine provides for a right of recovery for infliction of emotional distress where one is threatened with bodily harm as a consequence of a defendant's negligence and flows only from the viewing of death or serious physical injury of a member of that person's "immediate family." The term "immediate family" was at the crux of the debate in the *Greene* case.

Procedural History of the *Greene* Decision

The case was first heard by the Supreme Court, King's County. The grandmother argued that she should be classified as an "immediate family" member of the decedent child based on the "unique and special nature" of the relationship between a grandparent and a grandchild. The Supreme Court granted plaintiff's right to amend the complaint based on the zone of danger doctrine and concluded that based on the "unique and special" relationship between the grandmother and grandchild, the plaintiff should be considered an "immediate family" member of the child. The court noted the specific recognition of special custody rights of grandparents with respect to grandchildren in support of its decision.

Defendants appealed to the Appellate Division, Second Department, arguing that grandparents are excluded from the designation of "immediate family." The Second Department reversed the lower court, holding that the grandmother was not "immediate family" so as to permit her to recover on a claim that sounded in negligent infliction of emotional distress based on the zone of danger doctrine. The Second Department relied on the 1984 case of *Bovsun v. Sanperi*,[2] which stood for the proposition that the term "immediate family" encompasses only spouses and their children. The appellate court therefore concluded that the grandmother's proposed amendment was patently devoid of merit and that leave to amend the complaint should be denied. The majority decision referenced several cases that highlighted the courts' steadfast adherence to the definition of "immediate family" as described in *Bovsun.* In *Trombetta v. Conkling*,[3] the Court of Appeals held that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt where the niece's mother had died when the niece was 11 and the aunt had been her sole maternal figure. Further, in *Jun Chi Guan v. Tuscan Dairy Farms*,[4] the Second Department rejected a grandmother's argument that she should be considered immediate family and de facto maternal figure, where her grandson was killed in a stroller she was pushing, even though she spent the most time with the infant during his waking hours.

The Second Department's dissenting opinion in *Greene* provided a comprehensive historical overview of emotional damages and applied pertinent law to the facts of this case. The dissent examined the seemingly arbitrary and unjust results that followed from the application of the term "immediate family" as limited by *Bovsun*, and further stated that the current state of the law does not reflect modern familial structures and modern societal norms. Further, the dissent referenced the concept of the common-law system as a living mechanism – one that is ever-growing and responding to the surging reality of changed conditions. The dissent provided that where a rule produces arbitrary results, it is the duty of the court to inquire into the rule's continued viability and, if appropriate, reformulate the rule or abolish it completely.

As addressed in the dissent, it is not surprising that the definition of "immediate family" as applied by the courts in years past has evoked controversy and repeated challenges. While many modern families fall into the traditional two spouse and child/children structure, a great many families fall into untraditional models which include children being raised by grandparents, aunts, uncles, siblings, stepparents, and more.

The Court of Appeals Decision of Feb. 18, 2021

While reversing the lower court's decision, the Appellate Division also granted leave to appeal to the Court of Appeals. The court ultimately decided that the grandmother in this case should be classified as an "immediate family" member of the decedent grandchild. While the court noted the "historically circumspect approach" to expanding liability for emotional damages, the court based its decision on the increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense. The court further indicated that the *Bovsun* did not provide an exhaustive list of family members that could qualify as "immediate family."

The majority, however, strongly emphasized that its decision does not establish "outer limits" to the definition of "immediate family." In fact, the court indicated that it was tasked with determining only whether the grandmother in this case warranted a classification as a member of the "immediate family." The court even referenced the fact that the decisions in *Bovsun* and *Trombetta* also refused to set "outer limits" of the term.

The concurring opinion agreed with the majority decision yet simultaneously rebuked the decision stating that the "Court has missed the moment." The concurring justices indicated that the court could have discarded the "immediate family" requirement altogether, which is premised on antiquated definitions based strictly by marriage and degrees of consanguinity. Further, the concurring opinion argued that the limitation of "immediate family" as provided by *Bovson* is underinclusive in that it assumes that only spouses and certain relatives have the type of emotional attachment to the third-party victim that justifies recovery.

"New York's Wrongful Death Statute was enacted in 1847 when the family structure was far different from that of today."

The significance of the Court of Appeals decision in *Greene* is that it has become apparent that the court is willing to review the classification of additional types of plaintiff family members eligible for emotional damages. It should be anticipated that plaintiffs will seek to test the "outer limits" of the "immediate family" definition. Notably, various states such as California, Oregon, Texas and New Jersey have either abandoned the "immediate family" rule or expanded to more permissive rules as to who may recover under such circumstances. In considering the nuances of what constitutes familial affection, familial love and bonds that comprise family, it is understandable why New York courts may wish to move to a more permissive and inclusive test to consider the nature of a bystander's relationship to a victim.

Why did the Court of Appeals not discard the "immediate family" requirement altogether? Also, why has the Court of Appeals been so reluctant to set the "outer limits" of the phrase of "immediate family?"

Some would argue that by either discarding the rule altogether or by expanding the outer limits, the court may be allowing the floodgates to open to all types of plaintiffs, with potentially tenuous affections or sentiments to the victim. However, the courts are well adept in ferreting out proper individuals to recover damages in other areas of the law, so it is not clear why this area would be any different. Others may argue that the nuanced nature of familial bonds and relationships are too difficult to define, thus leaving an amorphous and open interpretation as the best solution to evaluate the bystander-victim relationship on a case-by-case basis, rather than a sweeping change of approach.

However, there is likely a historical component to the reluctance of the court to either discard or set "outer limits" of the "immediate family" rule. While the zone of danger doctrine is a common-law doctrine, it is still borne out of an era where the courts and the Legislature found it to be against public policy to recover for damages arising purely from mental trauma or anguish in the absence of physical contact or injury. In 1961, the court first recognized that a plaintiff could recover on a claim for damages based on mental distress without physical injury.[5] Essentially, the court determined that if the victim plaintiff could show that the defendant breached a duty of care and that the said breach resulted directly in the victim plaintiff's emotional harm, even absent physical injury, it was a compensable claim. However, such recognition only pertained to the direct victim. Derivative claims of bystanders, regardless of their familial connection, were not recognized as having any merit despite them suffering emotional distress as a result of witnessing the injury or death of another. The *Bovsun* decision in 1984 then carved out a loophole to this general denial of recovery of derivative claims of emotional distress or anguish under circumstances where the bystander was an "immediate family" member and was confronted with fear of physical harm or injury while being in the proximity of danger, coupled with the mental anguish and trauma of witnessing the injury or death of a loved one. Adding the physical danger component to the doctrine is what makes the derivative claim viable.

In *Greene*, the concurring justices urged the court to use its power to change both old rules of law as well as outdated common law rules, and cited the case of *Woods v. Lancent*, which provided:

> [W]hile legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than "with some outworn and antiquated rule of the past." No reason appears why there should

not be the same approach when traditional common-law rules of negligence result in injustice.[6]

However, the hesitancy of the majority in *Greene*, *Bovson* and *Trombetta* to define the "outer limits" of "immediate family," or to reject such limitation altogether, may be rooted in the historical truth that the legal landscape in respect to the areas of mental anguish, mental trauma and emotional distress, has overarchingly been based on a framework and tradition of limiting those who can recover and what can be recovered.

The Grieving Families Act and the Push for Reform

A similar theme of the curtailing of damages for mental anguish and trauma can be seen in New York's Wrongful Death Statute. The current Wrongful Death Statute is codified in the Estates, Powers and Trust Law. EPTL 5-4.4(a) states that the damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees. The distributees of a decedent are those who can take, per the statute, of the decedent's estate when the decedent dies intestate (without a will). New York's Wrongful Death Statute was enacted in 1847 when the family structure was far different from that of today. EPTL 5-4.3 indicates that a distributee can recover compensation for pecuniary injuries resulting from the decedent's death. The current law is restricted to what the victim would have financially contributed to certain family members left behind.

This means that a whole host of victims, who die at the hands of the negligence of another, are considered practically worthless under the law in the event of wrongful death. Loved ones who suffer a death of their family member who is a retiree, disabled individual, a child, stay at home-parent, grandparent, is in between jobs, or makes a meager income, are faced with the harsh reality that their grief will not be compensated.

It should be noted that, unlike the common-law doctrine of zone of danger, a wrongful death action in New York is purely a statutory right and cause of action. The Court of Appeals, in *Liff v. Schildkrout*,[7] in denying a husband's claim for loss of consortium within a wrongful death action concerning his deceased wife, held that the Legislature, by including the pecuniary injury limitation in its statutory scheme, prevents the courts from recognizing loss of consortium within a wrongful death action. The court explicitly stated that if a change should be made, it is for the Legislature, and not the courts, to make. This again displays the court's sensitivity as to the intent of the Legislature and its careful efforts to not broaden the interpretation of the statute beyond its original aim.

In response to this current state of the law, which is leading to what some may argue is disparate and inadequate compensation to family members of the deceased, a new bill labeled the Grieving Families Act (S.74-A/A.6770) has been introduced to the Legislature. The bill provides for an avenue for damages to be awarded for grief and anguish as a result of the wrongful death of a victim, separate and apart from any pecuniary loss.

Specifically, the proposed bill provides the type of damages that may be awarded to the person for whose benefit an action for wrongful death is brought, i.e., grief and anguish; loss of love, society, protection, comfort, companionship and consortium; reasonable funeral expenses; reasonable expenses for medical care, treatment prior to death; pecuniary injuries due to loss of services, support, inheritance; and loss of nurture, guidance or education. The current version of the bill, which has been sent to the Senate Judiciary Committee, adds an important new amendment to extend the statute of limitation for wrongful death from 2 to 3 1/2 years from the date of fatality.

If enacted, the proposed bill would lead to a vast expansion of the damages allowed for the pain, anguish and grief of loved ones as a result of a victim's wrongful death and would bring New York in the company of the 40+ other states that have enacted similar legislation.

In sum, both the courts and Legislature are reviewing and taking steps toward expanding the compensation available *to family members* for emotional injuries suffered due to the injury or loss of a loved one. We should be on close watch for further developments in this area as the legal landscape is evolving beneath our feet.

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Endnotes

1. 36 N.Y.3d 513 (2021).
2. 61 N.Y.2d 219 (1984).
3. 82 N.Y.2d 549 (1993).
4. 24 A.D.3d 725 (2d Dep't 2005).
5. *See Battalla v. State of New York*, 10 N.Y.2d 34 (1961).
6. 303 N.Y. 349, 355 (1951), *quoting Funk v. United States*, 290 U.S. 371, 382 (1933).
7. 49 N.Y.2d 622 (1980).

Title IX's 'Deliberate Indifference' Hurdle

By James A. Johnson and Julie A. Gafkay

Imagine you are a college student who believes that campus officials aren't taking your sexual harassment complaint seriously. You go to court to seek justice, confident the law is on your side, only to find the court doesn't see your case your way. Or, as one court said in ruling against a plaintiff, "You can't always get what you want."

That case, which involved Stony Brook University, the State University of New York, is indicative of the hurdle that college students across the nation encounter when they sue campus administrators who they believe have turned a blind eye toward their claim of sexual harassment or assault. This article examines that hurdle at both the state and national level.

The New York State Experience

Title IX protects all students in New York at federally funded colleges and universities, whether they are part-time or full-time. It also protects foreign students regardless of race, sex, national origin, gender identity, sexual orientation or religion.

New York state courts apply the deliberate indifference standard in Title IX claims involving sexual harassment and assault. The Second Circuit has held that a defendant acts with deliberate indifference both when its response to known harassment "is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified

delay."[1] "Deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[2] "Only actual notice by an 'appropriate person' who can rectify a violation of Title IX can support a claim under Title IX."[3]

A plaintiff must establish that the school was "on *actual notice* that their *specific policies* and responses to sexual assault were deficient, and their subsequent failure to remedy these policies was the proximate cause of [the student's] sexual assault."[4] In *Tubbs*, the district court held the plaintiff had not established the university officials acted with deliberate indifference even though the procedures for addressing her complaint were in conflict with a guidance letter from the office of civil rights, which included the university allowing the perpetrator to question directly the complainant.[5] In so holding, the district court crudely stated the following, which underscored the challenges faced by complainants in demonstrating deliberate indifference: "Although the court is sympathetic to plaintiff's difficulties, unfortunately, the law in this area repeatedly sings the same tune: 'You can't always get what you want.'"[6]

The National Experience

Over the past several years, colleges and universities have experienced a plethora of litigation involving student-on-student sexual assaults.[7] The majority of these suits assert Title IX causes of action.[8] Typically, at the college level, a student-complainant alleges that he or she was sexually assaulted by a fellow student-respondent. University investigators determine if the respondent violated school policy. This student conduct investigation is separate from a criminal investigation. If it is determined by a preponderance of evidence, after a hearing, that the student-respondent violated university policies, sanctions are issued. In most cases, the respondent can appeal the decision at the university level. As of Aug. 14, 2020, under Title IX regulations promulgated by the U.S. Department of Education, attorneys are now allowed to question witnesses at hearings during the investigative process by the university.[9] A complaint of sexual harassment under Title IX may be filed with the Department of Education, Office of Civil Rights, within 180 days of the last act of discrimination. Regardless of the outcome of the complaint, the victim can file a federal lawsuit. Indeed, a victim of sexual harassment can file a Title IX lawsuit without filing with the Office of Civil Rights first. The statute of limitations depends on the state in which the school is located.[10]

Under Title IX, when there is peer-to-peer sexual harassment, to hold a college or university liable the victim must demonstrate the school acted with deliberate indifference. The United States Supreme Court held in *Davis v. Monroe County Board of Education*[11] that a recipient of federal education funds, such as a college or university, may only be liable for student-on-student harassment where it is a deliberate indifference claim. The crux of these suits is that the university had an official policy of deliberate indifference creating a heightened risk of sexual harassment to the plaintiff.[12] For liability to attach, the university response must be unreasonable and deliberately indifferent; the respondent-student must be found to be under the university's control; and it must be found that the university had effectively precluded the student-complainant access to an education and had actual notice of the alleged harassment or assault.[13]

After the United States Supreme Court decision in the *Davis* case, the secretary of education amended the regulations implementing Title IX. The amendment adopted, but adapted, the deliberate indifference standard set forth in *Davis.*[14] Under the amended regulations,[15] a university must provide supportive measures to complainants:

> *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient›s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient›s educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.[16]

If a respondent is found to be responsible for sexual harassment, the recipient (university) must effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access, and may impose disciplinary sanctions on the respondent.[17]

Sixth Circuit – Deliberate Indifference

Foster v. Bd. of Regents is a recent Title IX case involving the sexual assault of a student by another student. The Sixth Circuit found that the University of Michigan was not liable under Title IX because the court concluded the university was not deliberately indifferent.[18]

In *Foster*, the plaintiff-student was part of an off-site MBA program based in Los Angeles, California. The program occasionally obligated weekend educational sessions at a hotel in the Los Angeles area, requiring students to stay at the hotel overnight on Thursday and Friday. The plaintiff became friends with another student (respondent) in the program. From September 2013 through February 2014, the respondent began expressing his interest in a romantic relationship. On multiple occasions he made unwanted physical contact, including grabbing her buttocks, rubbing her leg, kissing her forcefully and, more than once, climbing into her bed and attempting to force himself on top of her.[19]

On March 13, 2014, the plaintiff first reported the sexual harassment and assaults to the university's Office of Institutional Equity. After the initial report, the respondent was only instructed not to have contact with the plaintiff and not to retaliate against her in any way. In addition, the plaintiff and respondent were required to stay at different hotels and respondent could not eat in the same dining room; however, respondent was still allowed to attend class with plaintiff, although he was not allowed to attend social activities. The plaintiff complained the accommodations were not sufficient to address her safety concerns.[20]

On April 3, 2014, during the residency program, the respondent sent a crude email to various university administrators, which referred to the plaintiff as "psycho" and a "lying slut whore." The respondent was allowed to attend class with the plaintiff the next day, despite the email. During the next day's breaks, the respondent stood in the plaintiff's way when she exited the class and when she went to get a beverage, and then blocked her when she tried to go back to her desk. The plaintiff requested that security be called and for the respondent to be disallowed to attend class the next morning. While the respondent did not attend the class the next morning as directed by the university, he sent several classmates messages calling the plaintiff "a mean awful person," a "wackadoo chick," and stating, "my, what a time we had in her bed and mine for a few months there."[21]

After the April residency program, the respondent sent several more emails to university administrators generally criticizing the investigation, using aggressive language and making various demands. For instance, one email said he would be graduating with his class in person. The respondent was barred by the university from commencement and the plaintiff was advised to "exercise caution." Despite being barred, the respondent flew to Ann Arbor and appeared at a graduation function.[22]

The plaintiff brought a lawsuit under Title IX, which was dismissed on summary judgment by the court, which held the university responded "promptly, compassionately, and effectively" to Foster's complaints. The plaintiff appealed the decision to the Sixth Circuit, who initially reversed the summary judgment,[23] but after a rehearing en banc, the Sixth Circuit affirmed the district court.

The Sixth Circuit held that to prevail in a Title IX action, the victim must establish the school was "deliberately indifferent to sexual harassment, of which [it had] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[24] The Sixth Circuit relied on the U.S. Supreme Court decision of *Davis v. Monroe Cnty. Bd. of Ed,* which held a school's response to sexual harassment is deliberatively indifferent if it is "clearly unreasonable in light of the known circumstances."[25] The standard neither requires that the school purge its school of actionable peer harassment nor does it require courts to conclude that "minimal, ineffective, or belated efforts to respond to sexual harassment are not clearly unreasonable as a matter of law."[26]

In *Foster*, the Sixth Circuit did not find that the school engaged in deliberate indifference despite inadequate and ineffective action by the school once it knew about the sexual harassment and assault. The university knew that the initial "no-contact" order to the respondent was violated when the respondent texted "Really" and when the university got the erratic email calling the plaintiff names. Afterwards, the plaintiff detailed an escalating campaign of harassment by the respondent and ineffective responses by the university. Instead of the court finding there was a factual dispute for the jury regarding whether the university engaged in deliberate indifference, the court dismissed the plaintiff's action, finding as a matter of law that the university did not engage in deliberate indifference. By doing so, the court created an unreasonably high bar for a plaintiff-victim to meet in instances of sexual harassment by another peer on campus, even when it includes sexual assault. The egregious nature of the harassment should demand swift, serious disciplinary action against the student-perpetrator.[27] However, under the deliberate indifference standard, the court has removed a factfinder's ability to review the effectiveness of the university's action, thereby failing to adequately address the sexual harassment, and making the victim vulnerable, as in *Foster*, to further harm and retaliation.

Overcoming Deliberate Indifference in the First, Tenth, and Eleventh Circuits

Following *Davis*, the circuits have been divided on what is necessary to find a school subjected a student to discrimination under the deliberate indifference standard.[28] The First, Tenth and Eleventh Circuits "read this language to mean that students must demonstrate only that a school's deliberate indifference made harassment more likely, not that it actually led to any additional post-notice incidences of harassment."[29] To prevail in actions against public schools where peer-on-peer harassment occurs by overcoming the deliberate indifference standard, courts have found the following to be relevant: reasonableness of the school's

response, control by the school over context and the respondent, and notice of the alleged harassment or assault. The Tenth Circuit found that a university was liable under Title IX, where its deliberate indifference to reports by students of rape caused the victims to be more vulnerable to sexual harassment.[30] In the Tenth Circuit case, the plaintiffs alleged that the university's deliberate indifference caused them to have to continue attending school with the student-rapists, who were then potentially emboldened, causing the plaintiffs to withdraw from participation in educational opportunities because of fear of encountering the unchecked student-rapists and other students who knew of the rapes.

In a case out of the Eastern District of Michigan, the Hon. Terrence G. Berg found the student plaintiffs had a claim under Title IX because the school's deliberate indifference left the students more vulnerable to future abuse.[31] In that case, the respondent sexually touched the victim at school on numerous occasions (both 12 and 13 years old at the time and receiving special education services); despite this, the school wanted to place the victim back in the same classroom as the respondent, which exposed the victim to the same risk of abuse. In a subsequent decision out of the Sixth Circuit, the Sixth Circuit reaffirmed the standard for overcoming deliberate indifference in that the circuit required a showing of additional harassment.[32] In *Kollaritsch*, the Sixth Circuit reversed the district court's ruling denying the university's motion to dismiss in a Title IX case involving student-on-student sexual harassment. The court found that the sexual harassment was not pervasive enough and found that there was no additional harassment after the university took action. The case involved reports by four female students who were sexually assaulted by male students. The four female students sued Michigan State University's administration because they believed the administration responded inadequately to the complaints. After their complaints, the complainants encountered their perpetrator several times. The Sixth Circuit found that, to hold a university liable for deliberate indifference,

> the plaintiff must plead, and ultimately prove, an incident of actionable sexual harassment, the school's actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.[33]

Fourth Circuit

In a Fourth Circuit case, the court found there was deliberate indifference in a Title IX claim brought by a campus feminist group who were being sexually harassed through online posts on a university-maintained social media site.[34] The court found the university acted with deliberate indifference because its efforts were not reasonably calculated to end the harassment since it only created two listening circles, a generic email and, on one occasion, sent campus police to be with a threatened student.

In *Karaseck v. Regents of the Univ. of Cal.*,[35] the Ninth Circuit held deliberate indifference can be found in a pre-assault claim in order to survive a motion to dismiss when the following is shown: (1) a school maintained a policy of deliberate indifference to reports of sexual misconduct; (2) which created a heightened risk of sexual harassment; (3) in a context subject to the school's control; and (4) the plaintiff was harassed as a result. The court found that actual knowledge or acting with deliberate indifference to a particular incident of harassment was not necessary for a pre-assault claim if the four elements were established. The court found persuasive a report issued by the state auditor finding the mishandling of complaints was putting students at risk and the university's failure to address those concerns adequately.

Conclusion

A bevy of student-complainants in federal court are asserting a heightened risk claim under Title IX, alleging that institutions had an official policy of deliberate indifference to reports of sexual misconduct. Thus, the plaintiff was harassed as a result. A university that receives federal funds may be liable for its response to student-on-student sexual harassment or assault. However, actual notice and deliberate indifference by the university must be proven for liability to attach constituting intentional Title IX violation.

The U.S. Department of Education regulations, effective August 14, 2020, set out university procedures in cases involving student-on-student sexual assault.[36] Also, attorneys are now permitted to question witnesses at university hearings and in some cases conduct cross examination.

It is important that counsel read the cases in his or her jurisdiction to glean the application of Title IX litigation. This area of law is developing rapidly.

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Endnotes

1. *Hayut v. State Univ of N.Y.* 352 F.3d 733, 751 (2d Cir. 2003) (internal quotation marks & citations omitted).
2. *Davis v. Monroe County Bd. of Education*, 526 U.S. 629, 645 (internal quotation marks, alterations & citations omitted).
3. *Bliss v. Putnam Valley Cent. Sch. Dist.*, No. 7:06-cv-15509, 2011 U.S. Dist. LEXIS 35485 (S.D.N.Y. March 24, 2011 (*citing Gebser v. Lago Vista Ind. Sch. Dist*, 524 U.S. 274, 290 (1988)).
4. *Tubbs v. Stony Brook Univ.*, 343 F. Supp. 3d 292, 319 (S.D.N.Y. 2018).
5. *Id.*
6. *Id*. at 317.
7. *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 180 (D.R.I. 2016); *Doe v. Univ. of Ky.*, 971 F.3d 553 (6th Cir. 2020), standing to bring an alleged deliberate indifference claim although not technically enrolled. Decision limited to the unique facts in this case.
8. Title IX, 20 U.S.C. § 1681.
9. 34 C.F.R. § 106.
10. In Michigan, the statute of limitations for a Civil Rights Claim, like Title IX, is three years. *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 729 (6th Cir. 1996).
11. *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999).
12. *Karasek v. Regents of Univ. of Calif.*, 956 F.3d 1093, 1112 (9th Cir. 2020*); Lozano v. Baylor Univ.,* 408 F. Supp. 3d 861, 882–83 (W.D. Tex. 2019), denying a motion to dismiss on heightened risk claim; *Davis*, 526 U.S. 629.
13. *Lopez v. Regents of Univ. of Calif.*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013); *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 994 F.3d 613, 619–24 (6th Cir. 2019) (student must plead and ultimately prove that school had actual knowledge of actionable sexual harassment that was not found here).
14. 85 FR 30044.
15. 34 C.F.R. § 106.44(a).
16. 34 C.F.R. § 106.30.
17. 34 C.F.R. § 106.45(b)(1)(i); *see also* Brian Bardwell, *No One Is an Inappropriate Person: The Mistaken Application of Gebser's "Appropriate Person" Test to Title IX Peer Harassment Cases*, 68 Case W. Res. L. Rev. 1343, 1364–65 (2018).
18. *Foster v. Bd. of Regents*, 982 F.3d 960 (6th Cir. 2020).
19. *Id.* at 972.
20. *Id.*
21. *Id.* at 976–77.
22. *Id.* at 978–79.
23. *Foster v. Bd. of Regents*, 952 F.3d 765 (6th Cir. 2020).
24. *Foster,* 982 F.3d at 981.
25. 526 U.S. 629, 647 (1999).
26. *Id.*
27. Lack of disciplinary action against respondent-harassers by schools may be in part due to a school's concern that the respondent-harasser will take action for selective enforcement or assert an erroneous outcome claim. *Klocke v. Univ of Tex. at Arlington*, 938 F.3d 204, 210 (5th Cir. 2019); *Plummer v. Univ of Houston*, 860 F.3d 767, 777 (5th Cir. 2017). Erroneous outcome claims require a plaintiff to prove: (1) the disciplined student was innocent and wrongfully found to have committed the offense and (2) that gender was a motivating factor in imposing discipline. *Plummer v. Univ. of Houston*, 860 F.3d 767, 777 (5th Cir. 2017).
28. *Wamer v. Univ. of Toledo*, No. 20-4219, 2022 U.S. App. LEXIS 5511, at *16–17 (6th Cir. Mar. 2, 2022) (the court held there is a less stringent standard for providing teacher-student sexual harassment under Title IX than student-student harassment under Title IX).
29. *Id., citing Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103–05 (10th Cir. 2019).
30. *Id.*
31. *C.R. v. Novi Cmty. Sch. Dist.*, 2017 U.S. Dist. LEXIS 18394 (E.D. Mich. 2017).
32. *Kollaritsch v. Michigan State Univ. Bd of Trustees*, 944 F.3d 613 (6th Cir. 2019).
33. *Id*. at 623–24.
34. *Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018).
35. 948 F.3d 1150, 1169 (9th Cir. 2020).
36. *See* C.F.R. § 106.

In a Settlement, Should You Agree Not To Represent New Clients?

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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To the Forum:

I am a personal injury lawyer named Clara Contingency; I have a small firm with a few partners. I represent a retiree who worked for 25 years at a plant making plastic products owned by "Endorphin, Inc." After his retirement, my client developed a particular form of cancer, which he was certain was related to his long-term exposure to harmful chemicals at the plant. After doing the necessary research, I sued Endorphin on my client's behalf, under a one-third contingency arrangement.

In the course of discovery – all conducted under strict confidentiality orders – I saw Endorphin documents that I realized showed that company executives ignored warnings about the risks. The defendant is now offering a $20 million settlement, which my client is willing to accept. With some pride, I attribute the large amount to my own particular abilities and expertise, including my undergraduate training in chemistry that enabled me to understand the technical documents and detect and understand the cleverly worded warnings.

I have separately been contacted by several other former Endorphin workers who want to sue Endorphin for their own medical injuries, but none of them has formally retained me – yet.

Defendant's counsel has sent me a draft settlement agreement, which would require that my firm and I

1. Not represent anyone pursuing a similar claim against Endorphin or any other defendant.
2. Not assist in, or encourage, any suit against Endorphin or any other defendant for a similar claim.
3. Keep confidential the existence and amount of the settlement and all information we learned in the course of this representation (absent judicial process compelling disclosure, in which case we must provide Endorphin with sufficient notice and opportunity to contest such process).

I want to settle my client's case and get him the award to which he is entitled. But I also want to represent other clients against Endorphin, and these provisions would make that impossible. What should I do?

Sincerely,

Clara Contingency

Dear Ms. Contingency:

The answer to your question starts – and mainly ends – with New York Rule of Professional Conduct 5.6(a)(2).

Rule 5.6(a)(2) and Its Rationale

Rule 5.6(a)(2) states that "a lawyer shall not *participate in offering or making* . . . an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy" (emphasis added). As the italicized language indicates, the Rule's prohibitions are "directed to lawyers on both sides of the restrictive agreement," covering those who accept the limitation and those who demand it.[1] Comment [2], while not formally part of the Rule, states succinctly, "Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." The Rule has been included in New York's ethics rules with almost identical wording for decades and appears in the ABA Model Rules and the rules in other states as well.

The central purpose of Rule 5.6(a)(2) is simple: to avoid restricting a lawyer settling one case from representing future clients against the same defendant because such restrictions are considered to pose three problems:

1. They prevent the public from using the "lawyers who, by virtue of their background and experience, might be the very best available talent to represent those individuals," and who can do it most efficiently.[2]
2. They reward the plaintiff based not on the merits of his or her case but on the defendant's desire and ability to "buy off" plaintiff's counsel.[3]
3. Demanding such a restriction can create a conflict for the plaintiff's lawyer, who must weigh the client's interest in settling a particular case against the lawyer's own interest in securing future clients and work; this conflict is heightened if the lawyer already represents another plaintiff pursuing an action that would be affected by this restriction.

Criticisms of the Rule

Rule 5.6(a)(2) has long been the subject of harsh criticism. In the less-than-gentle words of one commentator, the Rule is "an anachronism, illogical and bad policy."[4] Critics argue that the policy concerns underlying the Rule are overblown. More particularly:

1. As to counsel's availability to the public, lawyers are permitted to turn down work for all sorts of reasons, and this should be no different; by the same token, defendants are permitted to put as many lawyers as they want on their payrolls even if for the express purpose of conflicting them out from representing plaintiffs.
2. The concern about "buying off" plaintiffs presupposes that only this one lawyer can handle the type of case involved, but in almost all instances this "ignores the market. If a claim has merit and elimination of one lawyer creates a vacancy, the market will produce a replacement."[5]
3. While it is unfortunate that the defendant's demand for a restriction may create a conflict of interest for plaintiff's counsel, that conflict is no different, and

> no worse, than that created when defendants in civil rights cases make offers that link the settlement amount to the attorneys' fee or when the possibility of an early settlement at a modest amount may provide a lower but more certain fee than a full-blown litigation.

These criticisms have occasionally resonated with courts in New York. For example, the court in *Feldman v. Minars*,[6] in what is probably best viewed as *dicta*, quoted Professor Gillers at length in concluding that "an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party *is not against the public policy of the State of New York*" (emphasis added) even if the Rule explicitly prohibits lawyers from entering into it. The actual holding of the case was that an agreement not to "encourage" (e.g., solicit) other plaintiffs to sue the defendants would be enforced even if an agreement not to represent other clients could not be enforced or could subject the lawyer to discipline. Much more recently, U.S. District Judge Furman was equally vocal in condemning the Rule and its rationale, though he also did so in *dicta*.[7]

We take no position on the pros and cons of the Rule. We note only that the Rule remains on the books, having been recodified in the Rules of Professional Conduct subsequent to *Feldman v. Minars*, and the Rule has often been cited favorably in court decisions and ethics opinions. In short, the Rule is still in force, and you must pay attention to it.

Applying the Rule to Your Facts

Turning to the Rule's application here, you face a conundrum. You want to represent other clients against Endorphin. You even have clients ready to retain you for that very purpose. But you also want – and indeed are even obligated – to settle the case on terms your current client is willing to accept. Your current client could not care less if you are unable to represent future clients; he just wants his money. Endorphin's draft settlement agreement, with its various conditions, places you in a conflict situation, with your own interests and those of other potential clients warring against the client's. But is the draft agreement ethical? And even if not, is it enforceable? In New York, these questions have surprisingly different answers.

Ethics first. Requiring that you "not represent anyone pursuing a similar claim against Endorphin or any other defendant" violates the Rule. Agreements like these have been declared unethical in New York.[8] The fact that both parties can be disciplined for making such a deal gives you a basis for pushing back against Endorphin's demands.

The second proposed condition – that you "not assist in, or encourage, any suit against Endorphin or any other defendant for a similar claim" – also violates Rule 5.6(a)(2). In N.Y. State Ethics Opinion 1006 (2014), the NYSBA Committee on Professional Ethics deemed ethically impermissible an agreement requiring the claimant's lawyer to refrain from: (i) soliciting other clients for the purpose of bringing similar claims against the settling party; and (ii) referring potential claimants to other counsel. This opinion repudiates the *Feldman* holding that an agreement not to *solicit* other clients comports with Rule 5.6(b)(2).

"In addressing an agreement that violates Rule 5.6(b)(2), you must recognize that there is a good chance a court will not let you have your cake and eat it too."

The third proposed condition must be broken into two parts. As to the prohibition on revealing "the existence and amount of the settlement," that condition is permissible. The First Department, in *Bassman v. Fleet Bank*,[9] held that such an agreement did not violate the Rule. The court also took the extreme outlying position that the lawyer could not represent others for fear that it would be impossible for the lawyer not to reveal the confidential settlement amount to future clients. Recent federal decisions have also permitted lawyers to agree to such a confidentiality agreement, but they have allowed the lawyers to represent future plaintiffs against the same defendants as long as the lawyers do not disclose the settlement terms in the process.[10]

The broader prohibition on using "all information . . . learned in the course of the representation" has been found to violate Rule 5.6(a)(2), even though the Rule's

terms do not specifically address it.[11] You must reject this restriction, even if the information in question was deemed confidential when provided.

Enforcing the Restrictions

But what if you sign the proposed agreement? Can it be subsequently enforced against you if you take on another client against Endorphin, or can you repudiate it as unethical? While, as we have shown, New York courts have different levels of enthusiasm for Rule 5.6(a)(2), they will use the "clean hands" doctrine to enforce an otherwise unethical restriction if a lawyer or client signed the agreement and got the benefit of it.

So it was in *Feldman v. Minars.* After criticizing Rule 5.6(a)(2) and its underlying policy, the court went on to say that even if it accepted the Rule, "failure to enforce a freely entered-into agreement would appear unseemly, and the 'clean hands' doctrine would preclude the offending attorneys from using their *own* ethical violations as a basis for avoiding obligations undertaken by them."[12] This reasoning has been followed in other contexts as well, to enforce otherwise unethical agreements lawyers and clients freely entered into and from which they benefited.[13]

In short, in addressing an agreement that violates Rule 5.6(b)(2), you must recognize, in deciding whether to sign the proposed settlement agreement, that there is a good chance a court will not let you have your cake and eat it too. That is, a court is unlikely to allow you to get the benefits of the current settlement from Endorphin by agreeing to the conditions and then later allow you to repudiate those conditions and sue Endorphin on behalf of other clients.

Practice Take-Aways

Here are some practical takeaways:

1. An agreement not to take on future clients against a particular defendant as part of a settlement with that defendant violates Rule 5.6(a)(2).
2. An agreement not to aid others in suing that defendant, or to not use information learned in the case against that defendant, also violates the Rule.
3. These ethical restrictions apply to both sides' lawyers. The lawyer being asked to agree to the restriction should remind the adversary of that early and often.
4. The Rule does not prohibit an agreement not to disclose the terms of a confidential settlement. Lawyers thus must exercise care in drafting the restriction to make sure it is limited to disclosure of confidential information, not use of that information, and exercise even more care in carrying out the agreement so as to use the information if appropriate but not in a way that breaches confidentiality. For example, if you have done several confidential settlements at 55 cents on the dollar and then tell a later client, "I think they'll settle for 55 cents on the dollar," you probably will not have breached your previous agreement or your duty to the later client if the later client infers that you have achieved that result before, but you cannot explicitly tell the later client that and if the later client presses you as to why you feel that way, you may find yourself in an extremely uncomfortable position. In some instances, you will find that a permissible confidentiality agreement will have the same practical effect as a prohibited no-other-representation agreement. Hence, if you would have been willing to agree not to represent anybody else but for the fact that the Rule prohibits you from doing that, you will approach a confidentiality provision differently than if you want to leave your options open to represent others.
5. A lawyer refusing to agree to these restrictions should nonetheless be permitted to inform a defendant, as of the time of a settlement, whether and the extent to which the lawyer is aware of any other clients who have asked for representation on the subject matter.
6. Though an agreement that runs afoul of the Rule may ultimately be enforced, stay away! It is not worth the disciplinary risk and potential litigation costs.

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QUESTION FOR THE NEXT FORUM

To the Forum:

I am a corporate transactional attorney who has been in practice for nearly 30 years. Every few years I participate in an alumni program at my law school, where I am paired with a recent law school graduate to mentor throughout their first few years of practice. A few years ago, I was paired with a graduate whom I have mentored for the last five years. She is now a mid-level associate at a boutique litigation firm where she just started. We were having coffee recently and discussing her new position. During our conversation, she recounted a few of her experiences with her new boss that left me troubled and

raised some questions as to attorney civility and her ethical responsibilities as an associate and member of the bar.

She told me that the partner to whom she reports, who I will refer to as "Ren," is particularly spirited, so much so that, in my opinion, he appears to cross the line between zealous advocate and unprofessional. For example, she told me that during meet-and-confer calls he is constantly screaming at adversaries, talking over them and changing course on his prior agreements by telling the court that he did not agree to certain things that my mentee specifically remembers that he did agree to. She also noted that he often attempts to justify his positions and misstatements by indicating that she agrees with him or that she will recall him saying things that she is certain he never said.

On one particularly offensive occasion, during a meet-and-confer Zoom between counsel, the associate on the opposing side attempted to address a discovery issue with my mentee directly. Ren immediately and aggressively interjected by stating, "DO NOT SPEAK TO HER!" She said she was taken aback because she was not only prepared to answer the adversaries' question, seeing as she was the attorney who prepared and transmitted the production, but she found it offensive that he would not even afford her the opportunity to speak at all. On another occasion, Ren even went as far as to tell one of their male adversaries to "control" his female co-counsel during a meet-and-confer call between counsels. While my mentee indicated that she was not comfortable speaking up during the call, she asked me whether I thought she should have addressed the issue with him directly after the call.

I couldn't believe what she was telling me. In my 30 years of practice, I have never encountered such behavior from a professional. Is Ren's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? If so, as an associate who is employed by the individual exhibiting inappropriate behavior, does she have any ethical obligations that she should be aware of?

Sincerely,
Ainsley Associate

Endnotes

1. N.Y. City 1999-03 (1999).
2. ABA Formal Op. 93-371 (1993).
3. *Id.*
4. S. Gillers, *A Rule Without a Reason,* 79 A.B.A. Journal 118 (Oct. 1993).
5. *Id.*
6. 230 A.D.2d 356, 359–61 (1st Dep't 1997).
7. *Ipsos-Insight, LLC v. Gessel,* 21-CV-3992 (JMF), 2021 WL 2784634 at *7 (S.D.N.Y. July 2, 2021).
8. *See, e.g.,* N.Y. City 1999-03 (1999) ("agreements not to represent present or future clients in litigation against a settling defendant . . . are improper," citing ethics opinions from numerous states); *In re Cardillo,* 123 A.D.2d 147, 148–49 (1st Dep't 2014) (imposing reciprocal discipline on lawyer who entered into settlement agreement requiring her not to represent clients adverse to the defendants in the future); *cf. Feldman,* 230 A.D.2d at 361 (to the extent "an agreement by counsel not to represent similar plaintiffs in similar actions against defendants" violates the ethics rules, "the 'violation' can be addressed by appropriate disciplinary authorities").
9. 2000 N.Y. Misc. LEXIS 659 at *2–3 (1st Dep't 2000).
10. *See Tour Tech. Software, Inc. v. RTV, Inc.*, 17-CV-5817, 2018 U.S. Dist. LEXIS 130021 at *4 n.4 (E.D.N.Y. Aug. 2, 2018); *Tradewinds Airlines, Inc. v. Soros,* No. 08 Civ. 5901 (JFK), 2009 WL 1321695 at *9 (S.D.N.Y. May 12, 2009).
11. N.Y. State Ethics Op. 730 (2000) (barring this prohibition under the Rule because its "*practical effect* is to restrict the lawyer from undertaking future representations and . . . [it] involve[s] conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose") (emphasis added). ABA Formal Op. 00-417 (2000) (lawyer may enter into a settlement agreement that prevents them from "revealing" confidential information but not one that prevents them from "using" such information); *Tour Tech. Software,* 2018 U.S. Dist. LEXIS 130021 at *6 (endorsing same distinction).
12. *Feldman v. Minars*, 230 A.D.2d 356, 361 (1st Dep't 1997) (emphasis in original).
13. *See, e.g., Marin v. Constitution Realty, LLC,* 28 N.Y.3d 666, 672 (2017) (although fee-sharing agreement between lawyers violated Rule 1.5(g), "it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits" (citation omitted)). *Friedman v. Kuczkir,* 272 F. Supp. 3d 613, 632–33 (S.D.N.Y. 2017) (client cannot avoid business arrangement with lawyer on ethical grounds after obtaining benefits of the agreement for several years).

Countdown for Congress: A Long To-Do List

As the midterm elections loom and Congress attempts to rack up some legislative accomplishments before November, there has been positive movement on several of NYSBA's 2022 federal priorities, and NYSBA's leadership went to Washington virtually to lobby for more. In the last column, I outlined NYSBA's priorities for 2022, and here I will update our readers on recent developments and examine the outlook for our other items.

Every year, the American Bar Association holds legislative advocacy days in Washington. Again this year, the event was virtual, due to the pandemic and resulting restricted access to the Capitol building. But NYSBA leadership, including President Brown and President-elect Sherry Levin Wallach, met with delegation members to thank them for their support of three priorities that were approved by Congress already this year.

A new priority for the association this year was support for reauthorization of the Violence Against Women Act. This landmark law was first championed by now-President Biden when he was in the Senate in 1993. Tragically, authorization of VAWA and its critical programs lapsed due to congressional inaction. The impact of VAWA legislation over a quarter of a century has been transformative, directly impacting the lives of countless survivors of domestic violence, sexual assault, stalking and dating violence. Fortunately, a deal was reached on

reauthorization, and it was included in the omnibus appropriations bill that provided funding for the federal government through Sept. 30, 2022. We hope this lifeline will never be dropped again and that Congress will fully fund their programs for next year.

A perennial priority for NYSBA is funding for the Legal Services Corp. LSC is an independent nonprofit corporation established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans. LSC promotes equal access to justice by providing funding to 133 independent nonprofit legal aid programs. New York has seven LSC grantees, which serve low-income individuals, children, families, seniors and veterans in 813 offices in every congressional district. It is critically important that Congress provide adequate funding for LSC in order to provide access to justice for those who need assistance. This has traditionally enjoyed bipartisan support on the Hill, even during the Trump era when the president zeroed out funding in his budget. For the past few years, Congress has fully funded LSC. For FY22, LSC received $489 million, $20 million over last year's appropriation level. I would expect an increase again this year, but the need is so great that more money is always needed.

As states like New York have legalized adult-use marijuana, the conflict with existing federal regulations hinders the state's ability to craft effective and legal policies. NYSBA supports legislation that would: (1) exempt from the Controlled Substances Act any production, distribution, possession or use of marijuana carried out in compliance with state laws; (2) remove marijuana from Schedule 1 of the Controlled Substances Act; and (3) encourage scientific research into the efficacy, dose, administration or side effects of commonly used and commercially available cannabis products in the U.S. With a Democratic administration and a nominally Democratic-controlled Congress, there was renewed optimism that relevant legislation would progress. On Friday, April 1, the House passed, 220-204, Chairman Nadler's Marijuana Opportunity Reinvestment and Expungement (MORE) Act, which is in line with NYSBA's position. The bill would eliminate criminal penalties associated with the drug and establish a process to expunge previous convictions from criminal records. It would further impose a federal tax on marijuana sales to fund programs meant to help communities negatively impacted by so-called "war on drugs" policies from the 1970s. Senate Majority Leader Chuck Schumer of New York has said that marijuana legalization is a top priority, and he has been working with fellow Democrats to unveil a bill this spring. It's not yet clear, however, if enough Senate Republicans, or even all Democrats, would get on board for the bill to clear a filibuster. When NYSBA's leadership met with Senator Schumer's staff during ABA Days, they raised NYSBA's support and offered to assist in any way needed with our Section experts and staff.

As the clock runs on the 117th Congress, members in both chambers and on both sides of the aisle, as well as the president, are looking for and needing some legislative wins. While Congress may not be able to come to agreements to pass legislation, the president has the authority to act unilaterally in some instances and implement policy changes by executive action.

Executive Orders are directives from the president of the United States that are written, signed and numbered and have the force of law. They do not require the approval of Congress, but Congress can overturn them by a vote. Historically, EOs have been used by every president since George Washington to a varying degree. As Congress fails to reach agreement on major policy issues, some members of Congress, particularly those in the Progressive Caucus, are angling for President Biden to issue more EOs on a variety of issues. Topics being discussed include NYSBA priorities of policing reform, immigration and gun violence. As of this writing, President Biden has issued 87 EOs on issues including health care, the environment and equality.

President Biden also acted with the Department of Education to extend the moratorium on federal student loan payments through the end of August. As part of the CARES package passed by Congress early in the pandemic, student loan payments were paused for a discrete period of time as many Americans fell ill from COVID-19 or lost their jobs due to the shutdowns. Payments were scheduled to start again on May 1. But many in Congress, as well as civic groups, have been calling for an extension of the moratorium through the end of the year, with many going further to call for a cancellation of student debt. NYSBA is calling on Congress to provide some form of student loan relief to the over 40 million Americans saddled with this debt.

The number of days left in the 117th Congress is short, but the to-do list is long. Will Congress be able to pass legislation to keep the government and the economy running? Will there be accomplishments for members of Congress to tout when they run for reelection during the often-punishing midterm elections? Or will the president act unilaterally to further his agenda? The political landscape could look very different a year from now in Washington, and that vision will be the motivation for all parties in the coming months.

Hilary Jochmans, policy director for NYSBA, writes about legislation of interest to members. Previously Jochmans was the director of the New York State governor's office in Washington for both Andrew Cuomo and David Paterson and has spent a dozen years on Capitol Hill working in the House and Senate.

Hundreds of NYSBA Members Train To Help Ukrainian Refugees

By Jennifer Andrus

Nearly 750 attorneys took part in specialized training on how to help Ukrainian refugees apply for temporary protected status, or TPS. The designation, announced by President Biden and the Department of Homeland Security, allows those fleeing wars and natural disasters to seek protection in the United States.

DHS Secretary Alejandro Mayorkas extended TPS designation to Ukrainian refugees on March 3. Any Ukrainian refugees here in the U.S. as of March 1 have the ability to apply. Earlier this week, Biden announced a commitment by the U.S. to accept 100,000 refugees from Ukraine.

NYSBA President T. Andrew Brown opened the event, who reiterated the association's strong stand against the Russian invasion of Ukraine.

"More must be done. Vladimir Putin shows no sign of backing down and the humanitarian crisis he has caused is steadily worsening," he said. Brown encouraged the members taking the training to use their skills and knowledge to help those in need. "Every lawyer here has the opportunity to change someone's life."

Two members of the Ukrainian Bar Association and the NYSBA Ukraine Task Force also joined to thank members for their help and support. Inna Liniova, a member of the task force, reported that while 3 million people have left Ukraine for neighboring countries, thousands of Ukrainian men have returned from abroad to fight for their country. She asked that the U.S. remain open to Ukrainian nationals for work.

Ivan Horodyskyy, co-chair of the Ukraine chapter, reminded the members that the refugees from Ukraine are not economic migrants and will look to return to their lives and homes in Ukraine when it is safe. He ended with words of hope that the Ukrainian cause will prevail. "We can see, hear, feel the changes that are making Ukraine stronger."

Michelle Lee of the Legal Project outlined the forms, identification documents and payments needed by refugees to apply for TPS. The status will last from March 2022 to September of 2023. In some cases, TPS can be extended past the first 18 months. If an extension is granted, applicants must reapply in order to stay in the U.S.

Daniel Alicea of the Center for Family Representation outlined important steps to avoid a TPS application rejection and how to navigate the next steps after approval. He also highlighted the red flags to watch out for in an application and when to seek the advice of an experienced immigration attorney. Alicea also outlined the backlog of cases at DHS in which thousands of refugees from Haiti and Venezuela are still waiting to hear if they are approved.

Former New York State Bar Association President David Miranda Joins Association as General Counsel

Brings wide range of experience and deep knowledge of NYSBA operations to leadership team.

By Susan DeSantis

Former New York State Bar Association President David Miranda has joined the association as its general counsel. He will oversee legal affairs, the Government Relations Department, facilities, and pro bono and lawyer assistance initiatives.

"It is a great honor, and tremendously gratifying, to serve as general counsel to this association that does so much for the legal profession and the public good," Miranda said. "We are in an era of great change, and NYSBA has a significant role to play in both supporting members and providing sound policy analysis to decision makers and elected officials. I am excited to be a part of that ongoing mission."

Miranda, who served as president of the association from 2015 to 2016, formed the Committee on the New York State Constitution to provide non-partisan guidance to lawyers and the public on policy issues of crucial importance to New Yorkers. He also served as president of the Albany County Bar Association in 2009.

Miranda is the host of the NYSBA podcast MIRANDA Warnings, which focuses on issues of importance to the legal community. Guests have included former U.S. Attorney General Loretta Lynch, former U.S. Secretary of Homeland Security Jeh Johnson, former U.S. Attorney for the Southern District of New York Preet Bharara, Rep. Mondaire Jones, MSNBC Chief Legal Correspondent Ari Melber, former New York State Attorney General Robert Abrams, and New York Times Deputy General Counsel David McCraw.

Prior to becoming NYSBA's general counsel, Miranda was partner in the intellectual property law firm of Heslin Rothenberg Farley and Mesiti of Albany. In 2006, he obtained a $7.8 million jury verdict in a copyright infringement and trade secret misappropriation case in U.S. District Court.

Since 2007, Miranda has been selected annually as a "Super Lawyer" in Intellectual Property Litigation by Thomson Reuters. In 2020, Miranda was a Fastcase 50 Honoree – a recognition awarded to top innovators in law and technology.

Miranda received the Dean's Medal from Albany Law School in May 2016 for his contributions to the legal profession and law school community. In 2002, he was appointed by then-Chief Judge Judith S. Kaye to the New York State Commission on Public Access to Court Records. The commission examined issues of privacy and open access related to court filings and helped shape policies regarding the availability of court records on the internet.

In 2001, Miranda was honored with the Capital District Business Review's "Forty Under 40" award for community service and professional achievement. He previously served as general counsel and on the board of directors of the Rensselaer County Chamber of Commerce. He is a graduate of Albany Law School and State University of New York at Buffalo.

New York State Bar Association To File Amicus Brief in Vitally Important U.S. Supreme Court Case

The New York State Bar Association's Executive Committee voted to participate in a consequential U.S. Supreme Court case that could seriously impact the application of anti-discrimination laws for the LGBTQ community and have a far-reaching impact across the country.

By Susan DeSantis

Similar to NYSBA's participation in *Fulton v. City of Philadelphia* in 2020, the association plans to file an amicus curiae in *303 Creative LLC v. Elenis*, which is expected to be heard during the next term.

"The New York State Bar Association has a long tradition of advocating for the human and legal rights of every New Yorker," said NYSBA President T. Andrew Brown. "I know that our brief will provide the Supreme Court with the kind of reasoned analysis that will support our contention that non-discrimination laws in public accommodations must protect the LGBTQ community and everyone else."

Almost four years after the U.S. Supreme Court ruled in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* on procedural grounds rather than the merits, the court has again decided to take up another case out of Colorado on the intersection of anti-discrimination laws as applied in public accommodations and the First Amendment.

Prior to the U.S. Supreme Court, the U.S. Court of Appeals for the Tenth Circuit ruled that Colorado's anti-discrimination laws are narrowly tailored to support Colorado's interest that LGBTQ customers have access to the publicly available wedding website design services that the petitioner provides, and that Colorado has a compelling interest to protect equal access to public accommodations for all customers.

When the U.S. Supreme Court accepted the case, the court limited the question to "whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."

The amicus curiae team will again be led by Christopher R. Riano, chair of the LGBTQ Law Section, co-chair of the Strategic Planning Committee and member of the Executive Committee, and Jackie P. Drohan III, chair of the LGBTQ Law Section's Litigation/Amicus Committee and member of the NYSBA Finance Committee.

"We are deeply honored to again be called upon to represent the best of our profession and lead the New York State Bar Association at the U.S. Supreme Court to say that there is no place for discrimination in publicly available accommodations, for the LGBTQ community or anyone else," Riano said. "I am exceedingly proud of the team that worked on our prior amicus curiae brief at the Supreme Court two years ago, and I am honored to have the opportunity to lead the team at the Supreme Court once again."

Celebrating Diversity

President T. Andrew Brown welcomes attendees to the Diversity Symposium. He served as a judge on the Insular Cases hearing during the symposium

The NYSBA staff gathered together at the New York Hilton Midtown

Congresswoman Stacey Plaskett won the Ruth Bader Ginsburg Award. L to R: Hon. Lizbeth Gonzalez, Plaskett, and Mirna Santiago, co-chair of the Committee on Diversity, Equity and Inclusion

Tamika Coverdale, Mirna Santiago, Edwina Frances Martin, and Ernesto Guerrero all celebrate diversity at the Diversity Reception

Freedom to Marry founder Evan Wolfson received the John E. Higgins Diversity Trailblazer Award

The House of Delegates was treated to an exclusive performance of "Law and Order and All That Jazz"

House of Delegates Meeting

President-Elect Sherry Levin Wallach catches up with Second Department Presiding Justice Hector LaSalle and Hon. Barry Kamins

Taa Grays presents the Task Force on Racism, Social Equity and the Law's informational report to the House

President T. Andrew Brown congratulates Hofstra Law student Sierra Sanchez, the inaugural recipient of the Ruth Bader Ginsburg Memorial Scholarship. Secretary Taa Grays expertly captured this "Twitter moment"

Delegate Maria Matos speaks about the Task Force on Racism, Social Equity and the Law's report

Professor Michael L. Fox speaks in support of civics education and the "absolutely vital" report of the Committee on Law, Youth & Citizenship

President-Elect Elect Richard Lewis addresses the House of Delegates for the first time

Rep. Stacey Plaskett, Evan Wolfson of Freedom to Marry, Honored at New York State Bar Association Diversity Celebration

By David Howard King

Four-term Congresswoman Stacey Plaskett received the New York State Bar Association's inaugural Justice Ruth Bader Ginsburg Beacon Award and Evan Wolfson, founder of Freedom to Marry, received the John E. Higgins Diversity Trailblazer Award at the New York Hilton Midtown in Manhattan as the association celebrated diversity in the legal profession.

President-Elect Sherry Levin Wallach, Congresswoman Stacey Plaskett, Hon. Cheryl E. Chambers, Evan Wolfson

Plaskett, who represents the Virgin Islands, is the first member from a U.S territory and only the fourth African American woman to serve on the powerful House Ways and Means Committee. She received national attention as an impeachment manager during the second impeachment trial of former President Donald Trump. She has served in the Bronx District Attorney's Office and the Justice Department.

"Congresswoman Plaskett has broken down barriers as a Black woman representing the Virgin Islands in Congress. She's stood up for the rule of law and committed herself to fighting for representation and equal treatment for those who are otherwise ignored," said NYSBA President T. Andrew Brown. "It's an honor to have Rep. Plaskett with us for this exciting event."

Wolfson, whose organization campaigned successfully for marriage equality in the U.S., has taught law and social change as a distinguished visitor from practice at Georgetown Law Center and as a distinguished practitioner in grand strategy at Yale University. He serves as senior counsel at Dentons, the world's largest law firm, with more than 190 offices, and directs a team of Freedom to Marry alumni and experts who assist human rights efforts worldwide under the banner of Freedom to Marry Global.

"Evan Wolfson's successes in the campaign for marriage equality have been monumental," Brown said. "Not only did Evan commit his life to winning marriage equality in the United States but he now works on that cause around the world."

The awards presentation was part of NYSBA's Diversity Symposium hosted by the association's Committee on Diversity, Equity, and Inclusion. The celebration featured a program titled "An Argument Against Second Class Citizenship in the U.S. Territories: A Movement for Equality and Overturning the Insular Cases." Panelists examined the Supreme Court's so-called Insular Cases and the attempt to ensure that those living outside the U.S. mainland are entitled to benefits such as Social Security.

How To Advocate for Yourself at Work

By Jennifer Andrus

Advocating for yourself in the workplace, especially for women, can be a touchy subject.

"Tooting your own horn" can come off like boasting, bragging or gloating about a success. The New York State Bar Association's Women in Law Section and General Counsel's Committee of the Section, chaired by Frettra De Silva, teamed up to tackle the thorny issue head-on. The Business Law Section and Kirkland & Ellis joined in co-sponsoring the event.

In a one-hour program, moderated by Joi Yvonne Bourgeois, four panelists shared tips and tactics to navigate promoting yourself in an effort to accelerate your career success.

Sheila Murphy, the founder of Focus Forward Consulting, kicked off the panel by assuring those in attendance that self-promotion is a form of self-care.

"You are taking care to make sure that you get what you need both in your career and your life and on top of that you are taking care of yourself," she said. "I am making sure people know my qualities and traits so they can make informed decisions as to whether they want to hire me or promote me. People can't do those things if they don't know who you are and what you do."

Natalya Johnson, senior counsel at Johnson & Johnson, agrees, saying it's time to reframe promotion as a positive term for women. "Self-promotion provides visibility for my experiences, for my expertise and amplifying the causes and organizations that have my energy," she added.

She offered three tips. First, bring other people into your promotion. If you have coworkers on a project, post on LinkedIn about the work and tag them. Second, focus on informal promotion by talking to your colleague or boss about the work you are doing. Third, use external resources or your organization's marketing department to promote larger projects.

Daisy Darvall, a partner at Kirkland & Ellis, says we need to remove the feeling of shame from the conversation. "You can't self-advocate unless you know your value and worth. No one will advocate for you like you will!"

Murphy echoed that sentiment by saying it's important to own your narrative. "I know that it feels icky now and then this idea of self-promotion and putting yourself out there, but let me tell you whether you put yourself out there or not, there is a story in people's heads about who you are and what you do." She says failing to be an advocate is a disservice to your firm, your clients and yourself.

Speaking Up and Taking on New Roles

Panelists were asked to share ideas on the disparity between women and men in the area of self-promotion. Rippi Karda, assistant general counsel at Verizon Communications, says that men are better at stating their goals and asking for opportunities to take on new roles and projects while women can be deferential and don't jump at the chance. "You can take on additional responsibilities and learn as you go; you can find other resources. You don't have to know it all; you just have to know that there is a plan you've got to concoct to figure it out." She says this advice also helped in her work at the South Asian Bar Association of New Jersey, where she is the 2022 president-elect.

Johnson said she saw a need to include women of color as presenters in programs about technology law, real estate and other areas of practice. So, in 2019 she started her own program to give attorneys of color a platform. Even in promoting her event she was reticent to take credit for the work. That work did get her noticed and led to further leadership positions. Johnson is the current president-elect of the Garden State Bar Association.

Karda shared how she got noticed while volunteering for projects that no one else wanted. She also sought out additional training. If you need training or learning opportunities, you can find them here at the New York State Bar Association. Consider it an investment in yourself and your career. It will help you and it will make you a better lawyer for your clients. Johnson says sometimes success can be as simple as "just showing up. Show up and bring excellence to everything you do and others will take notice."

Roy M. Warner

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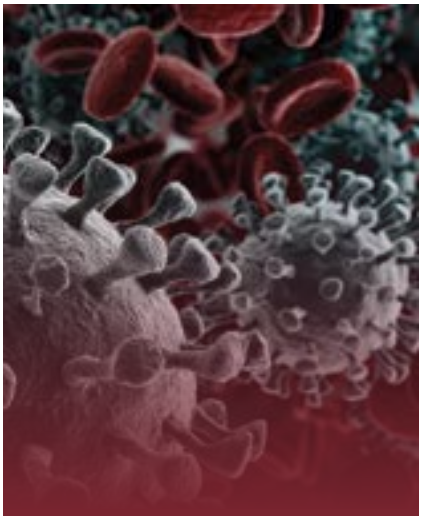

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Miller, Rachel Ellen

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Washington, Sarah M.

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Cohen, Brian S.
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† Levin Wallach, Sherry
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Gross, John H.
Islam, Rezwanul
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Kretzing, Laurel R.
Leo, Hon. John J.
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Wicks, Hon. James M.

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Katz, Joshua Reuven
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Taylor, Zenith T.
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Hill, Renee Corley
Marinaccio, Michael A.
Millon, Steven E.
Porzio, Madison
Santiago, Mirna M.

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Crawford, Allyn J.
Marotta, Daniel C.
Martin, Edwina Frances
McGinn, Sheila T.
Miller, Claire C.

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Filabi, Azish Eskandar
Gilbreath Sowell, Karen
Grady, Colleen M.
Heath, Hon. Helena
Houth, Julie T.
Reed, Prof. LaVonda Nichelle
Wolff, Brandon Lee

† Delegate to American Bar Association House of Delegates * Past President

Upcoming NYSBA Programs and Events

June & July

Webinar | **Enlightened Family Court Representation** | June 3 | 9:30 a.m. - 4:30 p.m. | 5.0 Credits

Video Replay | **Defending DWI/DUI: Legal Issues, Process, Treatment, NYS Impaired Driver System**
June 6 | 12:00 p.m. - 1:30 p.m. | 1.5 Credits

Webinar | **Starting a Solo Practice in New York 2022 - Part II: Operations, Technology and Risk Management**
June 7 | 9:00 a.m. - 2:30 p.m. | 6.0 Credits

Webinar | **International Litigation: Outbound Cross-Border Discovery**
June 7 | 12:00 p.m. - 1:00 p.m. | 1.0 Credit

Webinar | **Domestic Violence Survivors & Their Pets: Rights, Protections, and Best Interests**
June 8 | 12:00 p.m. - 1:30 p.m. | 1.5 Credits

New York, NY (and Webcast) | **Commercial Litigation Academy 2022**
June 9-10 | 9:00 a.m. - 5:00 p.m. | 16.0 Credits

Albany, NY | **Public Sector Labor and Employment Developments Since the Pandemic Began**
June 10 | 9:00 a.m. - 5:00 p.m. | 6.0 Credits

Video Replay | **Addressing Implicit Bias in the Criminal Justice System - Two Strategies**
June 15 | 11:00 a.m. - 1:30 p.m. | 3.0 Credits

Video Replay | **How a Single Cyber Attack Can Put Your Firm Out of Business and the Five Steps to Protect Yourself**
June 16 | 12:00 p.m. - 1:00 p.m. | 1.0 Credit

Saratoga Springs, NY | **Torts, Insurance and Compensation Law Section Awards Reception**
June 16 | 6:00 p.m. - 8:00 p.m.

Webinar | **June 2022 Bridging the Gap** | June 21-22 | 8:00 a.m. - 5:45 p.m. | 16.0 Credits

Webinar | **A Retrospective: FDA Commissioner Califf's (Second) First Six Months**
June 24 | 10:00 a.m. - 11:00 a.m. | 1.0 Credit

Webinar | **Representing UN Employees in Their Family Law Disputes**
June 28 | 12:00 p.m. - 1:30 p.m. | 1.5 Credits

Webinar | **Introduction to FDA and FTC: A Beginner's Guide for Practitioners**
June 30 | 10:00 a.m. - 11:00 a.m. | 1.0 Credit

Newport, RI | **Family Law Section 2022 Summer Meeting** | July 7-10

Webinar | **Comprehensive Commercial Arbitration Training for Arbitrators and Counsel**
July 11-13 | 9:00 a.m. - 5:00 p.m. | 24.5 Credits

Washington, D.C. | **Elder Law Section Summer Meeting** | July 14-16

Philadelphia, PA | **Real Property Law Section 2022 Summer Meeting** | July 21-24

Manchester, VT | **Trial Lawyers Section 2022 Summer Meeting** | July 31-Aug 2

*Details for programs and events may change so be sure to visit our website for the most up-to-date information.

To view all scheduled events, including those newly added, please visit:
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