



June 4, 2020

To: Members of the House of Delegates

Re: June 13 and 27, 2020 meetings

Enclosed are the agenda and related background materials for the upcoming meeting of the House of Delegates scheduled to begin at **9:00 a.m.** on Saturday, June 13, 2020 via a Zoom webinar. Participation instructions are being forwarded to you by e-mail. Due to the number of reports submitted for this meeting, the meeting will take place over two mornings, June 13 and June 27. The background materials with this memo cover items being considered on June 13; the materials for the June 27 meeting will be forwarded separately.

We look forward to seeing you virtually on June 13 and 27.

Scott M. Karson
President

T. Andrew Brown
President-Elect



**NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
VIRTUAL MEETING
SATURDAY, JUNE 13, 2020 – 9:00 A.M.
SATURDAY, JUNE 27, 2020 – 9:00 A.M.**

AGENDA

SATURDAY, JUNE 13, 2020

1. Call to order, Pledge of Allegiance, and welcome – Mr. T. Andrew Brown 9:00 a.m.
2. Approval of minutes of January 31 and April 4, 2020 meetings 9:05 a.m.
3. Recognition of Lawyers Lost to COVID-19 – Mr. T. Andrew Brown 9:10 a.m.
4. Memorial for Past President Henry G. Miller – Hon. Albert M. Rosenblatt 9:20 a.m.
5. Installation of officers – Hon. Jenny Rivera 9:30 a.m.
6. Installation of Scott M. Karson as President – Hon. Jenny Rivera 9:35 a.m.
7. Report of President – Mr. Scott M. Karson 9:45 a.m.
8. Report and recommendations of Health Law Section – Mr. Hermes Fernandez and Ms. Mary Beth Morrissey 10:05 a.m.
9. Report and recommendations of Committee on Technology and the Legal Profession – Mr. Mark A. Berman 10:30 a.m.
10. Report and recommendations of Committee on Standards of Attorney Conduct – Mr. Joseph E. Neuhaus 10:55 a.m.
11. Report and recommendations of Commercial and Federal Litigation Section – Hon. Shira A. Scheindlin 11:20 a.m.

SATURDAY, JUNE 27, 2020

12. Report of Treasurer – Mr. Domenick Napoletano 9:00 a.m.
13. Report and recommendations of Special Committee on Association Structure and Operations – Mr. Glenn Lau-Kee 9:15 a.m.
14. Report and recommendations of Task Force on Parole Reform – Messrs. Seymour W. James, Jr. and William T. Russell, Jr. 10:05 a.m.
15. Report and recommendations of Task Force on Domestic Terrorism And Hate Crimes – Ms. Carrie H. Cohen 9:55 a.m.
16. Report of The New York Bar Foundation – Ms. Lesley Rosenthal 10:20 a.m.
17. Administrative Items – Mr. T. Andrew Brown 10:30 a.m.
18. Date and place of next meeting
November 7, 2020
Bar Center, Albany

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
NEW YORK HILTON MIDTOWN, NEW YORK CITY
JANUARY 31, 2020**

PRESENT: Aaron; Adigwe; Alcott; Alomar; Arenson; Baum; Behrins; Bennett; Berman; Billings; Braunstein; Breeding; Brown, T.A.; Buholtz; Burke; Buzard; Caceres; Castellano; Chang, V.; Christensen; Christian; Christopher; Cilenti; Coffey; Cohen, D.; Cohen, M.; Cohen, O.; Cohn; Connery; Crawford; Dean; Disare; Doerr; Doxey; Eberle; Effman; Eng; Fallek; Fennell; Fernandez; Ferrara; Finerty; First; Fishberg; Fogel; Foley; Fox; Freedman, H.; Friedman; Frumkin; Genoa; Gerstman; Grady; Graves-Poller; Greenberg; Griesemer; Griffin; Grimaldi; Gross; Gutekunst; Gutenberger Grossman; Gitierrez; Haig; Harper; Heller; Fines; Hobika; Holtzman; Jackson; Jaglom; James; Kamins; Karson; Katz; Kean; Kearns; Kelly, K.; Kelly, M.; Kiernan; Koch; Krajewski; Kretser; LaBarbera; Lau-Kee; Lawrence; Leber; Leventhal; Levin Wallach; Levin; Levy; Lewis; Lindenauer; Lugo; MacLean; Madden; Madigan; Maldonado; Mandell; Margolin; Marinaccio; Markowitz; Marotta; Martin Owens; Martin; Matos; May; McCasnn; McNamara, C.; McNamara, M.; Meyer; Miller, C.; Miller, M.; Minkoff; Minkowitz; Miranda; Mohun; Montagnino; Moore; Muller; Mulry; Napoletano; Nowotarski; O’Connell; O’Donnell; Onderdonk; Palermo, C.; Perlman; Pessala; Pitegoff; Pleat; Poster-Zimmerman; Purcell; Radick; Ranni; Richardson; Rivera, J.; Russell; Ryan; Santiago; Scheinkman; Schofield; Schrag; Schraver; Schriever; Scott; Sen; Shafer; Shamoan; Sharkey; Sheldon; Sigmond; Silkenat; Simon; Singer; Skidelsky; Sonberg; Spolzino; Standard; Starkman; Sweet; Taylor; Tennant; Tesser; Triebwasser; van der Meulen; Ventura; Vigdor; Warner; Westlake; Wimpfheimer; Yeung-Ha; Young; Younger.

Mr. Karson presided over the meeting as Chair of the House.

1. Approval of minutes of November 2, 2019 meeting. The minutes were deemed accepted as distributed.
2. Report of the Treasurer. The Treasurer’s report for twelve months ending December 31, 2019, which had been presented by Treasurer Domenick Napoletano to members of the Association at the Annual Meeting, was received with thanks.
3. Report of the Nominating Committee and election of officers and members-at-large of the Executive Committee. Claire P. Gutekunst, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2020-2021 Association year: President-Elect: T. Andrew Brown, Rochester; Secretary: Sherry Levin Wallach, White Plains; Treasurer: Domenick Napoletano, Brooklyn; and Vice Presidents: First District – Diana S. Sen and Carol A. Sigmond, New York City; Second – Aimee L. Richter, Brooklyn; Third – Robert T. Schofield IV, Albany; Fourth – Marne Onderdonk, Saratoga Springs; Fifth – Jean Marie Westlake, East Syracuse; Sixth – Richard C. Lewis, Binghamton; Seventh – Mark J. Moretti, Rochester; Eighth – Norman P. Effman, Warsaw; Ninth – Adam Seiden, Mount Vernon; Tenth – Donna England, Centereach; Eleventh – David L. Cohen, Kew Gardens; Twelfth – Michael A. Marinaccio, White Plains; Thirteenth – Jonathan B. Behrins, Staten Island. Nominated as

members-at-large of the Executive Committee were Mark A. Berman, New York City; Jean F. Gerbini, Albany; Sarah E. Gold, Albany; Ronald C. Minkoff, New York City; Mirna M. Santiago, Pawling; Tucker C. Stanclift, Queensbury.

There being no further nominations, a motion was made and carried unanimously to elect the above-named individuals as officers and members-at-large of the Executive Committee.

4. Report of President. Mr. Greenberg highlighted items contained in his written report, a copy of which is appended to these minutes.
5. Report of Task Force on Free Expression in the Digital Age. David E. McCraw, co-chair of the Task Force, provided an informational report on the Task Force's work to date to address problems in local journalism, including strengthening FOIL provisions, legal threats to local journalism, non-profit funding, and legal services. The report was received with thanks.
6. Report and recommendations of New York County Lawyers Association. Hon. Jed S. Rakoff and Lewis F. Tesser presented a report setting forth recommendations to address the problem of innocent people pleading guilty in criminal dispositions. After discussion, a motion was adopted to approve the report and recommendations.
7. Address by Hon. Janet DiFiore, Chief Judge of the State of New York. Chief Judge DiFiore addressed the House of Delegates with respect to the status of Unified Court System initiatives. She provided an update on legislation to restructure the court system; the Excellence Initiative; early presumptive ADR criminal justice reform; increased 18-B rates;; the Judiciary's budget request; expanding access to justice; and a planned convocation on civic education. The chair thanked the Chief Judge for her report.
8. Presentation of the Ruth G. Schapiro Memorial Award. Mr. Greenberg presented the annual Ruth G. Schapiro Award to Hon. Rosalyn Richter in recognition of her judicial service and commitment to championing equal opportunities for all.
9. Report and recommendations of Committee on Cannabis Law. Aleece E. Burgio, co-chair of the Committee on Cannabis Law, presented the committee's recommendations for legalizing the recreational use of cannabis and detailed measures regarding safety, social equity, research, and taxation. After discussion, a motion was adopted to approve the report and recommendations.
10. Report and recommendations of Committee on Diversity and Inclusion. Violet E. Samuels, Vice Chair of the Committee on Diversity and Inclusion, together with committee member Lillian M. Moy, outlined the committee's proposed Diversity Plan for the Association and recommendations for its implementation. After discussion, a motion was adopted to approve the plan and implementation.
11. Report of Task Force on the New York State Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, presented an informational report on the Task Force's work to investigate and report on the experience and impact of New York's adoption of

the Uniform Bar Examination, including statewide public hearings the Task Force held in Fall 2019. The Task Force plans to present its report and recommendations at the April 2020 House meeting. The report was received with thanks.

12. Report of Task Force on Rural Justice. Hon. Stanley L. Pritzker and Taier Perlman, co-chairs of the Task Force, presented an informational report on the Task Force's work to develop recommendations for encouraging lawyers to work in rural communities. The Task Force plans to present its report and recommendations at the April 2020 House meeting. The report was received with thanks.
14. Report of Task Force on Mass Shootings and Assault Weapons. Margaret J. Finerty and David M. Schraver, co-chairs of the Task Force, presented an informational report on the Task Force's recommendations, which have been posted online, with a detailed report to be presented at the April House meeting. The report was received with thanks.
15. Report and recommendations of Committee on Standards of Attorney Conduct. Roy D. Simon, co-chair of the committee, outlined the committee's proposals to recommend to the Appellate Division the amendment of Rules 1.8, 3.4, 8.1 and 8.3 of the Rules of Professional Conduct. After discussion, a motion was adopted to approve the report and recommendations.
16. Administrative items. Mr. Karson reported on the following:

NYSBA delegates to ABA House of Delegates. At the April 4, 2020 meeting, the House would be requested to elect six of the Association's 11 delegates to the American Bar Association House of Delegates. The Nominating Committee had nominated the following individuals: T. Andrew Brown, Rochester; Sharon Stern Gerstman, Buffalo; Henry M. Greenberg, Albany; David P. Miranda, Albany; Kenneth G. Standard, New York City; Natasha Shisov, New York City (Young Lawyer Delegate).
17. Date and place of next meeting. Mr. Karson announced that the next meeting of the House of Delegates would take place on Saturday, April 4, 2020 at the Bar Center in Albany.
18. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
VIRTUAL MEETING
April 4, 2020**

Present: Aaron; Adigwe; Alcott; Alomar; Arenson; Barclay; Battistoni; Baum; Behrins; Bennett; Berman; Billings; Braunstein; Brown, T.A.; Brown, E.; Buholtz; Burke; Buzard; Castellano; Chang; Christensen; Christina; Christopher; Cobb; Cohen, D.; Cohen, M.; Cohen, O.; Connery; Crawford; Dean; DiPietro; Difalco; Doerr; Doxey; Doyle; Eberle; Effman; Eng; Engel; England; Fallek; Fay; Fennell; Fernandez; Finerty; First; Fishberg; Foley; Fox; Freedman, H.; Friedman; Frumkin; Gayle; Genoa; Gerstman; Getnick; Gilmartin; Goldberg; Good; Grady; Greenberg; Griesemer; Griffin; Grimaldi; Gross; Gutekunst; Gutenberger; Gutierrez; Haig; Hamid; Harper; Heller; Hines; Holtzman; Horan; Hurteau; Jackson; Jaglom; James; Jochmans; Kamins; Kapnick; Karson; Kearns; Kelly, K.; Kelly, M.; Kendall; Kenney; Kiernan; Koch; Krajewski; Kretser; LaBarbera; Lamberti; Lara-Garduno; Lau-Kee; Lawrence; Leber; Leo; Lessard; Leventhal; Levy; Lewis; Lindenauer; Lisi; Lugo; MacLean; Madden; Madigan; Maldonado; Mandell; Margolin; Marinaccio; Markowitz; Martin; Martin Owens; Matos; McCann; McDermott; McNamara, C.; McNamara, M.; Meyer; Miller, C.; Miller, M. Millett; Minkoff; Miranda; Montagnino; Muller; Mulry; Napoletano; Nowotarski; O'Connell; O'Donnell; Onderdonk; Ostertag; Palermo, A.; Palermo, C.; Pappalardo; Penzer; Perlman; Pessala; Peterson; Pitegoff; Pleat; Poster-Zimmerman; Purcell; Radick; Ranni; Richardson; Richter; Robinson; Rosenthal; Rosner; Russell; Ryder; Saleh; Santiago; Sarkozi; Scheinkman; Schofield; Schrauer; Schriever; Schwenker; Scott; Seiden; Sen; Shafer; Shamoon; Shampnoi; Sharkey; Sheldon; Shishov; Shoemaker; Sigmond; Silkenat; Silverman; Simon; Sinder; Singer; Skidelsky; Slavit; Smith; Sonberg; Spolzino; Starkman; Stoeckmann; Sweet; Tarson; Taylor; Tennant; Tesser; van der Meulen; Ventura; Vigdor; Warner; Weiss; Westlake; Weston; Whiting; Wimpfheimer; Wolff; Yeung-Ha; Young; Younger.

Mr. Karson presided over the meeting as Chair of the House.

1. Approval of minutes of meeting. The minutes of the January 31, 2020 meeting were approved as distributed.
2. Report of President. Mr. Greenberg highlighted the items contained in his written report, a copy of which is appended to these minutes.
3. Report of Treasurer. Domenick Napoletano, Treasurer, reported on the impact of Covid-19 on the Association's projected revenue and expenses through June 2020. In addition, he reported on the impact of the financial crisis on Association investments. The report was received with thanks.
4. Election of Nominating Committee and State Bar Delegates to ABA House of Delegates. Claire P. Gutekunst, Chair of the Nominating Committee, presented the report of the Nominating Committee.

- a. Election of members of the Nominating Committee. The following were nominated for service on the 2019-2020 Nominating Committee:

District members and alternates of the Nominating Committee: First – Vincent Ted Chang, Stephen C. Lessard, Susan B. Lindenauer, Michael J. McNamara, John Owens Jr., Seth Rosner Jay G. Safer, Kaylin Whittingham and Stephen P. Younger, with Adrienne B. Koch, First Alternate, Jai Chandrasekhar, Second Alternate; Second – Andrea E. Bonina and Armena Gayle, with Judith Grimaldi as Alternate; Third Hon. Rachel Kretser and Elena DeFio Kean, with Matthew Griesmer as Alternate; Fourth – Michelle H. Wildgrube and Tara Ann Pleat, with Peter Coffey as Alternate; Fifth – Timothy J. Fennell and Michael E. Getnick, with Hon. James P. Murphy as Alternate; Sixth – Kathryn Grant Madigan and Alyssa M. Barreiro, with Aaron Eberle as Alternate; Seventh – to be submitted; Eighth – Vincent E. Doyle III and Leah Nowotarski, with Thomas O'Donnell as Alternate; Ninth – Kelly M. Welch, James L. Hyer and Jessica D. Parker, with Dawn Kirby as Alternate; Tenth – Rosalia Baiamonte, Justin Block, Dorian Glover and Lynn Poster-Zimmerman, with Marian C. Rice, First Alternate, and Rosemarie Tully, Second Alternate; Eleventh – Violet E. Samuels and Chanwoo Lee, with Steven Wimpfheimer as Alternate; Twelfth – Adam Sheldon and Samuel M. Braverman, with Steven E. Millon as Alternate; Thirteenth – Michael J. Gaffney and Robert A. Mulhall, with Orin J. Cohen as Alternate.

A motion to elect the foregoing was adopted.

- b. Election of Delegates to ABA House: A motion was adopted to elect the following for a two-year term commencing in August 2020: T. Andrew Brown, Sharon Stern Gerstman, Henry M. Greenberg, David P. Miranda, and Kenneth G. Standard.
- c. Election of Young Lawyer Delegate to ABA House: A motion was adopted to elect Natasha Shisov as Young Lawyer Delegate to the ABA House of Delegates.
5. Report and recommendations of Task Force on Rural Justice. Hon. Stan L. Pritzker and Taier Perlman, co-chairs of the Task Force, presented the Task Force's recommendations to ensure access to justice for rural communities. After discussion, a motion to amend with respect to the Task Force's recommendation as to Rule 100.6 of the Rules of the Chief Administrative Judge was adopted with five members abstaining. A motion to approve the report as amended was adopted with three members abstaining.
6. Report and recommendations of Task Force on the New York Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, outlined the Task Force's recommendations with respect to the administration of the bar examination in New York. After discussion, a motion to table consideration of the report failed with four members abstaining. A motion was then adopted to approve the report with two members abstaining.
7. Report and recommendations of Committee on Standards of Attorney Conduct. Prof. Roy D. Simon, co-chair of the committee, together with committee member Joseph E. Neuhaus,

reviewed the committee's proposed amendments to Rule 7.5 of the Rules of Professional Conduct. After discussion, a motion to amend to disapprove the committee's proposed deletion in Rule 7.5 (b)(3) was approved with three abstentions. A motion was then adopted to approve the report and recommendations as amended. Two members abstained.

8. Report and recommendations of Task Force on Autonomous Vehicles and the Law. Dean Aviva Abramovsky, chair of the Task Force, reviewed the Task Force's recommendations for the regulation of autonomous vehicles; testing policies for autonomous vehicles; and liability and insurance. After discussion, a motion was adopted to approve the report and recommendations. One member abstained.
9. Report and recommendations of Task Force on Free Expression in the Digital Age. Cynthia Arato and David E. McCraw, co-chairs of the Task Force, outlined the Task Force's recommendations with respect to libel reform; FOIL reform; transparency; encouragement of nonprofits; and expanded legal services. After discussion, a motion to amend with respect to counsel fees as contained in Mr. Alcott's dissent was approved with two members abstaining. A motion to table the report was then approved with two members abstaining.
10. Administrative items. Mr. Karson reported on the following:
 - a. Motions to approve the designation of delegates filed by the county and local bar associations for the 2020-2021 Association year and to approve the filed roster of the members of the House for the 2020-2021 year were requested and approved.
 - b. He noted that this meeting represents his last as Chair of the House and thanked the House for the opportunity to serve. He thanked the departing members of the Executive Committee and the House for their service and thanked the staff for their support. He introduced Mr. Brown as the next Chair of the House.
11. Date and place of next meeting. Mr. Karson announced that the next meeting of the House of Delegates would take place on Saturday, June 13, 2020.
12. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.
13. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary



Henry M. Greenberg
President
Greenberg Traurig, LLP
54 State Street
Albany, New York 12207
greenbergh@gtlaw.com
518-689-1492

April 4, 2020

**President's Report
to the House of Delegates
April 4, 2020**

Our Finest Hour

Our entire society is in the throes of a historic public health crisis. Our lives have been upended, and the legal profession is not immune. As the state and federal governments work to contain the novel coronavirus (COVID-19), it continues to race across the nation and globe, leaving a trail of hardship and suffering in its wake. Here in New York, the epicenter of the pandemic, the virus has forced mass cancellations, curtailed our travel and compelled businesses and schools to close indefinitely. Most of us are cloistered at home in hopes of “flattening the curve” of infections and preventing our already stressed health care system from being completely overwhelmed.

The New York State Bar Association is meeting this unprecedented challenge head-on. Leaders and staff are working around the clock to help our members and the public. Rather than shut down, we stepped up. No bar association is providing more services or engaging in more effective advocacy for the betterment of the profession.

To paraphrase Winston Churchill, this is our finest hour.

Here are just a few examples of the work being done to address the challenges presented for lawyers by COVID-19.

Information Center

Because COVID-19 forced most lawyers to hunker down at home, it forced us to shift our law practices from real to virtual. NYSBA was well positioned to support and assist our members.

This past June we launched an all-out effort to complete construction of a “Virtual Bar Center” -- a digital platform where attorneys across the street and around the world are just a click away on their computer or smart phone from accessing NYSBA’s services and benefits. To do this, we overhauled our operating systems by creating a new website, adding state of the art e-commerce technology, enhancing the quality and reach of our communications capacity and digitalizing all publications.

When we were forced to close the Bar Center at 1 Elk Street in Albany, our Virtual Bar Center was open for business and could be operated remotely. In just a week, we converted NYSBA’s website, social media outlets and other digital platforms into the most robust COVID-19 information center of its kind for lawyers. Our members are kept up to date on the latest information -- including court notices, summaries of new directives and laws, and other developments -- through a continuous stream of e-mail alerts, podcasts, real-time posts on social media and original news stories.

At the same time, we have provided a record number of online CLE programs and webinars that address the unique legal issues arising from the crisis. Many of our coronavirus-related webinars are offered for free to members.

NYSBA has updated and reissued a comprehensive book on the state's public health laws entitled "New York State Public Health Legal Manual: A Guide for Judges, Attorneys and Public Health Professionals." The book, issued in collaboration with the New York State Office of Court Administration, examines the law governing the containment of communicable diseases, including pandemics like the one we now face.

We have also sought to educate the public about the laws that govern a public health crisis. NYSBA leaders have been cited and quoted in numerous news outlets on the complex civil liberties dimensions of the crisis.

Only when we are armed with accurate and timely information can we make smart decisions that will best prepare us to represent our clients, serve our communities and do the public good. NYSBA is providing our members with the information they need to navigate the crisis.

Emergency Task Force for Solos & Small Firms

Solo practitioners and law firms of fewer than 10 attorneys comprise more than half of NYSBA's membership. COVID-19 is having a devastating impact on these practitioners, many of whom have limited financial resources to draw upon during the crisis.

To provide immediate assistance, we have established an emergency task force comprised of a distinguished group of lawyers and judges from around the state. The task force is chaired by Domenick Napoletano from Brooklyn and June Castellano from Rochester, both solo practitioners themselves. This body is focused like a laser beam on the needs of solos and small firms and will make recommendations to get them help as quickly as possible.

Statewide Pro Bono Network

NYSBA has been in communication with senior officials in all three branches of government throughout the crisis. Lawyers have always led in times of crisis and policymakers are turning to us for ideas, assistance and support.

In late March, NYSBA and the Office of Court Administration announced a partnership to support and coordinate a statewide pro bono network of lawyers to handle the expected surge in legal cases resulting from the coronavirus pandemic and the ensuing economic fallout. New York's network of pro bono and institutional legal service providers was strained prior to the pandemic and will not be able to handle the expected onslaught of virus-related cases unaided. Thousands of New Yorkers will need help with a wide range of legal issues, including those arising from unemployment, evictions, family emergencies and claims by creditors. We will support legal aid societies and other institutional providers by matching pro bono attorneys with the anticipated overflow of clients.

The partnership between NYSBA and the state court system will seek to ensure that all indigent New Yorkers are able to exercise their right to legal counsel at a time when the demand for legal services will be higher than ever. As a first step, we will convene meetings of the state's bar associations, large law firms, the heads of law school clinics, institutional providers of legal services and others for the purposes of assembling a network of pro bono lawyers who can be rapidly dispatched to help those in need. Former Chief Judge Jonathan Lippman has agreed to spearhead the effort.

In times of crisis, lawyers and law firms have always met their professional obligation to protect the rights of those who cannot afford an attorney. We saw that during 9/11. We saw that in 2017, when thousands of lawyers mobilized at the nation's airports in response to

President Trump's attempt to ban entry into the United States by people from predominantly Muslim countries. We are seeing that again now.

Enhanced Advocacy

NYSBA has ramped up its advocacy efforts on multiple fronts. We joined the chair of the state Senate Judiciary Committee, Brad Hoylman, and other lawmakers in calling for Governor Andrew Cuomo to toll all statutes of limitations for the duration of the coronavirus disaster emergency. Our motive was simple: litigants and attorneys should not have to choose between placing themselves at risk of exposure to the coronavirus or pursuing civil and criminal justice.

Within two days of our announcement supporting this measure, the Governor signed the executive order.

In a similar vein, NYSBA has battled for graduating law students, many of whom carry massive student loan debts and are facing declining job opportunities as a result of the pandemic. Adding to their stress is the uncertainty over when they would be able to take the bar examination in New York. On March 23, I charged our Task Force on the Bar Examination on an emergency basis to consider how the state should handle the examination during the coronavirus crisis. In a week, the task force produced a cogent report that made three recommendations: First, that the July bar exam be rescheduled for a later date, as soon as possible around Labor Day. Second, if circumstances make a fall bar exam impossible, then graduates should be allowed to engage in certain law practice under practice orders, with the supervision of licensed attorneys. Third, a one-time general waiver should be granted to all law schools of the Court of Appeals' limits on distance learning credits for applicants to the New York bar, so that students completing law school this year would not be penalized due to

widespread social distancing measures implemented by their law schools to stop the spread of the coronavirus.

In less than 48 hours, the Court of Appeals adopted all three of the task force's recommendations. That action is a testament to the extraordinary leadership of the task force's chair, Hon. Alan Scheinkman, presiding justice of the Appellate Division, Second Department, and diligence of his colleagues. It also speaks volumes about the esteem with which NYSBA is regarded by the court system's leaders.

Attorney Well-Being

The COVID-19 outbreak is not only a threat to lawyers' physical health and law practices. It is also taking a toll on their emotional well-being. In this time of fear and isolation, many are experiencing anxiety and depression.

To help judges, attorneys and law students cope with the crisis, NYSBA is offering confidential support groups being held weekly via videoconference. The group is facilitated by Libby Coreno, the chair of the Attorney Well-Being Committee, and Kerry O'Hara, a psychiatrist. Each group session is organized with an overarching theme for discussion. All participants are given the opportunity to share if they wish, with supportive conversation to follow.

Looking to the Future

An old adage holds that "this too shall pass." And it shall. We have been here before. Just as NYSBA has weathered dangerous storms in the past — including two World Wars and the Great Depression — so too we will overcome the current crisis.

That said, the coronavirus pandemic is an inflection point. Trends long underway in the practice of law have been accelerated. With respect to the use of technology, for example, the

profession has experienced more change in just the past few weeks, than it has in the past few decades. It does not require prophetic powers to know that, when the crisis passes, traditional face-to-face encounters with clients and others will be less necessary as remote options become the norm. I am confident that soon, technology-enhanced courtrooms will become commonplace from Niagara Falls to Montauk.

The New York State Bar Association is now an agile technological powerhouse. That is a good thing, because never in the association's storied history has our voice and leadership been more desperately needed. Our response to the COVID-19 crisis proves that we are up to the challenge.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Health Law Section.

The attached report from the Health Law Section was prepared to review the legal issues faced by the health care system in response to the Covid-19 pandemic, as well as the pandemic's effects on individuals, families and communities. The section appointed a task force to conduct its review; the task force examined public health, ethics, provider systems, telehealth, reimbursement, business and liability, workforce and vulnerable population issues. It consulted with experts in medicine and bioethics on issues of concern.

The Section's recommendations are contained in Appendix G of the report, summarized as follows:

1. Public Health Law Framework and Legal Reforms:

The Department of Health (or through it the Task Force on Life and the Law) should review and consider:

- (a) Enactment into New York Law of the Model State Emergency Health Powers Act (MSEHPA),; and
- (b) Adoption of the, "Crisis Standards of Care," developed by the Institute of Medicine in 2012, as is, or as otherwise updated and amended, by the New York State Department of Health (or through it The Task Force on Life and the Law).

2. Ethical Issues in the Management of COVID-19:

(a) Allocation of Life-Saving Equipment: The Task Force on Life and the Law (NYSTFLL) or New York State Department of Health or Governor should:

- i. Review and consider whether the 2015 Task Force Report entitled, "Ventilator Allocation Guidelines" requires updating and amendment; and
- ii. DOH should issue emergency regulations mandating all providers and practitioners follow the ethics guidelines, and ensure: 1. the needs of vulnerable populations, including older adults, persons with disabilities, inmates and immigrants, are met in a nondiscriminatory manner in the implementation of emergency regulations and guidelines; 2. provision of palliative care as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID19 crisis, especially when access to life-saving measures, desired equipment or

other resources are not available; 3. provision of education and training to physicians, health care practitioners, and institutional triage and ethics committees; and 4. provision of generalist-level palliative care education and training for all health care workers and health-related service workers in all settings who are providing supportive care.

iii. The Governor should: 1. waive or suspend certain NYS laws to protect from civil and criminal liability exposure practitioners who follow the ethics guidelines; and 2. direct all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

(b) Withdrawal, DNR and Futility: Amend the New York State Public Health Law:

i. Article 29-C “Health Care Proxy,” should require in the case of a State Disaster Emergency Declaration: (i) at least one, rather than two, witnesses, or (ii) attestation by a notary public in person or remotely; and

ii. should provide criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities, when the following steps are taken: (1) a practitioner, as defined in Public Health Law Section 2994-a, determines that a patient’s resuscitation would be “medically futile” as defined in PHL 2961.12; (2) a second practitioner concurs with the determination; and (3) both practitioners document their determination in the medical record; and in connection therewith, revoke or amend all laws and regulations prohibiting or penalizing such determinations and actions, including without limitation, those set forth on page 12 of this Report.

(c) Virus Testing: New York State Department of Health or Governor should consider:

i. Establishing a coordinated statewide plan that ensures: frontline health care workers are prioritized in access to rapid diagnostic testing; and further, the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

3. Provider Systems and Issues:

(a) Amend New York Law:

i. Purchasing Necessary Supplies:

1. Amend New York General Business Law Section 396-r to include prohibition from exorbitant pricing of all equipment and products of any kind used either in patient care or to protect health care workers from infection.

(b) Continue Waivers and Executive Orders:

i. Ability to Exceed Certified Bed Capacity for Acute Care Hospitals

1. Continue the waiver by the Governor’s Executive Orders 202.1 and 202.10 of the DOH regulations governing certified bed restrictions for the pendency of the State Disaster Emergency.

ii. Limitation on Resident Hours Working in Acute Care Hospitals

1. Continue the Governor's Executive Order 202.10's waiver of NYCRR Article 10, Section 405, limiting resident work hours for the pendency of the State Disaster Emergency.

iii. Temporary Changes to Existing Hospital Facility Licenses Services and the Construction and Operation of Temporary Hospital Locations and Extensions

1. Continue the waiver provided in Executive Orders 202.1 and 202.10 of the State requirements that restrict the ability of Article 28 facilities to reconfigure and expand operations as necessary, for the pendency of the State Disaster Emergency.

iv. Anti-Kickback and Stark Law Compliance during the COVID-19 Emergency

1. New York State: Adopt the waivers provided by CMS and the OIG as to the AntiKickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue

(c) Long Term Care, Residential and Home Care, and Correctional and Detention Facility Settings

i. Older Adults, Nursing Home Providers and Nursing Home Residents: Governor, Department of Health (DOH), DOH Bureau of Long Term Care and State Office for Aging should ensure:

1. Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund; 2. Adequate provision of PPE; 3. Adequate levels of staffing; 4. Adequate funding of employee testing, as required under Executive Order 202.30; 5. Consistent and timely tracking and reporting of case and death data; 6. Adoption of non-discriminatory crisis standards and ethics guidelines; and 7. Recognition and honoring of Older New Yorkers' right to health and human rights, as protected under international conventions: and 8. Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.

ii. Persons with Disabilities in Residential Facilities or Group Homes: Governor and Department of Health should ensure:

1. Access of persons with disabilities to adequate COVID-19 testing and appropriate medical care, mental health and other supportive services, including appropriate day services to substitute for community-based day programs that need to be discontinued during a pandemic; 2. Adequate and appropriate staffing, of residential facilities and group homes, for both day and evening shifts, and provision of appropriate funding for such staff and for appropriate COVID-19 staff training; 3. Access of residential facility and group home staff to adequate testing and appropriate medical care and mental health and other supportive services; 4. Oversight of residential facilities and group homes and programs to assure nondiscriminatory management of persons with disabilities during the COVID-19 crisis conditions; and 5. Recognition and honoring of persons with disabilities' right to health and human rights, as protected under international conventions.

iii. Inmates and Correctional Facilities: Governor, NYS Department of Corrections and NYC Department of Corrections, should ensure:

1. Adequate access of inmates to COVID-19 testing, medical care and mental health and supportive services; 2. COVID-19 testing of correctional staff and adequate

provision of gloves, masks and other protective equipment; 3. Release to the community of older inmates and inmates with advanced illness who do not pose a danger to the community; 4. Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and 5. Recognition and honoring of inmates' right to health and human rights, as protected under international conventions.

iv. Immigrants in Detention Facilities: In its exercise of its police powers in the COVID19 public health emergency, New York State must take steps, similar to those outlined above, in cooperation with federal agencies to ensure:

1. Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers.

(d) Telehealth

i. Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

(e) Immunities

i. Adapt Executive Orders to be consistent with Sections of the Public Health Law and include criminal liability, as well as immunity to health care facilities.

4. Business/Contracts/Risk Management

(a) Consider extending immunity under NY UCC section 2-615(a) to supply chain vendors where specific performance under a contract becomes impracticable due to unforeseen event or good faith compliance with governmental orders or regulations during crisis.

(b) Adopt CMS 1135 Waivers and afford civil and criminal immunity to permit health care and health care related organizations and individual providers to modify operations to control contagion and manage the public health crisis. Immunity afforded to individual practitioners should extend to treatment of all patients during the crisis, not just acts of omission or commission in the management of COVID-19 since other patients within the health care system are inevitably impacted by the decisions made by these practitioners on the front lines.

5. Workforce

(a) Provide clear, timely guidance and support to all non-health care businesses and academic institutions to coordinate effective implementation of universal precautions and other workplace safety best practices to facilitate public health and trust, while mitigating disparate conditions during the phase-in process and long-term.

i. Consider publicly posting essential/non-essential business operations decisions with an industry-wide impact on the Empire State Development (ESD) website in real time to mitigate confusion and enhance institutional compliance.

ii. Consider granting staffing firms dedicated to child care the provider status necessary to enable them to operate in New York State and supplement the childcare

workforce in order to ensure the health and safety of our children, while enabling businesses to effectively reopen within sufficient childcare support.

iii. Consider education and training pertaining to crisis standards and civil and criminal immunity to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services.

iv. Consider enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by front-line health care workers under crisis conditions.

6. Vaccination

(a) When the efficacy of a COVID-19 vaccine has been confirmed, enact legislation requiring vaccination of each person unless the person's physician deems vaccination for his or her patient to be clinically inappropriate.

7. Vulnerable Populations and Issues of Equity and Discrimination: A Call for Social Justice

(a) Enhance regulatory oversight, to ensure:

i. adequate and non-discriminatory allocation of resources to vulnerable populations and communities of color;

ii. equitable access of vulnerable populations to health and mental health services, including palliative care as an ethical minimum to mitigate suffering among those

The report will be presented at the April 4 meeting by immediate past section chair Hermes Fernandez and Mary Beth Morrissey, chair of the section's task force.



NEW YORK STATE
BAR ASSOCIATION

Report of the New York State Bar Association's Health Law Section Task Force on COVID-19

May 13, 2020

The Health Law Section Executive Committee has voted unanimously to approve the report and recommendations of the Task Force.

This report is dedicated to New York's health care workers and workers in service jobs on the front lines of the pandemic.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. PUBLIC HEALTH LAW FRAMEWORK.....	3
INTRODUCTION	3
LEGAL REFORMS	3
CRISIS STANDARDS OF CARE.....	4
PROVIDER AND COMMUNITY ENGAGEMENT.....	5
ADOPTION AND COMMUNICATION OF CONSISTENT METHODS OF RESOURCE ALLOCATION.....	6
CONTINUOUS PERFORMANCE IMPROVEMENT	6
PROVIDER EDUCATION ABOUT THE CSC	6
CONSTITUTIONAL PROTECTIONS AND CIVIL LIBERTIES	7
II. ETHICAL ISSUES IN THE MANAGEMENT OF COVID-19.....	8
INTRODUCTION	8
ALLOCATION OF LIFE-SAVING EQUIPMENT	8
<i>Virus Testing</i>	8
<i>PPE</i>	8
<i>Ventilators and Other Scarce Equipment</i>	9
WITHDRAWAL, DNR, AND FUTILITY	11
BALANCING OF AUTONOMY VERSUS PROTECTION OF PUBLIC HEALTH	13
ESSENTIAL SERVICES.....	15
MEDICAL RESEARCH	15
<i>Ethical Considerations</i>	15
<i>Incapacitated subjects</i>	15
<i>Sharing of Data and Specimen</i>	15
<i>Health Care Workers as Study Subjects</i>	16
III. PROVIDER SYSTEMS AND ISSUES.....	16
INTRODUCTION	16
PURCHASING NECESSARY SUPPLIES FOR HOSPITALS AND OTHER HEALTH CARE PROVIDERS DURING A STATE OF EMERGENCY	16
ABILITY TO EXCEED CERTIFIED BED CAPACITY FOR ACUTE CARE HOSPITALS	17
LIMITATION ON RESIDENT HOURS WORKING IN ACUTE CARE HOSPITALS.....	18
TEMPORARY CHANGES TO EXISTING HOSPITAL FACILITY LICENSED SERVICES, AND THE CONSTRUCTION AND OPERATION OF TEMPORARY HOSPITAL LOCATIONS AND EXTENSIONS	19
ISSUES IN LONG-TERM CARE, RESIDENTIAL AND HOME HEALTH CARE, AND CORRECTIONAL AND DETENTION FACILITIES: HUMAN RIGHTS CRISIS.....	20
<i>Older Adults, Nursing Home Providers and Nursing Home Residents:</i>	23
<i>Persons with Disabilities in Residential Facilities or Group Homes:</i>	23
<i>Inmates and Correctional Facilities:</i>	23
<i>Immigrants in Detention Facilities:</i>	24
ANTI-KICKBACK AND STARK LAW COMPLIANCE DURING THE COVID-19 EMERGENCY	24
EXPANDED USE OF TELEHEALTH DURING THE COVID-19 EMERGENCY.....	28
TESTING DURING PANDEMIC.....	30
IV. BUSINESS/CONTRACTS/RISK MANAGEMENT	31
INTRODUCTION	31
POTENTIAL LIABILITY FOR BREACH OF CONTRACT DURING CORONAVIRUS PANDEMIC	32
FORCE MAJEURE.....	32
COMMON LAW DOCTRINES: FRUSTRATION OF PURPOSE AND IMPOSSIBILITY.....	33
NEW YORK’S UNIFORM COMMERCIAL CODE SECTION 2-615	34
PAYCHECK PROTECTION PROGRAM	35
IMMUNITY	35
<i>Federal Immunity Declarations in Response to COVID-19</i>	35
<i>New York State-Specific Immunity Declarations in Response to COVID-19</i>	37

HIPAA PRIVACY RULE.....	39
WORKPLACE LIABILITY EXPOSURE.....	40
<i>Employment Practices</i>	40
<i>Workplace Safety</i>	40
V. WORKFORCE ISSUES ASSOCIATED WITH COVID-19	41
INTRODUCTION TO WORKFORCE	41
ALLOCATION OF HUMAN RESOURCES.....	42
ESSENTIAL AND NON-ESSENTIAL BUSINESS CATEGORIZATION	42
EMPLOYER WORKPLACE CONSIDERATIONS.....	43
EMPLOYEE BENEFITS.....	44
SICK LEAVE, PAID TIME-OFF (PTO), UNEMPLOYMENT.....	44
<i>The Family First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic</i>	44
<i>Security Act (CARES Act)</i>	44
<i>WARN – Worker Adjustment and Retraining Notifications</i>	45
<i>Sick Leave and Paid Time-Off (PTO), Paid Family Leave Benefits</i>	45
<i>Unemployment Benefits</i>	46
SCHOOLS AND CHILD CARE.....	48
<i>Child Care</i>	49
<i>Public and Private Schools, Colleges, and Universities</i>	52
<i>Operational Uniformity across Academic Institutions</i>	52
<i>Entanglement of the School System, Food Security, and Health Care</i>	53
<i>Disparities Associated with Home Schooling and Online Learning</i>	54
ESSENTIAL HEALTH CARE SERVICES WORKERS.....	55
<i>State Licensure</i>	55
<i>Credentialing Requirements</i>	56
<i>Scope of Practice Principles</i>	56
<i>Education and Training to Crisis Standards of Care</i>	57
EMPLOYEES’ RIGHTS	57
<i>Safe Workplace</i>	57
<i>Protection against Retaliation</i>	59
<i>Discrimination</i>	59
VI. VACCINATION	60
VII. VULNERABLE POPULATIONS AND ISSUES OF EQUITY AND DISCRIMINATION: A CALL	
FOR SOCIAL JUSTICE.....	62
HEALTH CARE WORKERS AND ESSENTIAL SERVICES.....	63
ACTION STEPS.....	65
VIII. CONCLUSION	65
IMPROVING PREPARATION FOR NEXT PUBLIC HEALTH EMERGENCY	65
EVALUATION OF LAWS AND REGULATIONS POST-PANDEMIC.....	66
APPENDIX A	
NEW YORK STATE BAR ASSOCIATION HEALTH LAW SECTION LETTER TO GOVERNOR	
CUOMO, MARCH 26, 2020	67
APPENDIX B	
UNIVERSITY OF ROCHESTER MEDICAL CENTER DECISION ALGORITHMS (2015 NYSTFLL	
GUIDELINES)	68
APPENDIX C	
HEALTH LAW SECTION PROXY LAW MEMO.....	69
APPENDIX D	

**NEW YORK STATE BAR ASSOCIATION DEPARTMENT OF HEALTH PROPOSED RULEMAKING
IN RELATION TO THE RELEASE OF SUBJECT-IDENTIFIED RESEARCH FINDINGS 71**

APPENDIX E

STATE SOCIETY ON AGING OF NEW YORK LETTER TO GOVERNOR CUOMO, APRIL 30, 2020 .. 72

APPENDIX F

**GUIDANCE FOR DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A
WORKFORCE REDUCTION UNDER RECENT EXECUTIVE ORDERS..... 73**

APPENDIX G

TASK FORCE RECOMMENDATIONS..... 78

1. PUBLIC HEALTH LAW FRAMEWORK AND LEGAL REFORMS: 78
2. ETHICAL ISSUES IN THE MANAGEMENT OF COVID-19:..... 78
3. PROVIDER SYSTEMS AND ISSUES:..... 79
4. BUSINESS/CONTRACTS/RISK MANAGEMENT 81
5. WORKFORCE 82
6. VACCINATION 82
7. VULNERABLE POPULATIONS AND ISSUES OF EQUITY AND DISCRIMINATION: A CALL FOR SOCIAL JUSTICE
82
8. EMERGENCY PREPAREDNESS..... 83

APPENDIX H

**NEW YORK STATE BAR ASSOCIATION HEALTH LAW SECTION TASK FORCE MEMBERS,
ADVISORS AND EXPERTS..... 84**

Executive Summary

The COVID-19 crisis and New York on PAUSE¹ have presented a unique set of circumstances for New York healthcare providers, professionals and workers, and the persons, families and communities they serve. Over 22,000 New Yorkers have lost their lives to date, based upon New York State Department of Health data, including nursing home and adult care facility COVID-19 related deaths statewide, reported through the period ending May 13, 2020.² While the apex of the pandemic appears to be flattening in New York, deaths are still hovering at an unacceptably high number, and emerging data and evidence suggest heightened risk for young children. The health system as a whole has been struggling to deal with executive orders and overwhelmed capacities and capabilities, across the continuum of care, as well as the surge in capacity that occurred over a very short time period. Through drastic social control measures (i.e., closing businesses and enforcing social distancing), supported by innovation and resourcefulness (for example, in adaptation of equipment such as shared ventilators), explicit rationing of resources may have been averted in some parts of the system, or mitigated in others, at least for now, particularly as such rationing concerns allocation of ventilators in the hospital system. It has come to light that the long-term care system has not fared nearly as well, and there have been continuing shortages of personal protective equipment and staff in both the hospital and long-term care systems. Notwithstanding the unparalleled bravery we have witnessed at all levels of the system, issues concerning rationing scarce resources, including implicit forms of rationing, remain relevant while the pandemic continues to devastate populations and health care workers. This is particularly apparent in the long-term care sector. To the extent that crisis standards of care remain in place during the period the pandemic continues to flatten, as well as in future waves of COVID-19, there will continue to be concern about rationing.

In addressing the legal and ethical issues confronted by the health system, we must not forget the human face of COVID-19, the persons, families and communities affected by the pandemic, and the unspeakable assaults on the fabric of human life – loved ones dying alone in sterile hospital rooms, unemployment and food insecurity, the loss of sociality, and depths of bereavement and despair unknown in generations, at least in the western world. Communities of color and those historically disadvantaged and marginalized, including Black/African Americans and Latinos with illness burden, isolated and vulnerable older adults, nursing home residents, persons with disabilities, persons who are homeless, workers in low-income jobs and on the frontlines, and inmates and immigrants, have been the hardest hit by the pandemic, reflecting the intersectionality of age, race and ethnicity, class, gender, and disability and immigration status. In these contexts, there has been a lack of systematic attention to the psychosocial needs of those affected by the pandemic,³ or the role of the helping professions including psychology and social work, perhaps with the exception of palliative care which is playing a central role in the pandemic. Palliative care physicians, nurses, nurse practitioners, social workers, psychologists, and chaplains are trained in working with families, goals of care discussions, pain assessment and mitigation of suffering, and providing bereavement support. Efforts to locate palliative care practitioners and teams in emergency rooms during the pandemic, as reported by hospital systems here in New York, are helping to relieve the stress of front-line workers,

¹ N.Y EXEC. ORDER, *New York State on Pause: 10 Point Plan*, Mar. 22, 2020, <https://coronavirus.health.ny.gov/new-york-state-pause>.

² NEW YORK STATE, Department of Health, COVID-19 Tracker, *Fatalities*, May 14, 2020, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n>; *Nursing Home and ACF COVID Related Deaths Statewide*, May 13, 2020, https://www.health.ny.gov/statistics/diseases/covid-19/fatalities_nursing_home_acf.pdf.

³ UNITED NATIONS, Policy Brief: COVID-19 and the Need for Action on Mental Health, May 13, 2020, https://www.un.org/sites/un2.un.org/files/un_policy_brief-covid_and_mental_health_final.pdf.

and provide critical support to patients and their family members as they confront the assaults of the virus and imminent risk of death.⁴

As the crisis began to unfold, New York State Bar Association (NYSBA) President Hank Greenberg asked that the Health Law Section prepare a report on the legal issues presented by the COVID-19 epidemic. To meet the request, Section Chair Hermes Fernandez appointed a Task Force to address the unique legal and ethical questions raised by COVID-19.⁵ The Health Law Section Task Force began work in early March.⁶

The Task Force was charged with examining legal issues presented by the pandemic. As the Task Force pursued its work, it identified gaps in the law and legal and regulatory barriers to care delivery that have emerged during the pandemic. The Task Force also chose to make recommendations to address such gaps and barriers in the rapidly changing legal environment, based upon present knowledge.

Cluster groups were organized to examine public health, ethics, provider systems, telehealth, reimbursement, business and liability, workforce and vulnerable population issues.

The members of the Task Force and its various cluster groups convened approximately twice a week, starting on March 13 through April 24, to identify goals and priorities, and also consulted with experts in medicine and bioethics on issues of concern. The members of the Task Force and cluster groups followed consensus processes of decision making throughout its work. During this time, governmental leadership has managed many of the issues the Task Force addresses through a series of declarations and emergency orders.⁷ The Task Force acknowledges the value and impact of such steps.

This report reflects the consensus of the Task Force on a wide range of legal and ethical issues and recommendations to further ease the challenges presented now and anticipated in the future. The following limitations of the report are noted: although we touch upon the interaction of federal and state law, the principal focus of the report is New York law; the key issues identified and examined by the Task Force members are by no means exhaustive; and as of this date, sources of reliable data and evidence about the pandemic remain limited. A summary set of Task Force recommendations, based upon current knowledge, may be found at the end of the report.⁸ These recommendations will need to be re-assessed over the course of the pandemic, and as more knowledge is gained about the science of COVID-19, health system vulnerabilities, and population outcomes.

⁴ Dana Lustbader & Sean Morrison, *Palliative Care on the Front Lines of COVID-19*, GNYHA (webinar), Apr. 20, 2020, <https://www.gnyha.org/event/palliative-care-on-the-front-lines-of-covid-19-webinar/>.

⁵ See a full list of appointed members of the Task Force, as well as consulting advisors, scholars and legal professionals, and attorney and law student volunteers who provided support to the Task Force, Appendix H.

⁶ The opinions expressed herein are those of the Health Law Section, and not those of the New York State Bar Association until approved by the House of Delegates or the Executive Committee, or the individual members of the Task Force. The New York State Bar Association is a statewide bar association with 74,000 members. We are proud to have a robust Health Law Section with active members in diverse areas of practice concentration and legal scholarship.

⁷ See New York State Bar Association Health Law Section Task Force Letter to Governor and Department of Health, March 26, 2020, footnotes 4, 5, 6 and 7, Appendix A.

⁸ See Task Force Recommendations, Appendix G.

I. Public Health Law Framework

Introduction

Public health law focuses on the legal powers and duties of the state to protect the public health, as well as limitations on state power to preserve the legally protected interests of individuals. Public health law provides critical tools to support the response of federal, state, and local governments to public health emergencies (PHEs).⁹

Legal Reforms

Legal reforms have sought to improve planning and response for PHEs through development of legal response capabilities, comprehensive federal and state declarations, and improved classifications of PHEs utilizing modern approaches to react to current threats.¹⁰ Public health law experts and academics have promoted adoption of model emergency preparedness acts to equip government officials with the legal tools to respond to novel and emerging public health threats. For example, the Model State Emergency Health Powers Act (MSEHPA), developed by the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities in 2001, provides a set of model provisions for state and local government to respond to public health crises.¹¹ The MSEHPA balances individual and communal interests when government is responding to a public health threat that may result in a large number of deaths and/or mass morbidity. It provides a framework for governments to respond efficiently and effectively to public health emergencies without unjustly infringing upon individual rights.^{12,13}

New York can benefit from examining the principles established in the model legislation for coordinating an effective public health response during the coronavirus pandemic. Knowledge of a uniform structure of laws in New York for enabling a public health emergency response is especially important in protecting community health as more residents become infected, demanding more resources from the state's healthcare system. Once the pandemic is over, New York should review and consider adopting the MSEHPA provisions, as is or as otherwise amended, using the Columbia University Center for Health Policy Gap Analysis,¹⁴ developed at the impetus of, and in collaboration with, the NYSBA Public Health Law Committee.

New York State Executive Law Article 2-B,¹⁵ as significantly expanded in April 2020 (Ch. 23, Laws 2020),¹⁶ grants emergency powers to both local heads of government and to the Governor. Epidemics are included in its definition of what is an emergency.¹⁷ The chief executive of a town or city in which an epidemic is occurring may issue directives to safeguard the health of the public that include setting curfews and restricting people from gathering in public places.¹⁸ If an epidemic cannot be contained by local action,

⁹ JAMES G. HODGE, JR., *PUBLIC HEALTH LAW IN A NUTSHELL*, 227-247 (West Academic Publishing 2014).

¹⁰ James G. Hodge, Jr. et al., *From Anthrax to Zika: Key Lessons in Public Health Legal Preparedness*, 15 *INDIANA L. REV.*, 23, 25-26 (2018).

¹¹ See Lawrence O. Gostin et al., *Model State Emergency Health Powers Act*, CENTER FOR LAW AND THE PUBLIC'S HEALTH (Georgetown University 2001), <http://publichealthlaw.net/MSEHPA/MSEHPA.pdf>.

¹² See Lawrence O. Gostin & James G. Hodge, *State Public Health Law Assessment Report*, TURNING POINT PUBLIC HEALTH STATUTE MODERNIZATION NATIONAL COLLABORATIVE (2002).

¹³ See *id.*

¹⁴ Benjamin Mason Meier & Jocelyn Getgen, *Gap Analysis: Comparing the Model State Emergency Health Powers Act with Corresponding New York State And New York City Statutory Authority*, CENTER FOR HEALTH POLICY (Columbia University 2008).

¹⁵ N.Y. EXEC. L. Art. 2-B – State and Local Natural and Man-Made Disaster Preparedness.

¹⁶ Ch. 23, Laws 2020.

¹⁷ N.Y. EXEC. L. §20(2)(B).

¹⁸ N.Y. EXEC. L. §24.

the Governor may declare a disaster and issue directives to protect the public. Applicable laws require implementation of the least restrictive measures to protect the public, as well as reliance on specialists to prevent adverse effects of any public health emergency measures during the pandemic. The Public Health Manual, recently updated by the New York State Bar Association and New York's Office of Court Administration, provides an overview of the laws that apply to public health issues.¹⁹ As evidenced by the numerous Executive Orders issued over the past several months, more review, analysis, and legislation potentially, are needed.

Developing a systematic framework to prioritize scarce resources in the face of the coronavirus pandemic is essential to protect both individual rights and the public's health. This requires a robust evaluation of constitutional rights, ethical triage of scarce resources, guidance regarding existing advance care directives, and adverse effects of decisions on vulnerable populations and communities of color – all components of legal and ethical decision-making to ensure fairness, transparency and equity. Issues of equity present the most challenging allocation decisions and call upon us to grapple with questions of implicit bias and risks of discrimination in crisis standards and decision processes. For example, if people of color or with comorbidities and other burdens are less likely to survive hospitalization due to social and economic determinants of health that have compromised their health status over the life years and resulted in advance illness and compromise, is it ethical to consider long-term survival in making allocation decisions? Federal law bars discrimination on the basis of disability, and in the case of discriminatory triage guidelines, enforcement actions may result.²⁰

Crisis Standards of Care

New York State, and other jurisdictions, have lacked sufficient resources (e.g., practitioners, personal protective equipment, ventilators, and dialysis machines) to provide critical care during the coronavirus pandemic and may face similar situations in possible future surges. Rationing resources may thus be unavoidable at such times. The development of a framework to guide decision making in a crisis -- a pervasive (e.g., pandemic) or catastrophic (e.g., earthquake) disaster²¹ -- is important to preserve the rule of law and maintain focus on ethical considerations. Crisis standards of care ensure that scarce resources during these times are allocated based on evidence and data, with the participation of a broad range of public and private stakeholders, and that decisions are communicated in a transparent manner to preserve the community's trust.²²

The Institute of Medicine, in a 2009 letter and 2012 report, set forth a comprehensive approach to the development and implementation of crisis standards of care. The Crisis Standards of Care (CSC) proposed by the IOM provide one path for shifting from usual healthcare operation to crisis response required to address the need for a surge response.²³ They acknowledge the interdependency of public and private emergency responders and suggest a process to adjust the state's response to address medical surge and scarce resources. The CSC ensure provider and community engagement to adjust the delivery of care based

¹⁹ NYS PUBLIC HEALTH LEGAL MANUAL, A GUIDE FOR JUDGES, ATTORNEYS AND PUBLIC HEALTH PROFESSIONALS, 2d Edition, Currently available as free ebook at: <https://nysba.org/products/new-york-state-public-health-legal-manual-second-edition-ebook/?numberOfItemsInCart=1&salesOrderId=a1J1U000002yZ5PUAU&status=SUCCESS>.

²⁰ 42 U.S.C. §12132 (1990); 42 U.S.C. §12182 (1990); See HHS OFFICE OF CIVIL RIGHTS, *OCR Reaches Early Case Resolution With Alabama After It Removes Discriminatory Ventilator Triage Guidelines*, Apr. 8, 2020, <https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html?>; See also discussion of these issues, *infra*, Sections II and VII.

²¹ INSTITUTE OF MEDICINE, *CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE: VOLUME 1*, (Dan Hanfling, et al., eds., The National Academies Press 2012), <https://doi.org/10.17226/13351>, https://commed.vcu.edu/IntroPH/2012/crisisManagement_IOM.pdf.

²² *Id.*

²³ James G. Hodge et al., *Practical, Ethical, and Legal Challenges Underlying Crisis Standard of Care*, J. L. MED. & ETHICS, Spring 2013 at 2.

on fair and equitable principles. Furthermore, the CSC offer guidelines to enable providers to make difficult life and death decisions and reduce suffering.²⁴

The development of consensus standards of care can be particularly beneficial to New York State when navigating crises, such as the coronavirus pandemic, because it focuses on adherence to ethical and professional standards.²⁵ The IOM's standards are based on three substantive principles: fairness, duty of care, and duty to steward resources. Underlying the concept of fairness in allocating resources is the duty to base decisions on ethically sound principles. This presupposes the allocation of resources in a consistent and standardized way across all types of provider types and settings. Furthermore, it contemplates the rigorous assessment of decisions against professional ethics. A process for resource allocation should be developed based on specified goals.²⁶ For example, if healthcare practitioners will receive priority for being placed on a ventilator, public health officials must clearly identify the goals and rationale for establishing this priority. The process must be based on non-discriminatory and reasonable standards for protecting the public's health.²⁷

The CSC planning approach seeks to facilitate community and provider trust through transparency, consistency, proportionality, and accountability. Adoption requires public health officials to strictly adhere to ethical principles, as well as the development of standardized processes, and transparent communication with providers and the community about the processes.²⁸ Standardization protects and supports healthcare providers in resource allocation by providing a clear framework. The CSC planning approach promotes trust through transparency about the resource allocation process with the community.

Ideally, the CSC planning approach should be implemented before a public health emergency, when difficult decision-making can occur without the threat of immediate harm and private-public relationships can be cultivated. However, CSC can and should be implemented even during the crisis to create clear guidelines for practitioner and public health decision-making. While this report recommends adoption of a CSC planning approach, which requires long term planning outside of a PHE, it will also identify components of crisis standards of care that can be considered for potential implementation, on a temporary basis, during a crisis.

Provider and Community Engagement

Protecting the public health during the coronavirus pandemic requires a commitment from a multitude of stakeholders, from public health agencies, private organizations, emergency response personnel, and bordering state agencies. Cooperation and collaboration are critical for sharing of resources and equipment. As part of a CSC planning process, New York State should consider establishing memoranda of understanding and other agreements to facilitate interjurisdictional cooperation and coordination among

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.* at 3-4.

²⁷ Of course, the IOM standards, based on ethical, legal, and medical principles, must comport with federal and New York law, including New York's Constitution, statutes, and case law. New York State has long recognized the individual right to self-determination in health care and has a robust law of informed consent, including the right to refuse medical treatment, and the right to information and access to palliative care. The sensitive question of ventilator allocation must also satisfy federal and New York law. For example, under the Americans with Disabilities Act, as interpreted in Supreme Court decisions, health care providers may not discriminate against any patient in the provision of care based on the patient's disability, as discussed *infra* in Section II. Similarly, all providers have an ethical and legal duty not to abandon their patients, as discussed *infra* in Section II.

²⁸ James G. Hodge et al., *Practical, Ethical, and Legal Challenges Underlying Crisis Standard of Care*, J. L. MED. & ETHICS, Spring 2013 at 5.

different entities.²⁹ Agreements can ensure consistency with existing New York laws, as well as address specific concerns about resource allocation.³⁰

Provider and community engagement are essential for the delivery of healthcare services during the pandemic. Using the CSC planning framework, public health officials can work with healthcare organizations and the community to develop mechanisms to ensure compliance with surveillance, reporting, testing, screening, quarantine, social isolation, or other public health mandates. Patient issues, such as accommodations for disabled patients, preserving informed consent, and protecting patient privacy, can be addressed through engagement.³¹

Adoption and Communication of Consistent Methods of Resource Allocation

Achieving consistency in allocation of scarce resources can impact community and individual health outcomes. The CSC planning approach would establish meaningful guidance on shifting standards of care during PHEs, as well as establish legal authority. Recognition of changing standards of care in a declared emergency alleviates healthcare practitioner concerns regarding liability when allocating resources. By changing the scope of practice during a declared emergency, public health officials can also suspend certain licensure requirements to meet increased healthcare demands.³² Licensure and other requirements can be temporarily revised to allow healthcare providers to practice at the top of their license (e.g., reducing supervision requirements or authorizing practitioners with overlapping skills to fulfill service gaps).³³ (See Section III for a full discussion of licensure issues.)

Continuous Performance Improvement

The coronavirus pandemic has resulted in fluid decision-making as more information is released from the federal government and more patients recover from the virus. The CSC planning approach would promote continuous performance improvement to refine processes to provide the best level of care possible, even during the crisis. It would allow for the use of data and evidence-based decision making to make mid-course corrections, even during the crisis.³⁴

Provider Education About the CSC

Healthcare providers are trained to focus on individual patient needs and improving clinical outcomes. Coordinating the allocation of scarce medical resources could well require a dramatic shift in their approach to healthcare and difficult choices regarding patient care. Practitioners would need education on the CSC framework, and the conditions under which the crisis standards would come into play.³⁵

The CSC is based on modern public health principles to provide a consistent and ethically sound approach to delivering the best level of healthcare services to the community during the coronavirus pandemic. New York State should consider educating healthcare practitioners about the CSC to ensure transparency and fairness in all healthcare decision-making processes. Consistent application of CSC would also be important

²⁹ U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, Public Health Law/Publications and Resources/Emergency Preparedness, <https://www.cdc.gov/phlp/publications/topic/emergency.html> (last reviewed: Apr.10, 2020).

³⁰ INSTITUTE OF MEDICINE, CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE: VOLUME 1, 1-6 (Dan Hanfling, et al., eds., The National Academies Press 2012), <https://doi.org/10.17226/13351>, https://commed.vcu.edu/IntroPH/2012/crisisManagement_IOM.pdf.

³¹ *Id.*

³² JAMES G. HODGE, JR., PUBLIC HEALTH LAW IN A NUTSHELL, 227-247 (West Academic Publishing 2014).

³³ *Id.* at 4.

³⁴ INSTITUTE OF MEDICINE, CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE: VOLUME 1, 1-3 (Dan Hanfling, et al., eds., The National Academies Press 2012), <https://doi.org/10.17226/13351>, https://commed.vcu.edu/IntroPH/2012/crisisManagement_IOM.pdf.

³⁵ *Id.* at 1-33-1-34.

specifically in broadly reducing geographic variability or inconsistency in applications to evolving standards of care. Even variability can occur across health systems in the same metropolitan region.

Constitutional Protections and Civil Liberties

New York's ability to respond to public health emergencies is derived from its police powers and *parens patriae* powers.³⁶ The New York Constitution under Article XVII, Section 3 states, "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine." With this constitutional authority, on March 2, 2020, the legislature, passed an amendment to Executive Law §29-a granting the Governor broad discretion to address the emergent COVID-19 Pandemic.

The steps that New York has taken to control this novel virus are largely unprecedented. Exercising its power to address the coronavirus pandemic, the State implemented social distancing measures to protect public health during the pandemic, stay-at-home orders, the shutdown of "non-essential businesses," a moratorium on elective health procedures, and other directives that significantly infringe upon the rights of New York citizens. Such actions should be sparingly used, and only when there is a compelling reason to believe that these extreme measures are necessary to save lives. Accordingly, when implementing them, government officials must continually balance individual civil liberties against the need to protect the public health. They must be transparent about why such steps are needed, and they must impose the restrictions fairly and for only as long as they are needed.

For example, restrictions of movement should only be employed when they are necessary and public health officials can cite clear and compelling evidence that the disease, because of its communicability and severity, poses a grave risk to public health.³⁷ The government should ensure fair and equitable treatment, avoiding stigma or discrimination against individuals or groups. Furthermore, public health measures should be no more restrictive than necessary to accomplish public health objectives.³⁸ The evidence about the coronavirus and recovery outcomes are changing daily; therefore, New York should continually review the public health restrictions against evolving scientific evidence. Public health officials should revise executive orders and adjust restrictions accordingly to ensure least restrictive and fair measures.

Additionally, New York public health officials should implement safeguards to protect patient privacy during the pandemic. Patients have a right to privacy pursuant to the Health Information Portability and Accountability Act (HIPAA), as well as a state constitutional right to privacy. However, the right to privacy is not an absolute right; public health reporting is a standard exemption for providers, and public health officials and healthcare covered entities may share protected health information to advance public health surveillance and reporting activities.³⁹ While such data sharing promotes transparency, covered entities and public health officials must carefully consider protecting patient information by disclosing the minimum necessary information to achieve public health objectives.

Fair due process procedures are required when the government deprives an individual of property or liberty. The level of due process afforded must be commensurate with the extent of deprivation of life or liberty. Determining whether an informal process or a formal judicial process will preserve civil liberties rests on the level of coercive measures imposed, the risk of an erroneous decision, and the burden of additional

³⁶ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); Lawrence O. Gostin, *Public Health Law: Power, Duty, and Restraint*, 92-98 (Univ. of California Press 2008).

³⁷ Wendy Parmet & Michael Sinha, *COVID-19: The Law and Limits of Quarantine*, 15 *NEW ENG. J. MED.* 28 (2020).

³⁸ *Id.*

³⁹ 45 C.F.R. 160 (2012).

judicial procedures.⁴⁰ In New York, access to the courts has been curtailed temporarily due to the pandemic; however, virtual proceedings are increasingly available.

II. Ethical Issues in the Management of COVID-19

Introduction

There are two central ethical issues presented by the COVID-19 pandemic in the United State: i) the fair allocation of scarce resources; and ii) the balancing of autonomy, that is, individual rights and liberty interests, versus protection of the public's health. These are separate issues and merit consideration as such.

Allocation of Life-Saving Equipment

Allocating limited resources during the pandemic is among the greatest challenges in balancing our obligation to save the most lives against concerns of equity and the right to liberty. Such resources include tests to determine who is infected, personal protective equipment (PPE) to prevent spread, life-saving medical equipment – notably ventilators – and trained health care workers. Even items as mundane as hospital beds are scarce and must be allocated fairly.

Virus Testing

As other countries have demonstrated,⁴¹ the value of assuring adequate testing early enough to tailor social distancing measures can significantly reduce the apex of infection and prevent strain on life-saving resources. Test-availability and test access triage are variable across domestic regions, which both reflects and reinforces inequities across socioeconomic lines. This has created unjustifiable disparities: in access to better protection measures and treatment stratified by financial and social means.

There is evolving discussion about two specific types of testing now - diagnostic testing and post-exposure (antibody) testing. Both need to be in place and scaled. In light of the Governor's expressed intent to strategically execute a phased plan for reopening, a coordinated state-wide plan for diagnostic testing is needed to ensure: i) frontline health care workers are prioritized in access to testing on the basis of moral obligation; and ii) the most vulnerable New Yorkers from both a health and business operations standpoint have equitable access to testing.⁴² Frontline and essential employees who are forced to engage in significant close contact with other essential employees to perform their duties, and cannot easily be replaced, are critical to ensure that essential businesses are able to continue to operate effectively in support of our community members, while also proactively protecting our community members who rely on services and products from these entities.

PPE

The United States is also severely short on PPE for health care workers, such as gowns, face masks, eye protection, and surgical masks,⁴³ which leads to difficult questions about who among them should have access to the existing limited supply. Production and distribution should have ramped up sooner, preventing such shortages. Members of the general public are understandably inclined to use PPE to protect themselves, but such use could be limited according to actual effectiveness and curtailed according to the far greater

⁴⁰ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, AND RESTRAINT, 130-132 (Univ. of California Press 2008); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁴¹ Heather Stewart, *UK Must Learn from German Response to COVID-19, says Whitty*, THE GUARDIAN, Apr. 7, 2020, <https://www.theguardian.com/world/2020/apr/07/uk-must-learn-from-german-response-to-COVID-19-says-whitty>.

⁴² NEW YORK STATE, *Amid Ongoing Covid-19 Pandemic, Governor Cuomo Outlines Phased Plan to Re-open New York Starting with Construction and Manufacturing*, Apr. 26, 2020, available at: <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-phased-plan-re-open-new-york-starting>.

⁴³ Andrew Jacobs et al., *'At War With No Ammo': Doctors Say Shortage of Protective Gear is Dire*, N.Y. TIMES, Mar. 19, 2020, <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

need of health care workers. Whereas socially distanced members of the public can effectively protect themselves and others with carefully placed cloth coverings,⁴⁴ health care workers require more advanced N95 respirators because they are intimately and unavoidably exposed to infected people. Those hoarding PPE⁴⁵ represent the extreme violation of our collective ethical duty to steward precious resources.

Ventilators and Other Scarce Equipment

Allocation of life-saving equipment such as ventilators, which enable breathing for patients whose lung function is compromised by coronavirus infection, is the starkest exercise of justice during the pandemic. Access to a ventilator may make the difference between life and death for many individuals. Based upon all reports, there has been no explicit rationing of ventilators by providers upstate, and upstate systems actually sent available ventilators downstate. However, providers downstate were forced to adapt equipment to meet need, such as through ventilator sharing. It is not clear whether any patient was expressly denied access to a ventilator or other scarce equipment, although the state was on the brink of such decisions, and may very well not have enough scarce equipment for everyone in future waves of the pandemic, as experienced in Italy.⁴⁶ Accordingly, we may be faced in the future with difficult decisions about who will have access and for how long, and hence, must be adequately prepared.

Several organizations foresaw the possibility of pandemic-related ventilator shortage and developed guidelines for how to allocate fairly. These guidelines, including those produced by the New York State Task Force on Life and the Law (NYSTFLL) in 2015,⁴⁷ first issued in 2008, as well as the University of Pittsburgh,⁴⁸ the North Carolina Protocol for Allocating Scarce Inpatient Critical Care Resources in a Pandemic,⁴⁹ Maryland⁵⁰ and other states, and the Catholic Health Association of the United States,⁵¹ follow certain similar patterns. It is of note, however, that the updated 2015 New York Task Force on Life and the Law (NYSTFLL) Guidelines do not grant priority to health care workers. Some existing guidelines do give priority to health care workers, based upon the implicit assumption that such professionals can receive limited ventilation and then return to the workforce while the need still exists, which remains uncertain from both an individual and systems perspective.⁵² Furthermore, the definition of a health care worker is unclear. Is it just physicians and nurses, or just those who serve during a pandemic, or just those with expertise to treat pandemic patients? For example, should a Florida dermatologist who let his license lapse be prioritized in a New York hospital? The issue of the treatment of health care workers in the event

⁴⁴ Prevent Getting Sick, CTRS FOR DISEASE CONTROL & PREVENTION, Apr. 13, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>.

⁴⁵ Marty Stempniak, *Feds seize 900,000-plus pieces of PPE from hoarding price gouger, distribute to providers*, RADIOLOGY BUSINESS, Apr. 2, 2020, <https://www.radiologybusiness.com/topics/policy/ppe-COVID-19-pandemic-coronavirus-william-barr-doj>.

⁴⁶ Marco Pavesi, *I'm a Doctor in Italy. We Have Never Seen Anything Like This*, N.Y. TIMES, Mar. 18, 2020, <https://www.nytimes.com/2020/03/18/opinion/coronavirus-italy.html>.

⁴⁷ New York State Task Force on Life and the Law, Ventilator Allocation Guidelines, Nov. 2015, https://www.health.ny.gov/regulations/task_force/reports_publications/docs/ventilator_guidelines.pdf. See University of Rochester Medical Center grid attached, Appendix B.

⁴⁸ *Allocation of Scarce Critical Care Resources During a Public Health Emergency*, U. PITTSBURGH, DEPT. OF CRITICAL CARE MED. Apr. 15, 2020, https://ccm.pitt.edu/sites/default/files/UnivPittsburgh_ModelHospitalResourcePolicy_2020_04_15.pdf.

⁴⁹ North Carolina Protocol for Allocating Scarce Inpatient Critical Care Resources in a Pandemic, Douglas White, *A Model Hospital Policy for Allocating Scarce Critical Care Resources*, U. PITTSBURGH SCHOOL OF MED. Mar. 23, 2020, <https://ccm.pitt.edu/?q=content/model-hospital-policy-allocating-scarce-critical-care-resources-available-online-now>.

⁵⁰ *Maryland Framework for the Allocation of Scarce Life-sustaining Medical Resources in a Catastrophic Public Health Emergency*, U. MARYLAND SCHOOL OF LAW, Aug. 24, 2017, https://www.law.umaryland.edu/media/SOL/pdfs/Programs/Health-Law/MHECN/ASR%20Framework_Final.pdf.

⁵¹ Ethical Guidelines for Scarce Resources in a Pandemic, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES 2020, <https://www.chausa.org/docs/default-source/ethics/ethical-guidelines-for-scarce-resources-in-a-pandemic.pdf?sfvrsn=2>.

⁵² Mark A. Rothstein, *Should Health Care Providers Get Treatment in an Influenza Pandemic?*, 38 J. L. MED. & ETHICS, 412-419 (2010).

of scarce ventilator resources calls for re-examination in light of the experience and knowledge gained during the COVID-19 pandemic.

Most frameworks prioritize survival benefit, which means prioritizing patients for whom ventilator use will lead to hospital discharge and return to normal life. Such evaluations can be quite sophisticated in separating cases that seem similar. For example, the NYSTFLL guidelines recommend using the Sequential Organ Failure Assessment (SOFA) score⁵³ that quantifies the possibility of mortality based on the degree of dysfunction of six organ systems. Most frameworks then allow for the possibility that such a comparison will not be able to differentiate all patients, leading to the need for “tie-breakers.” A recent article in the *New England Journal of Medicine*⁵⁴ describes such tie-breakers as involving assessment of co-morbid conditions that would indicate which patients would likely have better post-treatment life-length and life-quality, or age, for which younger patients would get priority because they have yet to experience the full life-cycle. Advocates for those with disabilities have raised serious questions about the ethics of any guidelines that would discriminate against persons with disabilities,⁵⁵ and the HHS Office of Civil Rights has cautioned that such discrimination on the basis of disability or age is barred by federal law.⁵⁶

Many allocation frameworks describe the importance of avoiding decisions that in practice discriminate on non-medical grounds and suggest the use of a lottery only if all other factors are equal. While objective and utilitarian, decisions that differentiate patients on grounds such as assessment of co-morbidities and age cannot be free from unintentional discrimination. Many with co-morbid conditions are so affected because of prior social injustices, leading to their inability to access adequate care or maintain healthy lifestyles.⁵⁷ Accordingly, this prioritization scheme will inevitably save the lives of many whose health was better before the pandemic, which demonstrates the tension between the goal of saving the most lives and achieving distributive justice. Early data already suggest this pandemic is disproportionately affecting Black/African Americans and Latinos,⁵⁸ something that should be studied carefully and potentially used to ensure that social and economic determinants of health are considered in the fair allocation of life-saving resources.

Age has also been suggested as an allocation criterion. Older persons have historically been marginalized, but the value of remaining life is not necessarily diminished by age, which draws age into question as an

⁵³ *Sequential Organ Failure Assessment (SOFA) Score*, MD+CALC, (last accessed Apr. 24, 2020),

<https://www.mdcalc.com/sequential-organ-failure-assessment-sofa-score>.

⁵⁴ Ezekiel Emanuel et al., *Fair Allocation of Scarce Medical Resources in the Time of COVID-19*, *NEW ENG. J. MED.*, Mar. 23, 2020, <https://www.nejm.org/doi/full/10.1056/NEJMs2005114>.

⁵⁵ Ari Ne’eman, *When It Comes To Rationing Disability Rights Law Prohibits More than Prejudice*, *Bioethics Forum Essay*, HASTINGS CTR., Apr. 10, 2020, <https://www.thehastingscenter.org/when-it-comes-to-rationing-disability-rights-law-prohibits-more-than-prejudice/>; Joseph J. Fins, *Disabusing the Disability Critique of the New York State Task Force Report on Ventilator Allocation*, HASTINGS CTR., Apr. 1, 2020, <https://www.thehastingscenter.org/disabusing-the-disability-critique-of-the-new-york-state-task-force-report-on-ventilator-allocation/>; Joseph J. Fins, *New York State Task Force on Life and the Law Ventilator Allocation Guidelines: How Our Views on Disability Evolved*, HASTINGS CTR., Apr. 7, 2020, <https://www.thehastingscenter.org/new-york-state-task-force-on-life-and-the-law-ventilator-allocation-guidelines-how-our-views-on-disability-evolved/>.

⁵⁶ HHS OFFICE OF CIVIL RIGHTS, *Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)*, Mar. 28, 2020, <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>; Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).

⁵⁷ *SHORTER LIVES, POORER HEALTH* (Steven H. Wolf and Landon Aaron, eds., National Academies Press 2013); *FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT* (Jack P. Shonkoff and Deborah A. Phillips, eds., National Academies Press, 2000).

⁵⁸ Kenya Evelyn, *‘It’s a Racial Justice Issue’: Black Americans are Dying in Greater Numbers from COVID-19*, *THE GUARDIAN*, Apr. 8, 2020, <https://www.theguardian.com/world/2020/apr/08/its-a-racial-justice-issue-black-americans-are-dying-in-greater-numbers-from-COVID-19>.

allocation criterion. Yet some take the position that we may have a duty to help children and younger adults experience more life when possible, meaning that the value of experiencing more life-phases might necessitate age comparison in some cases. Clearly, an age difference of just one year or two will rarely be ethical grounds on which to allocate, but our intuitions might sometimes support a decision to ventilate a 9-year old over a 79-year old when ventilator access would give them an equal chance of hospital discharge. This intuition reflects a basic human impulse to afford special protection to small children, as reflected for example in child abuse laws.

Many allocation frameworks provide thoughtful yet general guidelines. The challenge in their development is to be prescriptive enough so that overburdened health care workers can make confident decisions without fear of liability, yet general enough to allow flexibility when similar scenarios should be handled differently. For example, if one ventilator must be allocated between two patients equally likely to survive the acute respiratory infection yet one has a heart condition that would indicate fewer remaining life-years, a comorbidities assessment would favor the unaffected patient. However, if the heart condition is congenital due to Down Syndrome, guidance might suggest avoiding allocation decisions that hinge on the presence of disability, even if indirectly. If the heart condition is the product of a poor diet from living in poverty, guidance might suggest avoiding allocation decisions based on factors that grow out of oppressive socio-economic structures. Relevant facts should thus inform ethical decisions to maximize lives saved while also avoiding unjust discrimination. At the same time, the allocation criteria should be sufficiently clear and concise that they can be understood and implemented by all front-line health care workers.

The development of a ventilator triage framework based on ethical principles should consider the social and cultural norms of the implementing system. It is also important to ensure healthcare staff are trained on the policy and processes and that they are universally applied. All clinicians should know how they are expected to assess survival benefit in accordance with a standardized, consistent process. Adherence to the accepted framework should serve to protect clinicians' allocation decisions, such as withdrawing care from someone who will not survive with maximum care to make resources available to another patient who is likely to benefit. There are mechanisms to relieve the attending health care staff of making the most difficult decisions that risk unjust discrimination on nonmedical grounds should not be made by the attending health care staff. To alleviate some of their burden and further insulate them from liability during this morally challenging time, a triage committee, or ethics committee, can be established and available to carefully apply the allocation policy and reach consensus about justified decisions in these cases. It is an unfortunate reality that many institutions do not have the capacity to train their staff on policy implementation or provide triage or ethics committee support for hard cases.

Withdrawal, DNR, and Futility

Usually, ventilator supply exceeds need. Under normal circumstances, when a ventilated patient will not likely survive after ventilator withdrawal, decisions regarding the course of care will involve a discussion of patient and family wishes, and appropriate implementation of palliative care to mitigate suffering, with limitations in public health emergency contexts such as the present one. Similarly, decisions to resuscitate a patient who is at risk of cardiac arrest will be informed by the patient's previously expressed wishes, or the family's wishes.⁵⁹ Such respect for patient autonomy represents the ideal of shared decision making in

⁵⁹ N.Y. PHL Art. 29-B, formerly the "DNR Law," now only applies in psych units and hospitals. It provides that, "It shall be lawful" for practitioners to write a DNR based on patient or agent/surrogate consent, or in the case of an isolated patient (i.e., a patient who lacks capacity and has no agent or surrogate) for two physicians to write a DNR based on medical futility. N.Y. PHL Art. 29-CC, the Family Health Care Decisions Act, authorizes decisions – including DNR – by surrogates for incapable patients who meet clinical criteria, and by two physicians for isolated patients when treatment would be in effect futile. N.Y. CLS SCPA § 1750-b relates to patients who have an intellectual disability. It authorizes decisions – including DNR – by surrogates for incapable patients who meet clinical criteria, and by a surrogate decision-making committee for isolated patients when treatment would be in effect futile.

modern western medicine. One way to better respect patient autonomy during the pandemic is to lower the existing bar for individuals to designate health care proxies, such as the recent Executive Order enabling remote witnessing of such legal designations.⁶⁰ In light of severely restricted access to serving as a witness for patients, more could be done including dropping the required two witnesses to one, or if none is available only requiring a remote notary.⁶¹

There will be many cases for which the existence of a health care proxy will not morally bear on the need to justly allocate or reallocate resources. Honoring the ideal of patient autonomy in all cases where advance directives and surrogate decision makers ask for continued care that meets the definition of futility during the pandemic would prevent distribution of resources to those who would survive hospital discharge and would lead to significantly more deaths. This said, some guidelines include a variation of “first come first served,” which means that once patients are on ventilators, if the family or the patient objects to withdrawal, this resource cannot be re-allocated to another patient who might benefit even if continued care meets the definition of futility. One potential foundation for this principle is that reallocation necessitates a direct and unjust comparison of the worth of two lives. This might be refuted by the fact that reallocation would only be considered if the presently-ventilated patient has negligible existing quality of life that can never be improved, whereas the new patient could have full quality of life with access to care.

Crisis standards of care⁶² protect withdrawing and withholding care from patients when such care would be medically futile. The challenge arises when the patient’s advance directive conflicts, or the surrogate decision-maker disagrees, with the decision to withdraw or withhold care. Although laws exist in states like California and Texas⁶³ that protect a clinical determination of futility leading to a do not resuscitate (DNR) order or the withdrawal of a ventilator against a surrogate’s wishes if the patient is still alive (with adequate time given to say goodbye), New York does not have such laws. This can lead to unhelpful resuscitation attempts in futile cases when families demand it. First, it exposes the resuscitation team to a high risk of infection – a risk not usually present in resuscitation attempts in non-pandemic circumstances. However, the issuance of a DNR without consent or over objection is not explicitly prohibited, leading to ambiguous territory especially during the pandemic. While we unavoidably need to ask health care professionals to risk their lives to save patients, we cannot ethically ask them to do so when there is no realistic prospect of saving the patient’s life. Moreover, even apart from that consideration, directing resuscitation attempts when there is no prospect of benefit to the patient is morally injurious to staff, and reallocation of resources can save far more lives.

Although an Executive Order has been issued⁶⁴ protecting health care workers from liability for making decisions in accordance with existing law or other executive orders,⁶⁵ there are no laws in New York that would protect physicians making decisions based on futility over family objection. This could lead to significant litigation and liability for all health systems for making ethical decisions to protect the greatest number of human lives, unless such an order is issued. A statute or Executive Order could override several existing laws, including PHL 308, PHL § 2504, PHL Art. 30-D, PHL Articles 29-B, 29-C, 29-CC and 29-CCC, MHL Art. 33, MHL Art. 47, and Surrogate's Court Procedure Act section 1750-b, Penal Law Title H, SSL Art. 11, the Justice Center Act, and other laws to the extent that such laws, and any regulations

⁶⁰ N.Y. EXEC. ORDER No. 202.10, Mar. 23, 2020.

⁶¹ See Health Care Proxy proposal, Appendix C.

⁶² INSTITUTE OF MEDICINE, CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE: Volume 1, 1-3 (Dan Hanfling, et al., eds., The National Academies Press 2012), <https://doi.org/10.17226/13351>, https://commed.vcu.edu/IntroPH/2012/crisisManagement_IOM.pdf.

⁶³ Michael D. Cantor et al., *Do-Not-Resuscitate Orders and Medical Facility*, 163 (22) ARCH. INTERN. MED. 2689 (2003).

⁶⁴ N.Y. EXEC. ORDER No. 202.10, Mar. 23, 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

⁶⁵ N.Y. PHL Art. 30.

promulgated pursuant to them, constrain the ability of an attending practitioner, as defined by PHL 2994-a, to issue a do-not-resuscitate order based on a determination that resuscitation would be “medically futile,” as defined in PHL 2961.12, provided there is a concurring determination by a second practitioner. It is also recommended that such determinations be documented in the medical record.

Balancing of Autonomy Versus Protection of Public Health

The second issue concerns the extent to which individual rights and liberty interests⁶⁶ may be superseded by measures to protect public health. This determination hinges on the magnitude of the affected population, the severity of symptoms, and the degree of resource limitation. As of this writing, in the United States the coronavirus has infected nearly 1.4 million people and resulted in nearly 84,000 deaths.⁶⁷ New York has suffered nearly 22,000 deaths,⁶⁸ primarily in the New York Metropolitan area. Of course, these numbers are changing rapidly, and questions have been raised about the accuracy of official death counts and possible undercounting.⁶⁹ As there is presently no vaccine available for COVID-19, the primary resources are the ability to test for its presence, the use of personal protective equipment (PPE) to reduce transmission, clinical support equipment, such as ventilators to support respiratory function of those with compromised lung capacity, and as of May 1, 2020, the investigational antiviral drug remdesivir, recently approved by the U.S. Food and Drug Administration through emergency authorization.⁷⁰ Many regions have only enough tests for those who must be hospitalized,⁷¹ hospital systems are creating makeshift PPE out of trash bags,⁷² and in New York (the U.S. COVID-19 epicenter), while it appears that catastrophic shortages of ventilators in the March-April surge were avoided, New York must be prepared to deal with shortages in future surges.⁷³ The issue is whether, and the extent to which, the speed, breadth, and lethality of COVID-19, and our inadequate preparation, create a ground for restricting liberty in order to save lives.

As the right to liberty is fundamental,⁷⁴ burdening or restricting the right must be limited to just those means that will prevent avoidable loss of life or property. Additional facts about this pandemic inform prevention efforts, specifically those aimed at reducing spread in the general community. While the virus is highly contagious, based on information presently available, it appears that many infected are asymptomatic for many days, many will remain asymptomatic, and a significant portion will only experience mild symptoms. Although it would seem at this point without rigorous research evidence that the risk of significant health

⁶⁶ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, AND RESTRAINT, 92-98 (Univ. of California Press 2008).

⁶⁷ CTR. FOR DISEASE CONTROL AND PREVENTION, CORONAVIRUS DISEASE 2019, *Cases in the U.S.*, (last updated May 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁶⁸ NEW YORK STATE, Department of Health, COVID-19 Tracker, *Fatalities*, May 12, 2020, [https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n;Nursing Home and ACF COVID Related Deaths Statewide](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n;Nursing+Home+and+ACF+COVID+Related+Deaths+Statewide), May 11, 2020, https://www.health.ny.gov/statistics/diseases/covid-19/fatalities_nursing_home_acf.pdf.

⁶⁹ Sarah Kliff & Julie Bosman, *Official Counts Understate the Official U.S. Coronavirus Death Toll*, N.Y. TIMES, Apr. 7, 2020, <https://www.nytimes.com/2020/04/05/us/coronavirus-deaths-undercount.html>.

⁷⁰ See, U.S. FOOD & DRUG ADMIN., CORONAVIRUS (COVID-19) UPDATE: FDA ISSUES EMERGENCY USE AUTHORIZATION FOR POTENTIAL COVID-19 TREATMENT, May 1, 2020, <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-issues-emergency-use-authorization-potential-covid-19-treatment>.

⁷¹ *New Coronavirus Testing Guidelines*, NYC Health and Hospitals, <https://www.nyhealthandhospitals.org/coronavirus-testing-guidelines/>.

⁷² Chris Brooks, *Using Trash Bags for Gowns: Interview with a New York Nurse*, LABORNOTES, Mar. 30 2020, <https://www.labornotes.org/2020/03/using-trash-bags-gowns-interview-new-york-nurse>.

⁷³ *COVID-19 Projections*, INS. FOR HEALTH METRICS & EVALUATION, <https://Covid19.healthdata.org/united-states-of-america>, (last visited Apr. 17, 2020).

⁷⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, AND RESTRAINT, at 92-98 (Univ. of California Press 2008).

consequences is lower for young healthy people, the evidence is not all in, and the risk is not negligible.⁷⁵ There are recent New York City Health Department reports of an inflammatory illness affecting children that may possibly be related to COVID-19⁷⁶ Moreover, the younger population can infect more vulnerable populations at great risk of dying. We have increasing evidence that suggests how the virus is transmitted and how long it lasts, but such data are not yet supported by robust scientific evidence and no curative treatment exists. Presently, it may serve society to be overprotective rather than under protective. Individuals do not have adequate information to engage in their own risk calculus regarding where to go and with whom to interact. Such decisions have enormous impact on others and the state's exercise of its police power in these circumstances to protect the population as a whole may justify a curtailment on the exercise of individual liberty.⁷⁷ As we have seen, those limitations, among other things, have been extensive, including prohibitions on gatherings, social distancing, the wearing of face coverings, and restrictions on the operations of businesses. Accordingly, it can be argued that the executive orders putting New York on PAUSE⁷⁸ and urgent campaigns to get us to stay home are ethically warranted. However, more draconian measures, such as quarantine with penalties as issued in China,⁷⁹ run so deeply counter to the core values of liberty and self-determination in the U.S. that they would only be considered if several measures more drastic than PAUSE prove insufficient, and even then might prove impossible to implement.

The harms of being overprotective run far beyond the boredom of being stuck indoors. Shutting down the economy is leading to extraordinary unemployment and financial suffering, which over the long term adversely affects health outcomes, for example, such as risks of drug use and suicide in some cases. Deferring the availability of essential services, elective medical procedures, and medicine production for vulnerable populations may lead to harm and death.⁸⁰ However, studies suggest that social distancing and mitigation strategies reduce the community spread of COVID-19 and concomitant mortality.⁸¹ Enacted protection measures must constantly balance these harms by being responsive to new discoveries about the disease and the best scientific predictions about the consequences of revisions to social distancing policies, such as allowing limited return to work.

⁷⁵ Sanjay Gupta, *The Mystery of Why Coronavirus Kills Some Young People*, CNN, Apr. 6, 2020, <https://www.cnn.com/2020/04/05/health/young-people-dying-coronavirus-sanjay-gupta/index.html>.

⁷⁶ J. Goldstein, *15 Children Are Hospitalized With Mysterious Illness Possibly Tied to COVID-19*, N.Y. TIMES, May 8, 2020, https://www.nytimes.com/2020/05/05/nyregion/children-Kawasaki-syndrome-coronavirus.html?campaign_id=16&emc=edit_ml_20200508&instance_id=18295&nl=well-family®i_id=70461562&segment_id=26869&te=1&user_id=a25ad6bf8443b5ca142cd1840c7794d2; NYC HEALTH DEPARTMENT, 2020 Health Alert #13: *Pediatric Multi-System Inflammatory Syndrome Potentially Associated with COVID-19*, <https://www1.nyc.gov/assets/doh/downloads/pdf/han/alert/2020/covid-19-pediatric-multi-system-inflammatory-syndrome.pdf>

⁷⁷ See *Jacobson v Massachusetts*, 197 U.S. 11 (1905).

⁷⁸ NEW YORK STATE, *New York State on Pause: 10 Point Plan*, Mar. 22, 2020, <https://coronavirus.health.ny.gov/new-york-state-pause>.

⁷⁹ Hilary Brueck et al., *China Took at Least 12 Strict Measures to Control the Coronavirus. They Could Work for the U.S. but Would Likely Be Impossible to Implement*, BUSINESS INSIDER, Mar. 24, 2020, <https://www.businessinsider.com/chinas-coronavirus-quarantines-other-countries-arent-ready-2020-3#the-country-postponed-non-urgent-medical-care-and-moved-many-doctors-visits-online-not-all-patients-were-given-the-critical-care-they-needed-during-the-outbreak-though-3>; Lawrence O. Gostin & James. G. Hodge, *US emergency Legal Responses to Novel Coronavirus Balancing Public Health and Civil Liberties*, JAMA, Feb. 13, 2020, doi:10.1001/jama.2020.2025.

⁸⁰ Robert Arnott & Stephen Moore, *Shutdown is Killing the Economy -and is Also No Good For Our Health*, THE HILL, Mar. 25, 2020, <https://thehill.com/opinion/finance/489566-shutdown-is-killing-the-economy-and-is-also-no-good-for-our-health>.

⁸¹ Brian Resnik, *12 Things Everyone Needs to Know About the Coronavirus Pandemic*, VOX, Apr. 2, 2020, <https://www.vox.com/science-and-health/2020/4/2/21197617/coronavirus-pandemic-COVID-19-death-rate-transmission-risk-factors-lockdowns-social-distancing>; Rochelle P. Walensky & Carlos del Rio, *From Mitigation to Containment of the COVID-19 Pandemic Putting the SARS-CoV-2 Genie Back in the Bottle*, JAMA, Apr. 17, 2020, doi:10.1001/jama.2020.6572.

Essential Services

Despite the fact that we must all consider ourselves at risk and despite the effectiveness of social distancing, “essential services” are excluded from government orders prohibiting in-person operations. However, the exemption imposes greater risk on those who provide essential services. It is unclear which employees providing such services have an ethical duty to continue working. What constitutes an essential service is debatable, even with New York’s executive order laying out categorical descriptions.⁸² Arguably, some essential services must remain open to prevent complete societal collapse, but few professionals are ethically bound to serve others at the expense of their own wellbeing.

Medical Research

Research to study both the nature of this coronavirus and how to treat it must proceed during this time.

Ethical Considerations

The pandemic heightens research ethics concerns regarding equal respect for those participating in research and fairness in terms of who is included in trials,⁸³ as well as not allowing either profit motive or fear to drive unjust or reckless trial development.⁸⁴ It also places enormous pressure on the procedures and safeguards that have been put in place over years to protect research subjects. We must commit to ensuring sufficient resources for studying the disease and treatment, and not move too fast with unproven treatments, whether to treat the general infected population or to treat infected frontline health care workers. We must also protect the vulnerable from incurring greater risk in dangerous trials, but also include traditionally marginalized populations in appropriate research without exploiting them. Moreover, we must not divert resources from proven methods of risk mitigation, and find the most careful ways to preserve non-pandemic essential health services.

Incapacitated subjects

Many patients who are on ventilators, such as advanced COVID-19 patients, are incapacitated and unable to agree to participate in a clinical trial. It is important that the rights and dignity of such patients, as well as all other individuals who lack capacity to consent, be respected should they be considered for enrollment as study subjects. We recommend that researchers follow the guidelines set forth in, “Report and Recommendations For Research with Human Subjects Who Lack Consent Capacity,” of the New York State Task Force on Life and the Law.⁸⁵

Sharing of Data and Specimen

We encourage the sharing of data and specimen among interested researchers to expand the breadth of potential research in COVID-19 related matters with adequate informed consent from research subjects. In all cases, the results of all studies should be made available to the public so that other researchers may better understand study results and limitations. These steps will also help support a research environment that encourages rapid funding of well-designed studies, advancing understanding of the disease, effective preventive measures and the development of novel treatments and a vaccine.

⁸² Press Release, *Governor Cuomo Issues Guidance on Essential Services Under The 'New York State on PAUSE' Executive Order*, Mar. 20, 2020, <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

⁸³ Beatriz Da Costa Thome, *Research in the Time of Coronavirus: Keep it Ethical*, STAT REP., Mar. 2, 2020, <https://www.statnews.com/2020/03/02/research-public-health-emergencies-ethics/>.

⁸⁴ Olivia Goldhill, *The Race to Develop Coronavirus Treatments Pushes the Ethics of Clinical Trials*, QUARTZ, Mar. 28, 2020, <https://qz.com/1826431/the-ethics-of-clinical-trials-for-coronavirus-treatments/>.

⁸⁵ See NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *Report And Recommendations For Research With Human Subjects Who Lack Consent Capacity*, Jan. 2014, https://www.health.ny.gov/regulations/task_force/docs/report_human_subjects_research.pdf.

Health Care Workers as Study Subjects

We should be particularly sensitive to studies involving our frontline health care workers. We should not place additional stress on them or their families by engaging them in research that may have marginal or no direct benefit to them or result in increased risk of infection. For example, if sufficient PPE is available at an institution, the health care workers should not be enrolled into a study testing an experimental new mask or face shield as such mask or shield will not have been shown to be as effective as the PPE already available.

However, we recommend consideration of qualitative inquiry and employment of diverse qualitative methods, including oral histories, to document the experience of health care workers both during the pandemic and the post-pandemic recovery period. Such research can be conducted during the pandemic with sensitivity to health care workers who consent to be research participants, and interviews arranged and conducted based upon their availability and comfort, including accommodating their needs as to place and time and limiting length of interview. Qualitative approaches may actually give health care workers an opportunity to share their experience of moral distress during the pandemic.

III. Provider Systems and Issues

Introduction

Hospitals, long-term care facilities, home health care, and physicians, nurses, and other health care workers, are in the front lines of our battle with COVID-19. We as members of the New York State Bar Association need to do all that we can to advocate for the removal of legal and regulatory obstacles that hinder health care providers' ability to fully respond to the challenges posed by the pandemic. This section covers many potential legal and regulatory barriers confronted by health care providers that can impede the thorough response to the pandemic. They include impediments relating to the following topics: supplies, bed capacity, resident work hours, facility licensure, anti-kickback and Stark laws, telehealth, and testing, as well as recommendations for overcoming such hurdles.

Purchasing Necessary Supplies for Hospitals and Other Health Care Providers during a State of Emergency

Health care facilities, as well as other health care providers, should be protected from price gouging and excessive pricing due to extraordinary market conditions for necessary supplies during the disruption of the marketplace due to a state of emergency.

The extent of such abusive business behavior nationwide is evident from the enormous and continually increasing number of complaints filed with the Federal Trade Commission.⁸⁶ Over 23,000 complaints were filed as of April 21, 2020.⁸⁷ One of the responsive federal actions includes the United States joint federal, state, and local COVID-19 Fraud Task Force to combat coronavirus-related fraud.⁸⁸

⁸⁶ See FEDERAL TRADE COMMISSION, *Coronavirus (COVID-19) Consumer Complaint Data*, <https://www.ftc.gov/coronavirus/complaint-data>.

⁸⁷ See FEDERAL TRADE COMMISSION, *FTC COVID-19 Complaints, January 1, 2020-April 21, 2020*, <https://www.ftc.gov/system/files/attachments/coronavirus-COVID-19-consumer-complaint-data/COVID-19-daily-public-complaints-042120.pdf>.

⁸⁸ See UNITED STATES ATTORNEY'S OFFICE, District of Arizona, *United States Attorney Michael Bailey and Arizona Attorney General Mark Brnovich Launch COVID-19 Fraud Task Force*, U.S. DEPT. OF JUSTICE, Apr. 8, 2020, <https://www.justice.gov/usao-az/pr/us-attorney-bailey-and-ag-brnovich-launch-COVID-19-fraud-task-force>.

In New York, the Department of Consumer and Worker Protection (“DCWP”) promulgated an emergency Rule under the City’s Consumer Protection Law⁸⁹ that makes price gouging illegal for any personal or household good or any service that is needed to prevent or limit the spread of or treat COVID-19. The Rule makes it illegal to increase prices by 10 percent or more, follows DCWP’s previous declaration that face masks, hand sanitizer, and disinfectant wipes are in short supply, and expands the Agency’s ability to protect New Yorkers from price gouging.⁹⁰ This emergency rule “is in effect ([since]March 16, 2020) and, under the city’s emergency rulemaking process, will be valid for 60 days. The Rule can be extended once for an additional 60 days.”⁹¹

In the absence of any violation of the antitrust laws,⁹² there does not appear to be any prior New York Law governing exorbitant pricing due to profiteering from an emergency situation that is directly applicable to supplies used by health care facilities and health care providers, such as ventilators, surgical gowns, and face masks. New York General Business Law Sec. 396-r⁹³ is intended to protect consumers against excessive pricing of necessary consumer goods (goods used, bought or rendered primarily for personal, family or household purposes) and services during an abnormal disruption of the market at the time of extraordinarily adverse circumstances, such as the stress of weather, climate events or disasters, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency. It empowers the New York State Attorney General to bring an action on behalf of the state to enjoin the activity, obtain civil penalties, and get restitution for the aggrieved individuals. There must be a nexus between the emergency situation and the specific goods at issue.

During periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, market forces competing for necessary products will cause crucial supplies to inordinately rocket upwards in price. Moreover, there also may be instances of suppliers engaging in price gouging taking advantage of the circumstances. Where those supplies are critical to hospitals and other health care providers for the care and treatment of patients, it becomes a matter of public safety for the state to ensure access to those supplies. Regardless of whether it is market forces or price gouging, the law must provide a means to protect the distribution of such products at reasonable prices. While national leadership is needed during these times to organize national purchasing and distribution of needed supplies, in the absence of such national initiative, the state should enact laws that encourage and facilitate the creation of buying cooperatively under these circumstances. In the short term, the Emergency Rule discussed above should be extended through the end of the pandemic. Subsequently, consumer protections extant under the General Business Law ought to be extended to cover hospitals and health care providers.

Ability to Exceed Certified Bed Capacity for Acute Care Hospitals

In a state of emergency that requires an immediate increase in acute care bed capacity to handle the surge of acutely ill persons within the state, we examine whether the regulatory restrictions limiting the number of inpatients at acute care hospitals to the respective total number of certified beds should be waived, thereby permitting each facility to go beyond the number of certified beds during the pendency of the emergency.

⁸⁹ N.Y.C. ADMIN. CODE § 20-701(b).

⁹⁰ NEW YORK CITY DEPT. OF CONSUMER AFFAIRS, *Notice of Adoption of Emergency Rule Prohibiting Price Gouging of Certain Personal and Household Goods and Services*, Mar. 15, 2020, <https://www1.nyc.gov/assets/dca/downloads/pdf/about/Emergency-Rule-Adoption-Price-Gouging.pdf>.

⁹¹ *Id.*

⁹² FEDERAL TRADE COMMISSION & US DEPARTMENT OF JUSTICE, *Joint Antitrust Statement Regarding COVID-19*, (regarding expedited antitrust procedure and guidance), Mar. 2020, https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.

⁹³ N.Y. GBL §396-r.

The total number of beds for which the facility has approval from the Commissioner of Health to operate is the number of beds that appears on the operating certificate.⁹⁴

In the 1974, the National Health Planning and Resources Development Act⁹⁵ was enacted to, among other things, control the costs and regulate the expansion of health care facilities and redundancy in medical services nationwide. As part of that federal legislation, states received grants for their Health Services Agencies to coordinate health care planning and to establish a “certificate of need” (“CON”) process acceptable to the U.S. Department of Health Education and Welfare, now known as, Health and Human Services. The CON process governs the establishment, construction, renovation and major medical equipment acquisitions of health care facilities, such as hospitals, nursing homes, home care agencies, and diagnostic and treatment centers. It seeks to determine where there is sufficient demand for new hospital or expanded hospital services within a given service area of the state. In addition to the need component of the process, there is financial feasibility, and character and competency aspects to the CON review process. This process then culminates in a review and approval by the Department of Health that can establish a new facility, or an expansion of an existing facility, with a set number of certified beds approved by the New York State Department of Health (“DOH”). The facilities are legally charged with operating at or below the number of certified beds approved DOH.

In the circumstances of a statewide emergency, where the need for increased hospital beds is urgently required, the limitation on the number of approved certified beds can present an obstacle to delivering necessary services to the people of New York State. Moreover, the time element for seeking an increase in bed capacity is contraindicated, and the CON process does not contemplate situations involving temporary need. Presently, Governor Cuomo’s Executive Order 202.1⁹⁶ accomplishes that goal by providing waivers of section 401.3 and section 710.1 of Title 10 of the NYCRR,⁹⁷ to the extent necessary, to allow hospitals to make temporary changes to physical plant, bed capacities, and services provided, upon approval of the Commissioner of Health, in response to a surge in patient census. The Executive Order was reissued in 202.10.⁹⁸

The waiver of the New York State Department of Health regulations governing certified bed restrictions resulting from the Governor’s Executive Orders 202.1 and 202.10 should be continued during the pendency of the state of emergency in New York.

Limitation on Resident Hours Working in Acute Care Hospitals

New York State was a pioneer in the adoption of limits on resident working hours, and they remain among the strictest in the country. Among other limitations, residents are not allowed to be scheduled to work more than 80 hours in a week, or 24 hours straight, or more than 12 consecutive hours in the emergency department.⁹⁹

In ordinary circumstances, limiting the number of hours that post-graduate trainees (residents) are permitted to work best serves the interests of patient care and the residents’ training experiences. However, where there is an extraordinary need for health care professions to care for numerous patients in a pandemic, and the state is requesting help from retired physicians and physicians from other jurisdictions, it is not helpful

⁹⁴ 10 NYCRR §441.60.

⁹⁵ PUB. L. NO. 93-641, 42 U.S.C. §§300k et seq.

⁹⁶ N.Y. EXEC. ORDER No. 202.1, Mar. 12, 2020, <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

⁹⁷ 10 NYCRR §§401.3, 710.1.

⁹⁸ N.Y. EXEC. ORDER No. 202.10, Mar. 23, 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

⁹⁹ 10 NYCRR §405.4(b)(6).

to limit the number of hours that graduate medical doctors can attend to patients at hospitals. It is anticipated that relaxation of these requirements will be implemented in a judicious manner that will not expose patients to unnecessary risk but will provide needed care to patient. By dint of Governor Cuomo’s original Executive Order 202,¹⁰⁰ a broadly worded waiver of section 405 that includes regulation of resident work hours was issued, providing that, Section 405 of Title 10 of the NYCRR¹⁰¹ was waived to the extent necessary to maintain the public health with respect to treatment or containment of individuals with or suspected to have COVID-19. That Executive Order has been reissued in Executive Order 202.10.¹⁰²

It is recommended that the waiver of the resident hour requirements during the pendency of an emergency state in response to the pandemic be continued.

Temporary Changes to Existing Hospital Facility Licensed Services, and the Construction and Operation of Temporary Hospital Locations and Extensions

Finally, we look at whether Article 28 of the New York State Public Health Law and DOH regulations governing the approval for changing hospital licensed services, and the construction and operation of temporary hospital locations and extensions, should be waived during the pendency of a state of emergency to permit hospitals to modify their services, and create temporary extension and other locations to better address the health care needs of the people of New York State.

New York State envisions that hospitals plan to achieve efficiency and economy of operation while producing care of high quality. To that end, the State has a comprehensive review and approval process for considering proposed changes to licensed hospital services, as well as the construction and operation of temporary hospital and location sites.

Public Health Law section 2803,¹⁰³ and DOH regulations at 10 NYCRR sections 400, 401, 405, 409, 710, 711 and 712,¹⁰⁴ govern the process for approval. They provide a comprehensive and elaborate scheme to regulate the building, alteration, reconstruction, improvement, extension or modification of a hospital facility, including its equipment and services. Among other things, the following types of proposals, regardless of cost, generally are subject to CON application and review requirements:

- (i) the addition, modification or decertification of a licensed service, or the addition or deletion of approval to operate part-time clinics;
- (ii) a change in the method of delivery of a licensed service, regardless of cost;
- (iii) the initial acquisition or addition of any equipment,;
- (iv) a conversion of beds.

Moreover, there are certain limited proposals that are eligible for administrative review. They mainly must be within specific cost limitations, or involve supporting certain policy objectives of the New York State Department of Health.

¹⁰⁰ N.Y. EXEC. ORDER No. 202, Mar. 7, 2020, <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

¹⁰¹ 10 NYCRR §405.

¹⁰² N.Y. EXEC. ORDER No. 202.10, Mar. 23, 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁰³ N.Y. PHL §2803.

¹⁰⁴ 10 NYCRR §§400, 401, 405, 409, 710, 711 and 712.

In response to the PHE, Governor Cuomo has issued a number of Executive Orders to expand the availability of health care resources and staff. On March 7, in Executive Order 202,¹⁰⁵ the Governor waived all regulatory provisions that might limit the use of hospital beds. Thereafter, as the crises exceeded capacity, on March 23, the Governor issued Executive Order 202.10,¹⁰⁶ which suspended the application of the law and regulations cited above, “to the extent necessary to permit and require general hospitals to take all measures necessary to increase the number of beds available to patients.”

New York State utilizes complex regulatory processes to govern changes in hospital service, as well as construction and operation of temporary hospital locations and extension sites. Some procedures are solely administrative and can be expedited, while others generally require a more in-depth review by bodies within the New York State Department of Health. These reviews are intended to validate the need, the costs, and the ability to competently operate the approved services and patient care sites. In a state of emergency, responding to the public health needs of the people of the state of New York is of paramount concern. The health facilities that regularly serve their communities are in the best position in the first instance to assess the needs of their respective service areas. Moreover, those facilities also are trusted, indeed required, to deliver the necessary service within their respective existing sites, as well as any additional locations that they deem essential to providing important health care interventions. Finally, the rapid response to the emergency conditions is critical for the health and safety of all New Yorkers. Therefore, the Governor appropriately removed all legal or regulatory barriers to the timely delivery of expanded, crucial health care services, and did not require the consent of DOH (though notice was anticipated) nor the recommendation of the Public Health and Health Planning Council or other applicable body.

We recommend continuation of the waiver provided under Executive Orders 202.1¹⁰⁷ and 202.10¹⁰⁸ of state requirements that would restrict the ability of hospitals to reconfigure and expand operations as necessary to deal with the PHE.

Issues in Long-Term Care, Residential and Home Health Care, and Correctional and Detention Facilities: Human Rights Crisis

Long-term care providers, and other institutional, residential, and home health care settings, are facing numerous challenges during this pandemic. These settings include, for example, group homes for persons with disabilities; religious communities maintaining nursing home residences on their campuses; correctional facilities housing older inmates, inmates with dementia, and inmates who experience accelerated aging and accompanying disease burden at younger ages; and detention facilities housing immigrants and refugees and their family members. This is not just a matter of a public health emergency, but it is also a human rights crisis.

Policies implemented largely by executive orders have not adequately addressed the problems that nursing homes, adult care facilities (ACFs), home care providers and group homes continue to face. In non-health care settings housing persons with healthcare needs, there has been a near total failure in developing and implementing policy or guidance to protect inmates and immigrants, who are often living in sub-human conditions with very limited access to health or mental health services under optimal circumstances, and remain at very high risk of COVID-19 as conditions have exacerbated.

¹⁰⁵ N.Y. EXEC. ORDER No. 202, Mar. 7, 2020, <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

¹⁰⁶ N.Y. EXEC. ORDER No. 202.10, Mar. 23, 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁰⁷ N.Y. EXEC. ORDER No. 202.1, Mar. 12, 2020, <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁰⁸ N.Y. EXEC. ORDER No. 202.10, Mar. 23, 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

The plight of vulnerable older adults and other vulnerable persons in diverse facility and residential settings demands immediate attention as the COVID-19 pandemic continues to ravage these communities. This is not only a legal obligation, but a moral imperative. The 2012 Crisis Standards of Care make clear there is a duty of care and a duty of non-abandonment to all persons under disaster and emergency conditions.¹⁰⁹

More specifically, with respect to nursing homes, the New York State Department of Health issued an advisory on March 25th, 2020, prohibiting nursing homes from denying admission or re-admission to a nursing home solely based on a confirmed or suspected diagnosis of COVID-19.¹¹⁰ It also prohibited nursing homes from requiring a hospitalized resident who was determined medically stable to be tested for COVID-19 prior to admission or readmission.¹¹¹ The Department of Health issued a nearly identical advisory for ACFs.¹¹² The foregoing mandates may have substantially contributed to increased risk of spread of infection in nursing homes and adult care facilities. It is also worthy of note that during the same period these mandates were in effect and until more recently, nursing homes continued to have much more limited access to PPE emergency stockpiles than hospitals. Comments by the Governor suggested that the rationale for this decision was that many of these facilities were privately owned, and therefore it was the owner/operator's responsibility to purchase and provide PPE.

An Executive Order (EO) issued on May 10, 2020¹¹³ imposes new requirements on nursing homes and ACFs and rescinds the nursing home directives as referenced in the preceding paragraph.

The May 10th EO No. 202.30, as applicable to Nursing homes and ACFs, mandates the following and imposes penalties for non-compliance:

- Testing of all personnel including employees, contract staff, medical staff, operators and administrators pursuant to a written plan filed with the Department of Health (DOH) no later than May 13, 2020;
- Reporting of all positive test results to DOH by 5 pm the day following receipt of test results;
- Filing of Certificate of Compliance with EO 202.30 and all other directives of DOH and Commissioner of Health no later than May 15, 2020; and
- Suspension or revocation of operating certificate if failure to comply with EO 202.30 or any other regulations or directives; financial penalties of \$2,000 per violation per day, including repeat violation penalty of \$10,000 per violation per day.

The following provisions of EO 202.30 are applicable to hospital discharges to nursing homes only, and not ACFs:

- Art. 28 hospitals cannot discharge a patient to a nursing home unless the nursing home first certified that is able to properly care for such patient; and
- Art. 28 hospitals cannot discharge a patient to a nursing home without first performing a diagnostic COVID-19 test and obtaining a negative result.

¹⁰⁹ INSTITUTE OF MEDICINE, CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE: VOLUME 1, 1-3, (Dan Hanfling, et al., eds., The National Academies Press 2012), <https://doi.org/10.17226/13351>, https://commed.vcu.edu/IntroPH/2012/crisisManagement_IOM.pdf.

¹¹⁰ NYS DOH Advisory: Hospital Discharges and Admissions to Nursing Homes, Mar. 25, 2020, previously available at: https://coronavirus.health.ny.gov/system/files/documents/2020/03/doh_Covid19_nhadmissionsreadmissions_032520.pdf, page no longer available.

¹¹¹ *Id.*

¹¹² NYS DOH Advisory: Hospital Discharges and Admissions to Adult Care Facilities, Apr. 7, 2020, available at: https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_acfreturnofpositiveresidents_040720.pdf.

¹¹³ N.Y. EXEC. ORDER No. 202.30, May 10, 2020, <https://www.governor.ny.gov/news/no-20230-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

On May 11, 2020, DOH issued a Dear Administrator Letter¹¹⁴ providing guidance on these new requirements. Nevertheless, there are many questions about how the above directives will be operationalized and more broadly, whether nursing homes and ACFs can reasonably comply with the mandates given the lack of access to COVID-19 testing and limited resources. Employee rights are also an area ripe for legal challenges.

In addition to the recent mandates referenced above, long-term care institutions have faced obstacles due to other state requirements, which have generally imposed new burdens on under-staffed facilities and administrators during the pandemic, taking precious time away from disease prevention efforts and reporting activities under applicable requirements. For example, the Governor signed S.8091/A.10153 to enact the COVID-19 Paid Sick Leave Law. This was followed by a liberal interpretation of the law by the Department of Labor in its related guidance.¹¹⁵ Further, as mentioned above, supply chain challenges and PPE shortages have exacerbated staffing challenges.

Conditions in the nursing home sector have also been inaccurately represented in the media reports. For example, media sources have described nursing home failures, including not adequately communicating to the state and to families of residents the status of coronavirus in facilities.¹¹⁶ CMS has issued new guidance tightening nursing home COVID-19 reporting requirements.¹¹⁷ However, media reports of nursing home failures need to be balanced by available evidence that communications with families and next of kin have become increasingly challenging due to a number of factors, including limitations on visitation by families imposed by New York State, and the very nature of operations in long-term care facilities, especially during the pandemic, including the growing numbers of both COVID-19 positive cases and deaths, staffing and PPE equipment shortages, and historically low reimbursement rates that threaten the stability of the long-term care sector. Many frail residents need assistance with activities of daily living and require staff to be in close contact with the residents they serve. There is ample evidence that health care workers in nursing homes count among the bravest in the battle against COVID-19 and have a high potential risk of infection themselves without the appropriate PPE. Allocation of sufficient resources to nursing homes during the pandemic must be a New York State priority. In sum, under-resourced nursing homes amount to a form of implicit rationing, detrimentally affecting New York's most vulnerable older adult populations.

In light of the heightened vulnerability of nursing home residents and nursing home staff to COVID-19 infection, as well as increased risk to all vulnerable persons in institutional, residential or home health care settings, including correctional¹¹⁸ and detention facilities, and the legal and ethical obligations to older

¹¹⁴ N.Y.S. DEP'T OF HEALTH, ACF DAL #20-14, NH-20-07 Required COVID-19 Testing for all Nursing Home and Adult Care Facility Personnel, May 11, 2020, available at:

https://www.health.ny.gov/professionals/hospital_administrator/letters/2020/docs/dal_20-14_covid_required_testing.pdf.

¹¹⁵ New York Paid Family Leave COVID-19, Mar. 18, 2020, Frequently Asked Questions, <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-COVID-19-faqs>; Guidance For Obtaining An Order For Mandatory Or Precautionary Quarantine, <https://paidfamilyleave.ny.gov/system/files/documents/2020/03/obtaining-order-of-quarantine.pdf>.

¹¹⁶ Jan Ransom, *Coronavirus Entered My Father's Nursing Home and Nobody Warned Me. I Did Not Get the Chance to Save Him*, PROPUBLICA, Apr. 21, 2020, <https://www.propublica.org/article/coronavirus-entered-my-fathers-nursing-home-and-nobody-warned-me-i-did-not-get-the-chance-to-save-him>; John Leland, *At Least 14 N.Y. Nursing Homes Have Had More Than 25 Virus Deaths*, N.Y. TIMES, Apr. 17, 2020, <https://www.nytimes.com/2020/04/17/nyregion/new-york-nursing-homes-coronavirus-deaths.html>; Michael Goodwin, *Andrew Cuomo's Coronavirus Nursing Home Policy Proves Tragic: Goodwin*, THE POST, Apr. 21, 2020, https://nypost.com/2020/04/21/cuomo-coronavirus-nursing-home-policy-proves-tragic-goodwin/?utm_campaign=iphone_nyp&utm_source=mail_app; Bernadette Hogan, Carl Campanile, Priscilla DeGregory & Tamar Lapin, *Woman Kept In Dark About Dad's Condition By Coronavirus-Stricken NYC Nursing Home*, THE POST, Apr. 21, 2020, <https://nypost.com/2020/04/21/coronavirus-in-ny-nursing-home-kept-woman-in-dark-about-dads-condition/>.

¹¹⁷ CMS, Center for Clinical Standards and Quality/Quality, Safety & Oversight Group, Ref: QSO-20-26-NH, Apr. 19, 2020, <https://www.cms.gov/files/document/qso-20-26-nh.pdf>.

¹¹⁸ See Josiah Bates, 'We Feel Like All of Us Are Gonna Get Corona.' Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning For U.S. Jails, Prisons, TIME (Magazine), Mar. 24, 2020, <https://time.com/5808020/rikers-island-coronavirus/>.

adults and such other vulnerable persons, health care workers and workers in service jobs, we recommend that the following actions be duly considered and implemented by the Governor, Department of Health and other government agencies, as applicable:

Older Adults, Nursing Home Providers and Nursing Home Residents:

Governor, Department of Health (DOH), DOH Bureau of Long Term Care and State Office for Aging to ensure:

1. Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;¹¹⁹
2. Adequate provision of personal protective equipment (PPE);
3. Adequate levels of staffing;
4. Adequate funding of employee testing, as required under Executive Order 202.30;
5. Consistent and timely tracking and reporting of case and death data;
6. Adoption of non-discriminatory crisis standards and ethics guidelines;
7. Recognition and honoring of Older New Yorkers’ right to health and human rights, as protected under international conventions; and
8. Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.

Persons with Disabilities in Residential Facilities or Group Homes:

Governor, Department of Health and OPWDD to ensure:

1. Access of persons with disabilities to adequate COVID-19 testing and appropriate medical care, mental health and other supportive services, including appropriate day services to substitute for community-based day programs that need to be discontinued during a pandemic;
2. Adequate and appropriate staffing, of residential facilities and group homes, for both day and evening shifts, and provision of appropriate funding for such staff and for appropriate COVID-19 staff training;
3. Access of residential facility and group home staff to adequate testing and appropriate medical care and mental health and other supportive services;
4. Oversight of residential facilities and group homes and programs to assure non-discriminatory management of persons with disabilities during the COVID-19 crisis conditions; and
5. Recognition and honoring of persons with disabilities’ right to health and human rights, as protected under international conventions.

Inmates and Correctional Facilities:

Governor, NYS Department of Corrections and NYC Department of Corrections, to ensure:

¹¹⁹ U.S. SENATE COMMITTEE ON FINANCE, Senator Charles E. Grassley, Chairman, Letter to HHS Secretary Alex Azar and CMS Administrator Verma, Apr. 17, 2020, (asking about the federal response to COVID-19 in nursing homes, group homes, and assisted living facilities, and expressing concerns about testing capacity, data tracking inconsistencies, lack of personal protective equipment (PPE) for nursing home staff, and federal spending transparency) <https://www.finance.senate.gov/imo/media/doc/HHSCoVIDLetter17Apr2020Final.pdf>.

1. Adequate access of inmates to COVID-19 testing, medical care and mental health and supportive services;
2. COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;
3. Release to the community of older inmates and inmates with advanced illness who do not pose a danger to the community; and
4. Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities.
5. Recognition and honoring of inmates' right to health and human rights, as protected under international conventions.

Immigrants in Detention Facilities:

In its exercise of its police powers in the COVID-19 public health emergency, New York State, in cooperation with federal agencies, must take step, similar to those outlined above, to ensure:

1. Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers.¹²⁰

Anti-Kickback and Stark Law Compliance During the COVID-19 Emergency

During the PHE, routine anti-kickback and compliance activities at hospitals and in other provider settings are largely suspended, contractual arrangements are being re-structured or ignored, and routine requirements of arms-length transactions, such as commercial reasonableness and fair market value (“FMV”), are often simply not considered, or if considered, not subject to standard verification. Under the circumstances, compliance with the federal and state Anti-Kickback statutes (“AKS”) and Physician Self-Referral (“Stark”) laws is particularly challenging. While the Centers for Medicare and Medicaid Services (“CMS”) has provided a broad (but not unlimited) waiver of the Stark law as necessary to respond to the epidemic, and the Office of the Inspector General of the United States Department of Health and Human Services (“OIG”) has issued a “comfort letter” regarding AKS enforcement, uncertainty remains.

Federal and state AKS and Stark laws, and their associated regulations, set standards governing certain behaviors of and arrangements between medical professionals, institutions, and associated contractors, affiliates, and other interested parties.

The federal AKS is a criminal statute that prohibits the knowing or willing offering, paying, soliciting, or receiving any remuneration, rebate, kickback, bribe, or thing of value, directly or indirectly, in cash or in kind to induce or in exchange for the recommending of or actual purchasing, leasing, ordering of any good, facility, or item under federal health care programs.¹²¹ The federal AKS covers those who both pay for and receive kickbacks or remuneration (i.e. anything of value), “including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind.”¹²² However, a payment of remuneration or similar scheme may violate AKS if “one purpose” is to wrongfully induce referrals, even if there are alternative valid motivations.¹²³ While the statute is interpreted broadly,¹²⁴ there are various narrow regulatory exceptions, called “safe harbors,” for practices recognized as beneficial.¹²⁵

¹²⁰ See Cole J.P Cole, Federal and State Quarantine Isolation Authority, CONGRESSIONAL RESEARCH SERVICE, Oct. 19, 2014, <https://www.ncsl.org/documents/statefed/health/FedandStateQIAuth.pdf>.

¹²¹ 42 U.S.C. § 1320a-7b(b).

¹²² 42 C.F.R. § 1001.951.

¹²³ *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985).

¹²⁴ *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985).

¹²⁵ See 42 U.S.C. 6 1320a-7b(b)(3); 42 C.F.R. § 1001.952.

The federal Stark law is a strict liability statute that prohibits physicians from referring patients to receive certain “designated health services” under federal health care programs from entities with which the physician or an immediate family member has a financial relationship.¹²⁶ The Stark law prohibits the submission, or causing the submission of claims that violate the prohibitions.¹²⁷ The Stark law also has certain regulatory exceptions for practices and arrangements that are sufficiently and strictly tailored as to avoid impropriety of referrals.¹²⁸

However, if violations are found, they can form the basis of direct liability under the applicable statute, which can include substantial legal penalties, such as civil monetary penalties per violation or per claim, plus up to three times the remuneration involved, exclusion from participation in federal health care programs, including Medicare and Medicaid, and in the case of AKS violations, potential criminal penalties.¹²⁹

In addition, these providers also face federal False Claims Act (“FCA”) liability,¹³⁰ which imposes civil (and potentially criminal¹³¹) liability on persons who knowingly submit false or fraudulent claims for reimbursement to government health care programs.¹³² The FCA is a particularly useful tool for fraud and abuse enforcement because it enables civil actions to be brought the Attorney General, or as a *qui tam* action initiated by whistleblowing “relators” who have independent knowledge of wrongdoing and who can recover between 15 and 30 percent of monetary proceeds, plus attorney fees, from successful judgments.¹³³ Note that with available treble damages, plus more than \$22,000 per false claim,¹³⁴ these judgments can quickly become catastrophic.

Notably, in October of 2019, the Department of Health & Human Services (“HHS”) proposed changes to the AKS and Stark law regulations aimed at reducing regulatory burdens on the expansion of value-based care, which have yet to be finalized.¹³⁵

New York State (“NYS”) has state law versions of both AKS and Stark law. The NYS AKS largely tracks the federal statute, is tied to Medicaid, but includes separate provisions detailing that violations are also considered professional misconduct, which could lead to administrative professional licensure penalties in addition to civil and criminal penalties.¹³⁶ The NYS Stark law is broader in scope of persons covered than is the federal Stark law as it applies to referrals from a broader range of “practitioners,” not only from “physicians,” but it is more limited in the services covered.¹³⁷ The NYS Stark law also covers claims submitted to all payors, not only to government payors, and does not have as many exceptions as does its federal counterpart, but the exceptions broadly apply to hospital/practitioner relationships. Although

¹²⁶ 42 U.S.C. § 1395nn(a); 42 C.F.R. 411.351.

¹²⁷ *Id.*

¹²⁸ 42 U.S.C. § 1395nn(b); 42 C.F.R. § § 411.355-57.

¹²⁹ *See generally*, OFFICE OF ATT’Y GENERAL, DEP’T OF HEALTH AND HUMAN SERVICES, A Roadmap for New Physicians, Fraud & Abuse Laws, <https://www.oig.hhs.gov/compliance/physician-education/01laws.asp>.

¹³⁰ 42 U.S.C. § 1320a-7b(g); 42 U.S.C. § 1395nn(g).

¹³¹ 18 U.S.C. § 287.

¹³² 31 U.S.C. §3729-33.

¹³³ 18 U.S.C. § 3730(b), (c) & (d).

¹³⁴ 31 U.S.C. § 3729; 28 C.F.R. § 85.3(a)(9). For updated figures, see <https://www.ecfr.gov/cgi-bin/text-id?rgn=div5&node=28:2.0.1.1.37>.

¹³⁵ For Department of Health and Human Services Office of Inspector General proposed regulations concerning AKS, *see* 84 FED. REG. 55694-765 (Oct. 17, 2019). For Centers for Medicare and Medicaid Services proposed regulations concerning Stark law, *see* 84 FED. REG. 55766-847 (Oct. 17, 2019).

¹³⁶ N.Y. ED. LAW §§ 6530(18) & (19); N.Y. Social Services Law § 366-d.

¹³⁷ N.Y. PHL §§ 238-a - 238-e.

penalties under the NYS Stark law are limited and there is no private right of action, New York has a parallel False Claims Act, with substantial treble damages, per claim penalties and attorney fee provisions, which can be used for violations of the NYS Stark law and AKS.¹³⁸

There is no general pandemic exception to the application of the federal AKS and Stark laws. However, on March 30, 2020, each of the OIG and CMS issued guidance designed to assist providers in responding to the epidemic.

CMS limited the application of the federal Stark law until the end of the PHE caused by COVID-19 through a waiver and attendant guidance.¹³⁹ CMS announced that it will waive penalties for violations of the Stark law in regard to compensation relationships between physicians and entities, such as hospitals, to which they refer if “solely related to” the COVID-19 pandemic. In particular, the waiver applies, among other things, to:

- violations of FMV requirements in the services, space and equipment lease exceptions,
- medical staff incidental benefits in excess of the regulatory cap,
- non-monetary or in-kind compensation to physicians that exceeds the regulatory cap,
- interest-free or low-interest loans,
- use of space by group practices that does not meet the “same building” requirements, and
- violations of the signature and documentation requirements.

The following are examples of actions that would be deemed “related to the COVID-19 pandemic”:

- diagnosis and treatment of COVID-19 patients,
- securing the services of physicians to provide services even if unrelated to COVID-19,
- ensuring the ability and expanding the capacity of providers to meet patient needs,
- shifting patient care locations to alternative sites, and
- addressing medical practice or business interruptions.

CMS cites a number of specific examples of permissible or expected activity, including:

- paying a premium or below market compensation,
- providing free office space,
- offering non-monetary services and incidental benefit increases (e.g., food, childcare, housing, clothing) beyond regulatory limits,
- providing hospital staff to assist private physicians’ offices in staff training related to COVID-19, patient intake and treatment, and care coordination tied to the crisis,
- paying physicians’ 15% electronic health records subsidy obligation,
- a group practice performing Stark-covered services at an expansion site that would otherwise be impermissible,
- ambulatory surgical center (“ASC”) owners continuing to refer to the ASC even though the ASC is licensed as a hospital during the PHE,
- providing services to patients in rural areas, and

¹³⁸ N.Y. STATE FINANCE LAW §§ 187-194.

¹³⁹ CMS, *Blanket Waivers of Section 1877(g) of the Social Security Act*, <https://www.cms.gov/files/document/COVID-19-blanket-waivers-section-1877g.pdf>.

- failing to obtain a signature or writing as required for a compensation relationship that is otherwise compliant.

The waiver only applies, “absent the government’s determination of fraud and abuse.” In this regard, the premise of the waiver is that the party is acting in good faith and is unable to meet the otherwise generally applicable exceptions, which may limit the benefit if interpreted literally. How does “unable” apply when technical compliance is feasible but at unnecessary delay and expense? Another concern is the use of the word “solely” before “related,” because very few things are “solely” the product of another. Nevertheless, the examples of the types of arrangements that CMS would appear to bless provide some comfort as to how “unable” and “solely related” will be defined.

The waiver is effective March 1, 2020 and will last for the duration of the PHE.

The OIG simultaneously issued a “message from leadership on minimizing burdens on providers.”¹⁴⁰ It notes that the “OIG places a high priority on providing the health care community with the flexibility to provide needed care during the emergency.”¹⁴¹ “[R]especting the great challenges currently facing the health care industry,” the OIG, “to the extent possible” will try to “minimize burdens on providers and be flexible where [it] can.”¹⁴² Providers are encouraged to reach out to the OIG if they need extensions of deadlines. Finally, and perhaps most significantly, “For any conduct during the emergency that may be subject to OIG administrative enforcement, OIG will carefully consider the context and intent of the parties when assessing whether to proceed with any enforcement action.”¹⁴³ The latter comment may well be a feature of defenses of direct and certainly FCA *qui tam* claims concerning conduct during the PHE.

Subsequently, on April 3, the OIG responded explicitly to the CMS Stark waiver of March 30.¹⁴⁴ It agreed to not to seek administrative sanctions against most of the behavior specifically permitted by CMS during the PHE. There are, however, differences. The OIG was not willing to accept, on a blanket basis, the CMS exceptions for referring to (i) an owned hospital that has expanded (or former ASC now operating as a hospital), (ii) an owned home care company, or (iii) a group practice for covered services at otherwise impermissible expansion sites or at a patient’s residence.¹⁴⁵ In addition, the blanket CMS waivers for patients in rural areas, and for arrangements that are compliant but for documentation requirements, are not accepted by the OIG.¹⁴⁶

The OIG has also established a process for obtaining prompt informal and non-binding advice during the PHE, including in regard to the Civil Monetary Penalty Law provisions on beneficiary inducements.¹⁴⁷

As of now, there are no waivers of the NYS Stark law or AKS for the PHE.

¹⁴⁰ DEP’T OF HEALTH & HUMAN SVCS, OFFICE OF INSPECTOR GENERAL, *Message From Leadership On Minimizing Burdens On Providers*, Mar. 30, 2020, <https://oig.hhs.gov/coronavirus/letter-grimm-03302020.asp>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ OIG Policy Statement Regarding Application of Certain Administrative Enforcement Authorities Due to Declaration of Coronavirus Disease 2019 (COVID-19) Outbreak in the United States as a National Emergency, DEP’T OF HEALTH & HUMAN SVCS, OFFICE OF INSPECTOR GENERAL, Apr. 3, 2020, <https://oig.hhs.gov/coronavirus/OIG-Policy-Statement-4.3.20.pdf>; DEP’T OF HEALTH & HUMAN SVCS, OFFICE OF INSPECTOR GENERAL, *FAQs – Application of OIG’s Administrative Enforcement Authorities to Arrangements Directly Connected to the Coronavirus Disease 2019 (COVID-19) Public Health Emergency*, Apr. 24, 2020, <https://oig.hhs.gov/coronavirus/authorities-faq.asp>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Provider/Referring practitioner relationships always need to be structured with care to assure compliance with the technical requirements of the Stark law and AKS exceptions and safe harbors, and to assure that the agreements are commercially reasonable, and the compensation thereunder is FMV. In the usual course, agreements are often subject to independent valuation consultant review to assure compliance. However, in the current crisis environment, these relationships are being created, modified and terminated “on the fly,” and without the normal regulatory review. Under the circumstances, providers should not have to be concerned about technical compliance, “absent any determination of fraud or abuse” (the words of the federal Stark law waiver). This would have the effect of focusing on the reality of the relationship and not the technicalities of the exceptions and safe harbors that cannot be met.

Given the statements from CMS and the OIG that are helpful in this regard, an order for the NYS Stark law and AKS from either the Governor of New York or the New York State Department of Health that is substantially similar to the CMS Stark law waiver and OIG letters would be prudent. Some might say that no waiver is needed since well-intentioned providers would not be charged with a violation in the absence of fraud and abuse. However, often the AKS safe harbors are treated as requirements by providers, and the failure to provide explicit grace in this context will both delay necessary implementation of restructurings between providers and practitioners and place those providers and practitioners at risk for potentially catastrophic damages. Moreover, the Stark Law does not require intent; it is a strict liability statute, so its suspension is very important.

The waivers provided by CMS and the letters provided by the OIG are helpful in providing some security to providers that enforcement discretion will be exercised in regard to reasonable responses to the PHE (the inconsistencies between the CMS and OIG guidance are unfortunate, but likely not curable and providers will need to navigate the inconsistencies). The waivers and guidance should be adopted in substantially similar form by NYS for the State versions of the Stark law and AKS, each as tailored for the particular statute at issue.

Expanded Use of Telehealth During the COVID-19 Emergency

Telehealth is a valuable tool to deliver healthcare, but longstanding statutory and regulatory barriers, including in the area reimbursement, have stunted the growth of telehealth and delayed its implementation.

The federal telehealth statute¹⁴⁸ imposes five requirements for Medicare fee-for-service coverage. Of these, one of the most significant hurdles to the expansion of telehealth has been the Medicare “originating site” requirement. Prior to COVID-19, Medicare fee-for-service reimbursement was available only when the patient receiving the telehealth service was in a designated rural area, and in a physician’s office or in a specified healthcare facility. The definition of a rural location is narrow, limited in general to an area either outside a Metropolitan Statistical Area or in a Health Professional Shortage Area within a rural census tract.¹⁴⁹ Additionally, only eligible practitioners¹⁵⁰ could provide Medicare telehealth services. In New York,¹⁵¹ state law allows a wide range of professionals¹⁵² to deliver services through telehealth in New

¹⁴⁸ 42 U.S.C. § 1395m(m).

¹⁴⁹ HEALTH RESOURCES AND SERVICES ADMINISTRATION, *Medicare Telehealth Payment Eligibility Analyzer*, <https://data.hrsa.gov/tools/medicare/telehealth>, (providing guidance on whether a particular site is eligible for Medicare telehealth payment).

¹⁵⁰ Under 42 U.S.C. § 1395m(m)(3)(A) and 42 C.F.R. § 410.78(b), Medicare-eligible telehealth practitioners are: physicians, physician assistants, nurse practitioners, clinical nurse specialists, nurse-midwives, clinical psychologists, clinical social workers, registered dietitians and nutritional professionals, and certified registered nurse anesthetists.

¹⁵¹ N.Y. PHL § 2999-dd(1); N.Y. SOC. SERVS. LAW § 367-u(2).

¹⁵² Under N.Y. PHL § 2999-cc(2), New York Medicaid-eligible telehealth practitioners are: physicians, physician assistants, dentists, nurse practitioners, registered professional nurses, podiatrists, optometrists, psychologists, social workers, speech language pathologists and audiologists, midwives, physical therapists, occupational therapists, certified diabetes educators,

York, to patients located in a wide range of originating sites, including in the patient’s own home.¹⁵³ In February 2019, however, in a Special Medicaid Telehealth,¹⁵⁴ New York instituted limitations, including the rule that for dual individuals (those eligible for both Medicare and Medicaid), “[i]f a service is within Medicare’s scope of benefits (e.g., physician), but Medicare does not cover the service when provided via telehealth, Medicaid will defer to Medicare’s decision and will not cover the telehealth encounter at this time.” The effect is to deny Medicaid for telehealth services outside of rural originating sites, and from non-Medicare-eligible practitioners for dually eligible beneficiaries,

The pre-COVID-19 federal and state reimbursement rules limited the expansion of telehealth. As a result, when the coronavirus spread in New York, the healthcare system was woefully underprepared to deploy this important tool quickly and effectively to minimize the spread of infection. The delay, in turn, allowed the disease to gain a foothold in the community and impeded efforts to limit exposure to and slow the viral spread.

The coronavirus pandemic ushered in a new age for telehealth reimbursement. In a major public policy shift, on March 6, 2020, Congress enacted the “Telehealth Services during Certain Emergency Periods Act of 2020,”¹⁵⁵ which lifted the “originating site” requirement for Medicare telehealth payment during certain public health emergencies. This statute authorized the waiver of Medicare requirements in a public health emergency to allow qualified providers – those with a pre-existing relationship with the patient – to deliver telehealth to beneficiaries: (i) outside of rural areas, (ii) in their homes, and (iii) by means of a telephone with audio and video capabilities. On March 27, 2020, Congress enacted the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act).¹⁵⁶ In addition to injecting trillions into the economy, the CARES Act authorized the waiver of the pre-existing relationship requirement and other telehealth expansions. On March 23, 2020, the U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR), which enforces the Health Insurance Portability and Accountability Act (HIPAA), announced the exercise of enforcement discretion for HIPAA restrictions that might otherwise have limited the use of telehealth services during the PHE.¹⁵⁷ These changes allowed for Medicare reimbursement for the delivery of health care services using smartphones.

Likewise, in New York, the New York State Department of Health (“DOH”) took action to promote the use of telehealth and telephonic evaluation. An Executive Order issued March 12, 2020,¹⁵⁸ suspended the New York telehealth statute and regulations, to the extent necessary to allow additional telehealth provider categories and modalities, to permit other types of practitioners to deliver services within their scopes of practice and to authorize the use of certain technologies for the delivery of health care services to established patients. Beginning on March 10, 2020, DOH issued a series of guidance documents regarding the use of

certified asthma educators, certified genetic counselors, hospitals, residential healthcare facilities serving special needs populations, home care services agencies, hospices, credentialed alcoholism and substance abuse counselors, early intervention program providers, clinics licensed or certified by the Office of Mental Health or funded or operated by the Office for People with Developmental Disabilities, and others subject to agency determination.

¹⁵³ *Id.*, § 2999-cc (3).

¹⁵⁴ New York Medicaid Update, Special Edition, Expansion of Telehealth Vol. 35, No. 2, N.Y.S. DEP’T OF HEALTH, Feb. 2019, https://www.health.ny.gov/health_care/medicaid/program/update/2019/feb19_mu_speced.pdf.

¹⁵⁵ Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. § 116-123, Mar. 6, 2020, <https://www.congress.gov/116/plaws/publ123/PLAW-116publ123.pdf>.

¹⁵⁶ Coronavirus Aid, Relief, and Economic Security Act, PUB. L. § 116-136, Mar. 27, 2020, <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

¹⁵⁷ Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, HHS OFFICE OF CIVIL RIGHTS, last reviewed Mar. 30, 2020, <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

¹⁵⁸ N.Y. EXEC. ORDER No. 202.1, Mar. 12, 2020, <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

telehealth, including telephonic services, for dates of service on or after March 1, 2020 and through the duration of the New York State COVID-19 emergency.¹⁵⁹ These guidance documents alleviate some of the barriers to telehealth by allowing clinicians and health care organizations to bill for telephonic services if they cannot provide the audiovisual technology traditionally referred to as “telemedicine.”

In the midst of the coronavirus, the temporary rollback of regulatory restrictions enabled providers to marshal telehealth to expand the delivery of services while reducing the spread of infection. This reduced the strain on the healthcare system and prevent further spread of disease. But why only temporary? Though telehealth, providers can deliver medical care much more quickly and serve more patients, without the need for them to travel long distances to the provider’s office to receive care. Telehealth proved itself under fire, and its benefits extend well beyond the emergency context. Moving forward, the coronavirus experience argues for the need for updated reimbursement policies to encourage the use of telehealth to provide proper, effective and efficient care for patients.

Testing During Pandemic

We examine the issue as to whether private research laboratories should be authorized to do serology testing for epidemiological studies during an emergency pandemic.

NYS PHL § 580 states, “[n]othing in this title shall be construed as affecting facilities which perform laboratory tests solely for research purposes, nor as affecting laboratory testing by a public health officer as part of an epidemiological investigation in which no patient identified result is reported for diagnostic purposes to a health care provider or the subject of the test.”¹⁶⁰

Essentially, section 580 of the Public Health Law exempts and authorizes research laboratories to pursue tests so long as clinical diagnoses of patients for treatment are not being conducted. At present, 10 NYCRR Part 58-1¹⁶¹ prevents research laboratories from reporting their results to individual patients.¹⁶²

Serological tests measure the number of antibodies or proteins present in the blood when the body is responding to a specific infection, like COVID-19. In other words, the test detects the body’s immune response to the infection caused by the virus rather than detecting the virus itself. This may potentially be used to help determine, together with other clinical data, that such individuals are no longer susceptible to infection and can return to work. In addition, these test results can aid in determining who may donate a part of their blood called convalescent plasma, which may serve as a possible treatment for those who are seriously ill from COVID-19.

Research laboratories present an untapped resource to scale mass testing to respond to COVID-19. The only portion of the Public Health Law that prevents a general research laboratory from engaging in epidemiological serology testing is the requirement that the testing be conducted by a public health officer.

¹⁵⁹ 2020 DOH Medicaid Updates, Volume 36, N.Y.S. DEP’T OF HEALTH, rev’d Apr. 2020, https://www.health.ny.gov/health_care/medicaid/program/update/2020/index.htm.

¹⁶⁰ N.Y. PHL § 580.

¹⁶¹ 10 NYCRR § 58-1.

¹⁶² The Health Law Section of the New York State Bar Association has proposed a rulemaking for the DOH that would permit research laboratories to report results to the health care provider designated by a study subject under specific limited conditions. Such health care provider may then determine if confirmatory tests should be pursued utilizing CLEP approved diagnostic testing in a CLEP approved laboratory. The Committee recommended the following be added as 10 NYCRR § 58-1.8b: “Results of tests conducted in the context of IRB approved research protocols by non-permitted research laboratories may be reported to the research subject’s designated health care provider solely for the purpose of referral of the subject for confirmatory testing by a permitted laboratory using approved test methodology.” See Letter from Ronald Kennedy, Director of Government Relations, NYSBA, to Stephanie Schulman, Ph.D., Director CLEP, Regarding Proposed Rule by NYSBA Health Law Section, April 3, 2018, Appendix D.

To the extent private research laboratories have capacity and are capable of assisting with epidemiological testing, the Governor should exercise his authority under NYS Executive Law § 29-a¹⁶³ to suspend that portion of NYS PHL § 580¹⁶⁴ that requires the testing to be provided by a public health officer to enable private research labs to assist with scaling serology testing.

Nevertheless, as of this writing, certain significant ambiguities regarding hospital clinic payment rates remain.

IV. Business/Contracts/Risk Management

Introduction

There is no doubt that the COVID-19 pandemic has had tremendous economic impact upon businesses. The Wall Street Journal reports that, “U.S. economy in the first quarter shrank at its fastest pace since the last recession as the coronavirus pandemic shut down much of the country.”¹⁶⁵ As non-essential businesses are put on “pause” and many essential businesses’ operations are limited, both individuals and businesses will be hard pressed to meet contractual obligations and must look to risk mitigation strategies to manage the financial impact. Although many businesses have insurance policies that are meant to kick in when disaster strikes, such business interruption coverage typically requires physical damage to the workplace making it impossible for workers to do their job. Quarantines and travel bans imposed by federal and state authorities in an effort to control contagion can make it just as impossible for workers to do their jobs as destruction from a fire, flood or earthquake, but do not cause the physical damage to workplaces that is necessary to trigger successful business interruption claims.¹⁶⁶ From an insurance perspective, such policies are not designed to cover the widespread business interruption caused by the shuttering of businesses across the country. Losses due to bacteria and virus such as the COVID-19 pandemic impacts the entire risk pool, leaving insurers at significant risk because such policies are designed to cover losses resulting from individual insured’s chance events and not catastrophic events that impact the entire risk pool.¹⁶⁷

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was signed into law as a \$2.2 trillion stimulus package designed to mitigate the cataclysmic economic impact resulting from the COVID-19 pandemic. The CARES Act provided substantial economic relief, but also includes several temporary modifications to chapter 7 and chapter 13 of the U.S. Bankruptcy Code that modify the definition of “current monthly income” to exclude payments made under federal law relating to a declared national emergency and permit chapter 13 debtors with prior-confirmed plans to seek modifications due to Covid-19 related hardships.¹⁶⁸ These provisions provide some relief for consumers, but do not address the risk of city and state bankruptcies as tax revenues fall due to plummeting gas prices, lack of tourism, and shuttering of the hospitality industry, and emergency spending on unemployment claims soars.¹⁶⁹ On April 22, 2020, U.S. Senate Majority Leader Mitch McConnell “opened the door to allowing U.S. states to file

¹⁶³ N.Y. EXEC. L. § 29-a.

¹⁶⁴ N.Y. PHL § 580.

¹⁶⁵ Harriet Torry, *Virus Shrinks Economy by 4.8%*, WALL STREET JOURNAL, Apr. 30, 2020 (Last accessed 04/30/2020), <https://www.wsj.com/articles/first-quarter-gdp-us-growth-coronavirus-11588123665>.

¹⁶⁶ Mary Williams Walsh, *Coronavirus Will Cost Businesses Billions. Insurance May Not Help*, N.Y. TIMES, Mar. 5, 2020, <https://www.nytimes.com/2020/03/05/business/coronavirus-business-insurance.html> (Last accessed Apr. 10, 2020).

¹⁶⁷ Jim Sams, *Some Insurance Regulators Skeptical About Business Interruption Claims*, CLAIMS JOURNAL, Apr. 27, 2020, (Last accessed May 3, 2020).

¹⁶⁸ K&L Gates, LLP, *COVID-19: How the CARES Act Will Impact Chapter 7 and Chapter 13 Consumer Bankruptcies*, JDSUPRA.COM, Mar. 31, 2020, <https://www.jdsupra.com/legalnews/covid-19-how-the-cares-act-will-impact-48826/> (Last accessed Apr. 30, 2020).

¹⁶⁹ Richard McGahey, *COVID-19 Could Bankrupt Your State*, FORBES, Apr. 6, 2020, [www.forbes.com/sites/richardmcgahey/2020/04/06/covid-19-could-bankrupt-your-state/#72fd\)d565489](http://www.forbes.com/sites/richardmcgahey/2020/04/06/covid-19-could-bankrupt-your-state/#72fd)d565489) (Last accessed 04/30/2020).

for bankruptcy to deal with economic losses stemming from the coronavirus outbreak that are punching big holes in their budgets.”¹⁷⁰ However, whether such relief is available to U.S. states remains a looming legal issue. Federal, state and local public health authorities must consider innovation solutions to (i) allow essential businesses to collaborate under CSC and channel resources to address the PHE; (ii) permit essential licensed health care workers in good standing to cross state lines and health care systems to help manage patient surges wherever they occur; and (iii) protect good faith efforts to maintain workplace and public safety and control the spread of contagion where is scarce. Likewise, business leaders should identify the weaknesses in their respective business operations and consider immediate, mid-term and long-term risk management strategies to assure recovery, resiliency, and financial stability.¹⁷¹

Potential liability for breach of contract during coronavirus pandemic

We examine whether nonperformance of contractual obligations during the coronavirus pandemic may result in liability for breach of contract.

Ordinarily, a failure to perform under a contract results in potential liability for the party who is in breach of his or her obligations. A supplier of goods, for example, may be held liable if he or she fails to deliver the goods as promised. Or a purchaser of goods may be held liable if he or she fails to pay for goods purchased from a supplier. Similarly, a lease contract may result in liability if either the tenant or the landlord breaches his or her obligations. Or a service provider may be held liable for failure to perform services, or the recipient may be held liable for failure to pay for the services. The law is clear: If you breach a contractual obligation, you may be held liable for the breach.

But what happens if a party does not – or cannot – perform his or her obligations under a contract in the middle of a pandemic? This question has taken on increased urgency in recent days, as companies across a wide range of industries have begun to alter their business practices and contractual arrangements in response to the outbreak of COVID-19. Will the COVID-19 outbreak excuse the nonperformance of a contract?

Under New York law, there are a limited set of circumstances under which the COVID-19 outbreak might excuse contractual non-performance. Those circumstances include: (1) when the relevant contract contains a provision that excuses performance—such as a *force majeure* clause; (2) when certain common law doctrines—such as the doctrines of frustration of purpose or impossibility – excuse non-performance.

Finally, New York’s Uniform Code Section 2-615(a) excuses delay or non-delivery under a contract for sale under certain circumstances, including where performance has been made impracticable by an event that goes to the heart of the contract or where the delay or non-delivery was caused by good faith compliance with governmental regulation.

Force Majeure

Some contracts contain provisions that excuse nonperformance due to circumstances beyond the control of the parties. These provisions are known as *force majeure* clauses.¹⁷² A *force majeure* clause generally allows a party relief if a specified event materially impacts, or renders impossible, the performance of the contract. Typically, if a *force majeure* clause applies, the parties’ obligations under the contract are

¹⁷⁰ *McConnell says he favors state bankruptcy over more federal aid*, Apr. 22, 2020, REUTERS, [reuters.com/article/us-health-coronavirus-usa-states/mcconnell-says-he-favors-state-bankruptcy-over-more-federal-aid-idUSKCN2242U7](https://www.reuters.com/article/us-health-coronavirus-usa-states/mcconnell-says-he-favors-state-bankruptcy-over-more-federal-aid-idUSKCN2242U7), (Last accessed 04/30/2020).

¹⁷¹ See, *The world remade by COVID-19*, DELOITTE, COVID-19/Collection Perspectives, www2.deloitte.com/global/en/about-deloitte/articles/covid-19-scenarios-and-impacts-for-business-and-society-world-remade.html.

¹⁷² *Kel Kim v. Central Mkts.*, 70 N.Y.2d 900, 902 (1987).

suspended during the pendency of the event, and, if the event continues for a certain period of time, the parties may have a right to terminate the contract.

Under New York law, *force majeure* clauses are narrowly construed and applied. As one New York court recently explained, *force majeure* clauses are designed to limit damages “where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.”¹⁷³ Moreover, the courts will generally strictly construe the types of events that give rise to relief under a *force majeure* event. “[O]nly if the *force majeure* clause specifically includes the event that actually prevents a party’s performance will that party be excused.”¹⁷⁴ When the parties have themselves defined the contours of *force majeure* in their agreement, “those contours dictate the application, effect, and scope of *force majeure*.”¹⁷⁵

Some contracts may include “epidemic” as a specific example of a *force majeure* event.¹⁷⁶ Other contracts may not specifically list epidemic as a *force majeure* event, but may include a catch-all provision. If the coronavirus pandemic is sufficiently similar to the events listed in the *force majeure* clause, then—under the rule of contract construction known as *eiusdem generis* – the coronavirus pandemic may be considered a *force majeure* event.¹⁷⁷

Common law doctrines: Frustration of purpose and impossibility

In the absence of a *force majeure* clause, two common law doctrines are potentially applicable: the doctrine of impossibility and the doctrine of frustration of purpose. Under New York law, the doctrine of impossibility provides only a limited path to relief and has been narrowly applied by the courts “due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.”¹⁷⁸ Under the doctrine of impossibility, a party’s performance will be excused “only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.”¹⁷⁹ “Moreover, the impossibility of performance must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.”¹⁸⁰ “Thus, where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.”¹⁸¹

The frustration of purpose doctrine excuses non-performance when a change in circumstances is such that one party’s performance would no longer give the other party what induced him to make the bargain in the first place.¹⁸² Like the doctrine of impossibility, the doctrine of frustration of purpose is a narrow one. Its application is “limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party.”¹⁸³ In order to successfully invoke the doctrine of frustration of purpose, a party must show that the purpose that is frustrated is the principal purpose of that party in making the contract. “The object must be so completely the basis of the contract that, as both parties understand, without

¹⁷³ *Constellation Energy Servs. of N.Y. v. New Water St.*, 146 A.D.3d 557, 558 (1st Dept. 2017).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., *Touche Ross & Co. Manufacturers Hanover Trust Co.*, 107 Misc. 2d 438, 441 (Sup. Ct. N.Y. County 1980) (quoting contract that defines *force majeure* as including “flood, epidemics, earthquake, [and] war”).

¹⁷⁷ See *Kel Kim*, 70 N.Y.2d 900 at 903.

¹⁷⁸ *Id.* at 902.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281-282 (1968).

¹⁸² *Bierer v. Glaze, Inc.*, 2006 U.S. Dist. LEXIS 73042, *21-22 (E.D.N.Y. Oct. 6, 2006); *U.S. v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

¹⁸³ *Id.*

it the transaction would make little sense.”¹⁸⁴ Restatement (Second) of Contracts § 265 (comment). The doctrine does not apply where performing under a contract would merely cause some degree of financial hardship.

New York’s Uniform Commercial Code Section 2-615

Finally, even in the absence of a force majeure provision, New York’s Uniform Commercial Code may excuse non-performance. Section 2-615(a) of the N.Y. U.C.C. provides that “[d]elay in delivery or non-delivery . . . is not a breach under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.” Under this provision, a seller is excused where its performance is "commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.”¹⁸⁵ There is an important caveat to Section 2-615(a): Where a seller's ability to supply is only partially impacted, the seller must allocate production/supply among its customers in a fair and reasonable manner.¹⁸⁶

With respect to impracticability caused by government regulation or order, such “governmental interference cannot excuse unless it truly ‘supervenes’ in such a manner as to be beyond the seller's assumption of risk.”¹⁸⁷ Moreover, a party cannot rely on supervening government action if he or she brought about the action that renders performance impracticable. “[A]ny action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.”¹⁸⁸

If the contract does not contain a *force majeure* clause, then courts will look to the language of the provision to determine if the clause excuses non-performance under the circumstances. *Force majeure* clauses vary widely, and the precise language will be critical. Some *force majeure* clauses specifically reference “epidemic” as a *force majeure* event; others do not. Even in the absence of a specific reference to epidemic, a *force majeure* clause may apply if it contains a catch-all provision and an epidemic event is sufficiently similar to the listed triggering events.

In the absence of a *force majeure* clause, nonperformance may be excused under the limited circumstances permitted by the doctrines of impossibility or frustration of purpose. These common law doctrines are applied narrowly by the courts of New York. The impossibility doctrine applies when an unanticipated and unforeseeable event occurs and, as a result of the event, the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. The frustration of purpose doctrine applies when a wholly unforeseeable event renders the contract valueless to one party and the principal purpose of the contract is no longer achievable.

Finally, New York’s Uniform Code Section 2-615(a) may excuse breach of certain sales contracts where performance has been made impracticable by an unforeseen supervening occurrence or where the breach was caused by good faith compliance with governmental regulation.

¹⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 265 (comment).

¹⁸⁵ UCC § 2-615, Official Comment 1.

¹⁸⁶ UCC § 2-615(b).

¹⁸⁷ UCC § 2-615, Official Comment 11.

¹⁸⁸ *Id.*

Paycheck Protection Program

It is important to note that the U.S. Small Business Administration established the Paycheck Protection Program (PPP) specifically designed to support small businesses experiencing economic harm from the pandemic and to encourage employers to maintain or rehire their employees, by offering forgiveness for those entities who use the loan proceeds to cover payroll costs and related costs at a specified level for a specified period of time and employee and compensation levels are maintained.¹⁸⁹ As such funding has been depleted quickly due to overwhelming response, additional funds have been granted through an amendment to the CARES Act.¹⁹⁰ Economic initiatives such as this which provide direct funding are critical to ensuring that New Yorkers remain employed and businesses across professional sectors are able to continue operating. However, it is evident that greater care must be given to ensuring that the business entities with greatest need are not dominated by those with greatest resources and influence.

Immunity

Federal Immunity Declarations in Response to COVID-19

CMS Blanket Waivers for Health Care Providers

Pursuant to section 319 of the Public Health Service Act,¹⁹¹ if the President declares a major disaster or emergency, the Department of Health and Human Services (“HHS”) may declare a Public Health Emergency (“PHE”) which triggers the authority of the Secretary of HHS under section 1135 of the Social Security Act¹⁹² to temporarily waive or permit flexibility of certain Medicare, Medicaid and HIPAA requirements. These 1135 waivers are adopted to allow hospitals, laboratories, nursing homes, hospice, psychiatric hospitals and critical access hospitals and other regulated organizations and facilities¹⁹³ to provide timely care to as many people as possible and may impact the following requirements:

- Conditions of participation and other certification requirements;
- Program participation and similar requirements;
- Preapproval requirements;
- Requirements that physicians and other health care professionals be licensed in the State in which they are providing services, so long as they have equivalent licensing in another State, subject to any applicable State laws governing licensure;
- Emergency Medical Treatment and Labor Act (EMTALA);
- Stark self-referral sanctions; and
- Limitations on payment for health care items and services furnished to Medicare Advantage enrollees by non-network providers.¹⁹⁴

These waivers allow for unconventional adjustments to operations governed by federal law to control contagion, assure sufficient staffing levels, efficiently treat patients, and allocate scarce resources to preserve and save as many lives as possible during the pandemic under CSC principles while using best efforts to assure the safety of its clinical staff and patient milieu, sometimes at the expense of individual

¹⁸⁹ See U.S. SMALL BUS. ADMIN., Coronavirus (COVID-19): Small Business Guidance & Loan Resources, <https://www.sba.gov/page/coronavirus-COVID-19-small-business-guidance-loan-resources>.

¹⁹⁰ Paycheck Protection Program and Health Care Enhancement Act, H.R. 266, 116th Cong. (2020), <https://www.congress.gov/amendment/116th-congress/senate-amendment/1580/all-info?s=4&r=1>.

¹⁹¹ 42 U.S.C. § 201 et seq.

¹⁹² 42 U.S.C. § 301 et seq.

¹⁹³ EMERGENCY MEDICAL TREATMENT & ACTIVE LABOR ACT, 42 U.S.C. § 1395dd.

¹⁹⁴ CMC, CMS Declaration of Waivers under 1135, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/1135-Waivers> (last visited Apr. 22, 2020).

patient's rights.¹⁹⁵ Such curtailment of individual patient rights however, may lead to regulatory complaints and investigation, penalties, and/or civil and criminal litigation when outcomes are not optimal. Likewise, notwithstanding these waivers, health care organizations and facilities must take caution to avoid fraud and abuse and other overt violations of the laws and regulations governing the health care delivery system. In addition, health care organizations and facilities remain subject to applicable state laws and regulations not under federal jurisdiction. Hence, the immunity afforded by both federal and state authorities to health care organizations and facilities as they navigate the health care delivery system during the coronavirus pandemic is critical to the implementation of CSC. Without such immunity, health care organizations and facilities could be exposed to liability ranging from medical malpractice, violation of federal and state non-discrimination laws, violations of regulatory requirements which may lead to investigation, prosecution under the False Claims Act, and possibly exclusion of federal and commercial payment programs.

CARES Act

As noted above, the Federal Coronavirus Appropriations Package or CARES Act, was enacted largely to stimulate the U.S. economy, but there are several provisions included in the legislation that also aim to relax typical restrictions on the healthcare industry workforce that is on the “frontlines” in providing patient care amid the pandemic, including a liability protection for health care providers who volunteer to provide health care services relating to the diagnosis, prevention or treatment of COVID-19 or the assessment or care of a person who has or is suspected to have COVID-19 (CARES Act § 3215). To qualify for the protection, a healthcare provider must be licensed, registered, and/or certified to provide health care services under State or Federal law and providing services within the scope of their license, registration or certification in good faith (*see id.*). Additionally, an individual must not be compensated for providing the services at issue (*see id.*). The protection is limited in time to the duration of the period of the PHE declared by the U.S. Health and Human Services.

PREP Act

The Public Readiness and Emergency Preparedness Act or PREP Act (42 USC §§ 247d-6d-6e), permits U.S. HHS to issue a declaration to provide liability protections to individuals and entities (referred to as “covered persons”) who manufacture, distribute or administer “medical countermeasures” in response to a public health crisis. After determining COVID-19 constituted a PHE, on January 31, 2020, the U.S. HHS Secretary issued a declaration under PREP.¹⁹⁶ Thereafter, consistent with the PREP Act, on March 10, 2020, the U.S. HHS Secretary issued a declaration under PREP that set forth specific covered persons and medical countermeasures that receive liability protection during the COVID-19 pandemic.¹⁹⁷ The covered persons include manufacturers, distributors, and program planners of medical countermeasures and their agents and employees and persons who prescribe, administer, deliver, distribute or dispense medical countermeasures.¹⁹⁸ The medical countermeasures include the following: any antiviral, other drug, biologic, diagnostic, other device or vaccine used to treat, diagnose, cure, prevent or mitigate COVID-19 or any virus mutating therefrom; or any device used in the administration of such product and the components and materials of same.¹⁹⁹

¹⁹⁵ *See id.*

¹⁹⁶ DEP'T OF HEALTH AND HUMAN SERVICES, Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, Mar. 17, 2020, FEDERAL REGISTER, <https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures#footnote-1-p15198> (last visited Apr. 17, 2020).

¹⁹⁷ *See* 85 C.F.R.15198.

¹⁹⁸ Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, Mar. 17, 2020, <https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures#footnote-1-p15198> (last visited Apr. 17, 2020).

¹⁹⁹ *See id.*

Since these official pronouncements by the US HHS Secretary, on April 14, 2020, HHS's Office of General Counsel has issued an Advisory Opinion discussing the declarations and the purpose and limitations of same ("the Advisory Opinion").²⁰⁰ The stated goal of the Advisory Opinion was to respond to the scores of questions HHS has apparently received as to what is and what is not covered by the liability protections offered under the PREP Act. Notably, the Advisory Opinion indicates the scope of liability protections afforded under the PREP Act is intended to be broad, and, as such, it is the opinion of the General Counsel's Office that if a person or entity that qualifies as a "covered person," that person or entity will likely not "lose" the immunity intended by the law if it turns out later a product believed in good faith to be a "medical countermeasure" was not actually a "medical countermeasure" outlined in the PREP declaration.²⁰¹

Finally, because covered persons are immune from suit, absent gross negligence, under the PREP Act, there is a Countermeasures Injury Compensation Program ("CICP") that provides compensation to individuals who are seriously injured or killed from medical countermeasures.²⁰² Notably, however, CICP is a "payor of last resort," and will only pay for medical costs not otherwise covered by third-party payors, including personal medical insurers, lost income, and survival benefits in some cases.²⁰³ To file for compensation under CICP, claimants must submit their requests for same within one (1) year of receipt of the countermeasure.²⁰⁴ It is too soon to tell whether CICP claims will increase beyond what is typical, but it seems very likely they will with what we know at this time.

New York State-Specific Immunity Declarations in Response to COVID-19

Organizational Immunity: Negligent Credentialing

Health care organizations and health care facilities are mandated by New York State laws and regulations to duly credential health care practitioners providing health care services at their facilities.²⁰⁵ Organizations have a duty to select and retain competent practitioners. Failure to meet established standards of credentialing and privileging may lead to regulatory exposure and/or organizational liability for negligent credentialing in the event of patient harm caused by a credentialed practitioner. Typical strategies employed by health care facilities and their governing boards to minimize risk in the credentialing process are time consuming and may prove impractical in the face of the coronavirus pandemic situation. Typical strategies include:

- Identifying red flags in a practitioner's history (e.g., NPDB reports)
- Thoroughly documenting the practitioner's professional competence through references
- Using a consistent, evidence-based evaluation process
- Collecting performance data on an on-going basis
- Establishing and enforcing standard evaluation parameters
- Assuring adequate facility resources to perform health care services in a safe, effective and efficient manner

²⁰⁰ Advisory Opinion on The Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under The Act (Dep't of Health & Human Services, Office of the Sec'y Apr. 14, 2020), <https://www.hhs.gov/sites/default/files/prep-act-advisory-opinion-april-14-2020.pdf>.

²⁰¹ *See id.* at 4.

²⁰² Countermeasures Injury Compensation Program, 76 FED. REG. 62, 306 (Oct. 7, 2011), <https://www.hrsa.gov/sites/default/files/cicp/about/forms/adminfinalrule.pdf> (last visited Apr. 23, 2020).

²⁰³ Frequently Asked Questions For Individual Requesters/Recipients, Health Resources & Services Administration, <https://www.hrsa.gov/cicp/faq/requesters.html> (last visited Apr. 23, 2020).

²⁰⁴ *See id.*

²⁰⁵ N.Y. PHL § 2805-k.

- Leadership oversight of the credentialing process (Board review and approval of candidates after careful review of a complete application)

The Governor’s EOs appropriately extend to health care entities and facilities immunity from liability resulting from reliance on credentialing processes of other health care organizations and health care facilities in New York and any other state.²⁰⁶

Individual Immunity

Likewise, individual practitioners who cross state lines to offer professional medical services to manage patient surges risk professional liability exposure. It is deemed professional misconduct for any licensed practitioner to practice in the State of New York without a valid license. As healthcare practitioners cross state lines to address patient surges, they risk being charged with professional misconduct on the grounds that they are practicing in New York without a license.²⁰⁷ Similarly, as practitioners and other healthcare workforce members are re-deployed or otherwise take on additional administrative and clinical duties and responsibilities outside the scope of their employment contracts, will health care organizations and health care facilities offer coverage and/or indemnification for potential liability exposure that may arise in the course of treating patients with COVID-19 given the relaxation of other regulatory requirements governing the delivery of health care and patients’ rights? The Governor’s EO 202.5 provides individual civil and criminal immunity to those duly licensed practitioners crossing state lines without a license to practice in New York state to assist their New York state colleagues in managing the surge of patients needing acute clinical care beyond that which health systems in New York can handle. More recently, EO 202.18 expanded civil and criminal immunity to those individual practitioners ranging from physicians to licensed clinical social workers to laboratory staff and pharmacy staff who are licensed and in current good standing in any province or territory of Canada. Such immunity however is limited to those acts of omission or commission in the management of COVID-19 consistent with the CSC.

Finally, from a risk management perspective, health care organizations and facilities should assure that termination of interjurisdictional credentialing arrangements and expansion of delineation of privileges should terminate contemporaneously with termination of the current public health emergency crisis as determined by governmental entities or when the health organization has sufficient capacity to handle census. Health care organizations and facilities should clarify for individual practitioners that termination does not amount to a termination or other denial of clinical privileges that would otherwise be deemed an adverse event triggering a report to the state Office of Professional Medical Conduct, Office of Professions or National Practitioner Data Bank.²⁰⁸

More significant, however, is the individual immunity necessary for health care workers who must make the life and death decisions about allocation of scarce resources such as ventilators, PPE and clinical staff when emergency departments and intensive care units are overwhelmed beyond their capacity. In this regard, EO 202.10 provides health care professionals with immunity from civil liability. Unfortunately, the immunity provision does not extend to individual criminal liability, nor does it extend to the health care facility at which the services are provided. Article 30-D of the Public Health Law,²⁰⁹ signed by Governor Cuomo on April 3, 2020, as part of the New York State budget extends “immunity for any liability, civil

²⁰⁶ See N.Y. EXECUTIVE ORDER No. 202.10, “Continuing Suspension and Modification of Laws Relating to the Disaster Emergency,” Mar. 23 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (last accessed Apr. 17, 2020).

²⁰⁷ N.Y. ED. L., Art. VIII.

²⁰⁸ 42 U.S.C. § 1320a, 42 C.F.R. § 1003.810, Failure to report to NPDB may result in significant Civil Monetary Penalties.

²⁰⁹ N.Y. PUB. H. L. § 3080 et seq.

and criminal, for any health care professional or facility alleged to have been sustained as a result of any act or omission” in the provision of care pursuant to a COVID-19 emergency rule or is otherwise lawful.²¹⁰

HIPAA Privacy Rule

The Health Insurance Portability and Accountability Act (“HIPAA”) is likely best known for its privacy protections. Indeed, HIPAA sets forth national standards to protect against the wrongful disclosure of information contained in patients’ medical records, as well as the disclosure of other personal health information.²¹¹ Importantly, the restrictions set forth in HIPAA apply to “covered entities,” which is defined to include health plans (i.e., individual or group plans that provide or pay the cost of medical care), health care clearinghouses (i.e., public or private entities that process or facilitate the processing of health information received from another entity, including, but not limited to billing companies), and health care providers who typically transmit health information in electronic form (and their “business associates”); and ordinarily restrict those entities from disclosing “health information,” defined as “any information... that relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual” without certain required consent from patients or their representatives or in certain limited defined exceptions.²¹²

Several of those defined exceptions are applicable now amid the COVID-19 crisis. There is an exception that permits covered entities to disclose otherwise protected health information to public health authorities “for the purpose of preventing or controlling disease... including, but not limited to, the reporting of disease” and where a patient “may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition.”²¹³ There is also an exception that allows covered entities to disclose information to a patient’s family members or other persons identified by the patient as being involved with his/her/their care if the information is directly relevant to the patient’s care – e.g., that certain precautions need to be taken if the patient has or is suspected to have COVID-19.²¹⁴

Related to this, there is also an additional exception that allows covered entities to disclose health information to when it is “necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public,” and that disclosure can be made to any “person or persons reasonably able to prevent or lessen the threat.”²¹⁵ Notably, however, in a bulletin issued on February 3, 2020 (“the February Bulletin”), HHS cautions that this exception should only be used when the “professional judgment of health professionals” indicate it is necessary because of the nature and severity of the threat.²¹⁶ The February Bulletin also warns against reporting health information to the media or the public at large, absent a patient’s consent to do so, and reminds covered entities and their business associates that they must make reasonable efforts to limit the disclosed information to the “minimum necessary.” Meaning, it would be permissible for a hospital to provide a public health authority requesting information on COVID-19 status, but the hospital should refrain from also provide information about that patient’s surgical history and other unrelated medical conditions, absent a reason for doing so.²¹⁷

²¹⁰ N.Y. PUB. H. L. § 3082.

²¹¹ See 45 C.F.R. § 160 et seq.

²¹² See 45 C.F.R. § 160.103; see also 45 C.F.R. 164.500 et seq.

²¹³ See 45 C.F.R. 164.512(b)(i) and (b)(iv).

²¹⁴ See 45 C.F.R. 164.510(b).

²¹⁵ See 45 C.F.R. 164.512(j).

²¹⁶ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, HIPAA Privacy and Novel Coronavirus, Feb. 2020,

<https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf> (last visited Apr. 23, 2020).

²¹⁷ See *id.*

In March 2020, HHS issued another HIPAA-related bulletin for the stated purpose of addressing the question of whether covered entities could share names of patients and other identifying information about patients who have been infected with or exposed to COVID-19 with law enforcement, paramedics, other first responders, and public health authorities (“the March Bulletin”).²¹⁸ The March Bulletin references the exceptions discussed above, and provides examples of how those exceptions apply.²¹⁹

In sum, while HHS has not “waived” the privacy restrictions that are set forth in the HIPAA Privacy Rule, the available exceptions that already exist in the law appear sufficient to provide public health authorities with the information they need to stop the spread of the pandemic. Importantly, in both the February Bulletin and the March Bulletin, HHS made clear patient confidentiality is extremely important and reasonable efforts should be made to ensure it is maintained to the greatest extent possible.

Workplace Liability Exposure

Employment Practices

As non-essential businesses press “pause” in response to the COVID-19 Pandemic, and as essential businesses reallocate their workforce, many employers have conducted layoffs, furloughs and implemented workshare programs to reduce salary and other overhead expenses during a time of limited cash flow. As more fully discussed in the Workforce Section of this Report, Federal and State laws governing paid sick leave, unemployment benefits, and FMLA have been expanded to account for some of the workforce reductions and lessen the devastating impact on individuals and the economy. However, as employers implement the difficult decisions pertaining to their employees, they must be cognizant of civil rights laws that prohibit discrimination in the workplace.²²⁰ Decisions pertaining to sick leave, layoffs, furloughs, workshare and reassignment of duties must be made in a non-discriminatory manner to avoid allegations of adverse employment actions, failure to provide reasonable accommodations, and wrongful termination. In addition, when implementing workshare or other reductions in work hours, employers must strictly comply with wage and hour provisions to protect employees’ right to unemployment benefits and avoid unnecessary liability for overtime hours worked. Finally, prior to implementing such reductions in force, employers subject to the Worker Adjustment and Retraining Notification Act must be sure to provide adequate notice as may be required by law.²²¹

Workplace Safety

Inevitably, essential workers risk exposure to COVID-19 and may suffer illness as a result. Such illness, when it is demonstrated that it was contracted during work-related activity in the course of employment, will be covered by workers’ compensation coverage. However, demonstrating a direct causal effect may prove difficult where employees may be exposed to the virus in their normal course of daily activities, likely leaving employers to work through workers’ compensation claims long after the crisis abates.

On the other hand, where employers do not or are not able to comply with OSHA and other workplace safety requirements, they may be exposed to organizational liability including, but not limited to significant civil monetary penalties imposed by the Department of Labor under the Federal Civil Penalties Inflation

²¹⁸ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities, <https://www.hhs.gov/sites/default/files/COVID-19-hipaa-and-first-responders-508.pdf> (last accessed Apr. 23, 2020).

²¹⁹ *See id.*

²²⁰ *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Title VII of the Civil Rights Act of 1964, (Pub. L. 88-352) 42 U.S.C. § 2000e et seq; Americans with Disabilities Act of 1990, 42 U.S.C. ch. 126 § 12101 et seq; Consolidated Omnibus Reconciliation Act of 1985, IRC §4980B and 29 U.S.C. §§ 1161-1168; Family Medical Leave Act, 29 U.S.C. ch. 28 §§ 2601-2654.

²²¹ Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2109.

Adjustment Act of 1990, as amended.²²² Failure to assure that adequate risk management strategies are adopted to minimize the risk of infection for employees, customers and others who interact directly with the public may expose employers to not only significant regulatory penalties, but claims arising from customers who may be exposed. Essential businesses including, but not limited to, grocery stores and other food markets, child-care centers, and utility providers must adopt infection prevention protocols such as standard and universal precautions that they, unlike health care delivery providers, may not otherwise be familiar with. Employers must assure that PPE and hand sanitizer is readily available and properly used, and that environmental surfaces and equipment are cleansed and disinfected effectively and often, and that social distancing policies are strictly enforced.

Given the health care services workers' shortage and patient surges during the COVID-19 Pandemic, the CDC has adopted guidance for occupational health programs and public health officials making decisions about return to work for healthcare personnel with confirmed COVID-19 or who have suspected COVID-19 but have not been tested.²²³ Healthcare services employers must balance the risk of early return to work with their local need for healthcare services personnel on the front lines to manage patient care needs and adopt standard policies that are consistently enforced to avoid unnecessary exposure for deviations from accepted CSC.

V. Workforce Issues Associated with COVID-19

Introduction to Workforce

Implementation of crisis standards of care in response to a public health emergency mandates that the interests of the public's health be deemed paramount and that all efforts and resources be devoted toward saving as many lives as possible. Governmental entities must determine how businesses and entities and their respective employees, independent contractors and volunteers are legally distinguished for the purpose of coordinating essential services while maintaining public and worker safety. The Centers for Disease Control ("CDC") and other public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued directives to minimize the risk of contagion by requiring quarantine, suspending non-essential commercial business operations, closing schools and taking other measures to prevent public gatherings in close quarters.

Governor Andrew Cuomo's Executive Orders ("EOs") coordinating restrictions on in-person business operations, school closures, and stay-at-home mandates across New York State in response to the ongoing COVID-19 pandemic have had a catalytic impact on New York State's economy, workforce, and education system, while also incidentally hindering access to essential resources and health care services for many individuals.²²⁴ Despite desperate efforts by federal, state and local government officials to minimize the inevitable harms associated with a deadly pandemic such as this, the debilitating effect of the existing mandates has exposed societal weaknesses specific to public health and safety which cannot be easily rectified in the present. Nonetheless, such efforts and the results thereof provide insight regarding potential opportunities to remedy recognized weaknesses and build upon discovered strengths.

²²² 28 U.S.C. § 2461.

²²³ CTRS FOR DISEASE CONTROL & PREVENTION, *Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19*, Apr. 13, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html> (last accessed Apr. 23, 2020).

²²⁴ See N.Y. EXEC. ORDER No. 202.14 (Extends restrictions on public and private businesses; postponement or cancellation of all non-essential gathering of individuals of any size for any reason, and closure of schools stateside until 11:59 on April 29, 2020).

Through a series of EOs, the Governor necessarily categorized businesses into non-essential and essential whereby workers in non-essential businesses, or non-essential positions in essential businesses, must “shelter-in-place.”²²⁵ Timely and definitive guidance on what constitutes an essential business, or an essential worker, is critical to balance societal access to vital resources with control over contagion to avoid overwhelming our health care systems. This requires thoughtful allocation of human resources where the public need is greatest. As a result, tensions between public health interests including those of vulnerable populations, with those of individual workers inevitably rise to the surface.

As the Governor’s office, the New York City Mayor’s office and other related stakeholders try to determine the appropriate timing and manner in which the economy should reopen in collaboration with surrounding states, Governor Cuomo has continued to emphasize the inseparable symbiotic relationship between businesses, schools, workforce, and transportation, while clearly stating that one cannot reopen independent of the others.²²⁶ This section highlights the tight interconnections among business, workforce and education and the associated issues that quasi “shelter-in-place” mandates have surfaced to date.

Allocation of Human Resources

Beginning in mid-March 2020, Governor Cuomo began issuing executive orders requiring government entities and businesses to have non-essential personnel work from home or take leave without charging accruals.²²⁷ Effective March 20, 2020, Executive Order 202.6 required all businesses and not-for-profit entities to utilize telecommuting or work from home procedures to the maximum extent possible. Within days, a new executive order was issued, reducing the in-person workforce at any work locations by 100% no later than March 22, 2020 with a limited exemption for essential businesses.²²⁸ This mandate, though undeniably one of the most successfully impactful State initiatives to “flatten the curve,” triggered a whirlwind of anxiety and uncertainty amongst employers and employees alike as they diligently attempted to comply with often vague and ever-changing “essential business/employee” definitions; fiscally and logistically manage business operations; balance employer/employee rights and responsibilities; and fully engage in public health efforts to mitigate spread of the virus in the workplace, homes, communities, throughout the State and worldwide. As New York State prepares to reopen and embrace the “new normal,” it is important to reflect on the past, identify and acknowledge the lessons learned as the emergency period continues to unfold, and commit to embracing an innovative future.

Essential and Non-Essential Business Categorization

As Governor Cuomo’s workplace mandates evolved over time, the following business and employee categories emerged and shifted from a workforce population percentage standpoint as restrictions became more stringent.

Essential Businesses

- First Responders (Medical)
- First Responders (Non-medical)
- Essential – significant contact with public and co-workers (grocery, manufacturing, shipping, transportation, etc.)
- Essential – limited or no contact with public

²²⁵ See N.Y. EXEC. ORDER Nos. 202.6; 202.13; Appendix F.

²²⁶ Governor Cuomo Press Conference, Apr. 18, 2020, <https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-covid-19-briefing-transcript-april-18> (last accessed 04/20/2020).

²²⁷ See N.Y. EXEC. ORDER No. 202.4, Mar. 17, 2020.

²²⁸ See Empire State Dev., Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders, Apr.19, 2020, <https://esd.ny.gov/guidance-executive-order-2026> (last visited Apr. 23, 2020).

Non-Essential Businesses

- On-site
- Telecommuting

Each category of professionals referenced above faces its own unique set of challenges, beyond those shared amongst all, as a consequence of the diverse roles and expected contributions required by society present day. Governor Cuomo reported that according to the Center for Economic and Policy Research, “41 percent of frontline workers are people of color, and of those frontline workers.” In addition, “45 percent of transit workers, 57 percent of building cleaning service workers and 40 percent of health care workers are people of color. People of color are also disproportionately represented in delivery and childcare services.”²²⁹ Furthermore, each category consists of numerous sub-categories of families and individuals who may be “sheltering” with family or loved ones; forced to “shelter” independently in isolation; working remotely with high productivity expectations which exceed the norm; or working with a reduced workload due to the economic impact of the pandemic. Each of these familial and individual categories are also differently situated socioeconomically, and thus must be closely scrutinized to ensure that unintended consequences do not result from overgeneralizing the perceived benefits and harms of existing and future initiatives, especially as we continue to navigate uncharted waters toward our “new normal.”

As previously suggested, the greatest challenges for business leaders beyond revenue related considerations have been associated with employee rights as related to employment, benefits, and protection from work-related exposure to COVID-19. In-person workforce reduction and quasi “shelter in-place” mandates significantly impacted demand for existing and new business almost instantaneously. Furthermore, many companies have not been able to collect payment for past services rendered, thus forcing them to determine how to effectively prioritize and allocate their employees and related business projects and tasks. Concerted efforts to prevent spread of the virus within the workplace have been futile to date as employees have continued to test positive since the pandemic was declared. Consequently, numerous human rights related concerns such as the “right to stay home” and “freedom of speech” have arisen and escalated in response to the highly contagious and deadly nature of the virus, which are addressed in a later section.

Employer Workplace Considerations

In light of the unprecedented impact of the COVID-19 pandemic economically, socially, and emotionally, employers must make every effort to maintain a supportive and legally sound work environment, recognizing the significant bearing workplace culture has on employee morale, trust and performance. Considering this, all operating businesses (non-essential and essential) should make a concerted effort to design and diligently implement a plan that is both employer and employee focused to ensure compliance with the legal and ethical practices, while fostering a supportive work environment. Employees should be provided with reputable state and federal resources to effectively follow best practices in mitigating the spread of the virus. Employers should closely follow public health guidelines and offer any equipment and materials necessary, including personal protective equipment (PPE), to not only support a healthy work environment, but convey a clear message to employees that the health and safety of themselves and their loved ones are of utmost importance. The New York State Nurses Association has challenged the adequacy of the PPE provided by certain hospitals during the PHE. The hospitals’ perspective is that the PPE was compliant with guidance during the pandemic.²³⁰

²²⁹ Governor Cuomo Press Conference, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Calls on Federal Government to Provide Hazard Pay to Essential Public Workers*, Apr. 20, 2020, <https://www.governor.ny.gov/news/amid-ongoing-COVID-19-pandemic-governor-cuomo-calls-federal-government-provide-hazard-pay>.

²³⁰ The case against one of the hospitals was dismissed on May 1, 2020. The cases against the other hospital are proceeding. Proskauer Rose LLP represents the hospitals in the NYSNA cases noted above. Edward S. Kornreich, a Proskauer Partner, is a

In light of the recent release of federal guidelines for reopening businesses,²³¹ it is important that public health considerations remain at the foundation of any decision-making associated with business operations to mitigate spread.²³² On May 4, 2020, Governor Cuomo announced four core factors that the State intends to monitor to determine which regions can re-open.²³³ Such considerations include the number of new infections, health care capacity, diagnostic testing capacity, and contact tracing capacity.²³⁴ Furthermore, businesses are required to document and put in place new safety precautions upon reopening to mitigate risk of virus spread.²³⁵ Such precaution requirements include the following:

- Workplace hours and shift design must be adjusted as necessary to reduce density in the workplace;
- Social distancing protocols must be enacted;
- Non-essential travel for employees must be restricted;
- All employees must be required to wear masks if infrequent contact with others;
- Strict cleaning and sanitation standards must be implemented;
- A continuous health screening process must be enacted for individuals to enter the workplace;
- Cases must be traced, tracked and reported on an ongoing basis; and
- Liability processes must be developed.

Business practices established during the early phase of the pandemic response which err on the side of caution, such as encouraging remote work when reasonably feasible, limiting non-essential travel and using reasonable discretion when employees display flu-like symptoms, will undeniably help expedite long-term health and economic success locally, nationally, and globally in the hours, days, and months to come. Considering this, such policies and procedures must not only be established, but implemented consistently and uniformly on an ongoing basis to ensure such efforts are worthwhile and have the long-term effect desired.

Employee Benefits

The following economically focused benefits and initiatives are designed to support employees impacted by exposure to or diagnosis of the COVID-19 virus, furloughs and layoffs.

Sick Leave, Paid Time-Off (PTO), Unemployment

The Family First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES Act)

The Family First Coronavirus Response Act (FFCRA) is a Congressional Act designed to respond to the economic impact of the ongoing pandemic. The Act contains numerous provisions including, paid leave for workers affected by the pandemic. The Coronavirus Aid, Relief and Economic Security Act (CARES Act) builds upon such efforts by providing additional support for individuals and businesses, including pandemic emergency unemployment compensation, pandemic unemployment assistance, extended benefits, short-

member of the Task Force. Mr. Kornreich did not participate in the creation of this section of the Report, or any other sections of the Report related to workforce issues, or to the Force Majeure and Impossibility discussions, and did not approve their contents. This Report does not represent the views of Proskauer, which disclaims any responsibility for, or association with, its contents.

²³¹ THE WHITE HOUSE, Guidelines: Opening Up America Again (2020), https://www.whitehouse.gov/wp-content/uploads/2020/04/Guidelines-for-Opening-Up-America-Again.pdf?mod=article_inline&mod=article_inline.

²³² Jennifer Maloney, Mike Colias, Paul Ziobro, *Businesses Strive to Reopen From Coronavirus Shutdown*, WALL ST. J., Apr. 20, 2020, <https://www.wsj.com/articles/the-corporate-coronavirus-plan-to-reopen-make-it-up-as-you-go-11587404618>.

²³³ Governor Cuomo Press Conference, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Outlines Additional Guidelines for When Regions Can Re-Open*, May 4, 2020, available at: <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-additional-guidelines-when-regions-can>.

²³⁴ *Id.*

²³⁵ *Id.*

term compensation, trade readjustment allowances, disaster unemployment assistance, and payments under the self-employment assistance program.

Under both the FFCRA and the CARES Act, laws and policies that affect employee wages, scheduling, and overtime remain unchanged from the current statutory regime under title 29 of the United States Code. Federal wage standards governed under 29 U.S.C. §209 hold that employers must pay employees a minimum wage. Furthermore, 29 U.S.C. §207(a)(1) requires employers to pay employees who work an excess of forty hours a week overtime pay “at a rate not less than one and one-half times the regular rate at which he is employed.” Exempt employees, such as contractual employees or employees subject to existing collective bargaining agreements, may be exempted from overtime pay under §209(a)(1) if such contract or agreement specifies an expectation that the workweek would exceed forty hours in accordance with 29 U.S.C. §209(b). These laws are designed to work in concert with State law. Under circumstances in which State benefits are more generous than federal benefits, such as that for family leave, the eligible individual will be able to obtain the difference of the amount owed from the State.²³⁶

WARN – Worker Adjustment and Retraining Notifications

The FFCRA and the CARES Act do not alter the provisions of the Worker Adjustment and Retraining Notification statutes.²³⁷ Under the federal WARN statutes, if a covered employer seeks a permanent or temporary shutdown – of a single site of employment, or one or more facilities or operating-units within a single site of employment – results in a reduction of fifty or more employees for a minimum of thirty days, then the covered employer must provide sixty day notice to those employees and relevant federal, state, and local government agencies of the pending closure.²³⁸ When a natural disaster causes a shutdown – such as the COVID-19 pandemic – an employer is not required to adhere to the sixty day notice requirement.²³⁹ The employer is still obligated to provide notice “as is practicable” and shall provide a brief statement of the basis of reducing the notification period.²⁴⁰

Sick Leave and Paid Time-Off (PTO), Paid Family Leave Benefits

In New York State, a detailed paid family leave framework was enacted to provide sick leave, paid family leave and other benefits to employees subject to an order for mandatory or precautionary quarantine due to COVID-19.²⁴¹ The provisions outline categories of eligible businesses, employee salary ranges, paid family leave or disability benefit eligibility standards and guaranteed job protections granted to individuals under the law.²⁴² For the purposes of these provisions, “disability” is defined as “any inability of any employee to perform the regular duties of his or her employment or the duties of any other employment which his or her employer may offer him or her as a result of a mandatory or precautionary order of quarantine or isolation” issued by specified entities.²⁴³ Furthermore, “family leave” includes any leave “taken by an employee from work when an employee is subject to a mandatory or precautionary order of quarantine or isolation” issued by specified entities due to COVID-19 or any leave taken “to provide care for a minor dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation” issued by the same specified entities due to COVID-19.²⁴⁴ Under the FFCRA, employees who

²³⁶ N.Y. Legis. 25 (2020), 2020 Sess. Law News of N.Y. Ch. 25 (S. 8091) (McKINNEY'S).

²³⁷ 29 U.S.C. §2101(a).

²³⁸ 20 C.F.R. § 639.4.

²³⁹ 29 U.S.C. § 2102(b)(2)(B).

²⁴⁰ 29 U.S.C. § 2107(b)(3).

²⁴¹ N.Y. Legis. 25 (2020), 2020 Sess. Law News of N.Y. Ch. 25 (S. 8091) (McKINNEY'S); New York State Paid Family Leave, Fact Sheets, COVID-19 Paid Sick Leave Employees, <https://paidfamilyleave.ny.gov/system/files/documents/2020/03/COVID-19-sick-leave-employees.pdf>, (last visited Apr. 23, 2020).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

work for businesses which employ over 50 but under 500 employees can also qualify for paid sick leave if the leave is related to the COVID-19 health emergency.²⁴⁵ There are six conditions that trigger these provisions, which are more expansive than New York State law. These conditions include:

- (1) The employee is subject to federal, state or local order to quarantine or self-isolate;
- (2) A health care provider advises the employee to quarantine or self-isolate related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19;
- (4) The employee is caring for an individual who is subject to quarantine/isolations;
- (5) The employee is caring for a son or daughter under the age 18 because school closures and child care is unavailable;
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.²⁴⁶

The U.S. Department of the Treasury, the IRS, and the U.S. Department of Labor have collaborated to provide small and mid-sized business tax credits to help such entities recover the cost of such benefits.

It is important to note that if an employer has reduced an employee's normal work hours, the employee is not eligible to use sick leave or the expanded family and medical leave to replace the lost hours, unless a qualifying condition stated above renders the employee unable to work.²⁴⁷ Even so, the extraordinary impact of these benefits is notable. As of May 3, 2020, there were over 170,000 confirmed cases of novel coronavirus, 43,045 hospitalizations, and approximately 13,536 deaths associated with the virus in New York City alone.²⁴⁸ Considering this, expanded paid leave and health insurance benefits have been critical to facilitating public health and safety for New Yorkers, in concert with the unemployment benefit initiatives referenced below.

Unemployment Benefits

An unprecedented number of employees have been laid-off, furloughed, or in some way severed from employment due to lack of work as a result of the pandemic.²⁴⁹ For the week of April 25, 2020, the total number of individuals filing initial claims for unemployment benefits was close to four million, bringing the total number of initial claims to over thirty million nationally.²⁵⁰ In New York, unemployment applications spiked 16,000 percent.²⁵¹ Individuals may qualify for unemployment insurance benefits offered through the state and federal government, including pandemic specific assistance provided under the Cares Act referenced above, depending on their employee category and status.²⁵² In New York, individuals seeking unemployment insurance must (a) have adequate past earnings; (b) be unemployed for

²⁴⁵ See U.S. DEP'T OF LABOR, Families First Coronavirus Response Act: Employee Paid Leave Rights (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcr-employee-paid-leave> (Last accessed Apr. 12, 2020).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ NEW YORK CITY HEALTH, COVID, COVID-19: DATA, (May 3, 2020), <https://www1.nyc.gov/site/doh/covid/covid-19-data.page>.

²⁴⁹ New York Dept. of Labor, Number of Unemployment Insurance Beneficiaries and Benefit Amounts Paid Regular Unemployment Insurance New York State, Region and County February 2020 and Cumulative Since January 1, 2020, <https://labor.ny.gov/stats/UI/Beneficiaries-and-Amounts-by-Region-and-County-February-2020.pdf>, (total including out of state residents is 194,400 in Feb. 2020).

²⁵⁰ U.S. DEP'T OF LABOR, Unemployment Insurance Weekly Claims (Apr. 30, 2020), <https://www.dol.gov/ui/data.pdf>; <https://oui.doleta.gov/unemploy/archive.asp> (Last accessed May 3, 2020).

²⁵¹ NEW YORK DEP'T OF LABOR, *Facing Unprecedented Spike in COVID-19 Related Unemployment Insurance Applications, NYS Department of Labor Announces Partnerships to Boost Tech Capacity and Make It Easier for New Yorkers to File*, Apr. 9, 2020, <https://labor.ny.gov/pressreleases/2020/april-09-2020.shtm>, (increase of application by 16,000%).

²⁵² See U.S. DEP'T OF LABOR, Families First Coronavirus Response Act: Questions and Answers (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcr-questions> (Last accessed 04/21/2020); CARES Act: sec. 6428 (S. Res. 3548, 116th Cong. §6428 (2020) <https://www.congress.gov/116/bills/s3548/BILLS-116s3548is.pdf>).

each day claimed; (c) be unemployed “through no fault of their own”; and be actively and viably seeking reemployment, in accordance with Section 500 of the New York State Labor Law.²⁵³ On March 12, 2020, Governor Cuomo signed an executive order waiving the 7-day waiting period for individuals claiming unemployment insurance through New York State as a result of the COVID-19 pandemic.²⁵⁴ Typically, unemployment benefits would exclude certain employee categories and be deemed considerably inadequate to financially support individuals, let alone families, under crisis circumstances such as this. However, New York State and the federal government have each made a concerted effort offer benefits at a livable wage and broaden the scope of employees eligible to receive them.

Under Title II of the CARES Act, unemployment insurance eligibility has been extended to self-employed workers, independent contractors, gig economy workers, clergy and others who are typically ineligible under a new temporary federal program called Pandemic Unemployment Assistance (PUA).²⁵⁵ Additionally, eligible parties are entitled to additional payment per week, on top of regular state benefits for an additional 13 weeks beyond the 26 weeks regularly provided, for a total of 39 weeks of coverage.²⁵⁶

Individuals are eligible under the CARES Act under the following circumstances:

- i. The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- ii. A member of the individual’s household has been diagnosed with COVID-19;
- iii. The individual is providing care for a family member or a member of the individual’s household who has been diagnosed with COVID-19;
- iv. A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- v. The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- vi. The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- vii. The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- viii. The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- ix. The individual has to quit his or her job as a direct result of COVID-19; or
- x. The individual’s place of employment is closed as a direct result of the COVID-19 public health emergency.

These pandemic specific economic initiatives strive to keep both essential and non-essential businesses viable and individuals employed. It is important to note there are technical differences between furloughed and laid-off workers which should be taken into consideration when making employment decisions, such as the anticipated length of time the impacted individual is intended to be out of work and benefit eligibility. In order to most effectively take advantage of the various benefits highlighted above, in addition to others

²⁵³ 18 N.Y. LAB. LAW § 500 et. seq.

²⁵⁴ NEW YORK STATE, Know Your Rights, <https://coronavirus.health.ny.gov/know-your-rights#insurance>; N.Y. EXEC. ORDER No. 202.1, Mar. 7, 2020, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_1.pdf.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

included in the CARES Act, employers and employees should seek guidance from the Department of Labor and professional and/or non-profit entities specializing in such matters.

Schools and Child Care

On April 11, 2020, the New York Times published an article highlighting diverging perspectives between the Mayor of New York City, Mayor Bill de Blasio, and the Governor of New York State, Governor Andrew Cuomo, regarding when schools and businesses should open, and which government leader has the authority to make such decision.²⁵⁷ The Mayor publicly announced that New York City schools, which at the time were shuttered since March 16th and required to adjust to distance learning, would remain closed for the remainder of the 2019-2020 academic year, while also proposing that businesses could potentially open in May 2020.²⁵⁸ However, Governor Cuomo soon thereafter stated that no decision had been made regarding closing schools or opening businesses in New York City or the State.²⁵⁹ As previously noted, the Governor believes in the deep interconnection between business and school operations, and thus determines that they must open in concert.²⁶⁰ On May 7, 2020, Governor Cuomo signed an Executive Order extending the closure of schools statewide for the remainder of the school year.²⁶¹ School districts are required to continue established alternative instructional options, distribution of meals, and child care, while prioritizing services for children of essential workers.²⁶² This symbiotic relationship contributes to various public health and social services related issues which must be closely analyzed and ultimately rectified going forward in the interest of future economic and social stability and most importantly, social justice. In an effort to address some of these challenges in a targeted fashion, the Governor has partnered with the Gates Foundation to develop a blueprint to reimagine education in the “new normal”²⁶³ and has established New York’s Reimagine Council²⁶⁴ to prepare for reopening. Key considerations include:²⁶⁵

- How can we use technology to provide more opportunities to students no matter where they are;
- How can we provide shared education among schools and colleges using technology;
- How can technology reduce educational inequality, including English as a new language student;
- How can we use technology to meet educational needs of students with disabilities;
- How can we provide educators more tools to use technology;
- How can technology break down barriers to K-12 and Colleges and University to provide greater access to high quality education no matter where the student lives; and

²⁵⁷ Eliza Shapiro, *N.Y.C. Closes Schools for Academic Year, but Cuomo Says it’s His Decision*, N.Y. Times, Apr. 11, 2020, <https://www.nytimes.com/2020/04/11/nyregion/nyc-schools-closed.html>.

²⁵⁸ *Id.*; Governor Cuomo Press Conference, Apr. 18, 2020, <https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-covid-19-briefing-transcript-april-18> (last accessed 04/20/2020).

²⁵⁹ Jesse McKinley, Eliza Shapiro and Jeffery C. Mays, *De Blasio Used Last-Minute Text to Tell Cuomo Schools Would Stay Shut*, N.Y. TIMES, Apr. 12, 2020, <https://www.nytimes.com/2020/04/12/nyregion/schools-cuomo-de-blasio-nyc-coronavirus.html> (last accessed Apr. 20, 2020).

²⁶⁰ Governor Cuomo Press Conference, Apr. 18, 2020, <https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-covid-19-briefing-transcript-april-18> (last accessed Apr. 20, 2020).

²⁶¹ N.Y. Exec. Order No. 202.28, <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (last accessed May 8, 2020).

²⁶² *Id.*

²⁶³ Governor Cuomo Press Conference, Video, *Audio, Photos & Rush Transcript: Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Collaboration with Gates Foundation to Develop a Blueprint to Reimagine Education in the New Normal*, May 5, 2020, <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces-19> (last accessed May 8, 2020).

²⁶⁴ Governor Cuomo Press Conference, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Members of the Reimagine Education Advisory Council*, May 8, 2020, <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-members-reimagine-education-advisory> (last accessed May 8, 2020).

²⁶⁵ Governor Cuomo Press Conference, Video, *Audio, Photos & Rush Transcript: Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Collaboration with Gates Foundation to Develop a Blueprint to Reimagine Education in the New Normal*, May 5, 2020, <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces-19> (last accessed May 8, 2020).

- Given ongoing social distancing rule, how can we delay classroom technology, like immersive cloud virtual classrooms learning, to recreate larger class or lecture hall environments in different locations?

As the Gates Foundation collaboration and New York’s Reimagine Council progress forward toward a revitalized and stronger New York, it is essential that health care practitioners and public health experts are proactively integrated in future discussions in light of the significant impact health has on positive education outcomes.

New York State has the largest comprehensive public university system in the United States, the State University of New York (SUNY) system, with a total enrollment of over 400,000 students across 64 campuses and over 2 million continuing education enrollments.²⁶⁶ Additionally, the City School District of the City of New York (the New York City public schools) is the largest school district in the United States with over 1.1 million students.²⁶⁷ Almost 1.5 million children receive free or reduced lunch through the public school system.²⁶⁸ In regards to child care, there are approximately 17,000 day care centers throughout New York State.²⁶⁹ Despite having a total capacity of over 630,000 children across centers, child care shortages are an ongoing issue throughout the state.²⁷⁰ Bearing in mind that these statistics fail to include all public and private institutions and entities throughout the State, it is evident that New York State manages one of the most robust, coordinated educational and social services systems nationally. New York families heavily rely on these systems, in addition to supplemental after school programs, extra-curricular opportunities, day and residential camps, and other child and youth-directed programming, to supervise and provide care for their minor children while at work. Deprived of these resources, in-person business operations throughout the state effectively deteriorate with a markedly disparate impact on women, minorities, and economically vulnerable populations.

Child Care

Child care is undeniably one of the most fundamental, critical and coveted social services in New York State under the oversight of Office for Children and Family Services (OCFS) and the New York City Department of Health (NYC DOH).²⁷¹ Such services are offered in varied forms, including day care centers, small day care centers, family day care homes, group family day care homes, and school-aged child care programs.²⁷² Over the years and in recent past, associations and advocacy groups throughout New York State, such as the Empire State Campaign for Child Care, Winning Beginning NY, and Business Council of New York State, have highlighted the fact that child care services offerings throughout the State are woefully inadequate and prohibitively costly due to inadequate funding, limited staff²⁷³ and a stringent

²⁶⁶ State Univ. of New York, Fast Facts, Jan. 2019, <https://www.suny.edu/about/fast-facts/> (last visited Apr. 19, 2020).

²⁶⁷ NEW YORK CITY DEP’T OF EDUC., DOE Data at a Glance, <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> (last accessed Apr. 19, 2020).

²⁶⁸ Council On Children & Families: Kids’ Well-Being Indicators Clearinghouse, KWIC Indicator: Children Receiving Free of Reduced-Price School Lunch – Public Schools, Apr. 19, 2020, https://www.nyskwic.org/get_data/indicator_profile.cfm?subIndicatorID=52.

²⁶⁹ OFFICE OF CHILDREN AND FAMILY SERV., New York State 2017 Child Care Demographics (2017).

²⁷⁰ *Id.*; Childcare Careers, Addressing the Childcare Shortage: An Analysis of the Potential Benefits Offered by the Temporary Childcare Worker Industry 2 (Nov. 2018) (citing an estimated 60 percent of New York residents live in “childcare deserts,” described as a location with inadequate child care facilities).

²⁷¹ Find Child Care Providers New York State, Guidelines, <https://www.ny.gov/services/find-child-care-providers-new-york-state>, (last accessed Apr. 19, 2020).

²⁷² See 18 N.Y.C.R.R. § 413.2.

²⁷³ Saima Akhta et al., Empire Justice Center, Joint Legislative Public Hearings on 2020-2021 Executive Budget Proposal 10-20, Jan. 30, 2020; The Business Council, Support of S.5811-A, Jun. 4 2019; Winning Beginning NY, Testimony of Winning Beginning NY 2-3, Jan. 30, 2020; Timothy Denton, *Nassau County is Child Care Desert, Comptroller finds COVID-19 Lockdown Highlights High Cost to Families*, Li Herald.com, Apr. 19, 2020, <https://www.liherald.com/stories/nassau-county-is-childcare-desert-comptroller-finds,124247>.

regulatory framework related to adult-child ratios, training and experience, inspections, and employee eligibility requirements.²⁷⁴

Though childcare policies may vary, a significant number of childcare centers operate on a schedule that aligns with the school districts. In February 2020, OCFS began releasing COVID-19 pandemic updates to child care providers with public health and operations related updates.²⁷⁵ To date, OCFS has been collecting information from licensed and registered providers via surveys to determine “whether they have openings in their child care program, and if they have the capacity and desire to serve more children than their established capacity.”²⁷⁶ Furthermore, surveys were distributed to determine parent or caregiver need.²⁷⁷ OCFS advises that child care *may* be available based on the responding party’s “job, employer, number of children, and financial need.”²⁷⁸ Simultaneously, school leaders, special education directors, and charter school leaders were directed by Governor Cuomo to “establish and submit plans for the care of children of essential health care workers and first responders and to address other identified student needs” in preparation for school closures across the state.²⁷⁹ Since then various stakeholders have started initiatives to ensure that health care workers, first responders and front-line workers have access to child care.²⁸⁰ In recognition of the shortage of child care workers and the significant impact potential infection could have on maintaining sufficient manpower, Governor Cuomo also altered background check requirements for child care workers.²⁸¹

Now that in-person operations for all non-essential business are closed, many parents at home are forced to work remotely, if able to do so, and care for their children while many work productivity and performance expectations not only remain unchanged, but potentially increase in light of such dire economic circumstances.²⁸² Additionally, it is uncertain whether all frontline workers in need of child care have sufficient and convenient access to it. The New York City Administration for Children’s Services (ACS) has also issued guidelines to facilitate the identification of a child or children whose parent or primary caregiver is impacted by COVID-19 resulting in hospitalization.²⁸³ The issue is whether there is a sufficient number of healthy, trained, and experienced child care workers available to support the workforce as the

²⁷⁴ *Id.*

²⁷⁵ Letter from Office of Children and Family Serv. to Child Care Providers, Feb. 6, 2020, (online at <https://ocfs.ny.gov/main/childcare/letterstoproviders/2020/Dear-Provider-2020Feb-Corona-Virus.pdf>).

²⁷⁶ OFFICE OF CHILDREN AND FAMILY SERV., Coronavirus Information (COVID-19) News and Updates, Survey on Child Care Program Openings, Mar. 25, 2020, <https://ocfs.ny.gov/main/news/COVID-19/#t1-Letters-to-Child-Care-Providers> (last accessed Apr. 20, 2020).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Letter from New York State Ed. Dep’t, Mar. 17, 2020; N.Y. EXEC. ORDER No. 202.4, Mar. 17, 2020.

²⁸⁰ See NEW YORK CITY DEP’T OF ED., Regional Enrichment Centers, <https://www.schools.nyc.gov/enrollment/enrollment-help/regional-enrichment-centers> (last accessed Apr. 21, 2020); *NBC New York: New York Giants Fund Childcare for First Responders During COVID-19*, NBC Television Broadcast, Mar. 23, 2020, <https://www.nbcnewyork.com/news/coronavirus/new-york-giants-fund-childcare-for-first-responders-during-COVID-19-crisis/2340883/> (last accessed Apr. 21, 2020); Press Release, Westchester County, Westchester County to Offer Child Care Opportunities for the Children of Healthcare Workers and First Responders, Mar. 25, 2020, <https://www.westchestergov.com/home/all-press-releases/8343-westchester-county-to-offer-child-care-opportunities-for-the-children-of-healthcare-workers-and-first-responders> (last accessed Apr. 21, 2020); Public Notice, Ichabod Crane Central Sch. Dist., Childcare for Essential Emergency Workforce Personal, Mar. 20, 2020, <https://www.ichabodcrane.org/2020/03/20/emergency-responder-health-worker-child-care/> (last accessed Apr. 21, 2020).

²⁸¹ N.Y. EXEC. ORDER No. 202.13, Mar. 29, 2020.

²⁸² Adam Golick, *The Productivity Pitfalls of Working From Home in the Age of COVID-19*, STANFORD NEWS, Mar. 30, 2020, <https://news.stanford.edu/2020/03/30/productivity-pitfalls-working-home-age-COVID-19/> (last accessed Apr. 21, 2020).

²⁸³ Identifying Caregivers for Children Unaccompanied and/or Unsupervised Due to the Hospitalization of their Primary Care Giver, NYC Children Emergency Guidelines, Apr. 9, 2020.

State's battle against the pandemic continues, and we begin phasing in the workforce.²⁸⁴ Such weaknesses in our social and workforce structure must be resolved.

The CARES Act contains increased appropriations for childcare services to help mitigate the impact of the COVID-19 health emergency. Monies were appropriated for the Child Care and Development Block Grant Act (CCDBG) and to remain available through September 30, 2021 to “prevent, prepare for, and respond” to the COVID-19 health emergency.²⁸⁵ The CARES Act also includes appropriations for Head Start, while reducing State cost-sharing contributions.²⁸⁶ Although these appropriations do not direct funding towards increasing access to childcare services to frontline workers, they provide States with increased flexibility to develop child care programs for these workers if warranted.²⁸⁷ Access to CCDBG grants typically require states to implement work plans that include background checks into State/local criminal databases, and the National Crime Information Center's National Sex Offender Registry. Currently, States that do not have access to the federal National Sex Offender Registry for various reasons, but the Office of Child Care has extended waivers for this provision which allow those States to continue to receive CCDBG grant funding.

On April 23, 2020, Governor Cuomo announced \$30 million in childcare scholarships for essential workers and supplies for health care providers through federal funding under the CARES Act.²⁸⁸ Such essential workers include, “first responders such as health care providers, pharmaceutical staff, law enforcement, firefighters, food delivery workers, grocery store employees and others who are needed to respond to the COVID-19 pandemic.”²⁸⁹ The income level for eligibility is less than 300 percent of the federal poverty level, which is \$78,600 for a family of four.²⁹⁰ The funding may be used to cover existing care arrangements or to establish a new one.²⁹¹ Funding will also provide child care providers critical resources, such as masks, gloves, diapers, baby wipes, baby formula and food, with child care resource and federal agencies receiving grants of approximately \$600 per provider.²⁹² As child care resource and referral agencies, child care providers, and families persevere through this pandemic season and strategically prepare for the “new normal” that awaits, stakeholders must consider the resources, facility space, and manpower necessary to ensure the public health and safety of our children, their associated families and our child care workers, while still maintaining a welcoming and nurturing environment.

In regard to workforce, New York should consider granting staffing firms dedicated to childcare the provider status in the Statewide Central Register necessary to enable them to operate in the State and supplement our childcare workforce. In addition to the volunteers sought over the course of this pandemic, child care specific staffing firms could provide fully qualified and pre-screened teachers, assistant teachers and site directors for child care centers, preschools, and before & after school programs on an on-demand,

²⁸⁴ Lillian Mongeau, *Coronavirus is Closing Day Cares; Child Care Providers Worry They May Never Reopen*, USA TODAY, Apr. 5, 2020, <https://www.usatoday.com/story/news/education/2020/04/05/coronavirus-daycare-child-care-center-essential-cares-act-unemployment/2946710001/> (last accessed Apr. 21, 2020).

²⁸⁵ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat 281 (2020).

²⁸⁶ *Id.*

²⁸⁷ See 45 C.F.R. 98.16(aa) (incorporating use of block grant funding to be used to assist with childcare and safety during a state-emergency); See also OFFICE OF CHILD CARE, *CCDF Frequently Asked Questions in Response to COVID-19*, Mar. 13, 2020, <https://www.acf.hhs.gov/occ/resource/ccdf-faqs-in-response-to-COVID-19> (last accessed Apr. 12, 2020).

²⁸⁸ Press Release, Governor Cuomo, *Video, Audio, Photos & Rush Transcript: Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces State Health Department Will Partner with Attorney General James to Investigate Nursing Home Violations*, Apr. 23, 2020, <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-COVID-19-pandemic-governor-cuomo-announces-12> (announcing \$30 million in childcare scholarships for essential workers and supplies for childcare workers).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

same day, short-term, long-term, or permanent basis.²⁹³ Organizations such as this often employ a high percentage of graduate students and young adults seeking experience in pursuit of professional growth, parents seeking part-time work, and retired professionals to facilitate child care workforce stability within local communities on a routine and emergency basis, while also ensuring ensure the safety of one of our most treasured populations, our children. Furthermore, they have a significant impact on the school system, by alleviating the burdens that inevitably arise from sharing a limited pool of trained and fully vetted workforce members. Going forward, increased funding for existing centers supplemented by increased manpower must be prioritized to stabilize the existing childcare system and ultimately strengthen such system in anticipation of future emergencies such as this. Furthermore, we must ensure that the entire workforce is effectively supported by removing existing hurdles rooted in socioeconomic stratification.

Public and Private Schools, Colleges, and Universities

Once medical experts and government leaders realized that public and private academic institutions are high risk environments for the spread of the COVID-19 virus in light of the asymptomatic nature of the virus amongst children and young adults, such entities have faced numerous and diverse challenges which are not only ongoing, but also far-reaching beyond present day. Such challenges included the lack of regional uniformity and clarity regarding appropriate closure strategies and next steps upon recognition that the virus was a serious threat;²⁹⁴ the significant reliance on schools for food security for a large population of students;²⁹⁵ structural and economic disparities across academic institutions and students associated with home schooling and online learning;²⁹⁶ disparities associated with alternative grading systems within institutions and the modification,²⁹⁷ postponement and/or cancellation of institutional, state and/or professional examinations;²⁹⁸ the short-term and long-term impacts associated with the postponement and/or cancellation of graduation and other related ceremonies;²⁹⁹ uncertainty regarding the timeline for reopening schools³⁰⁰ and the overarching financial, psychological and emotional impact of all of the above on the communities, institutional leaders, workforce members, parents, and children implicated.

Operational Uniformity across Academic Institutions

In light of the proven significance of “social distancing” in New York State’s effort to mitigate the spread of COVID-19, it is essential that key stakeholders, including local health, education, school, college and university leaders, whether public or private, be provided clear and timely guidance regarding operational expectations and best practices to ensure that such individuals and entities are empowered with the information necessary to make sound decisions in the best interest of their individual communities and public health within the State as a whole. Local leaders and leaders were disoriented and frustrated in the

²⁹³ Child Care Careers, About Us, http://www.childcarecareers.net/about_us (last visited Apr. 23, 2020).

²⁹⁴ Robyn Dixon, Karla Adam, Odysseus Patrick, *On Schools, No Global Consensus*, WASH. POST, Apr. 19, 2020, at A21 (discussing lack of consensus surrounding school closing/reopening policies).

²⁹⁵ Council On Children & Families: Kids’ Well-Being Indicators Clearinghouse, *Supra* at note. 7.

²⁹⁶ Anna North, *The Shift to Online Learning Could Worsen Educational Inequality*, Vox (Apr. 9, 2020), <https://www.vox.com/2020/4/9/21200159/coronavirus-school-digital-low-income-students-Covid-new-york>.

²⁹⁷ Shannon Doyne, Michael Gonchar, *Should Schools Change How They Grade Students During the Pandemic?*, N.Y. TIMES, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/learning/coronavirus-schools-grading.html>; Teresa Watanabe, *A’s for all? Pass/fail? Colleges grapple with grading fairness during coronavirus*, L.A. TIMES, Mar. 27, 2020, <https://www.latimes.com/california/story/2020-03-27/grades-vs-pass-fail-colleges-grapple-with-student-demands-to-change-grading-during-coronavirus>.

²⁹⁸ Court of Appeals (N.Y.), *New York Bar Exam Rescheduled for Fall 2020*, Mar. 27, 2020, https://www.nybarexam.org/Press/PressRelease_NY_BarExam.pdf (rescheduling of July Bar Exam to September); NEW YORK DEP’T OF CIVIL SERV., News and Notifications, <https://www.cs.ny.gov/home/news.cfm> (last visited Apr. 22, 2020) (indicating postponed state civil service exams).

²⁹⁹ Elissa Nadworny, *No Caps, No Gowns: For Many In The Class Of 2020, Commencement Is Called Off*, NPR, Apr. 1, 2020, <https://www.npr.org/2020/04/01/823866801/no-caps-no-gowns-for-many-in-the-class-of-2020-commencement-is-called-off>.

³⁰⁰ Dixon, et al, *supra*.

absence of strong direction from the State regarding school closures in the early phase of the pandemic.³⁰¹ Despite local leaders' appreciation for autonomy in many instances, emergency circumstances such as this where regional differences and conflicting priorities, such as public safety, food safety, and childcare, are at issue, strategic efforts to act in a staggered or unified fashion directed by the State helps mitigate anxiety and fear amongst interested parties, while strengthening public trust that local decision-makers are acting in their best interest.

Entanglement of the School System, Food Security, and Health Care

One of the most devastating issues from a logistical, public health and social equity standpoint beyond family reliance on schools for child care is the fact that so many children rely on the school system for food security, thus compromising New York State leaders' ability and willingness to close schools as early as they otherwise would have to mitigate the spread of the virus within schools and associated households.³⁰² Although the availability of such benefits for families and children in need is paramount, the State should closely assess the government entities, organizations, personnel, and strategies utilized over the course of the past several weeks during the school closure period to determine which programs can be maintained long term in an effort to purposefully transition the sole responsibility of food security for children in economically challenged households from schools to third-party entities. Furthermore, many schools have school-based health centers which offer primary health care services within the school environment.³⁰³ Beyond providing first aid, emergency care and other services to individuals and students within the building, the center also provides diverse services, such as primary care and preventative health services (physical exams, required school health services, medical care for chronic illness and disease and referrals to specialty care), mental health services on site or by referral, health education, drug and alcohol abuse counseling, dental services, and age-appropriate teen reproductive health services.³⁰⁴ Considering this, expanded partnerships with health care entities, such as federally qualified health centers, should be established to ensure access to such critical health services for children and youth. This proposal is not intended to suggest that school systems be excluded from providing such benefits entirely, but rather calls attention to the need for a more robust support system for children and families outside of the school system.

Different than the inherent nature of school as an indirect form of "child care" based on our society's operational structure, schools are otherwise designed and intended to be sources of academic and social development and support, while providing additional opportunities and resources as ancillary benefits. The mission and vision of the New York State Education Department is "to raise the knowledge, skill, and opportunity of all the people in New York" and "to provide leadership for a system that yields the best educated people in the world."³⁰⁵ Considering this, schools should be funded and empowered as necessary to support its students when concerns such as food security are at issue. However, such institutions should act as collaborative partners with existing small business and nonprofit initiatives and programs, such as mobile food and produce projects, in the interest of public health and safety and social justice.

³⁰¹ Madina Toure and Sally Goldenberg, *Cuomo Defends Decision To Keep Schools Open, But Pressure Mounts*, POLITICO NEW YORK, Apr. 15, 2020, <https://www.politico.com/states/new-york/albany/story/2020/03/15/cuomo-defends-decision-to-keep-schools-open-but-pressure-mounts-1267129> (last accessed Apr. 24, 2020).

³⁰² New York State Council on Children & Families, KWIC Indicator: Children Receiving Free or Reduced-price School Lunch - Public Schools, https://www.nyskwic.org/get_data/indicator_profile.cfm?subIndicatorID=52 (last accessed Apr. 24, 2020); Paul Berger and Lee Hawkins, *Gov. Cuomo Wants to Shut New York City's Public-School System*, WSJ, Mar. 15, 2020, <https://www.wsj.com/articles/pressure-mounts-to-shut-new-york-citys-school-system-bars-and-restaurants-11584290883> (last accessed Apr. 24, 2020).

³⁰³ NEW YORK STATE DEP'T OF ED., School-Based Health Centers, available at: <https://www.schools.nyc.gov/school-life/health-and-wellness/school-based-health-centers> (last accessed May 8, 2020)

³⁰⁴ *Id.*

³⁰⁵ NEW YORK STATE DEP'T OF ED., About NYSED, <http://www.nysed.gov/about> (last visited Apr. 24, 2020).

Disparities Associated with Home Schooling and Online Learning

The Governor's mandate across businesses and academic institutions to cease in-person operations and function remotely, including remote learning, has had a multifaceted impact on households and individuals throughout the State. Parents have been forced to assume a hands-on teaching role for courses of which they may not be well versed, using technologies with which they might be unfamiliar, while also working from home remotely with employer expectations of high productivity. For households led by front-line workers unable to work from home and single parent households, the burden can be unbearable logistically and emotionally. Considering the vastly diverse composition of our households today, caution must be taken to not discount or ignore the far-reaching implications of a fully technological and business framework. Caretakers and employees are required to not only have the necessary technological equipment to appropriately meet school and work requirements, but the technological and financial resources to support, such as internet. Many households positioned to operate remotely prior to the pandemic still experience the need to purchase necessary office supplies and develop home office and study spaces for work and student learning. We must remember that many others do not have that luxury.

Technology has the ability to facilitate equality through increased access to otherwise inaccessible resources or further stratify us within society as a result of its potentially prohibitive costs for equipment and internet, in addition to the potential need for training.³⁰⁶ Here, there is greater risk of stratification than the potential for equality that must be assessed and progressively resolved through collaborative public/private efforts. State, local and community leaders must ensure that vulnerable households needing economic or educational support are identified and supported to not only ensure that academic and professional requirements are able to be met, but academic and professional competency and growth are experienced and not hindered unfairly by this experience due socioeconomic status, disability, or any other factor. Individuals with disabilities must be provided the opportunity to receive ongoing education and services, whether via technological or in-person direct care services with sufficient protective measures, to safeguard them from being marginalized and ultimately harmed for the duration of this pandemic and going forward. The failure to provide appropriate evidence-based supports and services typically provided through schools could have long-term unintended consequences, such as regression. As New York seeks to become more technologically advanced in the area of education, the provision of technological hardware, software, communication devices, and other assistive technology which promote inclusive distant learning, while sheltering in place and beyond, could facilitate student access to the same educational opportunities as other students.

On April 4, 2020, the New York Times published an article entitled, "College Made Them Feel Equal. The Virus Exposed How Unequal Their Lives Are."³⁰⁷ This speaks to the fact that these issues of inequality permeate all academic and professional levels, and thus must be pondered and remedied as we evaluate and adapt our societal framework to withstand the present pandemic and look ahead to the future. On April 20, 2020, SUNY's chancellor announced the distribution of over 8,800 laptops and chromebooks to students to ensure that they are able to complete their spring coursework.³⁰⁸ Efforts such as this, with the provision of ancillary resources as needed, will help ensure the safety of our students at all levels and in all communities, while also enhancing their ability to more easily transition to remote learning and achieve academic regardless socioeconomic status.

³⁰⁶ Suzanne Woolley, Nikitha Sattiraju, Scott Moritz, *U.S. Schools Trying to Teach Online Highlight a Digital Divide*, BLOOMBERG, Mar. 26, 2020, <https://www.bloomberg.com/news/articles/2020-03-26/COVID-19-school-closures-reveal-disparity-in-access-to-internet>.

³⁰⁷ Nicholas Casey, *College Made Them Feel Equal. The Virus Exposed How Unequal Their Lives Are*, N.Y. TIMES, Apr. 4, 2020, <https://www.nytimes.com/2020/04/04/us/politics/coronavirus-zoom-college-classes.html>.

³⁰⁸ Press Release, SUNY, Chancellor Johnson Announces Distribution of Over 8,800 Laptops and Chromebooks to Students in Need to Complete their Spring Semester Coursework, Apr. 20, 2020, <https://www.suny.edu/suny-news/press-releases/04-2020/4-20-20/index.html>.

Many of our students, especially those in colleges and professional institutions, are experiencing disappointment and fear as a result of separation from friends and loved ones; delayed special events and graduations; altered coursework and grading rubrics; postponed and cancelled state and national examinations; withdrawn opportunities and deteriorating job markets. Thus, every effort must be made to provide a strong foundation of resources, guidance and support from which our educational leaders, families and students can build and thrive despite the challenges faced, with social equity and justice in mind.

Essential Health Care Services Workers

Generally, health care services workers are deemed essential workers under Governor Cuomo's EOs.³⁰⁹ However, not all health care services are deemed essential in a public health emergency crisis such as the coronavirus pandemic. For instance, routine dental care, elective joint replacements, non-emergent podiatric care are not deemed essential health care services during this crisis which demonstrates "a fundamental priority shift from routine, patient-centric health care services to providing the best care possible to the largest numbers of victims" of the virus.³¹⁰ As non-essential health care services are put on pause, many duly qualified health care services personnel become part of the scarce resources that are reallocated and reassigned to best protect the public's health as health care institutions and facilities assess their relative capacity to manage patient surges arising from a major public health crisis. Other health care providers may travel to different jurisdictions to assist where the incidence of COVID-19 is concentrated; they may be reassigned to roles and responsibilities not within their current contracts or delineation of privileges; or they may be asked to perform outside the boundaries of their traditional scope of practice. These contractual and regulatory frameworks within which and the laws governing the manner in which licensed health care workers practice must be relaxed to allow health care institutions and facilities to incrementally increase clinical staff and resources, establish stand-by pools of providers, and re-deploy non-essential clinical staff to address patient influx greater than current capacity. Likewise, individual health care providers must be assured that by accepting such reassignments they are not unduly exposed to personal professional liability otherwise applicable under normal patient-centric standards of care.

State Licensure

The New York State Education Law governs licensure requirements and scope of practice for licensed health care services providers.³¹¹ Such laws restrict state licensed health care services providers from crossing state lines even in response to a public health emergency. Licensed providers risk investigation, prosecution, and discipline including, but not limited to, exclusion from participation in Medicare and Medicaid, for practicing in a state without a valid license. Likewise, even retirees who have allowed their license registrations to expire risk investigation, prosecution and discipline for professional misconduct for practicing in the state without a current registration.³¹²

Recognizing state licensure as a significant barrier to interjurisdictional movement of health care service workers to meet the public health needs in areas of concentrated incidence of COVID-19, Governor

³⁰⁹ See Essential Workers EO, Appendix F.

³¹⁰ James G. Hodge, Jr., Dan Hanfling, and Tia P. Powell, *Practical, Ethical, and Legal Challenges underlying Crisis Standards of Care*, J. L. MED. & ETHICS, Spring 2012, at 51 citing INSTITUTE OF MEDICINE, *Crisis Standards of Care: A Systems Framework for Catastrophic Disaster Response* (2012).

³¹¹ Health care services providers include physicians, physician assistants, registered nurses, licensed practical nurses, and nurse practitioners, whose scope of practice is defined under New York State Education Law §§ 6524, 6542, 6905, 6906, and 6902, respectively.

³¹² See N.Y. ED. LAW §§ 6530 and 6509 (defining "professional misconduct" with respect to licensed health care services providers); (See also *Chapter on Business Contracts, Insurance and Risk Management for additional discussion.*).

Cuomo's EO 202.5 effectively waived these laws to permit such cross jurisdictional coverage.³¹³ More recently, EO 202.18 further relaxed these laws to allow physicians, physician assistants, registered nurses, licensed practical nurses, nurse practitioners, licensed master social workers, licensed clinical social workers and other similarly licensed or registered practitioners in good standing in any province or territory of Canada to practice in New York without civil or criminal penalty related to lack of licensure or registration. EO 202.18 further relaxed state laws governing laboratory and pharmacy practitioners to allow flexibility in the provision of those essential services for a designated time period during the pandemic.

Credentialing Requirements

Health care organizations and payors of health care services are required by federal and state law to assure that certain health care providers (e.g., physicians, dentists, podiatrists, physician assistants, nurse practitioners) undergo a robust clinical and economic credentialing process to verify licensure, character and competence to practice medicine and receive reimbursement.³¹⁴ Such processes typically take months to complete. Waivers of these laws coupled with organizations' expedited credentialing processes permit health care organizations to honor the credentialing processes of other health care institutions outside their jurisdictions or within the same health care system to facilitate the swift interjurisdictional movement of health care services workers to meet public health needs in a crisis and avoid unnecessary delays due to lengthy credentialing processes. The Centers for Medicare and Medicaid appropriately waived some applicable Conditions of Participation processes to allow for physicians whose privileges will expire to continue to practice and for new physicians to be able to practice before full medical staff/governing body review required by credentialing processes. Likewise, Governor Cuomo's EO 202.5 waives New York state laws requiring a robust credentialing process to permit hospital staff who are privileged and credentialed to work in a hospital or health care facility in any other state to practice in a hospital or health care facility in New York State. To further protect licensed health care providers from individual liability, many health care organizations and facilities are adopting disaster privileging policies to complement their existing medical staff disaster privileging processes established by their medical staff bylaws to address corresponding risk associated with such waivers.³¹⁵

Scope of Practice Principles

The scope of practice for each type of health care services worker is governed by the New York State Education Law.³¹⁶ Licensed and registered practitioners are not permitted to practice outside their respective statutory and regulatory scope of practice. The Nurse Practice Act limits registered nurses' ability to practice independently outside the scope of physician-ordered treatment regimen or other pre-approved clinical protocols.³¹⁷ The scope of practice of certain licensed health care practitioners working in health care institutions and facilities is further defined by their respective delineation of clinical privileges. Allied health professionals, such as physician assistants, although permitted to diagnose, treat and prescribe independently, may not practice outside the scope of practice of their respective supervising physician who is required to provide certain oversight.³¹⁸ The incremental expansion of clinical staff, establishment of stand-by pools and intra-system cross coverage arrangements may require licensed practitioners to be assigned administrative and/or clinical duties and responsibilities beyond their regulatory or contractual

³¹³ See N.Y. EXEC. ORDER No. 202.5, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, Mar. 18, 2020. <https://www.governor.ny.gov/news/no-2025-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (accessed Apr. 16, 2020).

³¹⁴ 42 C.F.R. § 482.22; PUB. H. LAW §§ 2805-j and 2805-k; 10 NYCRR 405.4, 405.5, 405.14, 405.19, and 405.22.

³¹⁵ See also discussion pertaining to negligent credentialing, *infra*, Section IV, Business Contracts, Insurance and Risk Management.

³¹⁶ N.Y. ED. LAW, Title VIII.

³¹⁷ See N.Y. ED. LAW § 6905 (requirements to qualify for a license as a registered professional nurse).

³¹⁸ See N.Y. ED. LAW §§ 6540-6548; N.Y. PUB. H. LAW §§ 3700-3704; 10 NYCRR 94.2 (relating to the licensure and scope of duties of physician assistants).

scope of services. Credentialed providers that typically provide elective medical care may be re-deployed to provide services beyond their delineation of privileges as Executive Orders “pause” elective and other non-essential health care services. EOs issued by Governor Cuomo in New York have waived certain limitations on scope of practice. For instance, EO 202.10 waived oversight requirements allowing physician assistants and advanced practice registered nurses with certain higher educational degrees to practice without otherwise necessary physician oversight during the public health crisis.³¹⁹ The relaxation of these oversight requirements makes it easier to reallocate essential providers as needs eb and flow during the crisis.

Education and Training to Crisis Standards of Care

During a PHE such as the coronavirus pandemic, as the standard of care shifts from traditional patient-centric standards to crisis standards of care, health care services workers must be educated and trained on the medical-legal implications of CSC. Consistent application of CSC is essential to give assurances to health care services providers who will be asked to exercise their professional clinical judgment to save as many lives as possible, sometimes to the detriment of individual patients where practitioners are taught “first, do no harm.”³²⁰ As the standard of care shifts, practitioners need to be assured that their decisions pertaining to triage, allocation of medical equipment, supplies and medications are consistent with generally accepted CSC adopted during a crisis. CSC will further require general practitioners, not often trained in palliative care, to offer palliative care interventions to manage symptoms and mitigate suffering in the face of shortages of vital health care equipment such as ventilators.

Employees’ Rights

Even in the face of a pandemic, employees’ rights must be balanced with those of the public health needs. The safety of society’s workforce is vital to the public’s health. Mandatory shelter-in-place and work from home policies are designed to keep non-essential employees and perhaps the most vulnerable workers out of harm’s way during the PHE. Essential workers that must report to work to assure essential resources, services and goods remain available and accessible are being asked to put their own health and welfare at risk for the greater public good. Employers must assure that they implement enforceable pervasive safety measures to effectively protect their employees on the front lines. The Occupational Safety and Health Administration (“OSHA”) and the Centers for Disease Control and Prevention (“CDC”) have issued guidance for employers to their employees remain safe in the workplace during the current coronavirus pandemic. These measures are guidance only and do not necessarily have the effect of law. Notwithstanding, general OSHA requirements to provide a safe workplace remain in full force and effect. Governor Cuomo’s EO 202.16 similarly requires all essential business employers to provide masks to employees in the workplace who have direct contact with customers or the general public. Such directive is enforceable by local governments or law enforcement pursuant to Public Health Law, section 12 or 12-b.

Safe Workplace

As essential businesses continue to operate in the face of a public health crisis, employers must continue to assure a safe workplace for their employees. The most relevant OSHA requirements applicable to the prevention of occupational exposure to COVID-19 are as follows:

- The General Duty Clause requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or

³¹⁹ See N.Y. EXEC. ORDER No. 202.10, Continuing Suspension and Modification of Laws Relating to the Disaster Emergency, 23 Mar. 2020. <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (last accessed Apr. 16, 2020).

³²⁰ See discussion in Ethics Issues in the Management of COVID-19, *infra*.

serious physical harm.”³²¹ COVID-19 presents a threat where persons gather together. Employers need to assure adequate social distancing in the workplace as essential workers interact with each other, customers and the general public. Meetings should be conducted virtually using appropriate video/audio conferencing mechanisms when available or in large conference rooms that permit adequate distance between and among attendees.

- OSHA’s Personal Protective Equipment (PPE) standards for general industry require employees to “use gloves, eye and face protection, and respirators when necessary. When respirators are necessary, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard.”³²²
- OSHA’s Bloodborne Pathogens standard applies to “occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions.”³²³ However, they offer guidance for the control of infectious disease such as COVID-19.

Compliance with these standards can prove to be difficult during a public health emergency such as the coronavirus pandemic due to scarce resources such as hand sanitizer, masks and other cleansing products. The health care services workforce is accustomed to using universal precautions which are the set of infection control practices used for all patient care to protect healthcare workers from infection and prevent the spread of infection from patient to patient.³²⁴ Universal precautions include proper hand hygiene, use of PPE, respiratory hygiene including cough etiquette principles, proper cleaning and disinfecting the environment, equipment, devices and laundry. Non-health care essential services workers are not necessarily educated, trained or otherwise familiar with such extensive precautions. As a result, essential workers outside the health industry and their respective constituents may be faced with unnecessary risk of exposure or general fear despite good faith efforts to adopt applicable precautions.

Despite good faith efforts of employers of health care services employees and other essential services employees to educate their workforce on the implementation of CSC and the use of appropriate PPE consistent with CDC and OSHA guidance, there are members of the essential workforce that fear coming to work or interacting with customers or the public during the coronavirus pandemic. Do essential business employees and essential health care services employees have a right to choose to stay home and/or self-quarantine or refuse to provide health care to patients who have not been tested for the virus? If so, under what circumstances do or should they have that right?³²⁵ Such tension between employees’ rights and their role in assuring essential goods and services remain available and accessible during the public health crisis inevitably arise. Employers engaged in providing essential goods and services to the public in times of such public health crises must be prepared to have an abundance of PPE available and examine their operational processes to minimize risk to their workforce and demonstrate genuine concern for their welfare such as limiting the number of employees within the workplace, hypervigilant efforts to keep surfaces clean and disinfected, social distancing protocols when dealing with co-workers and constituents, and temperature checks to assure the workforce remains symptom-free while on at the worksite. In addition, employers may

³²¹ Occupational Safety and Health (OSH) Act of 1970, 29 U.S.C. 654(a)(1).

³²² 29 C.F.R.1910.134.

³²³ 29 C.F.R.1910.1030.

³²⁴ Standard Precautions for All Patient Care, CDC, Jan. 26, 2016, <https://www.cdc.gov/infection-control/basics/standard-precautions.html>.

³²⁵ Health care providers treating patients in hospitals or other places of public accommodation where there is adequate availability of PPE must be cognizant of their risk of violating federal and state anti-discrimination laws and licensure requirements not to abandon patients when refusing to treat patients, especially those patients requiring emergency care and treatment for conditions other than COVID-19. *See* chapter discussing Contracts, Liability and Risk Management.

consider offering incentives to come to work such as hazard pay and alternative housing to protect families of health care services workers who may be putting their families at risk if they return home.

Protection against Retaliation

Health care services workers are keenly aware of the need for adequate PPE and other operational adjustments necessary to minimize unnecessary employee exposure during the coronavirus pandemic. In the event of a shortage of PPE, given the prevalence of social media communications, employers should be careful not to curtail employees' rights to free speech as employees voice concerns over equipment shortages and other weaknesses in our societal response to the pandemic. Health care services workers are accustomed to reporting their concerns as part of continuous performance improvement programs as mandated by New York State laws.³²⁶ Employers must be receptive to employees' concerns, especially in times of crisis to demonstrate the mutual care and concern for those individuals who are putting their own safety at risk to care for the public's health. The Public Health Law affords confidentiality and immunity for those who report and/or participate in any investigation of an incident or other concerns.³²⁷ Similarly, OSHA prohibits employers from retaliating against workers for raising concerns about safety and health conditions.³²⁸ Additionally, "OSHA's Whistleblower Protection Program enforces the provisions of more than 20 industry-specific federal laws protecting employees from retaliation for raising or reporting concerns about hazards or violations."³²⁹

Discrimination

The Americans with Disabilities Act of 1990 ("ADA")³³⁰ is a civil rights law that prohibits discrimination based upon disability. Among other provisions, it prohibits employers from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances. A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairment or health.³³¹ Whether a procedure is a medical examination under the ADA is determined by considering factors such as whether the procedure or test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional. During employment, the ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity where an employer has a reasonable belief, based upon objective evidence, that an employee will pose a direct threat due to a medical condition. Objective evidence under CSC principles would require that public health authorities set forth those objective parameters for such employee testing to assure a safe work environment for all workers. For instance, health care workers may be required by their employers to submit to a temperature check prior to entering the workplace to assure they do not present a direct threat to patients and staff.³³² "Direct Threat" is an important concept during the COVID-19 pandemic where individual's rights often cede to that of the public's health. During a pandemic, employers should rely on the latest CDC and state or local public health standards. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.³³³

³²⁶ See N.Y. PUB. H. LAW § 2805-l.

³²⁷ See N.Y. Pub. H. Law § 2805-m.

³²⁸ Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c).

³²⁹ OCCUPATIONAL HEALTH & SAFETY ADMINISTRATION, Safety and Health Topics/COVID-19, U.S. DEP'T OF LABOR, <http://www.osha.gov/SLTC/COVID-19/standards.html>.

³³⁰ 42 U.S.C. § 12101 et. Seq.

³³¹ 42 U.S.C. § 12112 (d).

³³² *Id.*

³³³ See Guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. http://www.eeoc.gov/facts/pandemic_flu.html.

Further, employers should be mindful of their obligation to assess on a case by case basis employees' requests for leave as a reasonable accommodation under the ADA. Employees suffering from certain medical conditions may have a legitimate basis to support a request for leave or an extension of leave until the risk(s) associated with COVID-19 subsides. Employers who neglect to conduct such case by case analyses may risk exposure to allegations of unlawful discrimination or wrongful termination and the protracted litigation that may ensue long after the crisis abates.³³⁴

VI. Vaccination

When a vaccine becomes available, there will be a majority of Americans who want the vaccination.³³⁵ However, some Americans may push back on the COVID-19 vaccination for religious, philosophical or personal reasons.³³⁶ Nonetheless, for the sake of public health, mandatory vaccinations for COVID-19 should be required in the United States as soon as it is available. Mandatory vaccinations are supported by the authority of the state police power when the vaccinations are necessary to protect the health of the community.³³⁷ Constitutional challenges under the religious freedom clause under the First Amendment and under the substantive due process clause of the Fourteenth Amendment have failed, when the individual interests are not strong enough to outweigh the public benefit.³³⁸

In New York State, the courts have found that religious, personal or “unsupported...medical literature”³³⁹ arguments persuasive.³⁴⁰ Healthcare workers³⁴¹ and parents of unvaccinated children³⁴² have unsuccessfully challenged compulsory vaccination on administrative law grounds – questioning the NYS and NYC Department of Health’s authority in mandating flu and measles vaccinations, as well as challenging the regulations as arbitrary and capricious. The courts found the policies mandating that healthcare workers be vaccinated for influenza, and children vaccinated for measles during an outbreak, were not arbitrary and capricious and the regulations were promulgated under proper authority.³⁴³ Further, on June 13, 2019, the religious exemption for vaccinating school-attending children was repealed.³⁴⁴ The gravity of COVID-19 presents compelling justification for State legislatures and Congress to mandate a COVID-19 vaccination.

³³⁴ See *Arnold v. Pfizer, Inc.*, 970 F.Supp.2d 1106, Oregon Dist. Ct. (Sept. 9, 2013).

³³⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, *National Center for Health Statistics: Immunization* (2018) <https://www.cdc.gov/nchs/fastats/immunize.htm> (70.4% of children aged 19-35 months receiving all 7 major vaccines).

³³⁶ *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *Cruzan by Cruzan v. Director Missouri Dept. of Health*, 497 U.S. 261, 262 (1990); *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015); *Caviezel v. Great Neck Public Schools*, 739 F.Supp.2d 273, 274-75 (E.D.N.Y. 2010) (*affm'd by Caviezel v. Great Neck Public Schools* 500 Fed.Appx. 16 (2d Cir. 2012)).

³³⁷ See generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

³³⁸ See *Cruzan by Cruzan*, 497 U.S. at 278 (citing *Jacobson*, 197 U.S. at 24-30). *Prince*, 321 U.S. at 167. *Phillips*, 775 F.3d at 542. *Caviezel*, 739 F.Supp.2d at 274-75.

³³⁹ *C.F. v. New York City Dept. of Health and Mental Hygiene*, 2019 NY Slip Op. 31047, at 4-6 (Apr. 18, 2019) (administrative ruling) (NYC Dept. of Health and Mental Hygiene regulation requiring any person who lives or works in “designated zip codes” to be vaccinated for MMR (measles)).

³⁴⁰ See *Cruzan by Cruzan*, 497 U.S. at 262. *Prince*, 321 U.S. at 167. *Phillips*, 775 F.3d at 542. *Caviezel*, 739 F.Supp.2d at 274-75. *C.F.*, 2019 NY Slip. Op. 31047, at 4-6.

³⁴¹ *Spence v. Shah*, 136 A.D.3d 1242, 1246 (App. Div. 3d 2016) (NYS Department of Health did not exceed their power and the regulation requiring healthcare workers to receive an influenza vaccination or wear a face mask was not “arbitrary, capricious, irrational or contrary to law”).

³⁴² *Garcia v. New York City Dept. of Health and Mental Hygiene*, 31 N.Y.3d 601, 621 (N.Y. 2018) (NYC Dept. of Health and Mental Hygiene was acting “...pursuant to its legislatively-delegated and long-exercised authority to regulate vaccinations” of children for influenza).

³⁴³ See *Garcia*, 31 N.Y.3d at 621, *Spence*, 136 A.D.3d at 1246, *C.F.*, 2019 NY Slip. Op. 31047, at 4-6.

³⁴⁴ PUB. H. LAW § 2164(9) (repealed Jun.13, 2019).

The U.S. Department of Health and Human Services developed the National Vaccine Program, to assist with vaccination production, distribution and education.³⁴⁵ It also annually issues a National Vaccine Plan.³⁴⁶ The National Vaccine Program addressed the development of a COVID-19 vaccine in its February 2020 meeting.³⁴⁷

Before the COVID-19 outbreak, a bill was introduced to federally mandate vaccination for school children.³⁴⁸ Since the COVID-19 outbreak began, additional bills and resolutions have been introduced by the 116th Congress regarding vaccination and immunization.³⁴⁹ They include resolutions by the House and Senate, supporting the GAVI Alliance, which supports vaccines and immunizations in developing countries.³⁵⁰

Some of the remaining pending federal bills and resolutions provide immediate insurance coverage for treatment of COVID-19, including a vaccination when one becomes available.³⁵¹ Others support wide-

³⁴⁵ 42 U.S.C. §300aa-1 (2020).

³⁴⁶ 42 U.S.C. §300aa-1 (2020). U.S. Dept. of Health & Human Services National Vaccine Program, The National Vaccine Program Office Mid-Course Review of the 2010 National Vaccine Plan, <https://www.hhs.gov/sites/default/files/nvpo-midcourse-review-final.pdf>.

³⁴⁷ U.S. Dept. of Health & Human Services National Vaccine Program, *February 13-14, 2020 NVAC Meeting, Agenda* <https://www.hhs.gov/vaccines/nvac/meetings/2020/02-13/index.html> (in the 1:15pm slot, Dr. Alan Embry presented the Coronavirus Vaccine Development: Opportunities and Potential Pitfalls https://www.hhs.gov/sites/default/files/nvac_feb2020_day1_panel2.pdf).

³⁴⁸ Recognizing the importance of vaccinations and immunizations in the United States, H.Res.179, 116th Cong. (introduced by Rep. Adam Schiff on Mar. 5, 2019); A resolution recognizing the importance of vaccinations and immunizations in the United States, S.Res.165, 116th Cong. (agreed to in the Senate on Apr. 11, 2019); Vaccinate All Children Act of 2019, H.R. 2527, 116th Cong. (introduced on May 3, 2019 by Rep. Frederica Wilson); VACCINES Act of 2019, H.R.2862, 116th Cong. (introduced by Rep. Kim Schrier on May 21, 2019); Vaccine Awareness Campaign to Champion Immunization Nationally and Enhance Safety Act of 2019, S.1619, 116th Cong. (introduced by Sen. Gary C. Peters on May 22, 2019); Protecting Seniors Through Immunization Act of 2019, S.1872, 116th Cong. (introduced by Sen. Mazie Hirono on Jun. 13, 2019); Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019, S.1379, 116th Cong. (became law on June 24, 2019 as Public Law 116-22); Supporting Older Americans Act of 2020, H.R.4334, 116th Cong. (introduced by Rep. Suzanne Bonamici on Sept. 16, 2019); Protecting Seniors Through Immunization Act of 2019, H.R. 5076, 116th Cong. (introduced by Rep. Donna Shalala on Nov. 13, 2019).

³⁴⁹ See, e.g., Take Responsibility for Workers and Families Act, H.R. 6379, 116th Cong. (introduced Mar. 23, 2020 by Rep. Nita Lowey). Ensuring Coverage in Public Health Emergencies Act of 2020, H.R. 6317, 116th Cong. (introduced by Rep. Lloyd Doggett on Mar. 23, 2020). Ensuring Treatment for Covid Act, S.3564, 116th Cong. (introduced by Sen. Robert P. Casey, Jr. on Mar 22, 2020). Care for COVID-19 Act, H.R.6311, 116th Cong. (introduced by Rep. Raul Ruiz on Mar. 19, 2020). Rapid Coverage of COVID-19 Vaccine Act of 2020, H.R. 6299, 116th Cong. (introduced Mar. 19, 2020 by Rep. Joe Courtney). Ensuring Coverage in Public Health Emergencies Act of 2020, S.3536, 116th Cong. (introduced by Sen. Robert P. Casey, Jr. on Mar. 19, 2020). Rapid Coverage for Coronavirus Vaccines Act, S.3505, 116th Cong. (introduced by Sen. Doug Jones on Mar. 17, 2020). Ensuring Access to COVID-19 Preventive Care Act of 2020, H.R. 6231, 116th Cong. (introduced by Rep. Larry Bucshon on Mar. 12, 2020). Ensuring Affordable COVID-19 Preventive Care Act of 2020, H.R. 6222, 116th Cong. (introduced by Rep. Janice Schakowsky on Mar. 12, 2020). Care for COVID-19 Act, S.3442, 116th Cong. (introduced by Sen. Cory A. Booker on Mar. 11, 2020). Coronavirus Vaccine Act, S.3370, 116th Cong. (introduced by Sen. Edward Markey on Mar. 2, 2020). Protecting Americans from Seasonal Influenza Act of 2020, H.R.5729, 116th Cong. (introduced by Rep. Rick Larsen on Jan. 30, 2020).

³⁵⁰ A resolution supporting the role of the United States in helping save the lives of children and protecting the health of people in developing countries with vaccines and immunization through GAVI, the Vaccine Alliance, S.Res.511, 116th Cong. (introduced by Sen. Marco Rubio on Feb. 27, 2020); Supporting the role of the United States in helping save the lives of children and protecting the health of people in poor countries with vaccines and immunization through the GAVI Alliance, H.Res.861, 116th Cong. (introduced by Rep. Betty McCollum on Feb. 21, 2020).

³⁵¹ Ensuring Coverage in Public Health Emergencies Act of 2020, H.R. 6317, 116th Cong. (introduced by Rep. Lloyd Doggett on Mar. 23, 2020); Ensuring Treatment for Covid Act, S.3564, 116th Cong. (introduced by Sen. Robert P. Casey, Jr. on Mar 22, 2020); Care for COVID-19 Act, H.R.6311, 116th Cong. (introduced by Rep. Raul Ruiz on Mar. 19, 2020); Ensuring Coverage in Public Health Emergencies Act of 2020, S.3536, 116th Cong. (introduced by Sen. Robert P. Casey, Jr. on Mar. 19, 2020); Rapid Coverage of COVID-19 Vaccine Act of 2020, H.R. 6299, 116th Cong. (introduced Mar. 19, 2020 by Rep. Joe Courtney); Rapid Coverage for Coronavirus Vaccines Act, S.3505, 116th Cong. (introduced by Sen. Doug Jones on Mar. 17,

spread vaccination across the United States.³⁵² These include bills offering wide-spread vaccination programs that are subsidized by the federal government for seniors and children.³⁵³ In the “Protecting Seniors Through Immunization Act of 2019,” the Medicare program will encourage and provide free vaccinations to seniors already covered.³⁵⁴ The “Vaccinate All Children Act of 2019” will require vaccinations for every student at a public elementary and secondary school to be vaccinated in order to receive federal grants, with only medical exemptions allowed.³⁵⁵ Given these proposals, vaccination distribution and funding will likely be heavily influenced by Congress.

The devastating impact of COVID-19 has led to the call for solutions that will help return our society to normalcy, elevating the importance of ensuring scientists and legislators move cautiously but quickly to provide vaccines and treatments. The history of unsuccessful attempts to challenge mandatory vaccinations may reduce the extent of opposition. As Hastings Center scholars have said, to avoid, “COVID-19 interventions [joining] the list of others that entered the clinic on the basis of limited or contested evidence of effectiveness and then harmed patients or proved to be ineffective[, strategies] can be developed to minimize this from happening, but they will only work with commitment from scientists, physicians, policymakers, patients, and the general public.”³⁵⁶ Deliberate, reasoned attention to such strategies is imperative.

VII. Vulnerable Populations and Issues of Equity and Discrimination: A Call for Social Justice

An often overlooked set of legal and ethical issues in the context of the COVID-19 crisis and crisis conditions concerns the impact of the crisis on vulnerable populations, especially with respect to the heightened precarity of such populations as a result of the present crisis and the serious threats the crisis poses to health and mental health, well-being, and post-crisis recovery and resilience.

The public health law perspective is well suited to the examination of issues of equity across diverse populations and communities in New York during the crisis, assessing the responsiveness of the law to the needs of all persons and communities across settings, including communities of color, vulnerable persons such as older adults and persons with disabilities, and all those who are isolated, home-bound or living in residential, correctional or detention facility settings, as well as vulnerable health care workers in under-resourced communities.

2020); Ensuring Affordable COVID-19 Preventive Care Act of 2020, H.R. 6222, 116th Cong. (introduced by Rep. Janice Schakowsky on Mar. 12, 2020); Ensuring Access to COVID-19 Preventive Care Act of 2020, H.R. 6231, 116th Cong. (introduced by Rep. Larry Bucshon on Mar. 12, 2020); Care for COVID-19 Act, S.3442, 116th Cong. (introduced by Sen. Cory A. Booker on Mar. 11, 2020).

³⁵² Recognizing the importance of vaccinations and immunizations in the United States, H.Res.179, 116th Cong. (introduced by Rep. Adam Schiff on Mar. 5, 2019); A resolution recognizing the importance of vaccinations and immunizations in the United States, S.Res.165, 116th Cong. (agreed to in the Senate on Apr. 11, 2019).

³⁵³ Vaccinate All Children Act of 2019, H.R. 2527, 116th Cong. (introduced on May 3, 2019 by Rep. Frederica Wilson); Protecting Seniors Through Immunization Act of 2019, S.1872, 116th Cong. (introduced by Sen. Mazie K. Hirono on Jun. 13, 2019); Protecting Seniors Through Immunization Act of 2019, H.R. 5076, 116th Cong. (introduced by Rep. Donna Shalala on Nov. 13, 2019).

³⁵⁴ Protecting Seniors Through Immunization Act of 2019, S.1872, 116th Cong. (introduced by Sen. Mazie K. Hirono on Jun. 13, 2019); Protecting Seniors Through Immunization Act of 2019, H.R. 5076, 116th Cong. (introduced by Rep. Donna Shalala on Nov. 13, 2019).

³⁵⁵ Vaccinate All Children Act of 2019, H.R. 2527, 116th Cong. (introduced on May 3, 2019 by Rep. Frederica Wilson).

³⁵⁶ Karen J. Maschke & Michael K. Gusmano, *Ethics and Evidence in the Search for a Vaccine and Treatments for COVID-19*, The Hastings Center, Bioethics Forum, Apr. 16, 2020, <https://www.thehastingscenter.org/ethics-and-evidence-in-the-search-for-a-vaccine-and-treatments-for-COVID-19/>.

As framed in Part I of the report, public health law effects a shift from person-centered clinical care to community and population health, and the social and economic determinants of health, such as education, neighborhood, income, race and ethnicity, food insecurity, and access to health and mental health services.

COVID-19 has tragically resulted in the heightening of precarity among those who are already vulnerable and marginalized, such as older persons, members of communities of color or low-income communities, inmates, immigrants, nursing home and assisted living facility residents, persons who are homeless, persons with disabilities, and rural-dwelling community members. Health disparities across these groups, including among health care workers who are members of such groups, are well documented.³⁵⁷ Data reported during the current crisis document higher numbers of COVID-19 positive cases and higher mortality rates among Black/African Americans and other marginalized and socioeconomically disadvantaged groups.³⁵⁸ New York City Department of Health data show rates of cases, hospitalizations and deaths by race/ethnicity group, reflecting stark disparities across Black/African American, Hispanic/Latino, White and Asian groups,³⁵⁹ as well as across the five boroughs.³⁶⁰ Crisis conditions of scarce resources, such as PPE, dialysis machines, and ventilators, also heighten the precarity of vulnerable individuals who are more likely to have advanced illness, and therefore less likely to access life-saving measures based on certain crisis standard of care plans that use allocation criteria risking discrimination.³⁶¹ While federal law bars such discrimination,³⁶² forms of persistent discrimination and racism that remain embedded in our social structures, and less visible in non-emergency circumstances, are more prominently foregrounded in the crisis conditions of the COVID-19 emergency.

Health Care Workers and Essential Services

Strategic initiatives and efforts are desperately needed, in addition to increased access to protective equipment and testing to protect immuno-compromised or otherwise high-risk populations who work on the front lines. Statistically, a disproportionate number of older, minority and immigrant populations with limited access to quality health care work in low-paying front-line jobs deemed “essential” in the midst of the crisis, including direct service workers.³⁶³ As we plan to reopen the economy, we must consider a way to protect individuals on the front lines identified by health care providers as very high-risk individuals based on their health status and underlying health conditions in the interest of the health of the individual, public health as a state and local community, and mitigating fatalities nationally.

We are confronted too with the social and ethical problem of access to health care and education for some of our most vulnerable populations, such as individuals with disabilities, especially as related to direct care services. The Office for People with Disabilities (OPWDD) has issued guidance stating that Direct Support Professionals (DSPs) are “essential and integral employees to OPWDD’s provision of services” which is

³⁵⁷ Aaron van Dorn, Rebecca E. Cooney & Mariam L. Sabin, *COVID-19 exacerbating inequalities in the US*, 395.

³⁵⁸ *Id.*; COVID-19 exacerbating inequalities in the US, LANCET, Vol. 395, Apr. 18, 2020; Yancy CW, COVID-19 and African Americans, JAMA, Published online Apr. 15, 2020, doi:10.1001/jama.2020.6548.

³⁵⁹ Age-adjusted rates of lab confirmed COVID-19 nonhospitalized cases, estimated non-fatal hospitalized cases, and patients known to have died 100,000 by race/ethnicity group as of Apr. 16, 2020, <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/COVID-19-deaths-race-ethnicity-04162020-1.pdf>.

³⁶⁰ NEW YORK CITY DEPARTMENT OF HEALTH, Rates by Borough of positive cases per 100,000 people in each borough, <https://www1.nyc.gov/site/doh/Covid/COVID-19-data.page#download>,

³⁶¹ Ari Ne’eman & Sam Bagenstos, Evaluation Framework for Crisis Standard of Care Plans, Apr. 8, 2020, http://thearc.org/wp-content/uploads/2020/04/Evaluation-framework-for-crisis-standards-of-care-plans-4.9.20-final_4-14-20.pdf.

³⁶² 42 U.S.C. §§ 2000 *et. seq.*; HHS Office for Civil Rights in Action, Bulletin: *Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)*, Mar. 28, 2020, <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>.

³⁶³ NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, *Direct Support Professionals Defined As Essential Employees*, Mar. 18, 2020; *See also* Dorn, *supra* note 1.

“especially true during this public health emergency,”³⁶⁴ which echoes that of the New York State Department of Education.³⁶⁵ The Department further clarified that agencies which provide services to individuals with developmental disabilities and are operated, certified, authorized or funded by OPWDD are exempt and “should remain in operation to the extent necessary to provide those services.”³⁶⁶ The failure to do such could potentially result in the suspension or limitation of a provider’s operating certificate.³⁶⁷ However, some patients and students who receive therapies in their homes and schools are not receiving such critical direct care services, despite them being prescribed by a physician and covered by health insurance. Moreover, the temporary expansion of Title 1 of the Family and Medical Leave Act (FMLA)³⁶⁸ and adoption of “The Emergency Paid Sick Leave Act” under The Families First Coronavirus Response Act³⁶⁹, do not provide relief for families who must care for vulnerable adult children who are unable to attend adult day care facilities due to government shut-downs.

Thus, anecdotal evidence suggests lack of uniformity in access to services, such as therapeutic interventions for individuals with autism, in response to the implementation of “New York State on Pause,” enacted by Governor Cuomo, which are designed to minimize the transmission of the COVID-19 virus through social distancing and business closures.³⁷⁰ Some providers may be unsure as to whether the OPWDD exemption applies to them, especially if the provider serves the disabled community but is not a licensed OPWDD provider, while others may opt to not provide services in light of the pandemic. Whichever is the case, interruption of such services for even short periods of time, let alone the duration of the pandemic’s “PAUSE” period, significantly increases the risk of adverse outcomes when such services are necessary to maintain physiological and emotional stability, while facilitating health and social progress.³⁷¹

The scope of this issue is expansive as it also impacts our young and adult patients and minor students residing in schools for the developmentally disabled or other TBI programs where they would otherwise receive physical and occupational therapy, and other services essential to their unique physical and mental needs. Considering this, it is imperative that any clarification necessary to ensure that exempt providers are operating in accordance with OPWDD guidance be published. Furthermore, providers not regulated by the OPWDD, but are otherwise exempt, should be advised to continue to serve any patients with which a treatment relationship has been established, if able, or refer the patient elsewhere to prevent patient abandonment.³⁷² This is critical from not only a professional but ethical standpoint, and in the best interest of public health.

³⁶⁴ NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, *supra* note 4.

³⁶⁵ THE STATE EDUCATION DEPARTMENT, *Additional Guidance on Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State*, Mar. 17, 2020.

³⁶⁶ NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, *COVID-19 Guidance for Providers on Essential Business*, Mar. 20, 2020.

³⁶⁷ N.Y. EXEC. ORDER No. 202.5, Mar. 18, 2020.

³⁶⁸ 29 U.S.C. § 2601 *et. seq.*

³⁶⁹ Families First Coronavirus Response Act, Public Law No. 116-127 (Mar. 18, 2020) (*to be added as 29 U.S.C. §§ 2601 et. seq.*). Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020).

³⁷⁰ N.Y. EXEC. ORDER No. 202.8, Mar. 20, 2020, <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. See also NEW YORK STATE, *Governor Cuomo Signs the ‘New York State on PAUSE’ Executive Order*, Mar. 20, 2020, <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>.

³⁷¹ See generally Mary Beth Walsh, *The Top 10 Reasons Children With Autism Deserve ABA*, 1 BEHAVIOR ANALYSIS PRACTICE 72-79 (2011).

³⁷² See generally Valerie Blake, J.D., M.A., *When Is a Patient-Physician Relationship Established?*, AMERICAN MEDICAL ASSOCIATION JOURNAL OF ETHICS (May 2012).

Action Steps

In sum, the COVID-19 crisis has illuminated the social structural inequities in the health systems and put the most vulnerable populations and communities of color, including vulnerable health care workers, at the highest risk. The Task Force urges action steps, including appropriate regulatory oversight, to ensure:

- adequate and non-discriminatory allocation of resources to vulnerable populations and communities of color;
- equitable access of vulnerable populations to health and mental health services, including palliative care as an ethical minimum to mitigate suffering among those vulnerable persons who remain in residence or institutionalized in nursing homes, assisted or independent living facilities or group homes, or are hospitalized during the COVID-19 crisis, especially when desired equipment or other resources are not available;
- provision of PPE to essential health care workers at highest risk in delivering essential services to vulnerable populations; and
- monitoring conformity with federal laws barring discrimination.

We call for urgent attention to these issues both in the context of the current crisis, as well as through long-term health policy planning. In the words of our esteemed colleague and public health law scholar Lawrence O. Gostin, we must settle for no less than a fully unburdened, “global health with justice.”³⁷³

VIII. Conclusion

The preceding Sections of this Report contain a number of specific recommendations which may be found in summary form in Appendix F. The following observations present overarching recommendations to further strengthen both New York State’s emergency preparedness capabilities and its general delivery of health care.

Improving Preparation for Next Public Health Emergency

COVID-19 has proven that city, state and federal emergency preparedness efforts, which were enhanced after 9/11, are insufficient for an extreme public health crisis. The Task Force recommends that Governor Cuomo keep a core team of experts in place to review the MSEHPA, the Columbia University Center for Health Policy Gap Analysis,³⁷⁴ IOM’s Crisis Standards of Care, as applicable, equipment allocation guidelines,³⁷⁵ and each of the emergency orders needed to manage COVID-19. This team could be charged with drafting legislation to combine the essential provisions of these useful resources.

Legislation in New York, and other states which have not yet adopted the MSEHPA and the CSC, would facilitate the immediate activation of most if not all of the emergency orders which have been needed to manage COVID-19.

Further, Governor Cuomo will soon become the Chair of the National Governors Association.³⁷⁶ In that role, New York will be well placed to facilitate a coordination of efforts across the states. Effective state coordination will place each state in a position to be less vulnerable to inadequate federal action.

³⁷³ LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* 72 (Har. Univ. Press 2014).

³⁷⁴ Benjamin Mason Meier & Jocelyn Getgen, *Gap Analysis: Comparing the Model State Emergency Health Powers Act with Corresponding New York State And New York City Statutory Authority*, CENTER FOR HEALTH POLICY, Columbia University (2008).

³⁷⁵ See discussion *infra*, Section II of this Report, Ethical Issues in the Management of COVID-19.

³⁷⁶ National Governors Association, Executive Committee, <https://www.nga.org/governors/ngaleadership/>.

Evaluation of Laws and Regulations Post-Pandemic

For the purposes of assuring a post-pandemic legal environment that serves the public well, we also call for evaluation of the state and federal laws and regulations that have been waived during the pandemic. CMS has provided a convenient list of the federal and state COVID-19 waivers.³⁷⁷ In the post-COVID 19 world, both government and health care providers will face enormous financial pressure. Before being automatically reinstated, laws and regulations that have been waived during the pandemic should be critically re-evaluated in terms of benefit to the public, as well as the costs and administrative and enforcement burdens to government. For instance, emergency waivers relating to EMTALA, HIPAA and 42 CFR Part 2, and federal fraud and abuse laws have elements that could be continued in the post-COVID-19 world. At the New York State level, some scope of practice requirements, CON requirements and directives to managed care organizations should be reviewed before waivers and directives are lifted. In short, this emergency provides an opportunity to re-test waived regulations for new circumstances.

It is evident through the progress in “flattening the curve” achieved to date that employers, employees, and community members at large in the State of New York are committed to working hard to maintain and ultimately re-strengthen our economy while keeping public health, safety and community values at the forefront of their efforts. If we continue to commit ourselves to pressing forward in a united fashion and reaching beyond the racial, socioeconomic, geographic and political barriers that often seek to divide us, our communities and the State of New York can not only heal, but be transformed and strengthened in a fashion beyond our comprehension.

³⁷⁷ CMS, CMS list of Coronavirus Waivers & Flexibilities, available at: <https://www.cms.gov/about-cms/emergency-preparedness-response-operations/current-emergencies/coronavirus-waivers>.

APPENDIX A

New York State Bar Association Health Law Section Letter to Governor Cuomo, March 26, 2020

COVID-19 New York Public Health Emergency and Disaster Conditions: Call for Essential Crisis Standards in New York

APPENDIX B

University of Rochester Medical Center Decision Algorithms (2015 NYSTFLL Guidelines)

2015 Ventilator Allocation Guidelines, NYS Task Force

University of Rochester 2015 Updated Ventilator Allocation Flow Diagrams

APPENDIX C
Health Law Section Proxy Law Memo

TO: Howard Zucker, MD, Commissioner, NYSDOH
Megan Baldwin, Assistant Secretary, Executive Chamber

FROM: NYSBA Health Law Section

RE: **Health Care Proxy Barriers and Solutions**

The New York State Bar Association (NYSBA) Health Law Section was pleased to learn about Executive Order 202.14, which should make it much easier for most people to complete a health care proxy when two witnesses are not physically present. However, it is not enough to help the most vulnerable, those who have no one to witness or have only one person, or those who don't have access to, cannot use, or cannot be taught to use technology.

Therefore, the NYSBA Health Law Section supports additional urgently needed reforms to ensure that people are able to complete valid health care proxies.

In the midst of the coronavirus pandemic, we have learned that many patients want to complete health care proxies, but cannot as there are no available witnesses given the social distancing and quarantine requirements. We have also heard from clinicians that many patients have no advance directives, especially as hospitals continue to become overwhelmed. There is little doubt that similar problems must exist in other facilities, such as nursing homes.

It is critically important that patients have the ability to complete health care proxies, but existing legal barriers will still prevent some people, despite EO 202.14, from doing so.

Urgent measures are needed, either legislatively or through Executive Order, to address this concern, including:

- Removing the two-witness requirement and requiring only one witness.
- If no witnesses are available, provide the option of requiring only a notary public signature.
- If a notary is used, allowing an audio-visual notarization as the Governor's Executive Order 202.7 now allows for other notary services.
- Allowing for individuals who do not have access to the technology which enables them to accomplish video conference witnessing, to have a valid health care proxy if the patient communicates auditorily to two witnesses the name of their health care agent and possible alternate(s). The communication to the witnesses does not need to be simultaneous and can happen at separate times. Such witnesses' contact information shall be stated in the document and such witnesses shall be willing to confirm they heard the principal express their wishes if contacted by a health care facility.
- All the above would include the I/DD population, but required capacity determination should remain in effect.
- Accelerating the effective date regarding the amendments to PHL 29-CCC on physician assistants (currently June 17, 2020) regarding MOLST forms which it is possible, but unclear, that Executive Order 202.10 now does.

Implementing these measures will make it more likely that patients will get health care and treatment that they want and need, and make it easier for health care professionals to both know the health care wishes of their patients.

Others who are experts in the field, doctors, lawyers and organizations which work with people on advance care planning and specifically health care proxies, also support the urgent need for the reforms proposed. These include among others, those listed below.

Patricia A. Bomba, MD, MACP, FRCP
Vice President & Medical Director, Geriatrics, Excellus BlueCross BlueShield
Chair, MOLST Statewide Implementation Team
MOLST & eMOLST Program Director
Chair, National Healthcare Decisions Day NYS Coalition

Carla Braveman
President & CEO
Hospice and Palliative Care Association of New York State

Thomas V. Caprio, MD, MPH, MS
Director, Finger Lakes Geriatric Education Center
Chief Medical Officer, UR Medicine Home Care & Hospice
University of Rochester Medical Center

CaringKind

Maggie Carpenter, MD, HMDC
Nightingale Medical

Sarah Egan, MD
Hospice and Palliative Medicine
Brooklyn, NY

David N. Hoffman, Esq.
Compliance Officer
Carthage Area Hospital and Claxton-Hepburn Medical Center

Robert Milch, MD, FACS
Professor, Clinical Surgery
University at Buffalo
Jacobs School of Medicine

New York Legal Assistance Group (NYLAG)

Volunteers of Legal Service

APPENDIX D

New York State Bar Association Department of Health Proposed Rulemaking in Relation to the Release of Subject-Identified Research Findings

Proposed Rule by the NYSBA Health Law Section

Proposal in Relation to the Release of Subject-Identified Research Findings

APPENDIX E

State Society on Aging of New York Letter to Governor Cuomo, April 30, 2020

COVID-19 New York Public Health Emergency and Disaster Conditions: Call for Equitable Allocation of Scarce Resources to Older Adults and Non-Discriminatory Crisis Standards

APPENDIX F

GUIDANCE FOR DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A WORKFORCE REDUCTION UNDER RECENT EXECUTIVE ORDERS (enacted to address the COVID-19 Outbreak)³⁷⁸

ESSENTIAL BUSINESSES OR ENTITIES, including any for-profit or non-profit, regardless of the nature of the service, the function they perform, or its corporate or entity structure, are not subject to the in-person restriction. *Essential Businesses must continue to comply with the guidance and directives for maintaining a clean and safe work environment issued by the Department of Health (DOH) and every business, even if essential, is strongly urged to maintain social distancing measures to the extent possible.*

This guidance is issued by the New York State Department of Economic Development d/b/a Empire State Development (ESD) and applies to each business location individually and is intended to assist businesses in determining whether they are an essential business. With respect to business or entities that operate or provide both essential and non-essential services, supplies or support, only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the workforce reduction restrictions.

State and local governments, including municipalities, authorities, and school districts, are exempt from these essential business reductions, but are subject to other provisions that restrict non-essential, in-person workforce and other operations under Executive Order 202.

For purposes of Executive Order 202.6, “Essential Business,” shall mean businesses operating in or as:

1. Essential health care operations including

- research and laboratory services
- hospitals
- walk-in-care health clinics and facilities
- emergency veterinary, livestock medical services
- senior/elder care
- medical wholesale and distribution
- home health care workers or aides for the elderly
- doctor and emergency dental
- nursing homes, residential health care facilities, or congregate care facilities
- medical supplies and equipment manufacturers and providers
- licensed mental health providers
- licensed substance abuse treatment providers
- medical billing support personnel
- emergency chiropractic services
- physical therapy, prescribed by medical professional
- occupational therapy, prescribed by medical professional

2. Essential infrastructure including

- public and private utilities including but not limited to power generation, fuel supply, and transmission

³⁷⁸ Please note that the content below represents an abridged version of content noted on the following Empire State Development website, <https://esd.ny.gov/guidance-executive-order-2026>.

- public water and wastewater
- telecommunications and data centers
- airlines/airports
- commercial shipping vessels/ports and seaports
- transportation infrastructure such as bus, rail, for-hire vehicles, garages
- hotels, and other places of accommodation

3. Essential manufacturing including

- food processing, manufacturing agents including all foods and beverages
- chemicals
- medical equipment/instruments
- pharmaceuticals
- sanitary products including personal care products regulated by the Food and Drug Administration (FDA)
- telecommunications
- microelectronics/semi-conductor
- food-producing agriculture/farms
- household paper products
- defense industry and the transportation infrastructure
- automobiles
- any parts or components necessary for essential products that are referenced within this guidance

4. Essential retail including

- grocery stores including all food and beverage stores
- pharmacies
- convenience stores
- farmer's markets
- gas stations
- restaurants/bars (but only for take-out/delivery)
- hardware, appliance, and building material stores
- pet food
- telecommunications to service existing customers and accounts
- delivery for orders placed remotely via phone or online at non-essential retail establishments; provided, however, that only one employee is physically present at the business location to fulfill orders

5. Essential services including

- trash and recycling collection, processing, and disposal
- mail and shipping services
- laundromats and other clothing/fabric cleaning services
- building cleaning and maintenance
- childcare services
- bicycle repair
- auto repair
- automotive sales conducted remotely or electronically, with in-person vehicle return and delivery by appointment only
- warehouse/distribution and fulfillment
- funeral homes, crematoriums and cemeteries
- storage for essential businesses

- maintenance for the infrastructure of the facility or to maintain or safeguard materials or products therein
- animal shelters and animal care including dog walking, animal boarding
- landscaping, but only for maintenance or pest control and not cosmetic purposes
- designing, printing, publishing and signage companies to the extent that they support essential businesses or services
- remote instruction or streaming of classes from public or private schools or health/fitness centers; provided, however, that no in-person congregate classes are permitted

6. News media

7. Financial Institutions including

- banks or lending institution
- insurance
- payroll
- accounting
- services related to financial markets, except debt collection

8. Providers of basic necessities to economically disadvantaged populations including

- homeless shelters and congregate care facilities
- food banks
- human services providers whose function includes the direct care of patients in state-licensed or funded voluntary programs; the care, protection, custody and oversight of individuals both in the community and in state-licensed residential facilities; those operating community shelters and other critical human services agencies providing direct care or support

9. Construction

All non-essential construction must safely shut down, except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone, but only to the point that it is safe to suspend work).

Essential construction may proceed, to the extent that:

- construction is for, or your business supports, roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools;
- construction is for affordable housing
- construction is necessary to protect the health and safety of occupants of a structure;
- construction is necessary to continue a project if allowing the project to remain undone would be unsafe, provided that the construction must be shut down when it is safe to do so;
- construction is for projects in the energy industry
- construction is for existing (i.e. currently underway) projects of an essential business; or
- construction work is being completed by a single worker who is the sole employee/worker on the job site.

10. Defense

- defense and national security-related operations supporting the U.S. Government or a contractor to the US government

11. Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses including

- law enforcement, including corrections and community supervision
- fire prevention and response
- building code enforcement
- security
- emergency management and response, EMS and 911 dispatch
- building cleaners or janitors
- general maintenance whether employed by the entity directly or a vendor
- automotive repair
- disinfection
- residential moving services

12. Vendors that provide essential services or products, including logistics and technology support, child care and services including but not limited to:

- logistics
- technology support for online services
- childcare programs and services
- government owned or leased buildings
- essential government services
- any personnel necessary for online or distance learning or classes delivered via remote means

13. Recreation

- Parks and other open public spaces, except playgrounds and other areas of congregation where social distancing cannot be abided
- However, golf courses are not essential and cannot have employees working on-premise; notwithstanding this restriction, essential services, such as groundskeeping to avoid hazardous conditions and security, provided by employees, contractors, or vendors are permitted and private operators may permit individuals access to the property so long as there are no gatherings of any kind and appropriate social distancing of six feet between individuals is strictly abided
- Marinas, boatyards, and recreational marine manufacturers, for ongoing marina operations and boat repair/maintenance, where such facilities adhere to strict social distancing and sanitization protocols. Use of such sites for the purposes of personal use or operation of boats or other watercraft is permissible, provided that no establishment offer chartered watercraft services or rentals. Restaurant activity at such sites are limited to take-out or delivery only.

14. Professional services with extensive restrictions

- Lawyers may continue to perform all work necessary for any service so long as it is performed remotely. Any in-person work presence shall be limited to work only in support of essential businesses or services; however, even work in support of an essential business or service should be conducted as remotely as possible.
- Real estate services shall be conducted remotely for all transactions, including but not limited to title searches, appraisals, permitting, inspections, and the recordation, legal, financial and other services necessary to complete a transfer of real property; provided, however, that any services and parts therein may be conducted in-person only to the extent legally necessary and in accordance with appropriate social distancing and cleaning/disinfecting protocols; and nothing within this provision should be construed to allow brokerage and branch offices to remain open to the general public (i.e. not clients).

Restrictions on requesting designation as an essential business:

Pursuant to the Governor's Executive Orders, the following businesses are specifically enumerated as non-essential and are, therefore, unable to request a designation:

- Any large gathering or event venues, including but not limited to establishments that host concerts, conferences, or other in-person performances or presentations in front of an in-person audience;
- Any dine-in or on-premise restaurant or bar service, excluding take-out or delivery for off-premise consumption;
- Any facility authorized to conduct video lottery gaming or casino gaming;
- Any gym, fitness centers, or exercise classes, except the remote or streaming service noted above;
- Any movie theater;
- Any indoor common portions of retail shopping malls with 100,000 or more square feet of retail space available for lease;
- All places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, arcades, fairs, children's play centers, funplexes, theme parks, bowling alleys, family and children's attractions; and
- Any barbershops, hair salons, tattoo or piercing parlors and related personal care services, including nail technicians, cosmetologists and estheticians, and the provision of electrolysis, laser hair removal services.

APPENDIX G

Task Force Recommendations

The Task Force acknowledges the leadership of New York State Governor Andrew M. Cuomo and Commissioner of Health Howard A. Zucker, M.D., J.D., during the State Disaster Emergency. Governor Cuomo and Commissioner Zucker *inter alia* rapidly and creatively adapted State policies to: **(1)** prevent the spread of the COVID-19 pandemic, **(2)** enhance the ability of health care providers to treat and care for persons suffering from COVID-19, and **(3)** protect health care workers in doing so.

The members of the Task Force recommend the following actions in order to build upon the Governor's and Commissioner's considerable accomplishments to date:

1. Public Health Law Framework and Legal Reforms:

The Department of Health (or through it the Task Force on Life and the Law) to review and consider:

- (a) Enactment into New York Law of the Model State Emergency Health Powers Act (MSEHPA), which was developed by the Center for Law and Public Health and the Public Health at Georgetown and John Hopkins Universities in 2001, as informed by the Columbia University Center for Health Policy Gap Analysis and as otherwise updated; and
- (b) Adoption of the, "Crisis Standards of Care," developed by the Institute of Medicine in 2012, as is, or as otherwise updated and amended, by the New York State Department of Health (or through it The Task Force on Life and the Law).

2. Ethical Issues in the Management of COVID-19:

- (a) Allocation of Life-Saving Equipment: The Task Force on Life and the Law (NYSTFLL) or New York State Department of Health or Governor to:
 - i. Review and consider whether the 2015 Task Force Report entitled, "Ventilator Allocation Guidelines" requires updating and amendment, including without limitation whether the equipment to be allocated should include hemo-dialysis or other life-saving machines, and recommend that the New York State Department of Health adopt the policy as is, or as amended, and
 - ii. DOH to issue emergency regulations mandating all providers and practitioners follow the ethics guidelines, and ensure: 1. the needs of vulnerable populations, including older adults, persons with disabilities, inmates and immigrants, are met in a non-discriminatory manner in the implementation of emergency regulations and guidelines; 2. provision of palliative care as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID-19 crisis, especially when access to life-saving measures, desired equipment or other resources are not available; 3. provision of education and training to physicians, health care practitioners, and institutional triage and ethics committees; and 4. provision of generalist-level palliative care education and training for all health care workers and health-related service workers in all settings who are providing supportive care.

- iii. Governor to: 1. waive or suspend certain NYS laws to protect from civil and criminal liability exposure practitioners who follow the ethics guidelines; and 2. direct all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

(b) Withdrawal, DNR and Futility: Amend the New York State Public Health Law:

- i. Article 29-C “Health Care Proxy,” to require in the case of a State Disaster Emergency Declaration: (i) at least one, rather than two, witnesses, or (ii) attestation by a notary public in person or remotely; and
- ii. to provide criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities, when the following steps are taken: (1) a practitioner, as defined in Public Health Law Section 2994-a, determines that a patient’s resuscitation would be “medically futile” as defined in PHL 2961.12; (2) a second practitioner concurs with the determination; and (3) both practitioners document their determination in the medical record; and in connection therewith, revoke or amend all laws and regulations prohibiting or penalizing such determinations and actions, including without limitation, those set forth on page 12 of this Report.

(c) Virus Testing: New York State Department of Health or Governor to consider:

- i. Establishing a coordinated statewide plan that ensures: frontline health care workers are prioritized in access to rapid diagnostic testing; and further, the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

3. Provider Systems and Issues:

(a) Amend New York Law:

- i. Purchasing Necessary Supplies:
 - 1. Amend New York General Business Law Section 396-r to include prohibition from exorbitant pricing of all equipment and products of any kind used either in patient care or to protect health care workers from infection.

(b) Continue Waivers and Executive Orders:

- i. Ability to Exceed Certified Bed Capacity for Acute Care Hospitals
 - 1. Continue the waiver by the Governor’s Executive Orders 202.1 and 202.10 of the DOH regulations governing certified bed restrictions for the pendency of the State Disaster Emergency.
- ii. Limitation on Resident Hours Working in Acute Care Hospitals

1. Continue the Governor’s Executive Order 202.10’s waiver of NYCRR Article 10, Section 405, limiting resident work hours for the pendency of the State Disaster Emergency.
- iii. Temporary Changes to Existing Hospital Facility Licenses Services and the Construction and Operation of Temporary Hospital Locations and Extensions
 1. Continue the waiver provided in Executive Orders 202.1 and 202.10 of the State requirements that restrict the ability of Article 28 facilities to reconfigure and expand operations as necessary, for the pendency of the State Disaster Emergency.
 - iv. Anti-Kickback and Stark Law Compliance during the COVID-19 Emergency
 1. New York State: Adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue
- (c) Long Term Care, Residential and Home Care, and Correctional and Detention Facility Settings
- i. Older Adults, Nursing Home Providers and Nursing Home Residents: Governor, Department of Health (DOH), DOH Bureau of Long Term Care and State Office for Aging to ensure:
 1. Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;³⁷⁹
 2. Adequate provision of PPE;
 3. Adequate levels of staffing;
 4. Adequate funding of employee testing, as required under Executive Order 202.30;
 5. Consistent and timely tracking and reporting of case and death data;
 6. Adoption of non-discriminatory crisis standards and ethics guidelines; and
 7. Recognition and honoring of Older New Yorkers’ right to health and human rights, as protected under international conventions: and
 8. Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.
 - ii. Persons with Disabilities in Residential Facilities or Group Homes: Governor and Department of Health to ensure:
 1. Access of persons with disabilities to adequate COVID-19 testing and appropriate medical care, mental health and other supportive services, including appropriate day

³⁷⁹ U.S. SENATE COMMITTEE ON FINANCE, Senator Charles E. Grassley, Chairman, Letter to HHS Secretary Alex Azar and CMS Administrator Verma, Apr. 17, 2020, (asking about the federal response to COVID-19 in nursing homes, group homes, and assisted living facilities, and expressing concerns about testing capacity, data tracking inconsistencies, lack of personal protective equipment (PPE) for nursing home staff, and federal spending transparency), <https://www.finance.senate.gov/imo/media/doc/HHSCoVIDLetter17Apr2020Final.pdf>.

- services to substitute for community-based day programs that need to be discontinued during a pandemic;
 - 2. Adequate and appropriate staffing, of residential facilities and group homes, for both day and evening shifts, and provision of appropriate funding for such staff and for appropriate COVID-19 staff training;
 - 3. Access of residential facility and group home staff to adequate testing and appropriate medical care and mental health and other supportive services;
 - 4. Oversight of residential facilities and group homes and programs to assure non-discriminatory management of persons with disabilities during the COVID-19 crisis conditions; and
 - 5. Recognition and honoring of persons with disabilities' right to health and human rights, as protected under international conventions.
- iii. Inmates and Correctional Facilities: Governor, NYS Department of Corrections and NYC Department of Corrections, to ensure:
- 1. Adequate access of inmates to COVID-19 testing, medical care and mental health and supportive services;
 - 2. COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;
 - 3. Release to the community of older inmates and inmates with advanced illness who do not pose a danger to the community;
 - 4. Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and
 - 5. Recognition and honoring of inmates' right to health and human rights, as protected under international conventions.
- iv. Immigrants in Detention Facilities: In its exercise of its police powers in the COVID-19 public health emergency, New York State must take steps, similar to those outlined above, in cooperation with federal agencies to ensure:
- 1. Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers.³⁸⁰

(d) Telehealth

- i. Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

(e) Immunities

- i. Adapt Executive Orders to be consistent with Sections of the Public Health Law and include criminal liability, as well as immunity to health care facilities.

4. Business/Contracts/Risk Management

³⁸⁰ See Cole J.P Cole, *Federal and State Quarantine Isolation Authority*, CONGRESSIONAL RESEARCH SERVICE, Oct. 19, 2014, <https://www.ncsl.org/documents/statefed/health/FedandStateQIAuth.pdf>.

- (a) Consider extending immunity under NY UCC section 2-615(a) to supply chain vendors where specific performance under a contract becomes impracticable due to unforeseen event or good faith compliance with governmental orders or regulations during crisis.
- (b) Adopt CMS 1135 Waivers and afford civil and criminal immunity to permit health care and health care related organizations and individual providers to modify operations to control contagion and manage the public health crisis. Immunity afforded to individual practitioners should extend to treatment of all patients during the crisis, not just acts of omission or commission in the management of COVID-19 since other patients within the health care system are inevitably impacted by the decisions made by these practitioners on the front lines.

5. Workforce

- (a) Provide clear, timely guidance and support to all non-health care businesses and academic institutions to coordinate effective implementation of universal precautions and other workplace safety best practices to facilitate public health and trust, while mitigating disparate conditions during the phase-in process and long-term.
 - i. Consider publicly posting essential/non-essential business operations decisions with an industry-wide impact on the Empire State Development (ESD) website in real time to mitigate confusion and enhance institutional compliance.
 - ii. Consider granting staffing firms dedicated to child care the provider status necessary to enable them to operate in New York State and supplement the childcare workforce in order to ensure the health and safety of our children, while enabling businesses to effectively reopen within sufficient childcare support.
 - iii. Consider education and training pertaining to crisis standards and civil and criminal immunity to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services.
 - iv. Consider enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by front-line health care workers under crisis conditions.

6. Vaccination

- (a) When the efficacy of a COVID-19 vaccine has been confirmed, enact legislation requiring vaccination of each person unless the person's physician deems vaccination for his or her patient to be clinically inappropriate.

7. Vulnerable Populations and Issues of Equity and Discrimination: A Call for Social Justice

- (a) Enhance regulatory oversight, to ensure:
 - i. adequate and non-discriminatory allocation of resources to vulnerable populations and communities of color;
 - ii. equitable access of vulnerable populations to health and mental health services, including palliative care as an ethical minimum to mitigate suffering among those

vulnerable persons who remain in institutional, facility, residential or home or care settings, or are hospitalized during the COVID-19 crisis, especially when desired equipment or other resources are not available;

- iii. provision of PPE to essential health care workers at highest risk in delivering essential services to vulnerable populations; and
- iv. monitoring conformity with federal laws barring discrimination.

8. Emergency Preparedness

- (a) Maintain a core team of emergency preparedness experts to review and draft legislation, drawing upon the following evidentiary sources:
 - i. MSEHPA;
 - ii. Columbia University Center for Health Policy Gap Analysis;
 - iii. IOM's Crisis Standards of Care;
 - iv. Allocation of scarce resource guidelines, and
 - v. Emergency orders needed to manage COVID-19.
- (b) Re-evaluate the public benefit and costs of reinstating laws which have been waived during COVID-19.

APPENDIX H

New York State Bar Association Health Law Section Task Force Members, Advisors and Experts

Hermes Fernandez, *Health Law Section Chair*

Members of Task Force

Mary Beth Quaranta Morrissey, Esq., PhD, MPH, *Task Force Chair*

Jane Bello Burke, Esq.

Kathleen M. Burke, Esq.

Veda Collmer, Esq.

Karen Gallinari, Esq.

Edward S. Kornreich, Esq.

Anoush Koroghlian-Scott, Esq.

Thomas G. Merrill, Esq.

Brendan S. Parent, Esq.

Nathan G. Prystowsky, Esq.

Salvatore J. Russo, Esq.

Jennifer M. Schwartzott, Esq.

Mishka A. Woodley, JD, LLM

Advisors to the Task Force:

Thomas V. Caprio, MD, MPH, MS, CMD, HMDC, FACP, AGSF, FAAHPM

Christopher Comfort, MD

Larry Faulkner, Esq.

Allie Gold, Esq.

Roshni D. Persaud, Esq.

Donna Seminara, MD, MACP

Samuel J. Servello, JD, LLM

Attorney, law clerk and law student, and other volunteers:

Patrick Benjamin

John D. Clopper, Esq.

Marissa Cohen

Morgan Dowd

Michele Korkemaz-Christie

Martha Mahoney

Kerianne Morrissey

Matthew Pappalardo

Ivelina V. Popova, Esq.

Daniel S. Weinstein

We thank the following esteemed members of the bar, scholars and ethicists who served as experts and provided generous assistance and consultative support to the Task Force:

Linda Fentiman, JD, LLM

Joseph J. Fins, M.D., M.A.C.P., F.R.C.P.

Professor Lawrence O. Gostin

James Hodge, Jr., JD, LLM

Beth Roxland, JD, M.Bioethics

Robert Swidler, Esq.

NYSBA Health Law Section COVID-19 Report Addendum

May 2020 Updates to Report:

Correction (bolded): Section IV, Vaccination, p. 60, 2nd paragraph:

In New York State, the courts have found religious, personal or “unsupported...medical literature”¹ arguments unpersuasive.²

Disproportionate COVID-19 Impact: Black/African American and Hispanic/Latinx Groups including Older Adults, Nursing Home Residents and Health Care Workers

There is a growing body of evidence that the COVID-19 pandemic has had a disproportionate impact upon Black/African Americans and Hispanic/Latinx in New York, New York City, and nationally. While there is variability in data reporting, numerous data sources (i.e., CDC, NYS DOH, and NYC DOH) show that racial and ethnic minority group members have been hit the hardest by the pandemic. The public health law perspective, as addressed in the NYSBA Health Law Section Report, focuses on the health of the public and population health, and sheds light upon the multiple factors contributing to vulnerability to COVID-19 and historical inequities in the society that have heightened the precarity and suffering of racial and ethnic minority groups. Such factors include social and economic determinants of health such as neighborhood, housing, food insecurity, access to health and mental health services, (public) health insurance, employment, income, and health, immigrant and disability status, as well as implicit bias in the health systems that creates significant barriers to care. The cumulative disadvantage of race, ethnicity, age, gender, underlying conditions, and poverty have compounded the detrimental impact of the pandemic across Black/African American and Hispanic/Latinx groups including older adults, nursing home residents, persons who are homeless living in shelters or who are incarcerated, immigrants, and essential workers. New York has reported deaths by race/ethnicity, as follows: Black or African American: 14% of population, 25% of deaths; Hispanic or Latino. 16% of population, 26% of deaths. (COVID-19 Racial Data Tracker, June 2, 2020, <https://covidtracking.com/race/dashboard#state-ny>). In New York City, disparities are glaring: Black/African Americans and Latinx are dying at twice the rate of non-Hispanic Whites (NYC Department of Health, *Case, Hospitalization and Death Rates*, May 23, 2020 <https://www1.nyc.gov/site/doh/covid/covid-19-data.page>). Nursing homes in particular, largely segregated before the pandemic, have been crucibles of racialized suffering and racial disparities during the pandemic. At least one-third of all U.S. COVID-19 deaths are nursing home residents or workers and in New York, nursing home deaths are at twenty percent of total deaths in the state (Yourish, *New York Times*, May 11, 2020).

The NYSBA Health Law Section recommends the following steps to ensure racial and ethnic disparities and inequities are being addressed as a moral obligation and to reduce morbidity and mortality among these populations:

¹ *C.F. v. New York City Dept. of Health and Mental Hygiene*, 2019 NY Slip Op. 31047, at 4-6 (Apr. 18, 2019) (administrative ruling) (NYC Dept. of Health and Mental Hygiene regulation requiring any person who lives or works in “designated zip codes” to be vaccinated for MMR (measles)).

² See *Cruzan by Cruzan*, 497 U.S. at 262. *Prince*, 321 U.S. at 167. *Phillips*, 775 F.3d at 542. *Cavizel*, 739 F.Supp.2d at 274-75. *C.F.*, 2019 NY Slip. Op. 31047, at 4-6.

- adequate and non-discriminatory allocation of resources to communities of color and vulnerable populations, including nursing home residents;
- equitable access to health and mental health services, including palliative care as an ethical minimum to mitigate suffering, especially when desired equipment or other resources are not available;
- provision of PPE to essential health care workers, and prioritizing health care workers in access to testing; and
- monitoring conformity with federal laws barring discrimination.

Facing Scarcity During COVID-19 - From PPE to Trained Health Care Workers

The COVID-19 Pandemic has brought us face-to-face with a situation of scarcity across the continuum of care – from not enough PPE to not enough trained Health Care Workers. Weill Cornell Bioethicist Joseph J. Fins describes this situation well in the upcoming issue of the NYSBA Health Law Journal (in press):

Despite public declarations to the contrary, there was scarcity and resort to crisis of standards of care in New York City during the Covid-19 surge... To respond to this dire need hospitals across the city increased their ICU capacity by over 200-300%... Although the attention was on the shortage of equipment and the built environment, the greater stressor was the lack of adequately trained personnel able to manage critically ill patients.

What happens when there are not enough supplies, trained intensivists, or ICU beds in the midst of a pandemic? Some will be lucky enough to access the care they need, such as an ICU bed or artificial ventilation equipment, and others won't. Some workers will get masks, and others will be exposed to virus infection. But who gets to make what may be life and death decisions during pandemic conditions? In the absence of uniform written guidelines that all providers can follow, there's a risk of arbitrary decision making in these circumstances, or possible discrimination based upon factors such as age, race and ethnicity, or disability. The NYSBA Health Law Section calls for issuance of uniform statewide ethics guidelines that all providers can follow in making decisions about how scarce resources are allocated. The NYS Task Force on Life and the Law issued Ventilator Guidelines in 2015 that use a physiologic metric to guide decisions on how resources are distributed when not enough for all. The NYSBA Health Law Section recommends that these guidelines be reviewed, and amended as needed, and adopted by the New York State Department of Health (DOH). Further, DOH should issue emergency regulations mandating all providers and practitioners follow the guidelines.

See Ventilator Allocation Guidelines, NYSBA, Nov. 2015,
https://nysba.org/app/uploads/2020/05/2015-ventilator_guidelines-NYS-Task-Force-Life-and-Law.pdf

See Executive Summary Excerpt:

“IV. The Guidelines’ Primary Goal: Saving the Most Lives The primary goal of the Guidelines is to save the most lives in an influenza pandemic where there are a limited number of available ventilators. To accomplish this goal, patients for whom ventilator therapy would most likely be lifesaving are prioritized. The Guidelines define survival by examining a patient’s short-term likelihood of surviving the acute medical episode and not by focusing on whether the patient may

survive a given illness or disease in the longterm (e.g., years after the pandemic). Patients with the highest probability of mortality without medical intervention, along with patients with the smallest probability of mortality with medical intervention, have the lowest level of access to ventilator therapy. Thus, patients who are most likely to survive without the ventilator, together with patients who will most likely survive with ventilator therapy, increase the overall number of survivors.”

Mandated Vaccination Program

Once a safe and effective COVID-19 vaccine becomes available, the NYSBA Health Law Section recommends mandated vaccination, and steps to ensure a planned vaccination program:

- Phase 3 safety and efficacy (and effectiveness) prospective, randomized and placebo-controlled study trial: participants would be randomized to receive either the vaccine or control (such as a placebo) and go back to their usual living conditions, where they may or may not be exposed to the virus that causes COVID-19 disease. Researchers would follow them over time to assess whether the vaccine was effective at preventing infection (*JAMA*, June 1, 2020, https://www.youtube.com/watch?v=2DUiBlj5rsQ&feature=youtu.be?utm_source=silverchair&utm_medium=email&utm_campaign=article_alert-jama&utm_content=olf&utm_term=051920);
- Rapid mass vaccination achieved through equitable distribution;
- Prioritizing health care workers and individuals at highest risk for complications and virus transmission to others if inadequate vaccine supply; and
- Linguistically and culturally competent vaccine educational and acceptance program. (Schaffer DeRoo S, Pudalov NJ, Fu LY. Planning for a COVID-19 Vaccination Program. *JAMA*, Published online May 18, 2020. doi:10.1001/jama.2020.8711)

Resources

New York State Bar Association Health Law Section

<https://nysba.org/healthlawsectioncovid19/>

United States:

Crisis Standards of Care

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjEob3D097pAhUBh-AKHVzoDA0QFjAAegQIAxAB&url=https%3A%2F%2Fwww.nursingworld.org%2F~496044%2Fglobalassets%2Fpracticeandpolicy%2Fwork-environment%2Fhealth--safety%2Fcoronavirus%2Fcrisis-standards-of-care.pdf&usq=AOvVaw1QxPOaHHx77SrPJnZO5dpw>

New England Journal of Medicine:

Eric C. Schneider, M.D., Failing the Test — The Tragic Data Gap Undermining the U.S. Pandemic Response, May 15, 2020

<https://www.nejm.org/doi/full/10.1056/NEJMp2014836?query=TOC>

Lancet:

Lee & McGreer, May 30, 2020, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31239-3/fulltext?dgcid=raven_jbs_etoc_email](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31239-3/fulltext?dgcid=raven_jbs_etoc_email)

Ayesha Ahmad, et al., What does it mean to be vulnerable in the era of COVID-19?, Apr. 27, 2020, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30979X/fulltext?dgcid=raven_jbs_etoc_email](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30979X/fulltext?dgcid=raven_jbs_etoc_email)

Richard Cash, Vikram Patel, Has COVID-19 subverted global health?, May 5, 2020, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31089-8/fulltext#seccestitle10](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31089-8/fulltext#seccestitle10)

Prof. Feng-Cai Zhu, MSc, et al., Safety, tolerability, and immunogenicity of a recombinant adenovirus type-5 vectored COVID-19 vaccine: a dose-escalation, open-label, non-randomised, first-in-human trial, May 22, 2020

[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31208-3/fulltext?dgcid=etoc-edschoice_email_tlcoronavirus20](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31208-3/fulltext?dgcid=etoc-edschoice_email_tlcoronavirus20)

David Chiriboga, et al., Health inequity during the COVID-19 pandemic: a cry for ethical global leadership, May 15, 2020

[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31145-4/fulltext?dgcid=raven_jbs_etoc_email](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31145-4/fulltext?dgcid=raven_jbs_etoc_email)

Julian Tudor Hart, The Inverse Care Law, Lancet, Feb. 27, 1971, 1: 405-412

[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(71\)92410-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(71)92410-X/fulltext).

Abstract: The availability of good medical care tends to vary inversely with the need for it in the population served. This inverse care law operates more completely where medical care is most exposed to market forces, and less so where such exposure is reduced. The market distribution of medical care is a primitive and historically outdated social form, and any return to it would further exaggerate the maldistribution of medical resources.

COVID-19 Resource Centre

<https://www.thelancet.com/coronavirus>

New York State Data:**NYS COVID-19 Tracker**

<https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker->

[Map?%253Aembed=yes&%253Atoolbar=no&:isGuestRedirectFromVizportal=y&:embed=y](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%253Aembed=yes&%253Atoolbar=no&:isGuestRedirectFromVizportal=y&:embed=y)

Fatalities, Fatalities by Race/Ethnicity

<https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker->

[Fatalities?%253Aembed=yes&%253Atoolbar=no&%3AisGuestRedirectFromVizportal=y&%3Aembed=y](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%253Aembed=yes&%253Atoolbar=no&%3AisGuestRedirectFromVizportal=y&%3Aembed=y)

NYS Department of Corrections and Community Supervision Data:

<https://doccs.ny.gov/doccs-covid-19-report>

New York City Data:

<https://www1.nyc.gov/site/doh/covid/covid-19-data.page>

<https://www1.nyc.gov/site/coronavirus/resources/covid-testing.page#queens>

Disparities in Far Rockaway:

<https://subscriber.politicopro.com/states/new-york/city-hall/story/2020/05/20/divergent-death-tolls-in-new-yorks-rockaways-show-covid-19s-uneven-reach-1284964>

CDC COVID-19:

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Cases in United States:

<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

<https://www.cdc.gov/covid-data-tracker/index.html>

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>

The effects of COVID-19 on the health of racial and ethnic minority groups is still emerging; however, current data suggest a disproportionate burden of illness and death among racial and ethnic minority groups. A recent [CDC MMWR report](#) included race and ethnicity data from 580 patients hospitalized with lab-confirmed COVID-19 found that 45% of individuals for whom race or ethnicity data was available were white, compared to 55% of individuals in the surrounding community. However, 33% of hospitalized patients were black compared to 18% in the community and 8% were Hispanic, compared to 14% in the community. These data suggest an overrepresentation of blacks among hospitalized patients.

(Shikha Garg, et al. Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1-30, 2020, CDC, Apr. 8, 2020

https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s_cid=mm6915e3_w)

Among COVID-19 deaths for which race and ethnicity data were available, New York City identified death rates among Black/African American persons (92.3 deaths per 100,000 population) and Hispanic/Latino persons (74.3) that were substantially higher than that of white (45.2) or Asian (34.5) persons. Studies are underway to confirm these data and understand and potentially reduce the impact of COVID-19 on the health of racial and ethnic minorities.

(<https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-deaths-race-ethnicity-04162020-1.pdf>)

COVID-19 Data Repository by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University

This is the data repository for the 2019 Novel Coronavirus Visual Dashboard operated by the Johns Hopkins University Center for Systems Science and Engineering (JHU CSSE). Also, Supported by ESRI Living Atlas Team and the Johns Hopkins University Applied Physics Lab (JHU APL).

Visual Dashboard (desktop):

<https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>

Visual Dashboard (mobile):

<http://www.arcgis.com/apps/opsdashboard/index.html#/85320e2ea5424dfaaa75ae62e5c06e61>

Lancet Article:

[An interactive web-based dashboard to track COVID-19 in real time](#)

Provided by Johns Hopkins University Center for Systems Science and Engineering (JHU CSSE):

<https://systems.jhu.edu/>

Data Sources: Aggregated data sources:

- World Health Organization (WHO): <https://www.who.int/>
- European Centre for Disease Prevention and Control (ECDC): <https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases>
- DXY.cn. Pneumonia. 2020. <http://3g.dxy.cn/newh5/view/pneumonia>
- US CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- BNO News: <https://bnonews.com/index.php/2020/02/the-latest-coronavirus-cases/>
- WorldoMeters: <https://www.worldometers.info/coronavirus/>
- 1Point3Arces: <https://coronavirus.1point3acres.com/en>
- COVID Tracking Project: <https://covidtracking.com/data>. (US Testing and Hospitalization Data. We use the maximum reported value from "Currently" and "Cumulative" Hospitalized for our hospitalization number reported for each state.)

- US data sources at the state (Admin1) or county/city (Admin2) level:
 - Washington State Department of Health: <https://www.doh.wa.gov/emergencies/coronavirus>
 - Maryland Department of Health: <https://coronavirus.maryland.gov/>
 - New York State Department of Health: <https://health.data.ny.gov/Health/New-York-State-Statewide-COVID-19-Testing/xdss-u53e/data>
 - NYC Department of Health and Mental Hygiene: <https://www1.nyc.gov/site/doh/covid/covid-19-data.page> and <https://github.com/nychealth/coronavirus-data>
 - Florida Department of Health Dashboard: https://services1.arcgis.com/CY1LXxl9zIJeBuRZ/arcgis/rest/services/Florida_COVID19_Cases/FeatureServer/0 and <https://fdoh.maps.arcgis.com/apps/opsdashboard/index.html#/8d0de33f260d444c852a615dc7837c86>
 - Colorado: <https://covid19.colorado.gov/covid-19-data>

- Non-US data sources at the country/region (Admin0) or state/province (Admin1) level:
 - National Health Commission of the People's Republic of China (NHC): http://www.nhc.gov.cn/xcs/yqtb/list_gzbd.shtml
 - China CDC (CCDC): <http://weekly.chinacdc.cn/news/TrackingtheEpidemic.htm>
 - Hong Kong Department of Health: <https://www.chp.gov.hk/en/features/102465.html>
 - Macau Government: <https://www.ssm.gov.mo/portal/>
 - Taiwan CDC: <https://sites.google.com/cdc.gov.tw/2019ncov/taiwan?authuser=0>
 - Government of Canada: <https://www.canada.ca/en/public-health/services/diseases/coronavirus.html>
 - Australia Government Department of Health: <https://www.health.gov.au/news/coronavirus-update-at-a-glance>
 - COVID Live (Australia): <https://www.covidlive.com.au/>
 - Ministry of Health Singapore (MOH): <https://www.moh.gov.sg/covid-19>
 - Italy Ministry of Health: <http://www.salute.gov.it/nuovocoronavirus>

- Dati COVID-19 Italia (Italy): <https://github.com/pcm-dpc/COVID-19/tree/master/dati-regioni>
- French Government: <https://dashboard.covid19.data.gouv.fr/> and <https://github.com/opencovid19-fr/data/blob/master/dist/chiffres-cles.json>
- OpenCOVID19 France: <https://github.com/opencovid19-fr>
- Palestine (West Bank and Gaza): <https://corona.ps/details>
- Israel: <https://govextra.gov.il/ministry-of-health/corona/corona-virus/>
- Ministry of Health, Republic of Kosovo: <https://kosova.health/> and <https://covidks.s3.amazonaws.com/data.json>
- Berliner Morgenpost (Germany): <https://interaktiv.morgenpost.de/coronavirus-karte-infektionen-deutschland-weltweit/>
- rtve (Spain): <https://www.rtve.es/noticias/20200514/mapa-del-coronavirus-espana/2004681.shtml>
- Ministry of Health, Republic of Serbia: <https://covid19.rs/homepage-english/>
- Chile: <https://www.minsal.cl/nuevo-coronavirus-2019-ncov/casos-confirmados-en-chile-covid-19/>
- Brazil Ministry of Health: <https://covid.saude.gov.br/>
- Gobierno De Mexico: <https://covid19.sinave.gob.mx/>
- Japan COVID-19 Coronavirus Tracker: <https://covid19japan.com/#all-prefectures>
- Monitoreo del COVID-19 en Perú - Policía Nacional del Perú (PNP) - Dirección de Inteligencia (DIRIN): <https://www.arcgis.com/apps/opsdashboard/index.html#/f90a7a87af2548699d6e7bb72f5547c2>
- Colombia: <https://antioquia2020-23.maps.arcgis.com/apps/opsdashboard/index.html#/a9194733a8334e27b0eebd7c8f67bd84> and Instituto Nacional de Salud
- Russia: <https://xn--80aesfpebagmfb1c0a.xn--p1ai/information/>
- Ukraine: <https://covid19.rnbo.gov.ua/>

Additional Information about the Visual Dashboard:

<https://systems.jhu.edu/research/public-health/ncov/>

American Public Health Association:

APHA supports HEROES COVID-19 Funding:

APHA welcomes essential public health funding, supports key provisions in COVID-19 bill, May 16, 2020

<https://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/heroes-act>

APHA Disproportionate Impact Upon Hispanics

APHA leader calls for greater access to COVID-19 resources for Hispanics, May 18, 2020

<https://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/hispanics-and-covid-19>

APHA’s Latinx COVID-19 Task Force

Louise Dettman, Task force addresses gaps, works toward intervention, PHN, May 18, 2020

<http://publichealthnewswire.org/?p=latinx-covid19-task-force>

Today’s guest blogger is Paulina Sosa, vice president of APHA’s Latino Caucus, chair of its Latinx COVID-19 Task Force and founder of the Latinx Voces en Salud Campaign. She is assistant editor of APHA’s American Journal of Public Health and public affairs coordinator for APHA’s COVID-19 response.

COVID-19 has highlighted a number of health disparities and inequities faced by Latinx communities. They are one of the most vulnerable populations throughout the U.S. because of:

- higher uninsured rates;
- a higher percentage working in “essential services,” including the meatpacking, farming and service industries;
- poor access to personal protective equipment;
- inability to social distance at home;
- lack of accurate and bilingual information and resources; and
- fear of accessing testing or health care services.

The large gaps in access to health information and health care felt by these communities stem from immigration status, stigmatization, income inequalities, language barriers and even cultural stigmas.

United Hospital Fund COVID-19 Resources:

<https://uhfnyc.org/our-work/initiatives/covid/>

Chad Shearer and Dr. Anthony Shih, Written Testimony of the United Hospital Fund Submitted to the Senate and Assembly Joint Legislative Hearing on Exploring Solutions to the Disproportionate Impact of COVID-19 on Minority Communities, May 18, 2020

https://uhfnyc.org/media/filer_public/fb/b1/fbb1d00a-4b1b-4ca3-aa77-2ee5cab003fb/uhf_testimony_on_impact_of_covid-19_on_minority_communities.pdf

Robert Wood Johnson County Health Rankings, comparison of Bronx and Queens to New York State,

https://www.countyhealthrankings.org/app/new-york/2020/compare/snapshot?counties=36_005%2B36_081

United Health Fund analysis of New York City Neighborhood Health Atlas,
<https://www1.nyc.gov/site/doh/health/neighborhood-health/nyc-neighborhood-health-atlas.page>

New York Times COVID-19 Coverage:

Who is likely to die from the coronavirus?

https://www.nytimes.com/interactive/2020/06/04/opinion/coronavirus-health-race-inequality.html?campaign_id=29&emc=edit_up_20200604&instance_id=19080&nl=the-upshot®i_id=69741277&segment_id=30074&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348

JAMA

https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2736934?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=062819

Robert Gebeloff et al., *The Striking Racial Divide in How Covid-19 Has Hit Nursing Home*, May 21, 2020

https://www.nytimes.com/article/coronavirus-nursing-homes-racial-disparity.html?campaign_id=9&emc=edit_nn_20200521&instance_id=18657&nl=the-morning®i_id=69741277&segment_id=28666&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348

Black Americans Face Alarming Rates of Coronavirus Infection in Some States
<https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>

John Eligon et al., *Lockdown Delays Cost at Least 36,000 Lives, Data Show*, Apr. 7, 2020
https://www.nytimes.com/2020/05/20/us/coronavirus-distancing-deaths.html?campaign_id=9&emc=edit_nn_20200521&instance_id=18657&nl=the-morning®i_id=69741277&segment_id=28666&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348

John Eligon et al., *Questions of Bias in Covid-19 Treatment Add to the Mourning for Black Families*, May 10, 2020

<https://www.nytimes.com/2020/05/10/us/coronavirus-african-americans-bias.html>

Immigrant communities (May 21):

"Children of Immigrants in the Age of Deportation," Edited by Alejandro Portes & Patricia Fernandez-Kelly, w/ articles from Doug Massey, Min Zhou, Ruben Rumbaut & Cynthia Feliciano, Patricia Gandara, Ruben Hernandez-Leon, Helen Marrow, Roberto Gonzales and many others

[https://think.taylorandfrancis.com/ethnic-and-racial-studies-children-immigrants/?utm_source=print&utm_medium=printed piece&utm_campaign=JPC12866&fbclid=IwAR1en5lJPyzpiBTd0sx2lDUqKaZYfLisBHev8Qk_I7D-6uz93XxDgIyHblA](https://think.taylorandfrancis.com/ethnic-and-racial-studies-children-immigrants/?utm_source=print&utm_medium=printed%20piece&utm_campaign=JPC12866&fbclid=IwAR1en5lJPyzpiBTd0sx2lDUqKaZYfLisBHev8Qk_I7D-6uz93XxDgIyHblA)

Long-Term Care / Nursing Homes:

Centers for Disease Control and Prevention. Nursing home care. Last reviewed March 11, 2016. <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>. Accessed March 19, 2020.

Centers for Disease Control and Prevention. Preparing for COVID-19: long-term care facilities, nursing homes. Last reviewed March 21, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spread-in-long-term-care-facilities.html>. Accessed March 23, 2020.

Centers for Medicare & Medicaid Services. Center for Clinical Standards and Quality/Quality, Safety & Oversight Group. March 13, 2020. <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>. Accessed March 19, 2020.

Society for Post-Acute and Long-Term Care Medicine. Strategies for mitigating the emotional impact of COVID-19. March 15, 2020.

<https://paltc.org/sites/default/files/Strategies%20for%20Mitigating%20the%20Emotional%20Impact%20of%20COVID-19.pdf>. Accessed March 19, 2020.

Health Affairs:

Michael Cantor, et al., Reducing COVID-19 Deaths In Nursing Homes: Call To Action, May 27, 2020

https://www.healthaffairs.org/doi/10.1377/hblog20200522.474405/full/?utm_campaign=HASU&utm_medium=email&utm_content=COVID-19%3A+How+Medicaid+Can+Address+Disparities%2C+Opioid+Use+Disorder+Treatment%2C+Reducing+Deaths+In+Nursing+Homes%2C+Latest+Congressional+Coverage+Proposals%3B+Iowa+s+Medicaid+Healthy+Behaviors+Program&utm_source=Newsletter

ACHA, NCAL, and NHPCO: [Guidance on the Role of Hospice Services in LTC Facilities During COVID-19 Pandemic.](#)

AMDA (Society for Post-Acute and Long-Term Care Medicine): [COVID-19 Resources](#) including [FAQ](#) and self-care [resources](#)

CDC: [Preparing for COVID-19: Long-term Care Facilities, Nursing Homes](#) - Information to help LTCs prevent, identify, and contain COVID-19 infection, assess PPE, and care for residents with serious illness.

CMS: [Upcoming Requirements for Notification of Confirmed COVID-19 \(or COVID19 Persons under Investigation\) Among Residents and Staff in Nursing Homes](#)

- See the CDC's clarification of CMS reporting requirements [here](#).

Indiana University Center for Aging Research: [Advance Care Planning During a Crisis: Key Information for Nursing Facility Staff](#): 12-minute webinar created by Susan Hickman, PhD, and Kathleen Unroe, MD, MHA

John A. Hartford Foundation: COVID-19 Resources for Nursing Homes & Long-Term Care

- **Coronavirus Disease (COVID-19) Resources for Older Adults, Family Caregivers and Health Care Providers (Updated 5/27)**, Posted In: Age-Friendly Health Systems, Family Caregiving, Serious Illness & End of Life, CDC

As we all work together to ensure the safety of the public, and in particular, older adults and other individuals who are at increased risk from COVID-19, it is important to turn to trusted sources of information.

Below are resources from our partners and grantees that they will regularly update with information for older adults, family caregivers and health care providers.

Please regularly consult the Centers for Disease Control (CDC) and your state health departments for specific and up-to-date information about your community.

For a fuller list of nursing home and long-term care specific resources, go to our COVID-19 Resources for Nursing Homes & Long-Term Care post.

To get support from our COVID-19 Rapid Response Network for Nursing Homes, join our daily 20-minute National Nursing Home Huddles at 12pm ET/9am PT.

- **What Older Adults and Their Family Caregivers Should Know:**

Administration for Community Living (ACL)

- What do Older Adults and People with Disabilities Need to Know?
- Eldercare Locator

Centers for Disease Control and Prevention (CDC)

- People at Risk for Serious Illness from COVID-19 - Older Adults
- Resources for Home: Plan, Prepare, and Respond to Coronavirus Disease 2019

AARP

- What you need to know about the Coronavirus Outbreak
- Health, Coronavirus and Caregiving
- COVID-19 Spanish Language Resources
- Preparing Caregivers during COVID-19

Alzheimer's Association

- Coronavirus (COVID-19): Tips for Dementia Caregivers
- Emergency Preparedness: Caring for persons living with dementia in a long-term or community-based care setting
- Coronavirus (COVID-19) and Dementia: Tips for Public Health Community (*New*)

Archangels

- COVID-19 Resources: To Read & Share

Caregiver Action Network

- COVID-19 and Family Caregiving

Diverse Elders Coalition

- COVID-19 Community Resources

Family Caregiver Alliance

- Coronavirus (COVID-19) Resources and Articles for Family Caregivers

National Foundation for Infectious Diseases

- Frequently Asked Questions About Novel Coronavirus (COVID-19)
- Common Questions and Answers About COVID-19 for Older Adults and People with Chronic Health Conditions

Prepare for Your Care

- COVID-19 Resources and Hospital Go Bag in English and Spanish

News and Articles to Keep You Informed:

Kaiser Health News

- COVID-19 Latest News on the Coronavirus Outbreak

Next Avenue (PBS' Online News Platform for Older Adults)

- The Coronavirus Outbreak: What You Need to Know

Health Affairs

- COVID-19 (Coronavirus Disease)

What Long-Term Care Providers Should Know:

Centers for Disease Control and Prevention (CDC)

- [Interim Guidance for Nursing Homes](#)

LeadingAge

- Coronavirus and COVID-19 Information

American Health Care Association (AHCA)

- Coronavirus

The Society for Post-Acute and Long-Term Care Medicine (AMDA)

- Update on COVID-19

What Health Care Professionals Should Know - *Federal Guidance:*

Centers for Disease Control and Prevention (CDC)

- Information for Healthcare Professionals
 - Resources for Hospitals and Healthcare Professionals Preparing for Patients with Suspected or Confirmed COVID-19
 - Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings
 - Interim Guidance for Implementing Home Care of People Not Requiring Hospitalization for Coronavirus Disease 2019 (COVID-19)
 - Guidance for Retirement Communities and Independent Living

Centers for Medicare and Medicaid Services (CMS)

- Current Emergencies Website (COVID-19)

Health Resources and Services Administration (HRSA)

- Emergency Preparedness and Recovery Resources for Health Centers

What Health Care Professionals Should Know - *Geriatric Care:*

American Geriatrics Society (AGS)

- AGS Coronavirus Disease 2019 (COVID-19) Information Hub
- Allocating Scarce Resources In the COVID-19 Era
- The Journal of the American Geriatrics Society Publications on COVID-19

Home Centered Care Institute - for Home-Based Primary Care Providers

- COVID-19 Information Hub

Geriatric Emergency Department Collaborative

- COVID-19 Links and Resources

Gerontological Society of America (GSA)

- National Adult Vaccination Program COVID-19 Updates

What Health Care Professionals should know - *Serious Illness Care:*

Ariadne Labs

- Serious Illness Care Program COVID-19 Response Toolkit

Center to Advance Palliative Care (CAPC)

- CAPC COVID-19 Response Resources

Coalition to Transform Advanced Care

- Resources to Support Serious Illness Population

National POLST

- POLST and COVID-19 (Facility Guidance)

Respecting Choices

- Resources to have Planning Conversations in COVID-19

The Conversation Project

- COVID-19 Resources

VitalTalk

- COVID-Ready Communication Skills: A Playbook of VitalTalk Tips

National Hospice and Palliative Care Organization

- Emergency Preparedness: COVID-19 Information

What Health Care Professionals Should Know - *General:*

American College of Physicians (ACP)

- Coronavirus Disease 2019 (COVID-19): Information for Internists

American Hospital Association (AHA)

- Updates and Resources on Novel Coronavirus (COVID-19)

American Pharmacists Association (APhA)

- Pharmacists' Guide to Coronavirus

Better Care Playbook

- Addressing Complex Care Needs Amid COVID-19

Center for Medicare Advocacy

- COVID-19: An Advocates Guide to Beneficiary Related Medicare Changes

Institute for Healthcare Improvement

- COVID-19 Guidance and Resources

University of Washington Medical Center (UW Medicine)

- COVID-19 Resource Site for Healthcare Workers

The Center for Connected Health Policy (CCHP)

- National Telehealth Resource Center (*New*)

The Hastings Center

- Ethical Framework for Health Care Institutions & Guidelines for Institutional Ethics Services Responding to the Coronavirus Pandemic

The Joint Commission

- Coronavirus (COVID-19)

RELATED RESOURCES

- COVID-19 Resources for Nursing Homes & Long-Term Care (Updated 5/27)
May 27, 2020
- Virtual Briefing: NAC and AARP's Caregiving in the U.S. Report
May 26, 2020
- COVID-19 Rapid Response Network for Nursing Homes: Join Daily National Nursing Home Huddles
May 26, 2020

Journal of the American Geriatrics Society (JAGS):
[COVID-19 in the Long-Term Care Setting: The CMS Perspective](#)

LeadingAge:
[Coronavirus Resources](#) including timely 'hot topic' updates and training

NASEM:
[Keeping Nursing Home Residents and Staff Safe in the Era of COVID-19](#) - April 22 webinar moderated by Terry Fulmer, PhD, RN, FAAN, President of The John A. Hartford Foundation.

The New York Times:
Charles C. Camosy, What's behind the nursing home horror, May 17, 2020
https://www.nytimes.com/2020/05/17/opinion/nursing-home-coronavirus.html?utm_source=Fordham+Master+List&utm_campaign=cd2a2ff643-EMAIL_CAMPAIGN_2020_05_22_05_03&utm_medium=email&utm_term=0_808eb3c98f-cd2a2ff643-172921917

JAMA:
Grabowski DC, Mor V, Nursing Home Care in Crisis in the Wake of COVID-19. *JAMA*. Published online May 22, 2020. doi:10.1001/jama.2020.8524
https://jamanetwork.com/journals/jama/fullarticle/2766599?guestAccessKey=6286cca3-9a3c-4f36-8789-76dd159043d7&utm_source=silverchair&utm_medium=email&utm_campaign=article_alert-jama&utm_content=olf&utm_term=052220

Kaiser Family Foundation:
Chidambaram P. Kaiser Family Foundation Issue Brief: state reporting of cases and deaths due to COVID-19 in long-term care facilities. Accessed April 26, 2020.
<https://www.kff.org/medicaid/issue-brief/state-reporting-of-cases-and-deaths-due-to-covid-19-in-long-term-care-facilities/>

Senate Committee on Finance:
Testimony of David C. Grabowski, PhD , Senate finance committee hearing: not forgotten: protecting Americans from abuse and neglect in nursing homes. Accessed January 19, 2020.
<https://www.finance.senate.gov/imo/media/doc/Grabowski%20Senate%20Finance%20testimony%20FINAL.pdf>

Additional Resources on Disparities:**NYC DOH**

Death rates by race/ethnicity

<https://www1.nyc.gov/site/doh/covid/covid-19-data.page>

New York Magazine:

Matt Stieb, NYC Department of Health: Black and Latino New Yorkers Dying at ‘Around Twice the Rate’ of Whites, May 18, 2020

<https://nymag.com/intelligencer/2020/05/black-latino-new-yorkers-dying-at-twice-the-rate-of-whites.html>

ABC2/WMAR Baltimore:

WMAR Staff, COVID-19 Impacts Upon African American Communities, May 19, 2020

<https://www.wmar2news.com/news/coronavirus/new-poll-reveals-covid-19s-impacts-on-african-american-communities?emci=b027d2ee-b69a-ea11-86e9-00155d03b5dd&emdi=0e3c038c-e59a-ea11-86e9-00155d03b5dd&ceid=1878892>

JAMA:

Yancy, CW. COVID-19 and African Americans. *JAMA*. Published online April 15, 2020. doi:[10.1001/jama.2020.6548](https://doi.org/10.1001/jama.2020.6548)

NEJM

Matthew J. Akiyama, et al., Flattening the Curve for Incarcerated Populations - Covid-19 in Jails and Prisons, May 28, 2020

<https://www.nejm.org/doi/full/10.1056/NEJMp2005687?query=TOC>

Health Affairs:

Kristen M Azar, et al., Disparities In Outcomes Among COVID-19 Patients In A Large Health Care System In California, May 21, 2020

<https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.00598>

Shilpa Patel & Tricia McGinnis, Inequities Amplified By COVID-19: Opportunities For Medicaid To Address Health Disparities, May 29, 2020

https://www.healthaffairs.org/doi/10.1377/hblog20200527.351311/full/?utm_campaign=HASU&utm_medium=email&utm_content=COVID-19%3A+How+Medicaid+Can+Address+Disparities%2C+Opioid+Use+Disorder+Treatment%2C+Reducing+Deaths+In+Nursing+Homes%2C+Latest+Congressional+Coverage+Proposals%3B+Iowa+s+Medicaid+Healthy+Behaviors+Program&utm_source=Newsletter

Ruqaiyah Yearby & Seema Mohapatra, Structural Discrimination In COVID-19 Workplace Protections, May 29, 2020

https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full/?utm_campaign=HASU&utm_medium=email&utm_content=COVID-19%3A+How+Medicaid+Can+Address+Disparities%2C+Opioid+Use+Disorder+Treatment%2

VERA INSTITUTE OF JUSTICE:

Vera Resources on Immigrant Population

- **Our new website [Immigrant Justice and the COVID-19 Pandemic](#)** includes a compilation of our resources and information for the public, advocates, attorneys, government officials, and other stakeholders. Here is Vera's recent tweet promoting the resources.
- **How Local Leaders Can Ensure Immigrant Justice During [COVID-19 Guidance Brief](#):** Our immigration system is on the threshold of a new crisis precipitated by the COVID-19 pandemic. People in detention face high risks of infection from the close quarters of facilities, shelters, and courtrooms, and they lack adequate sanitation, health care, and protective measures. *The Vera Institute of Justice created this guidance brief to equip local leaders with practical actions and policy solutions to ensure equal access to justice amid the COVID-19 pandemic, including direct financial relief, publicly-funded deportation defense, and calling for the release of immigrants in detention.* Here is Vera's recent tweet promoting the guidance.
- **Support Universal Representation Fact Sheet:** At a time when the stakes for people in immigration detention could not be higher, universal representation advances due process, helps secure release from detention, defends family unity, stabilizes communities and economies, and secures justice for all. This fact sheet provides an overview of Vera's SAFE Network and the growing movement for universal representation for immigrants.
- **Public Support in the United States for Government-Funded Attorneys in Immigration Court:** Vera partnered with a survey firm, Lucid, to design and field a survey exploring attitudes toward government-funded attorneys for people in immigration court in the United States. The survey was fielded online in September 2019 and included 6,000 adults residing in the US. The report revealed overwhelming public support for government-funded attorneys for people in immigration court.
- **Vera Blog: Communities Need State and Local Deportation Defense Programs Now More Than Ever.** Also, see here for sample messaging and talking points to assist in advocating for publicly-funded deportation defense programs amid COVID-19.

American Immigration Council:

Jorge Loweree, et al., The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System, May 27, 2020

<https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system#.XtBQjtjovCZs.email>

Navajo Nation

<https://www.nytimes.com/2020/05/30/opinion/sunday/coronavirus-native-americans.html?smid=tw-nytopinion&smtyp=cur>

<https://www.asaging.org/blog/navajo-nation-pre-existing-conditions-will-remain-long-past-pandemic>

<https://www.ndoh.navajo-nsn.gov/COVID-19>

Mothers and Children

[When Separation Is Not the Answer: Breastfeeding Mothers and Infants affected by COVID-19](https://onlinelibrary.wiley.com/doi/abs/10.1111/mcn.13033?campaign=wolacceptedarticle)
<https://onlinelibrary.wiley.com/doi/abs/10.1111/mcn.13033?campaign=wolacceptedarticle>

American Psychological Association Disabilities Resources

<https://www.apa.org/topics/covid-19/disability-tip-sheet>

United Nations

United Nations (2020). Policy brief: the impact of COVID-19 on older persons. Retrieved on May 20, 2020, from:

<http://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/COVID-Older-persons.pdf>

United Nations Office of the High Commission on Human Rights (1991). UN Principles for Older Persons. Retrieved on May 15, 2020, from:

<https://www.ohchr.org/en/prfessionalinterest/pages/olderpersons.aspx>

Vaccines:

JAMA

Sarah Schaffer De Roo, et al., Planning for a COVID-19 Vaccination Program, May 18, 2020

[https://jamanetwork.com/journals/jama/fullarticle/2766370?guestAccessKey=b1789fba-d24e-49f2-8067-](https://jamanetwork.com/journals/jama/fullarticle/2766370?guestAccessKey=b1789fba-d24e-49f2-8067-7628536a64a5&utm_source=silverchair&utm_campaign=jama_network&utm_content=covid_weekly_highlights&utm_medium=email)

[7628536a64a5&utm_source=silverchair&utm_campaign=jama_network&utm_content=covid_weekly_highlights&utm_medium=email](https://jamanetwork.com/journals/jama/fullarticle/2766370?guestAccessKey=b1789fba-d24e-49f2-8067-7628536a64a5&utm_source=silverchair&utm_campaign=jama_network&utm_content=covid_weekly_highlights&utm_medium=email)

Palliative Care:

Trauma and Loss

<https://hospicefoundation.org/Education/Therapeutic-Response-to-Trauma-and-Loss-in-the-COV>

Center to Advance Palliative Care Resources and Toolkit:

<https://www.capc.org/toolkits/covid-19-response-resources/>

Global:

The New York Times

Jin Wu et al., 87,000 Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak, continuing coverage, last updated May 28, 2020

[https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-](https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html?campaign_id=29&emc=edit_up_20200528&instance_id=18880&nl=the-upshot®i_id=69741277&segment_id=29429&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348)

[deaths.html?campaign_id=29&emc=edit_up_20200528&instance_id=18880&nl=the-](https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html?campaign_id=29&emc=edit_up_20200528&instance_id=18880&nl=the-upshot®i_id=69741277&segment_id=29429&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348)

[upshot®i_id=69741277&segment_id=29429&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348](https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html?campaign_id=29&emc=edit_up_20200528&instance_id=18880&nl=the-upshot®i_id=69741277&segment_id=29429&te=1&user_id=6e8449ef70c4ce15f55ec38ace345348)

World Health Organization:

WHO COVID-19 Dashboard

<https://covid19.who.int/>

COVID-19 Situation Update for the WHO African Region (May 27, 2020)

https://apps.who.int/iris/bitstream/handle/10665/332199/SITREP_COVID-19_WHOAFRO_20200527-eng.pdf

COVID-19 could deepen food insecurity, malnutrition in Africa

<https://www.afro.who.int/news/covid-19-could-deepen-food-insecurity-malnutrition-africa>

Africa COVID-19 cases top 100 000

<https://www.afro.who.int/news/africa-covid-19-cases-top-100-000>

MEMORANDUM

To: Kathy Baxter
CC: Health Law Section
From: Terri A. Mazur, Chair, Women in Law Section
Date: June 9, 2020
Re: NYSBA Health Law Section CIVUS-19 Report Addendum on

The Women in Law Section has reviewed the Health Law Section's May 2020 Addendum to the Health Law Section's May 2020 Addendum to its Report on legal issues facing the health care system as a result of COVID-19 ("Addendum"), which recommends steps to ensure that the disproportionate impact of COVID-19 on Black/African American and Hispanic/Latino groups, including on older adults, nursing home residents and health care workers is being addressed. The Women in Law Section supports approval of the Addendum because we believe many women, particularly those of color or of limited economic means, are nursing home residents and health care workers. Persons of color, including women, have suffered disproportionately from COVID-19, because of underlying health conditions, as well as the long-standing inequities in the health care system and other sectors of our society. This includes those who did not have the benefit of working remotely from home and were deemed essential workers required to report to work. As members of the legal profession, we are charged with being a voice for the voiceless and to protect the vulnerable and underrepresented.

To the Members of the Executive Committee:

I'm writing to ask that consideration of the Health Care Report be postponed by the Executive Committee or by the sponsors until the November meeting of the House. I along with a number of other past presidents are concerned that a report of this complexity and length which also has a number of controverted issues not be considered at the meeting at which it is introduced nor subjected to an up or down vote at that time. Best practice in the past has been to present such reports and take questions at the first meeting and then have a debate at the second meeting so that the debate can be more informed and deliberate and compromises can be worked out in the interim. That practice is particularly applicable here under the circumstances. Most of us have just seen the report and I doubt that I am alone in not understanding much of it because it is not a report simply on the law but it makes a number of factual conclusions and recommendations not within the knowledge and expertise of lawyers. We also do not have any reports from sections or committees on such issues as immunity. Furthermore, we are not meeting in person and cannot exchange informal opinions and find common ground. There is no way we can have the report adequately explained and then a deliberate and careful debate which is currently allocated for 35 minutes. We ask in the interest of careful deliberation and fairness to the members of the House that the sponsors agree to explain the report and answer questions at the meeting on Saturday and that consideration of the report be postponed until the November meeting.

Sincerely,

A. Vincent Buzard, Past President
Mark Alcott, Past President
A. Thomas Levin, Past President
Vincent Doyle, Past President
Sharon Stern Gerstman, Past President
James Moore, Past President
Bernice Leber, Past President

NYSBA HOUSE OF DELEGATES COVID-19 RESOLUTIONS

Resolution #1

Recommendations

A. Public Health Legal Reforms and Emergency Preparedness

- A. 1. Recommend the Department of Health (DOH), (or through it, the NYS Task Force on Life and the Law(NYSTFLL)), review and consider:
 - (a) Enactment into New York Law of the **Model State Emergency Health Powers Act** (MSEHPA), developed by the Center for Law and Public Health at Georgetown and John Hopkins Universities (2001), as informed by the Columbia University Center for Health Policy Gap Analysis (2008), and as otherwise updated; and
 - (b) Adoption of the, “**Crisis Standards of Care,**” developed by the Institute of Medicine in 2012, as is, or as otherwise updated and amended.
- A. 2. Recommend DOH review and consider:
 - (a) Appoint and maintain a core team of emergency preparedness experts to review evidentiary sources and draft legislation to strengthen emergency preparedness planning;
 - (b) Re-evaluate the public benefit and costs of reinstating laws waived during COVID-19.

Resolution #1 (continued)

B. Ethical Issues: Ethics Guidelines including Allocation of Life-Saving Equipment, and DNR/Futility and Virus Testing

B.1. Recommend DOH, NYSTFLL, or Governor review/consider:

- (a) NYSTFLL 2015 Report, “Ventilator Allocation Guidelines,” and adopt the policy as is, or as amended; and
- (b) Issue emergency regulations mandating all providers and practitioners follow the ethics guidelines, and ensure:
 - i. the needs of vulnerable populations, including persons and communities of color, older adults and nursing home residents, persons with disabilities or who are incarcerated, and immigrants, are met in a non-discriminatory manner in the implementation of emergency regulations and guidelines;
 - ii. provision of palliative care as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID-19 crisis, especially when access to life-saving measures, desired equipment or other resources are not available;
 - iii. provision of education and training to physicians, health care practitioners, and institutional triage and ethics committees; and
 - iv. provision of generalist-level palliative care education and training for all health care workers and health-related service workers in all settings who are providing supportive care.

B.2. Recommend amendment of the New York State Public Health Law: Article 29-C “Health Care Proxy,” to require in the case of a State Disaster Emergency Declaration:

- (a) at least one, rather than two, witnesses, or
- (b) attestation by a notary public in person or remotely.

B.3. Recommend the DOH or Governor review and consider: Establishing a coordinated statewide plan for Virus Testing to ensure:

- (a) frontline health care workers are prioritized in access to rapid diagnostic testing; and
- (b) the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

Resolution #2

Recommendations

A. Providers

A.1. Amend New York Law:

Purchasing Necessary Supplies: Amend New York General Business Law Section 396-r to include prohibition from exorbitant pricing of all equipment and products of any kind used either in patient care or to protect health care workers from infection.

A.2. Continue Waivers and Executive Orders (See also Immunities):

(a) Ability to Exceed Certified Bed Capacity for Acute Care Hospitals: Continue the waiver by the Governor's Executive Orders 202.1 and 202.10 of the DOH regulations governing certified bed restrictions for the pendency of the State Disaster Emergency.

(b) Limitation on Resident Hours Working in Acute Care Hospitals: Continue the Governor's Executive Order 202.10's waiver of NYCRR Article 10, Section 405, limiting resident work hours for the pendency of the State Disaster Emergency.

(c) Temporary Changes to Existing Hospital Facility Licenses Services and the Construction and Operation of Temporary Hospital Locations and Extensions: Continue the waiver provided in Executive Orders 202.1 and 202.10 of the State requirements that restrict the ability of Article 28 facilities to reconfigure and expand operations as necessary, for the pendency of the State Disaster Emergency.

(d) Anti-Kickback and Stark (AKS) Law Compliance during the COVID-19 Emergency: New York State to adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

A.3. Older Adults, Nursing Home Providers and Nursing Home Residents: Governor, DOH, DOH Bureau of Long Term Care and State Office for Aging to ensure:

(a) Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;

(b) Adequate provision of PPE;

(c) Adequate levels of staffing;

(d) Adequate funding of employee testing, as required under Executive Order 202.30;

Resolution #2 (continued)

- (e) Consistent and timely tracking and reporting of case and death data;
- (f) Adoption of non-discriminatory crisis standards and ethics guidelines; and
- (g) Recognition and honoring of Older New Yorkers' right to health and human rights, as protected under international conventions: and
- (h) Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.

A.4. Persons incarcerated and Correctional Facilities and Care: Governor, NYS Department of Corrections and NYC Department of Corrections, to ensure:

- (a) Adequate access of persons incarcerated to COVID-19 testing, medical care and mental health and supportive services;
- (b) COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;
- (c) Release to the community of older persons who are incarcerated or living with advanced illness who do not pose a danger to the community;
- (d) Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and
- (e) Recognition and honoring of the right to health and human rights of persons who are incarcerated, as protected under international conventions.

A.5. Immigrants in Detention Facilities: Governor, DOH or other state agencies:

In its exercise of state police powers in the COVID-19 public health emergency, New York State must take steps, similar to those outlined above, in cooperation with federal agencies to ensure:

- (a) Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers

A.6. Telehealth

Governor or DOH to review and consider:

Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

Resolution #2 Continued:

B: Workforce, Schools, Child Care and Disproportionate Impact upon Communities of Color and Vulnerable Populations

B.1. Governor, Board of Regents or Department of Education:

(a) Provide clear, timely guidance and support to all non-health care businesses and academic institutions to coordinate effective implementation of universal precautions and other workplace safety best practices to facilitate public health and trust, while mitigating disparate conditions during the phase-in process and long-term.

(b) Consider publicly posting essential/non-essential business operations decisions with an industry-wide impact on the Empire State Development (ESD) website in real time to mitigate confusion and enhance institutional compliance.

(c) Consider granting staffing firms dedicated to childcare the provider status necessary to enable them to operate in New York State and supplement the childcare workforce in order to ensure the health and safety of our children, while enabling businesses to effectively reopen within sufficient childcare support.

(d) Consider education and training pertaining to crisis standards and civil and criminal immunity to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services.

(e) Consider enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by front-line health care workers under crisis conditions.

B.2. Governor or DOH or other state agencies: Enhance regulatory oversight, to ensure:

(a) adequate and non-discriminatory allocation of resources to persons and communities of color and vulnerable populations;

(b) equitable access of persons and communities of color and vulnerable populations to health and mental health services, including palliative care as an ethical minimum to mitigate suffering among those persons who remain in institutional, facility, residential or home or care settings, or are hospitalized during the COVID-19 crisis, especially when desired equipment or other resources are not available;

(c) provision of PPE to essential health care workers at highest risk in delivering essential services to vulnerable populations; and

(d) monitoring conformity with federal laws barring discrimination.

Resolution #3

Vaccine Mandate Recommendation (revised 6-12-20)

After testing and as supported by scientific evidence, once a safe and effective COVID-19 vaccine becomes available, the NYSBA Health Law Section recommends;

A.1. That a vaccine subject to scientific evidence of safety and efficacy be made widely available, and widely encouraged, and if the public health authorities conclude necessary, required, unless a person's physician deems vaccination to be clinically inappropriate.

A.2. Steps to ensure a planned vaccination program:

(a) Rapid mass vaccination achieved through equitable distribution;

(b) Prioritizing health care workers and individuals at highest risk for complications and virus transmission to others if inadequate vaccine supply; and

(c) Linguistically and culturally competent vaccine educational and acceptance program.
(Schaffer DeRoo S, Pudalov NJ, Fu LY. Planning for a COVID-19 Vaccination Program. *JAMA*. Published online May 18, 2020. doi:10.1001/jama.2020.8711)

Resolution #4

Recommendations

A. COVID-19 Qualified Legal Immunities for Providers and Practitioners

3.A.1. Patient Care Immunities: Federal and NYS Governments:

Provide/extend criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities related to provision of care to patients in connection with the COVID-19 disaster emergency (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).

3.A.2. Ethics Guidelines Immunities: Governor or DOH :

(a)waive/suspend certain NYS laws to provide/extend immunity from civil and criminal liability to providers and practitioners who follow the ethics guidelines (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm); and

(b)direct all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

3.A.3. DNR/Medical Futility Immunities: Governor, DOH, or Amend Law: provide/extend immunity from criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities, when the following steps are taken (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm):

(a)a practitioner, as defined in Public Health Law Section 2994-a, determines that a patient's resuscitation would be "medically futile" as defined in PHL 2961.12;

b) a second practitioner concurs with the determination; and

c) both practitioners document their determination in the medical record; and in connection therewith, revoke or amend all laws and regulations prohibiting or penalizing such determinations and actions, including without limitation, those set forth on page 12 of this Report.

B. COVID-19 Business of Health Care Immunities:

3.B.1. Anti-Kickback and Stark Laws: New York State:

Resolution #4 continued:

Adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

3.B.2. Vendors: New York State:

Consider extending immunity under NY UCC section 2-615(a) to supply chain vendors where specific performance under a contract becomes impracticable due to unforeseen event or good faith compliance with governmental orders or regulations during crisis.

C. COVID-19 Regulatory Waiver Immunities: New York State:

3C. Provide/extend immunity from civil and criminal liability for practitioners and providers related to acts or omissions under regulatory waivers, such as would be applicable to credentialing, licensure, registration, and scope of practice, during the COVID-19 declared emergency and disaster (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Technology and the Legal Profession.

Attached is a report from the Committee on Technology and the Legal Profession recommending that NYSBA support amendment of the mandatory continuing legal education rule be amended to require one credit in cybersecurity. The credit would be included within the “ethics and professionalism” category and would not add to the minimum 24-hour biennial rule for experienced attorneys or the 32-hour biennial requirement for new attorneys. The amendment would be effective for four years and revisited after that time.

The committee notes that New York ethics rules require lawyers to keep up with technology and to exercise reasonable care in preventing disclosure of confidential information. Accordingly, educating attorneys regarding cybersecurity has taken on increased importance. Both Florida and North Carolina have added a technology requirement to their CLE requirements. Rather than recommend a general technology requirement, the committee believes cybersecurity protection is a pressing issue for lawyers and should be emphasized through a one-credit requirement.

This report was published in the Reports Community February 2020. The Local and State Government Law Section has indicated that it opposes the proposal, and the Trusts and Estates Law Section indicates that it supports.

The report will be presented at the June 13 meeting by committee co-chair Mark A. Berman.

**REPORT RECOMMENDING THAT THE ATTORNEY
CONTINUING LEGAL EDUCATION BIENNIAL
REQUIREMENT BE MODIFIED TO REQUIRE THAT
THE ETHICS AND PROFESSIONALISM
REQUIREMENT INCLUDE FOR FOUR YEARS ONE
CREDIT ON CYBERSECURITY**

COMMITTEE ON TECHNOLOGY AND THE LEGAL PROFESSION

OF THE

NEW YORK STATE BAR ASSOCIATION

January 27, 2020



*Opinions expressed are those of the Committee preparing the Report
and do not represent those of the New York State Bar Association unless and until
the report has been adopted by the Association's House of Delegates or Executive Committee.*

COMMITTEE ON TECHNOLOGY AND THE LEGAL PROFESSION

CO-CHAIRS

Mark A. Berman

Ganfer Shore Leeds & Zauderer LLP

Gail L. Gottehrer

Law Office of Gail Gottehrer LLC

COMMITTEE MEMBERS

Seth Agata
Alison Arden Besunder
Shoshanah V. Bewlay
John D. Cook
Hon. Fern A. Fisher
Parth N. Chowlera
Tracee E. Davis
Sarah E. Gold
Maura R. Grossman
Ronald J. Hedges
Shawndra Jones

James B. Kobak, Jr.
Glenn Lau-Kee
Ronald C. Minkoff
David P. Miranda
Mauricio F. Paez
Marian C. Rice
Kevin F. Ryan
Prof. Roy D. Simon
Sanford Strenger
Ronald P. Younkings

EXECUTIVE SUMMARY

The Committee on Technology and the Legal Profession (the “Committee”) of the New York State Bar Association (“*NYSBA*”) proposes to the Executive Committee of *NYSBA* that it recommend that the biennial, twenty-four hour credit requirement for attorney continuing legal education requirement (“CLE”) contained in the CLE Board Rules and Regulations be modified to require one credit on the topic of cybersecurity. The credit would be considered under “*Ethics and Professionalism*” and it would be included within the existing biennial “*Ethics and Professionalism*” requirement. The one credit would not add to the already-required thirty-two (32) credit hours for new attorneys or the twenty-four (24) hours for more experienced attorneys. The requirement would exist for four years and would be revisited thereafter and potentially be extended depending on the state of the legal profession at the time regarding cybersecurity, including the “hacking” of law firm electronically stored information.

INTRODUCTION

NYSBA has a long history of being on the cutting edge of CLE requirements for lawyers. *NYSBA* considers technological competence in the practice of law to be essential to respond effectively to the needs of our changing society and a CLE requirement designed to educate lawyers on how to protect confidential and proprietary client and law firm electronic assets relates directly to legal competency.

Mandatory CLE was initially conceived, supported and implemented as a way to enhance both lawyer competence and public trust in the profession. The ABA’s 1992 MacCrate Report, entitled “*Law Schools and the Profession: Narrowing the Gap*,” provided a platform for states considering whether to mandate CLE requirements and identified four basic values of professional responsibility. As described by one commentator in 1998, the four values are: “1) providing

competent representation; 2) striving to promote justice, fairness and morality; 3) striving to improve the profession; and 4) professional self-development.” Including a mandatory cybersecurity component will help advance those values by providing attorneys with ongoing education in this critical area and increasing public trust that their confidential and proprietary information will be secure when in the possession of attorneys.

THE LANDSCAPE OF HACKING IN THE LEGAL PROFESSION

The *New York Law Journal* (“*NYLJ*”) reported in an October 2019 article, entitled “Eight NY Law Firms Reported Data Breaches as Problems Multiply Nationwide,” that the number of law firm data breaches in New York State doubled in 2018 and that “[d]espite a number of high-profile breaches putting firms on notice of cyber risks in recent years, there are indications that law firm breaches are occurring more frequently, not less.” The article also reported that some cybersecurity lawyers and consultants said the numbers “likely represent a tiny fraction of the breaches affecting the legal industry. Law firms, like other privately held businesses, don’t often publicize when their data is breached, and many may not report it to state officials, depending on the law.” The *NYLJ* also reported in an October article entitled, How Vendor Breaches Are Putting Law Firms at Risk, that “[e]xternal breaches, including phishing and hacking as well as vendor incidents, were the most commonly identified source of data exposure events reports by law firms.”

Also, in an October 2019 article, entitled “As Hackers Get Smarter, Can Law Firms Keep Up?,” the *NYLJ* reported that “large and small law firms can do much better in preventing and reacting to data breaches” and “cautioned that the legal sector may risk falling behind other industries.” The *NYLJ* noted that “[w]hile hackers are getting smarter, it’s also the case that some law firms aren’t keeping up with security guidelines developed inside the industry and in other

professional fields, according to legal industry surveys and interviews with security consultants and law firm leaders.” The article quoted Austin Berglas, former head of the FBI’s cyber branch in New York, as stating that “he would rate law firm cybersecurity as ‘middle of the road’ now, as firms juggle the competing interests of access and security.”

The article then quoted Logicforce, an IT law firm consulting company that had surveyed midsize law firms, which noted that the legal industry “remains very vulnerable to cyberattacks.” The article noted that, according to the survey, “fewer firms in 2019 compared with last year’s survey reported implementing prevention techniques such as multifactor authentication and data loss prevention technology, which can scan and block the transmission of personally identifiable information.” Critically, the *NYLJ* article made clear that “[e]thics laws require lawyers to keep pace with technology to protect client information. Still, some observers point to a slow pace of budding ethics rules on cybersecurity questions.”

NEW YORK’S ETHICAL FRAMEWORK

NYSBA Committee on Professional Ethics Op. 950 provides:

A fundamental principle in the client-lawyer relationship “is that, in the absence of the client’s informed consent or except as permitted or required by the Rules of Professional Conduct (the “Rules”), the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source.” Rule 1.6, Cmt. [2]. The attorney not only has an obligation to refrain from revealing such information, but also must *exercise reasonable care* to prevent its disclosure or use by “the lawyer’s employees, associates, and others whose services are utilized by the lawyer.” (emphasis added).

NYSBA Committee on Professional Ethics Op. 1019 provides that the duty of “reasonable care”

does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered to determining the reasonableness of the lawyer’s expectation of confidentiality

include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

In fact, NYSBA Committee on Professional Ethics Op. 842 provides that a lawyer must take reasonable care to *affirmatively* protect a client's confidential information. It further provides that:

[c]yber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. Lawyers can no longer assume that their document systems are of no interest to cyber-crooks. That is particularly true where there is outside access to the internal system by third parties, including law firm employees working at other firm offices, at home or when traveling, or clients who have been given access to the firm's document system. See, e.g. Matthew Goldstein, "Law Firms Are Pressed on Security For Data," N.Y. Times (Mar. 22, 2014) at B1 (corporate clients are demanding that their law firms take more steps to guard against online intrusions that could compromise sensitive information as global concerns about hacker threats mount; companies are asking law firms to stop putting files on portable thumb drives, emailing them to non-secure iPads or working on computers linked to a shared network in countries like China or Russia where hacking is prevalent)

In light of these developments, it is even more important for a law firm to determine that the technology it will use to provide remote access (as well as the devices that firm lawyers will use to effect remote access), provides reasonable assurance that confidential client information will be protected. Because of the fact-specific and evolving nature of both technology and cyber risks, we cannot recommend particular steps that would constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients, including the degree of password protection to ensure that persons who access the system are authorized, the degree of security of the devices that firm lawyers use to gain access, whether encryption is required, and the security measures the firm must use to determine whether there has been any unauthorized access to client confidential information.

New York ethics opinion make clear that lawyers have an affirmative duty to protect confidential and proprietary client and law firm information and to stay current on cybersecurity threats, including the risk of being electronically compromised and what anticipatory or counter-measures should be reasonably implemented in order to appropriately safeguard client and law firm confidential and proprietary information.

The education of lawyers on the issue of cybersecurity has become even more imperative now that New York has enacted the "*Stop Hacks and Improve Electronic Data Security*" or "*SHIELD Act*," which applies to all law firms, even to solo practitioners and small firms. The *SHIELD Act* creates, for the first time, substantive security requirements for persons or businesses that hold the "private information" of New York residents, and it: (1) expands the types of data that may trigger data breach notification to include user names or e-mail addresses, and account, credit or debit card numbers; (2) broadens the definition of a breach to include unauthorized "access" (in addition to unauthorized "acquisition"); and (3) creates a new reasonable security requirement for companies to "develop, implement and maintain reasonable safeguards to protect the security, confidentiality and integrity of" private information of New York residents. Safeguards may include designating employees to coordinate a security program, conducting risk assessments and employee training on security practices and procedures, selecting vendors capable of maintaining appropriate safeguards and implementing contractual obligations for those vendors, and securely disposing of private information within a reasonable time.

The *SHIELD Act*, as it applies to solo practitioners and small law firms, requires those persons and entities to ensure that there "are reasonable administrative, technical and physical safeguards that are appropriate for the size and complexity of the small business, the nature and scope of the small business's activities, and the sensitivity of the personal information the small business collects from or about consumers."

OTHER STATES NOW MANDATE TECHNOLOGY CLE CREDIT

The Florida Supreme Court approved a rule requiring Florida lawyers to take a minimum of three hours of technology-related CLE courses during a three-year cycle. In addition to adding the three-hour requirement, the Court amended a comment to its rule on lawyer competence to

state that lawyers could retain nonlawyer advisers with “established technological competence in the relevant field.” The Court added that competent representation may also involve cybersecurity and safeguarding confidential information. The Court also noted that “in order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology.”

The North Carolina Supreme Court also recently approved a mandatory CLE rule. It provides that:

“Technology training” shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B-1320(a)(11), or successor statutory provision, for a definition of “information technology”), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 of this subchapter: specifically, the primary objective of the program must be to increase the participant’s professional competence and proficiency as a lawyer. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool process or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; and g) practice management software. See Rule 1602 of this subchapter for additional information on accreditation of technology training programs.

THE COMMITTEE’S APPROACH

The Committee considered recommending that a general technology component be added as a required subject under New York Bar’s CLE requirement, as did Florida and North Carolina; however, the Committee agreed that such a general requirement may result in attorneys not actually focusing on what the Committee believes to be one of the most pressing and urgent issues facing our legal profession: cybersecurity protection of confidential and proprietary client and law firm electronic information and assets, which includes protecting client and law firm monies

maintained in escrow and operating accounts, all of which are subject to phishing, scams, impersonation, fraud and other wrongful artifices. The Committee believes that requiring attorneys to take one credit in cybersecurity will sensitize and educate lawyers on how to secure confidential and proprietary client and law firm electronic information, and when and how to notify clients and/or law enforcement, as appropriate, in the event of a cyber incident.

Lastly, notwithstanding reporting by the press on data breaches and, more importantly on law firm breaches, the Committee has been surprised by the relative lack of attendance at *NYSBA* CLEs on cybersecurity, whether in person or over webinars.

CONCLUSION

Accordingly, we request that the Executive Committee of the NYSBA support this important initiative by voting in support of the Committee's recommendation.

To: Committee on Technology and the Legal Profession
From: Trusts & Estates Law Section, CLE Committee
Date: May 8, 2020
Re: Proposed Modification of MCLE Requirements

The Committee on Technology and the Legal Profession of the New York State Bar Association has proposed a modification of the New York State CLE Board Regulations & Guidelines (*see* “Report Recommending that the Attorney Continuing Legal Education Biennial Requirement Be Modified to Require that the Ethics and Professionals Requirement Include for Four Years One Credit on Cybersecurity,” January 27, 2020). The proposed modification is that, for a period of four years — two biennial registration periods — one of the credit-hours of continuing legal education already mandated in the area of ethics and professionalism (*see* 22 NYCRR §1500.12 [a] [1] and 22 NYCRR §1500.22 [a]) be devoted to cybersecurity. At the end of the four-year period, the Committee on Technology and the Legal Profession would evaluate whether to extend the requirement. We recommend that the proposal be approved. Safeguarding client information in electronic form is a timely and important ethics issue for attorneys practicing in New York State.

**COMMENTS ON THE REPORT OF THE
COMMITTEE ON TECHNOLOGY AND THE LEGAL PROFESSION
BY THE LOCAL AND STATE GOVERNMENT LAW SECTION**

These comments are respectfully submitted by the Local and State Government Law Section (the “Section”) on the report of the Committee on Technology and the Legal Profession (the “Committee”) entitled “Report Recommending that the Attorney Continuing Legal Education Biennial Requirement Be Modified to Require that the Ethics and Professionalism Requirement Include for Four Years One Credit on Cybersecurity” dated January 27, 2020.

While the Section agrees with the Committee that cybersecurity for law firms is of critical importance, and agrees that this subject should be offered as an option to fulfill the required continuing legal education (“CLE”) ethics credits, we disagree with the recommendation that it be mandatory that one credit of the four required CLE ethics credits be on this topic for the following reasons:

1. It has not been demonstrated that cybersecurity is a topic over which most attorneys have control. Many attorneys, particularly those employed by larger law firms and government entities, have little, if any, ability to control or influence their employer’s cybersecurity policies and do not typically handle escrow funds. Similarly, they do not control the choice of vendors to be used by their employers, or those vendors’ cybersecurity choices or protections. While the Section recognizes that phishing emails and hacking attempts may be sent to any attorney, and that attorneys should be educated about how to avoid such attempts, this topic does not require an hour of CLE for every attorney for every biennial reporting period. The first line of defense is the email software utilized by the attorney’s employer, whether firm or governmental entity, and the majority of attorneys have no control over those choices.
2. Enacting this requirement effectively limits the amount of CLE programming that the Section can provide on ethical subjects specific to Section members during Section meetings. One of the Section’s goals has been to provide, during its in-person Fall and Annual Meetings, sufficient CLE opportunities for the members to satisfy their CLE requirements. Given the finite time available for programming during Section meetings, particularly the annual meeting in New York City, the imposition of this requirement will mean, as a practical matter, that a portion of the time otherwise devoted to Section-specific ethical education will be replaced with this more general CLE instruction in order to fulfil the requirement, thereby diluting the member benefit of providing Section-specific information. While it is true that the Section could offer additional substantive and ethical programming via webinars throughout the year to make up for this change, it is not as optimal as engaging in the ethical discussions of municipal law subjects that typically occur at the in-person meetings.
3. As a corollary to the second point, the assertion may be made that the Section (or another entity) could provide the cybersecurity requirement via webinar or at a separate meeting. While technically correct, this also raises concerns. For example,

Section attorneys are not typically cybersecurity experts, and the Section likely would need to locate outside sources to provide this education to their members. Some governmental entities typically provide their attorneys with in-house CLE. The City of New York is an example. If this requirement is imposed, the City will be burdened with either developing new courses to satisfy this requirement or obtaining the materials from outside sources, neither of which is optimal because, as noted in item 1 above, few of their employees would have any decision-making authority concerning cyber-security.

In sum, the goal of sensitizing attorneys to cybersecurity issues is laudable. However, it can be achieved by methods other than making training a mandatory hour of education for every attorney.



**Tannenbaum Helpert
Syracuse & Hirschtritt** LLP

900 Third Avenue New York, NY 10022-4775
Tel: (212) 508-6700 | Fax: (212) 371-1084
www.thsh.com | @THSHLAW

Vincent J. Syracuse
Direct Dial: (212) 508-6722
Fax: (212) 371-1084.
E-mail: Syracuse@thsh.com

June 5, 2020

Mark A. Berman, Esq.
Ganfer Shore Leeds Zauderer LLP
360 Lexington Avenue
New York, New York 10017

Re: Report Recommending that the Attorney Continuing Legal Education Biennial Requirement Be Modified to Require that the Ethics and Professionalism Requirement Include for Four Years One Credit on Cybersecurity (the “Cybersecurity Report”)

Dear Mark:

I am a member of the NYSBA Committees on Attorney Professionalism and Continuing Legal Education and a former Chair of the Commercial & Federal Litigation Section. I have also authored over 75 Attorney Professionalism Forums in the NYSBA Journal since January 2012.

I write to support the adoption of the Cybersecurity Report by the House of Delegates at tomorrow’s meeting. I endorse the proposal that for a period of four years one of the credit-hours of continuing legal education already mandated in the area of ethics and professionalism (*see* 22 NYCRR §1500.12 [a] [1] and 22 NYCRR §1500.22 [a]) be devoted to cybersecurity with an evaluation whether to extend the requirement to take place at the end of the four years. As emphasized in our June/July Forum, which discusses the ethical and professional challenges that we have all been facing practicing law during the pandemic, the protection of client information from cybersecurity threats is an ethical issue of paramount importance to all attorneys practicing in New York State and should be make a part of the continuing legal education ethics requirement.

Sincerely,

s/Vincent J. Syracuse

Vincent J. Sryacuse



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

YOUNG LAWYERS SECTION

2020-2021 Officers

MICHAEL D. DIFALCO

Chair
Aiello, DiFalco & Gianakos LLP
600 Old Country Road – Suite 520
Garden City, New York 11530
mdd@matlawyers.com

ANNE LOUISE LABARBERA

Chair-Elect
Thomas LaBarbera Counselors At Law
11 Broadway Suite 6015
New York, New York 10004
annelabarbera@gmail.com

BRANDON LEE WOLFF

Treasurer
LeClairRyan, PLLC
885 Third Avenue - 16th Floor
New York, NY 10022
brandon.wolff@leclairryan.com

JOSEPHINE BAHN

Secretary
Federal Deposit Insurance Corporation
Washington, DC
Josephine.bahn@gmail.com

To: Mark Berman & the Committee on Technology and the Legal Profession

From: Young Lawyers Section

The Young Lawyers Section supports the proposed modification to the MCLE requirements contained in the Report your Committee prepared. We agree that it is critical for all lawyers in New York State to fully understand and appreciate the necessity of cybersecurity. Including cybersecurity as part of the MCLE requirements would ensure that law firms are better equipped to practice law in 2020 and beyond. Especially as we work from home, relying on digital technology to engage with our clients, our colleagues, the courts and others, it is imperative that we practice securely.

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

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

TO THE FORUM:

I am the managing partner of a general practice law firm of approximately 40 lawyers and 20 staff members. In response to the ongoing pandemic, all firm employees are required to work from home. While the safety of the firm's employees is always a top priority, our management team has concerns about how our employees remain in compliance with their ethical obligations during this time. Specifically, with many of our attorneys working in close quarters to other family members, how can they best ensure they are safeguarding client's confidentiality?

Additionally, our firm has implemented a number of practices to facilitate a seamless transition when working from home. For example, we provide secure remote access protected with two-factor authentication for access to our work applications. We also provide a firm-hosted cloud-based file sharing service so that our employees can transfer multiple and high-volume files to clients as well as one another throughout the workday. Are there any specific ethical obligations we should be aware of with respect to the technology and working from home? How can our firm ensure that we are using technology safely, effectively and in compliance with our ethical obligations?

Separately and surprisingly, we have reached out to adversaries requesting extensions of deadlines, and one adversary in particular was obstinate refusing to give us an extension, despite the fact that my client was one of the many individuals who had become sick because of the pandemic, forcing us to make an application to the court. Is our adversary's conduct ethical? What principles of ethics should we adhere to when dealing with unreasonable adversaries?

Lastly, given that face-to-face communications are severely limited and individual accessibility is uncertain, what are our ethical obligations with respect to the supervision of subordinate attorneys and staff?

*Sincerely,
Patty Partner*

DEAR PATTY:

The global pandemic has undoubtedly forced us to steer a course through uncharted professional territory. It has created many professional and ethical challenges as lawyers have been compelled to practice law primarily in a remote work environment.

One of the most fundamental challenges that lawyers face when working from a remote location is the necessity to protect client confidences. As discussed in prior Forums, RPC 1.6 governs a lawyer's duty of confidentiality, and this duty applies in all settings and at all times.

When working at home, it is easy to adopt casual practices. Attorneys should be wary of falling into that trap. Working remotely often creates unique circumstances of having to work in close proximity to other family members. As a result, attorneys must take extra precautions to safeguard client confidences. For example, your "remote office" should be as autonomous as possible. It is best practice to avoid working in commonly used areas of your home such as the kitchen table or the living room.

However, we understand that this might not be feasible in every situation, especially for attorneys with younger children engaging in remote learning. If your circumstances do not permit you to create a designated and private workspace within your home, you should endeavor to set clear boundaries with children, partners and other members of your household as to how they should treat your workspace and work files. You also may want to consider investing in a locked filing cabinet to store sensitive information. If you do not have locked storage, we suggest that you store your work-related materials somewhere only you can access them. Attorneys should also consider practical efforts, such as not letting children or significant others access work devices for personal use and setting up a private, password-protected, Wi-Fi network specifically for your professional work. At a minimum, your work devices (laptops, tablets, phones) should always be password-protected with strong and unique passwords.

We also suggest that you do your best to become “tech-savvy” or competent in the technology you will need when working remotely. The NYSBA Committee on Professional Ethics (the “Committee”) has opined that an attorney should only use technology that he or she is competent to use. See NYSBA Comm. on Prof’l Ethics, Op. 1025 (2014). Accordingly, a law firm should take appropriate steps to ensure that its attorneys are familiar with the firm’s operating systems and computer programs and the firm’s policies concerning the use of those systems/programs before transitioning to a fully remote work environment.

But, that is only half the battle. Attorneys also should be cognizant of the heightened risk of cybersecurity threats when working remotely. Comment [8] to RPC 1.1 states: “to maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information.” As addressed in a prior Forum, attorneys and law firms have an ethical obligation to institute and maintain sound cybersecurity protocol, and to ensure that third-party vendors do the same. See Vincent J. Syracuse, Maryann C. Stallone, Richard W. Trotter &

Carl F. Regelman, Attorney Professionalism Forum, N.Y. St. B.J., June 2017, Vol. 89, No. 5.

Phishing scams are an example of a common cybersecurity threat to law firms. These scams include fraudulent emails that appear to be sent from a genuine source, such as a colleague, family member or personal banking institution, for the purpose of obtaining personal information, such as passwords and banking details, and defrauding attorneys or their firms. For this reason, attorneys should be extra vigilant when reviewing emails and downloading files. It is always a best practice to double check the email address of the sender and confirm the email is legitimate, as many hackers will create fake email accounts with only slight variations to that of the individual the hacker is purporting to impersonate. Attorneys also should avoid downloading files or clicking on links from an email that they are not expecting, and immediately bring emails that appear to be suspicious to the attention of the firm’s IT department for further investigation.

Furthermore, we recommend that attorneys access their firm networks remotely through a Virtual Private Network (VPN), an encrypted connection over the internet from a device to a network. The encrypted connection



helps ensure that sensitive data is safely transmitted over the internet. Firms should always keep their VPNs current and deploy all patches with updated security configurations. Moreover, it is critical to maintain proper multi-factor authentication for all VPN access to networks.

Cybersecurity threats also arise with the use of cloud-based file-sharing services to send and receive confidential client documents. A 2014 report by the Department of Homeland Security recognized that “online tools that help millions of Americans work from home may be exposing both workers and businesses to cybersecurity risks.” Michael Roppolo, *Work-from-home remote access software vulnerable to hackers: Report*, CBS News (July 31, 2014).

In two ethics opinions issued in 2014, the Committee concluded that giving lawyers remote access to client files was not unethical, as long as the technology used provides reasonable protection to confidential client information, or the law firm informs the client of the risks and obtains informed consent from the client to proceed. See NYSBA Comm. on Prof’l Ethics, Op. 1019 (2014) and NYSBA Comm. on Prof’l Ethics, Op. 1020 (2014). In Opinion 1019, the Committee noted that “because of the fact-specific and evolving nature of both technology and cyber risks, we cannot recommend particular steps that would constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients.” *Id.* However, Comment [17] to RPC 1.6 instructs us that “[t]he key to whether a lawyer may use any particular technology is whether the lawyer has determined that the technology affords reasonable protection against disclosure.” RPC 1.6, Comment [17].

To meet the reasonable care standard set forth in RPC 1.6, attorneys should consult with their firm’s IT department or service provider to investigate whether their firm’s file-sharing services implement reasonable security measures to protect client confidence. Where possible, the firm should implement two-factor authentication to access its work applications and software. If after speaking with your IT provider/personnel you continue to have doubts as to security, you should obtain the client’s consent before sharing any files or documents. The failure to employ basic data-security measures can have severe consequences, including civil liability for professional malpractice.

A security measure that law firms should consider implementing to protect client confidences is the encryption of files and emails sent both inside and outside the firm. Encryption is the process of converting digital information into a code, to prevent unauthorized access by outside parties

Additional best practices in addressing cybersecurity risks include: (1) understanding and using reasonable security measures, such as secure internet access methods; when accessing files remotely, attorneys should avoid logging on to unsecured Wi-Fi networks or “hotspots,” which can expose both the attorney and the firm’s files to malware – software designed by hackers that can infiltrate remote desktops and whose capabilities include logging keystrokes, uploading discovered data, updating malware and executing further malware; (2) training non-lawyer support staff in the handling of confidential client information and to report suspicious activity; (3) clearly and conspicuously labelling confidential client information as “privileged and confidential”; (4) conducting due diligence on third-party vendors providing digital storage and communication technology; (5) creating and implementing a data breach incident response plan; and (6) assessing the need for cyber insurance for data breaches. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 477 (May 2017).

Using secure internet access is of critical importance to avoid a man-in-the-middle attack, or “MITM” attack, which occurs when the communication between two systems is intercepted by a third party, i.e., a Man-in-the-Middle. This can happen in any form of online communication, such as email, web-browsing, and even social media. The MITM can use a public Wi-Fi connection to gain access to your browser, or even compromise your entire device. Once the MITM gains access to your device they have the ability to steal your credentials, transfer data files, install malware, or even spy on the user. To avoid the potentially significant and disastrous effects of a MITM attack, you should work off a secure Wi-Fi network and avoid using “hotspots.”

Additionally, when using video-conferencing platforms such as Zoom, make sure that your meetings are password-protected to avoid a type of cyberattack called “Zoom-bombing,” where strangers hijack a private Zoom teleconferencing chat and draw offensive imagery onscreen, such as pornographic images, personal information of the individuals in the chat, and even taunting them with hate speech and threats.

Turning to the part of your question regarding the civility (or lack thereof) of your adversary, the pandemic is certainly no excuse for bad behavior. As discussed in a recent Forum, RPC 3.4 governs “fairness to opposing party and counsel” and provides that when dealing with an opposing party and the opposing party’s counsel, an attorney must act with fairness and candor. See RPC 3.4; see also Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelman & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., April 2020, Vol. 92, No. 3. The commentary to Rule 1.2 further provides that in

accomplishing the client's objectives, the lawyer should not be offensive, discourteous, inconsiderate or dilatory. RPC 1.2 Comment [16]. And, while the RPC does not specifically address an attorney adversary's obligations under Rule 3.4 or 1.2 in the wake of a global pandemic, it is axiomatic that lawyers should be particularly sensitive to reasonable requests for extensions under such circumstances.

While your adversary's refusal to grant you a reasonable extension is not a per se violation of the RPC or a basis for a report to the Disciplinary Committee, such conduct may violate the New York State Standards of Civility (the "Standards"), particularly if this is the first time you are asking for an extension on the motion. See 22 N.Y.C.R.R. § 1200, App. A. As discussed in a prior Forum, the Standards of Civility were adopted as a guide for the legal profession, including lawyers, judges and court personnel, and outline basic principles of behavior to which lawyers should aspire. See Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2016, Vol. 88, No. 3.

The language of the Standards of Civility is clear – in the absence of a court order, a lawyer should agree to reasonable requests for extensions of time when the legitimate interests of the client will not be adversely affected. See 22 N.Y.C.R.R. § 1200, App. A. An adversary who refuses to provide a reasonable extension during the global pandemic in order to gain some tactical advantage is not just exhibiting bad form, but is creating a negative reputation and relationship with their adversary that may ultimately adversely affect their position in the litigation. By way of example, an uncooperative attorney is unlikely to get a professional courtesy in the future. Moreover, judges and juries generally do not look kindly upon attorneys that do not extend professional courtesies. In the ordinary course, reasonable requests for extensions of time should be handled by the attorneys in the case, not by the courts.

The flip side to this scenario, which is also likely to occur, is attorneys using the pandemic as an excuse for their dilatory tactics to delay the case and frustrate your client's ability to recover. As is the case with many ethical rules, the deciding factor in whether to grant or deny a request for an extension is the reasonableness of the request.

Separately, your obligations with respect to the supervision of subordinate attorneys remain unchanged. RPC 5.1 sets forth the responsibilities of law firms, partners, and managers over other lawyers. Lawyers serving in a managerial or supervisory role are required to make reasonable efforts to ensure that all attorneys comply with their ethical obligations. This duty becomes even more important in a time of disaster or emergency. See RPC 5.1. Specifically, RPC 5.1(b) requires lawyers with

management or direct supervisory authority over other lawyers in the firm to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the RPC such as identifying dates by which actions must be taken in pending matters and ensuring that inexperienced lawyers are appropriately supervised. See RPC 5.1, Comment [2].

There are no bright line rules governing supervision. Comment [3] to RPC 5.1 tells us that each law firm should carefully consider the structure and nature of its practice when adopting policies governing the supervision of subordinate attorneys. See RPC 5.1, Comment [3]. For example, if the firm is relatively small and consists of mostly experienced lawyers, informal supervision and periodic review of compliance with the required policies will ordinarily suffice. Conversely, if the firm is much larger, and employs numerous junior attorneys, more elaborate measures may be necessary to place the firm in compliance with RPC 5.1. *Id.*

The degree of supervision required also varies on a case-by-case basis and is generally judged by what is reasonable under the circumstances. Factors that should be considered include: (i) the experience of the person whose work is being supervised, (ii) the amount of work involved in a particular matter, and (iii) the likelihood that ethical problems might arise while working on the matter. See *id.*

Generally speaking, it is best practice for supervising attorneys to remain apprised of subordinate attorneys' workload, implement a system for review of the subordinate attorney's work product and ensure that the subordinate attorney understands that system. In our experience, requiring subordinate attorneys to submit weekly status reports detailing the matters they are working on is a good first step to guarantee that no matter falls through the cracks.

Supervising attorneys also should establish an open line of communication with subordinate attorneys. In today's age, there are many mediums that allow for regular communication in this remote work environment, including video conferencing (via Zoom or Skype), telephone calls, email and even text messages. Therefore, in addition to communicating via email, a supervising attorney should schedule regular calls (via Zoom, Skype or telephone) with subordinate attorneys to check on their progress and review and discuss their work product and workload. How often you communicate with the individuals under your supervision will depend on the complexity of the matter and issues, and the upcoming deadlines in those matters. This too is a matter of the lawyer's reasonable judgment and care.

Notably, RPC 5.1(d) articulates a general principle of personal responsibility for acts of other lawyers in the law firm and imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. See RPC 5.1(d). Thus, lawyers acting in a supervisory or managerial role should be aware that their failure to exercise diligence in reviewing the work of subordinate attorneys may result in personal liability under RPC 5.1(d).

Whether you are working in the office or remotely, attorneys should always use their best efforts so that client communication and diligent representation continues uninterrupted. One of our prior Forums referred attorneys to RPC 1.4, which governs an attorney's obligations with respect to communicating with clients. RPC 1.4 states that attorneys are ethically obligated to promptly comply with reasonable requests for information from clients. RPC 1.4(a)(4); see Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., July/August 2016, Vol. 88, No. 6. To avoid noncompliance with RPC 1.4 while working remotely, attorneys should inform clients of the best way to reach them. If, for example, an attorney is able to forward calls from the office line to a personal cell phone, the attorney can tell clients that they may still use the office number. If attorneys do not have this ability, they need to advise their clients what alternate number they can be reached at (whether a cell phone number or home landline). In addition, attorneys should regularly check their office voicemail and email and avoid large gaps in response time.

Finally, attorneys must continue to maintain their professionalism and decorum despite working from the comfort of their homes. We have previously talked about the importance of dressing appropriately when appearing in front of a tribunal; proper dress is part of basic professionalism and a sign of respect. See Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 204, Vol. 86, No. 4. That standard still applies when participating in a virtual court conference, as well as video arbitrations and mediations. Judge Dennis Bailey of Broward County Florida recently expressed his dismay that attorneys appeared inappropriately on camera for virtual court hearings: "It is remarkable how many attorneys appear inappropriately on camera," Bailey said. "We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up that you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or

not." Debra Cassens Weiss, Lawyers are dressing way too casual during Zoom court hearings, judge says, ABA Journal (Apr. 15, 2020), <https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says>.

As always, the devil is in the details. What is deemed appropriate can be subjective, and there may not always be agreement on what should be worn when in a virtual court or ADR proceeding. Certainly, going shirtless, wearing a bathing suit or video conferencing from your bed is never appropriate. You should use common sense, and when in doubt, it is best to err on the side of caution and overdress to avoid facing the risk of having your choice of clothing overshadow the needs of your client or what you might be saying.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com)
Maryann C. Stallone, Esq.
(stallone@thsh.com) and
Alyssa C. Goldrich, Esq.
(goldrich@thsh.com)
Tannenbaum Helpert Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM:

I am an attorney in private practice focusing on personal injury law here in New York. I also do a bit of matrimonial law. My clients come from underserved communities, and many face extreme financial hardships. I've always known that Rule 1.8(e) prohibits giving financial assistance to clients in connection with a pending litigation and, as much as I have wanted to, I never gave anyone a dime. Rather, over the years, I developed a nice Rolodex with contacts at public service associations to refer these clients to so they could get their needs met. But with all this Covid-19 stuff going on it has gotten way worse and so many have now found themselves without a paycheck and are simply unable to meet their day-to-day needs. The public service organizations have been inundated, and my clients are unable to get desperately needed help. I was recently approached by a client, a young parent of two preschool-aged children, who is unable to buy groceries. And while I know that I probably shouldn't have, I figured that it would be okay to give him a few bucks for a couple of bags of groceries. He's a good kid and I know the money is going to his children. I am concerned I may have done something wrong but it really was so little to me and so much to him. What should I have done?

Sincerely,
Justa Bene Mensch

James R. Barnes, Esq.
Co-Chair, NYSBA Committee on Continuing Legal Education
Burke & Casserly, P.C.
255 Washington Avenue Extension, Suite 104
Albany, NY 12205

June 10, 2020

Via e-mail to: skarson@nysba.org
Scott M. Karson, Esq.
President
New York State Bar Association
One Elk Street
Albany, NY 12207

**RE: NYSBA Executive Committee Meeting – June 12, 2020
Endorsement of Report from Committee on Technology and the Legal Profession**

Dear President Karson:

I offer this letter to you for consideration in your capacity as President of the New York State Bar Association, and leader of its Executive Committee. I understand that the Executive Committee will be having its summer meeting later this week on Friday, June 12, 2020.

I am the Co-Chair of the Association's Committee on Continuing Legal Education, serving with Shawndra G. Jones, Esq. Our committee held our spring meeting on Tuesday, May 19, 2020. It was a virtual meeting with a full agenda, and I am pleased to report that it was well attended by both committee members and Association staff. Our agenda included consideration of the "Report Recommending that the Attorney Continuing Legal Education Biennial Requirement be Modified to Require that the Ethics and Professionalism Requirement Include for Four Years One Credit on Cybersecurity." This Report was issued by the Committee on Technology and the Legal Profession on January 27, 2020, which is Co-Chaired by Mark A. Berman, Esq., and Gail L. Gottehrer, Esq. I understand that this Report will be presented to the Executive Committee during Friday's meeting.

The Committee on Continuing Legal Education enthusiastically supports the Report, and kindly requests that you share our endorsement with the Executive Committee. Our members had the opportunity to review it in advance of our meeting, and then engage in some robust discussion to consider its points. Of note, this Report was finalized well before the COVID-19 pandemic engulfed our country. That being said, its merit seems even that much more significant given everything our profession has experienced over the last several months.

The recommendations were carefully constructed, and do not add to the CLE hours required for new or experienced attorneys. The proposed cybersecurity requirement would also sunset in four years to allow for review and consideration of its impact. Our committee agrees with the notion that mandatory CLE was "initially conceived, supported and implemented as a way to enhance

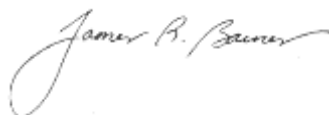
both lawyer competence and public trust in the profession.” The Report argues that a mandatory cybersecurity component will advance lawyer competence and public trust, since the protection of confidential and proprietary information is a central part of our professional ethics.

The issue of cybersecurity and its impact on the legal profession will only become more important over time. We commend the Report for consideration of New York State’s SHIELD Act, CLE requirements in other jurisdictions relative to technology, and how to best craft this requirement for New York State. We believe that the approach has a solid foundation, and Mr. Berman was aptly able to provide our committee with context as to why the focus was specific to cybersecurity, as opposed to technology generally. In this way, if a requirement is going to be modified, it should be done for specific and important purpose.

We have just recently witnessed the benefit of a slight, but critical modification to the continuing legal education requirements, with the addition of the “Diversity and Inclusion” (“D&I”) credit. The programming in our Association alone since the D&I rollout has been first-class and is already accomplishing the goals of advancing lawyer competence and increasing public trust in the profession. Simply stated, D&I programming makes the profession better. Cybersecurity is an entirely different concept, obviously, but technology and confidentiality must enjoy a solid marriage for our profession to maintain its status in the public trust.

The Report enjoyed nearly unanimous support by our committee, and we hope that it will find favor in the Association’s Executive Committee. Our committee sincerely appreciates the opportunity to serve the Association in the consideration of all issues impacting continuing legal education. Thank you for your consideration of this Report, and our committee’s endorsement.

Respectfully submitted,



James R. Barnes, Esq.

cc: Shawndra G. Jones, Esq. (via e-mail to: sjones@ebglaw.com)
Pamela McDevitt, Esq. (via e-mail to: pmcdevitt@nysba.org)
Kathleen Mulligan Baxter, Esq. (via e-mail to: kbaxter@nysba.org)

MEMORANDUM

To: Kathy Baxter
CC: Committee on Technology and the Legal Profession
From: Terri A. Mazur, Chair, Women in Law Section
Date: June 9, 2020
Re: Committee on Technology & the Legal Profession's Proposed Modification of MCLE Ethics Requirements

The Women in Law Section has reviewed the Committee on Technology and the Legal Profession's ("Committee") report, which details the Committee's proposed modification of the New York State CLE Board Regulations & Guidelines to require that one of the credit hours of continuing legal education -- already required in the area of ethics and professionalism -- be devoted to cybersecurity for a period of four years, which would be two biennial periods. (See "Report Recommending that the Attorney Continuing Legal Education Biennial Requirement Be Modified to Require that the Ethics and Professionals Requirement Include for Four Years One Credit on Cybersecurity" ("Report")). This timely proposal addresses the critical risk to confidential client and law firm information from cyber fraud. One member of the Women in Law Section commented that this proposed cybersecurity ethics requirement may place an undue burden on solo attorneys, as well as those practicing in small and even mid-size firms, during the current pandemic given the burdens and difficulties they are already facing. However, all attorneys need to understand the potential cybersecurity issues and protect confidential client information. This issue is especially important at this time when so many attorneys and legal support staff are working remotely because of the pandemic and may not have sufficient safeguards against cyber fraud.

On balance, the benefits of mandating that one of the four existing ethics credits be devoted to cybersecurity for the next two biennial periods outweigh the burden. Accordingly, the Women in Law Section supports approval of the Committee's proposal.

To: Committee on Technology and the Legal Profession
From: Elder Law and Special Needs Section, CLE Committee
Date: June 10, 2020
Re: Proposed Modification of MCLE Requirements

The Technology committee of the Elder Law and Special Needs Section of the New York State Bar Association writes this memorandum in support of the proposal by the Committee on Technology and the Legal Profession of the New York State Bar Association (attached). We firmly believe that the obligation of attorneys to protect the digital assets of their clients is paramount to the practice of law in modern times.

The proposed modification is that, for a period of four years — two biennial registration periods — one of the credit-hours of continuing legal education already mandated in the area of ethics and professionalism (see 22 NYCRR §1500.12 [a] [1] and 22 NYCRR §1500.22 [a]) be devoted to cybersecurity. At the end of the four-year period, the Committee on Technology and the Legal Profession would evaluate whether to extend the requirement.

While COVID-19 has brought many of these issues to the forefront, it is most certainly an issue that will continue to evolve as we, as attorneys, step into the 21st century, some of us for the first time. Sharing information and best practices to ensure the safest possible environment for all of our practices is both admirable and necessary in these times.

The Elder Law and Special Needs Section supports the addition of a requirement of cyber security credits in the area of ethics education for attorneys in Continuing Legal Education.



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

CORPORATE COUNSEL SECTION

39th YEAR

2020 Executive Committee

Joy D. Echer

Chair
Foot Locker, Inc.
330 West 34th Street
4th Floor
New York, New York 10001
jecher@footlocker.com

Yamicha Stephenson

Chair-Elect
Deloitte
30 Rockefeller Plaza
New York, New York 10112
ystephenson@deloitte.com

Naomi K. Hills

Vice-Chair
17456 128th Avenue
Jamaica, New York 11434
naomikhillslaw@gmail.com

Miya T. Owens

Vice-Chair
Jewelers Vigilance Committee
802 2nd Avenue, Suite 303
New York, New York 10017
miya@jvclegal.org

Sanoj Stephen

Secretary
Sotheby's International Realty
650 Madison Ave., 2nd floor
New York, New York 10022
sanoj.stephen@sothebyshomes.com

Naomi K. Hills

Treasurer
17456 128th Avenue
Jamaica, New York 11434
naomikhillslaw@gmail.com

To: Mark Berman & the Committee on Technology and the Legal Profession

From: Corporate Counsel Section

The Corporate Counsel Section writes in support of the Committee on Technology and the Legal Profession's Report recommending that the attorney CLE biennial requirement be modified to require that the Ethics and Professionalism requirement include for four years one credit on cybersecurity. We agree that every lawyer practicing in New York State should receive ongoing education in the critical area of cybersecurity to increase the public's trust that confidential and proprietary information will be secure when in the possession of attorneys.

TO: New York State Bar Association’s Committee on Technology and the Legal Profession

FROM: New York State Bar Association, Commercial and Federal Litigation Section

DATE: June 11, 2020

RE: Report Proposing Modification of the CLE Biennial Requirement to Require that Ethics and Professionalism Requirement Include One Credit on Cybersecurity

The Commercial & Federal Litigation Section of the New York State Bar Association (“Section”) is pleased to submit these comments in response to the Report issued by the New York State Bar Association’s Committee on Technology and the Legal Profession (“Technology Committee”), dated January 27, 2020 (“Report”) proposing a modification of the biennial, twenty-four hour credit requirement for attorney continuing legal education requirement (“CLE”) contained in the CLE Board Rules and Regulations to require for the next four years that one credit on the topic of cybersecurity be included within the Ethics and Professionalism requirement.

I. RESPONSE AND SUGGESTIONS

Our Section strongly supports the Technology Committee’s proposal as we agree that cybersecurity is an important topic that has and will increasingly affect many companies and individuals. Law firms throughout the world have been impacted by cyber intrusions and data breaches. We believe that this requirement will help to educate New York lawyers on best practices in securing confidential and proprietary client and law firm information, as law firm and corporate data is increasingly becoming the target of hackers. Our only suggestion is that the Technology Committee clearly set forth the scope of the CLE programming that would

satisfy this requirement so that there is no confusion, given that cybersecurity itself is a wide-ranging topic.

Jonathan Fellows, Chair, Commercial & Federal Litigation Section
Daniel Wiig, Chair-Elect, Commercial & Federal Litigation Section
Ignatius Grande, Vice-Chair, Commercial & Federal Litigation Section
Anne Sekel, Treasurer, Commercial & Federal Litigation Section
Jessica Moller, Secretary, Commercial & Federal Litigation Section
Peter Pizzi, Internet & Cybersecurity Committee Co-Chair
Joseph DeMarco, Internet & Cybersecurity Committee Co-Chair



TRIAL LAWYERS SECTION

Betty Lugo, Esq.

Chair,

Pacheco & Lugo, PLLC

William S. Friedlander, Esq.

Vice Chair

Daniel Ecker, Esq.

Treasurer

Christian Soller, Esq.

Secretary

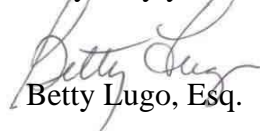
To: Mark Berman, Esq. and the NYSBA Committee on
Technology and the Legal Profession

From: NYSBA Trial Lawyers Section

The NYSBA Trial Lawyers Section supports the proposed modification to the CLE requirements contained in the Report of The Committee on Technology and the Legal Profession that recommends that the biennial, twenty-four hour credit requirement for attorney continuing legal education requirement (“CLE”) contained in the CLE Board Rules and Regulations be modified to require one credit on the topic of cybersecurity. The credit would be considered under “*Ethics and Professionalism*” and it would be included within the existing biennial “*Ethics and Professionalism*” requirement.

It is essential for all lawyers in New York State to be educated and fully understand the necessity of cybersecurity in our practices. The inclusion of cybersecurity as part of the Ethics CLE requirements will promote the necessary education on the security and effective protection of confidential and proprietary client and law firm information and to assist us in staying current on cybersecurity threats.

Very truly yours,



Betty Lugo, Esq.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #10

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct (COSAC).

Attached are two reports from COSAC proposing amendments to the comments to the New York Rules of Professional Conduct. The first report proposed amendments to the comments to Rules 1.6 and 4.2, summarized as follows:

- **Rule 1.6:** Amend Comments [16] and [17] to improve clarity, and to add a new Comment [17A] to provide additional guidance to lawyers regarding cybersecurity practices.
- **Rule 4.2:** Add a new Comment [4A] to (i) explain the circumstances under which a lawyer may access the public online information of a represented person, (ii) define certain terms, and (iii) make clear that communications with jurors and prospective jurors are governed by Rule 3.5 (addressing communications with jurors and prospective jurors), not by Rule 4.2 (which governs communications with represented persons).

It should be noted that when COSAC originally published this report for comment, it included proposals relating to Rules 3.4(e) and 8.3. In response to comments received, it is not presenting those proposals at this meeting.

The second report recommends amendments to the comments to Rule 7.1 and 7.5 relating to advertising and trade names. These proposals take into account the amendments adopted by the House at the April meeting and that were published for public comment by the Administrative Board of the Courts. The report notes that these amendments are similar to ones approved by the House in November 2019.

The report will be presented at the June 13 meeting by past COSAC chair Joseph E. Neuhaus.

MEMORANDUM

June 4, 2020

COSAC's *Revised* Proposals to Amend Comments to Rules 7.1 and 7.5 of the New York Rules of Professional Conduct

On May 1, 2020, COSAC circulated a report recommending amendments to the Comments to Rules 7.1 and 7.5, which primarily concern advertising and trade names. This memorandum reviews the public comments sent to COSAC regarding those proposals, and offers the proposals for consideration by the House of Delegates.

By way of background, on November 2, 2019 the House of Delegates approved COSAC's proposals to amend Rules 7.1 through 7.5, together with accompanying Comments. However, before proposed Rules 7.1 through 7.5 were forwarded to the Administrative Board of the Courts, a federal lawsuit was filed in S.D.N.Y. against multiple New York disciplinary counsel claiming that New York's blanket ban on firms in private practice practicing under a trade name is unconstitutional. COSAC was requested to draft a version of Rule 7.5 that would permit trade names under some conditions, and COSAC did so.

On April 4, 2020, the House of Delegates approved COSAC's proposed amendments to Rule 7.5 (with one amendment from the floor restoring the prohibition against including the name of a nonlawyer in the name of a law firm in private practice).

On April 14, 2020, the Administrative Board of the Courts approved COSAC's amended proposal with one change (expanding "misleading" to "false, deceptive, and misleading"). On Friday, April 17, 2020, the Administrative Board circulated its version of Rule 7.5 for public comment, with a June 1 deadline for submitting comments.

If the Administrative Board ultimately adopts the version of Rule 7.5 that it has circulated for public comment, then the Comments to Rules 7.1 and 7.5 must be revised to match. This memorandum offers COSAC's proposed Comments to Rules 7.1 and 7.5 that are consistent with the version of Rule 7.5 that the Administrative Board circulated for public comment.

The amended proposals are similar to the versions the House of Delegates approved back in November 2019. The main differences are that (a) COSAC has moved certain Comments about law firm names from Rule 7.1 to Rule 7.5, where they fit more logically, and (b) COSAC has revised and reorganized the Comments to Rule 7.5.

Below is the version of Rule 7.5 that the Courts have circulated for public comment, followed by a clean version of the revised Comments COSAC is proposing to Rules 7.1 and 7.5, followed by a redline version of the same Comments. (The redline compares the COSAC proposals that the House of Delegates approved in November 2019 with the revised Comments COSAC is recommending now.)

Clean version of *Proposed* Rule 7.1 and Comment [5] Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[5] A law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must also comply with Rule 7.5, which treats those forms of communication in detail.

Clean Version of *Proposed* Rule 7.5 Professional Notices, Letterheads, and Names as *approved* by NYSBA House of Delegates on April 4, 2020 and *amended and circulated for public comment* by the Administrative Board of the Courts on April 17, 2020

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule.

(b)(1) A lawyer or law firm in private practice shall not practice under:

- (i) a false, deceptive, or misleading trade name;
- (ii) a false, deceptive, or misleading domain name; or
- (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

(2) *Specific Guidance Regarding Law Firm Names.*

- (i) Such terms as "legal aid," "legal service office," "legal assistance office," "defender office," and the like may be used only by bona fide legal assistance organizations.
- (ii) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law.
- (iii) A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.
- (iv) The name of a professional corporation shall contain "PC" or such symbols permitted by law.

(v) The name of a limited liability company or limited liability partnership shall contain “LLC,” “LLP” or such symbols permitted by law.

(vi) A lawyer or law firm may utilize a telephone number that contains a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules.

(3) A lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis may not include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith.

(4) A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer’s name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer’s name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

Clean version of *proposed* Comments to Rule 7.5

Professional Affiliations and Designations

[1] A lawyer’s or law firm’s name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer’s services and must not be false, deceptive, or misleading. They must comply with this Rule and with Rule 7.1.

[2] A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm’s identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

[3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization.

A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as “Legal Services,” “Legal Assistance,” or “Legal Aid” unless the lawyer or law firm is a bona fide legal assistance organization.

[4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a “firm” as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

Professional Web Sites, Cards, Office Signs, and Letterhead

[6] A lawyer or law firm may use internet web sites, social media pages, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided they do not violate any statute or court rule and are in accordance with Rule 7.1. Thus, a lawyer may use the following:

(i) a professional card identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer’s law firm, the names of the law firm’s members, counsel, and associates, and any information permitted under Rule 7.2(c);

(ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm, counsel, and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state or describe the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.2(c). A letterhead of a law firm may also give the names of members, associates, and counsel, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession; and

(v) internet web sites or social media pages or sites that comply with these Rules.

Professional Status

[7] To avoid misleading clients, courts, and the public, lawyers should be scrupulous in representing their professional status. For example:

(i) A lawyer or law firm may be designated “Counsel,” “Special Counsel,” “Of Counsel,” and the like on a letterhead or professional card if there is a continuing relationship with another lawyer or law firm other than as a partner or associate;

(ii) A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or law firm devotes a substantial amount of professional time to representing that client;

(iii) To alert clients, the public, and those who deal with a lawyer or law firm about possible limitations on liability, the name of a professional corporation shall contain “PC” or such symbols permitted by law, and the name of a limited liability company or limited liability partnership shall contain “LLC,” “PLLC,” “LLP” or such symbols permitted by law;

(iv) A law firm name, trade name, or domain name may not include the terms “non-profit” or “not-for-profit” unless the law firm qualifies for those designations under applicable law, such as the New York Not-for-Profit Corporation Law (“NPCL”).

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm’s letterhead and in other permissible listings should make clear the jurisdictional limitations on those members, counsel, and associates of the firm not licensed to practice in all listed jurisdictions.

Trade Names and Domain Names

[9] Some lawyers and law firms may prefer to practice under trade names and/or domain names to make it easier for clients to remember or locate them. A lawyer may practice under a trade name or domain name that is not false, deceptive, or misleading. Provided a lawyer or law firm uses a name otherwise complying with these Rules, it is proper to practice under the lawyer’s or law firm’s own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features, among other things.

[10] For example, with respect to trade names, a law firm whose practice includes real estate matters may use and practice under a name such as AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers. Likewise, a law firm may use and practice under a trade name such as Albany Personal Injury Lawyers if the firm practices in Albany and its practice includes personal injury law. With respect to domain names, if the law firm of Able & Baker practices real estate law, the firm may use and practice under a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com, or under a colloquial domain name such as www.dirtlawyers.com, as long as the name is not false, deceptive, or misleading.

[11] Neither trade names nor domain names may be false, deceptive, or misleading. A law firm may not use a trade name such as “Win Your Case,” or a domain name such as www.winyourcase.com because those names imply that the law firm can obtain favorable results regardless of the particular facts and circumstances. In all events, neither a trade name nor a domain name may be false, deceptive, or misleading or violate Rule 7.1 or any other Rule.

Telephone Numbers

[12] A lawyer or law firm may use telephone numbers that spell words or contain a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules. As with domain names, lawyers and law firms may always properly use telephone numbers consisting of (i)

their own names or initials, or (ii) combinations of names, initials, numbers, and words. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL. By way of further example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.)

Public comments on Comments to Rule 7.5 and COSAC's response

New York City Bar

Two different committees from the New York City Bar comments on COSAC's proposals to amend the Comments to Rules 7.5.

The City Bar Committee on Professional Ethics said it “supports COSAC's proposed amendments” to the Comments to Rules 7.1 and 7.5.

The Professional Responsibility Committee said it “supports the COSAC report regarding comments to Rules 7.1 and 7.5 of the NY Rules of Professional Conduct.”

COSAC's response to the City Bar

COSAC is gratified that two City Bar committees support COSAC's proposals.

Bar Association of Erie County

The Bar Association of Erie County (“BAEC”) submitted the following comment:

... [T]he Ethics committee ... has reviewed the Proposals to Rules 7.1 and 7.5 and again has no objections to the same. We do note for the record that allowing trade names will be a substantial change and we expect it will lead to disputes regarding trade names which are misleading. However, those disputes can be resolved by the Ethics committee.

COSAC's response to BAEC

COSAC agrees that allowing trade names will be a substantial change in New York, but whether to allow trade names is the prerogative of the New York Courts, which have sole power to adopt the black letter Rules of Professional Conduct. COSAC's proposed Comments to Rule 7.5 are intended to provide guidance to lawyers in the event the Courts approve the pending proposal to amend Rule 7.5 to permit trade names.

Robert Kantowitz

Robert Kantowitz, a New York attorney and a member of this Association, made two comments:

In Rule 7.5(b)(2)(i), and in the spirit of the *booking.com* Supreme Court case, the terms “legal service office,” “legal assistance office” and “defender office” are generic enough that

there should be no prohibition on their use. Only "legal aid" has a definitive *pro bono* meaning.

Comment 11 is overwrought. No rational person would assume that "win" in a trade name guarantees victory.

COSAC's response to Mr. Kantowitz

COSAC recognizes that reasonable minds can differ with respect to the use of particular words or phrases in trade names, and COSAC understands Mr. Kantowitz's views, but COSAC disagrees with both of his points. In COSAC's view, the terms "legal service office," "legal assistance office" and "defender office" have all come to signify not-for-profit or pro bono legal services, and lawyers in private practice should not be permitted to expropriate those phrases for private gain.

Likewise, the word "win" as part of a law firm name might well raise unjustified expectations for some people. Mr. Kantowitz is very likely right that most people would not think that including "win" in a trade name "guarantees victory," but some people might put undue weight on the word "win," especially those inexperienced with the legal system who see the name in mass advertising, so COSAC thinks it is prudent to exclude that word (and words like it) from the vocabulary of trade names.

Redline version of *proposed* Comments to Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[5] ~~Firm names, A law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must also comply with Rule 7.5, which treats those forms of communication in detail. [Note from COSAC: Comments [1] through [4] of COSAC's previous proposals will not be affected by permission to practice under trade names or domain names. The first sentence of Comment [5] has been revised. The rest of Comment [5] to Rule 7.1 and all of Comments [6] through [8B] to Rule 7.1 are shown here as deleted, but the substance has been moved, with some changes, to the Comments to Rule 7.5.] A law firm may not use a name that is misleading. A firm may be designated by the names of all or some of its current members or by the names of deceased members where there has been a succession in the firm's identity. A lawyer or law firm also may be designated by a distinctive website address, social media username, domain name, or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with (i) a government agency, (ii) a deceased lawyer who was not a former member of the firm, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as~~

~~“Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication— cf. Rule 7.5(b)(2).~~

~~{6} A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm’s letterhead and in other permissible listings should make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions— see Rule 7.5(b).~~

~~{7} Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners— see Rule 7.5(c).~~

~~{8} It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm— see Rule 7.5(b).~~

~~{8A} A lawyer may utilize a domain name for an internet web site that does not include the name of the lawyer or the lawyer’s firm if (1) all pages of the web site include the actual name of the lawyer or firm; (2) the lawyer or law firm does not attempt to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules— see Rule 7.5(e).~~

~~{8B} Likewise, a lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules— see Rule 7.5(f).~~

Redline version of *proposed* Comments to Rule 7.5 **Professional Notices, Letterheads, and Names**

Professional Affiliations and Designations

{1} A lawyer’s or law firm’s name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer’s services and must not be false, deceptive, or misleading. They must comply with this Rule and with Rule 7.1.

{2} A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm’s identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

[3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as “Legal Services,” “Legal Assistance,” or “Legal Aid” unless the lawyer or law firm is a bona fide legal assistance organization.

[4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a “firm” as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

Professional Web Sites, Cards, Office Signs, and Letterhead

[6] A lawyer or law firm may use internet web sites, social media pages, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided they do not violate any statute or court rule and are in accordance with Rule 7.1. Thus, a lawyer may use the following:

(i) a professional card identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer’s law firm, the names of the law firm’s members, counsel, and associates, and any information permitted under Rule 7.2(c);

(ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm, counsel, and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state or describe the nature of the legal practice to the extent-permitted under Rule 7.2(c);

(iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.2(c). A letterhead of a law firm may also give the names of members, associates, and counsel, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession; and

(v) internet web sites or social media pages or sites that comply with these Rules.

Professional Status

[7] To avoid misleading clients, courts, and the public, lawyers should be scrupulous in representing their professional status. For example:

(i) A lawyer or law firm may be designated “Counsel,” “Special Counsel,” “Of Counsel,” and the like on a letterhead or professional card if there is a continuing relationship with another lawyer or law firm other than as a partner or associate;

(ii) A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or law firm devotes a substantial amount of professional time to representing that client;

(iii) To alert clients, the public, and those who deal with a lawyer or law firm about possible limitations on liability, the name of a professional corporation shall contain “PC” or such symbols permitted by law, and the name of a limited liability company or limited liability partnership shall contain “LLC,” “PLLC,” “LLP” or such symbols permitted by law;

(iv) A law firm name, trade name, or domain name may not include the terms “non-profit” or “not-for-profit” unless the law firm qualifies for those designations under applicable law, such as the New York Not-for-Profit Corporation Law (“NPCL”).

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm’s letterhead and in other permissible listings should make clear the jurisdictional limitations on those members, counsel, and associates of the firm not licensed to practice in all listed jurisdictions.

Trade Names and Domain Names

[9] Some lawyers and law firms may prefer to practice under trade names and/or domain names to make it easier for clients to remember or locate them. A lawyer may practice under a trade name or domain name that is not false, deceptive, or misleading. Provided a lawyer or law firm uses a name otherwise complying with these Rules, it is proper to practice under the lawyer’s or law firm’s own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features, among other things.

[10] For example, with respect to trade names, a law firm whose practice includes real estate matters may use and practice under a name such as AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers. Likewise, a law firm may use and practice under a trade name such as Albany Personal Injury Lawyers if the firm practices in Albany and its practice includes personal injury law. With respect to domain names, if the law firm of Able & Baker practices real estate law, the firm may use and practice under a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com, or under a colloquial domain name such as www.dirtlawyers.com, as long as the name is not false, deceptive, or misleading.

[11] Neither trade names nor domain names may be false, deceptive, or misleading. A law firm may not use a trade name such as “Win Your Case,” or a domain name such as www.winyourcase.com because those names imply that the law firm can obtain favorable results regardless of the particular

facts and circumstances. In all events, neither a trade name nor a domain name may be false, deceptive, or misleading or violate Rule 7.1 or any other Rule.

Telephone Numbers

[12] A lawyer or law firm may use telephone numbers that spell words or contain a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules. As with domain names, lawyers and law firms may always properly use telephone numbers consisting of their own names or initials, or combinations of names, initials, numbers, and legal words. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL. By way of further example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.)

[Note from COSAC: Comments [1]-[4] below were approved by the House of Delegates on November 2, 2019 - but COSAC was subsequently asked to draft a version of Rule 7.5 that would permit law firms to practice under trade names in some circumstances. COSAC submitted a revised draft of Rule 7.5 and on April 4, 2020 the House of Delegates approved it, with one floor amendment. COSAC has since redrafted the Comments to Rule 7.5 to be consistent with Rule 7.5 as circulated by the Courts for public comment on April 17, 2020. The revised Comments to Rule 7.5 use much of the language of Comments previously approved by the House, but COSAC has substantially revised and reorganized those Comment.]

Professional Status

~~[1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.~~

~~[1A] A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following: (i) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates; (ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4; (iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or (iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letter head of a law firm may also~~

~~give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated “Of Counsel” on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.~~

Trade Names and Domain Names

~~[2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a “domain name.” As long as a law firm’s name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name www.ableandbaker.com, or www.ab.com, or www.able.com, or www.ablelaw.com. However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm’s name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com or a colloquial domain name such as www.dirtlawyers.com. Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name www.realestatelaw.com, the firm may not advertise that people buying or selling homes should “contact www.realestatelaw.com” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.~~

Telephone Numbers

~~[3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4 RED-LAW, or RB-LEGAL.~~

~~[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD,~~

~~or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].~~

MEMORANDUM

June 5, 2020

COSAC Proposals to Amend Comments to Rules 1.6 and 4.2 of the New York Rules of Professional Conduct

On April 14, 2020, COSAC circulated a memorandum to seek public comment on proposals to amend the black letter text of Comments to Rules 1.6, 3.4, 4.2, and 8.3. COSAC had not previously circulated the proposals regarding Rules 1.6 for public comment, but COSAC had twice previously circulated proposed amendments to the Comments to 4.2 for public comment, in separate reports dated August 13, 2019 and October 31, 2019.

COSAC received formal or informal comments on these proposals from more than a dozen groups and one individual. Here is a list of those who submitted comments:

- United States Department of Justice and United States Attorneys in New York
- NYSBA Committee on Professional Ethics
- NYSBA Committee on Technology and the Legal Profession
- NYSBA Committee on Attorney Professionalism
- NYSBA Trusts and Estates Law Section
- NYSBA Criminal Justice Section
- NYSBA Dispute Resolution Section
- NYSBA State and Local Government Law Section
- NYSBA Real Property Law Section
- Bar Association of Erie County
- New York County Lawyers' Association
- New York City Bar Committee on Professional Ethics
- New York City Bar Committee on Professional Discipline
- New York City Bar Committee on Professional Responsibility
- Robert Kantowitz

COSAC thanks all of these groups for the time and thought they invested in assisting COSAC. COSAC carefully considered every comment and suggestion. COSAC accepted many of the suggestions, and all of the public comments directed COSAC's attention to areas of potential concern. The public comments helped COSAC to improve its earlier proposals or sharpen COSAC's explanation of those proposals. The public comments have persuaded COSAC not to go forward with the proposed amendments to Rules 3.4(e) and the Comments to Rule 8.3 at this time. This memorandum contains COSAC's proposals to amend the Comments to only two Rules:

- Rule 1.6 Confidentiality of Information
- Rule 4.2: Communication with Person Represented by Counsel

Proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval. The amendments to the Comments proposed in this memorandum interpret existing black letter Rules and are not related to or contingent upon any judicial changes to the black letter Rules.

This memorandum summarizes the proposed amendments, explains the issues and reasoning that led COSAC to propose each amendment, sets forth the public comments regarding COSAC's current and prior proposals, and provides COSAC's response to the public comments. We set out each proposed amendment in redline style, striking out deleted language (~~in red~~) and underscoring added language (in blue).

Summary of Proposals

- **Rule 1.6:** Amend Comments [16] and [17] to improve clarity, and to add a new Comment [17A] to provide additional guidance to lawyers regarding cybersecurity practices.
- **Rule 4.2:** Add a new Comment [4A] to (i) explain the circumstances under which a lawyer may access the public online information of a represented person, (ii) define certain terms, and (iii) make clear that communications with jurors and prospective jurors are governed by Rule 3.5 (addressing communications with jurors and prospective jurors), not by Rule 4.2 (which governs communications with represented persons).

The remainder of this report explains COSAC's recommendations.

Rule 1.6: **Confidentiality of Information**

COSAC is not proposing any amendments to the black letter text of Rule 1.6 at this time, but COSAC is proposing various amendments to the Comments to Rule 1.6 that interpret Rule 1.6(c). The proposed amendments include (i) making stylistic changes to Comment [16] to improve clarity and flow, (ii) creating a new Comment [16A] by splitting off language from Comment [16], (iii) adding a new Comment [17A] to provide better guidance on cybersecurity, and (iv) creating a new Comment [17B] by splitting off language from Comment [17].

In redline style, the new and amended Comments would provide as follows:

Duty to Preserve Confidentiality

[16] Paragraph (c) is intended to protect confidential information. It imposes three related obligations: (i) preventing “inadvertent disclosure”; (ii) preventing “unauthorized disclosure”; and (iii) preventing “unauthorized access.” Specifically, paragraph (c) of this Rule ~~It~~ requires a lawyer to make reasonable efforts to safeguard confidential information ~~against unauthorized access by third parties and~~ against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client (or who are otherwise subject to the lawyer's supervision). Paragraph (c) also requires a lawyer to

[make reasonable efforts to safeguard confidential information against unauthorized access by third parties.](#) See also Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients.

[16A] Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18 does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (*e.g.*, by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer’s duties when sharing information with nonlawyers inside or outside the lawyer’s own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality.

[17A] [The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communication and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to \(a\) the size, nature, and complexity of the practice, and \(b\) the sensitivity of the confidential information the practice maintains.](#)

[17B] ~~However,~~ a lawyer may be required to take specific steps to safeguard a client’s information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked “Confidential” or “Confidential – Attorneys’ Eyes Only”; the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) may require a lawyer to take specific precautions with respect to a client’s or adversary’s medical records; and court rules may require a lawyer to block out a client’s Social Security number or a minor’s name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

COSAC discussion of new and amended Comments [16]-[17B] to Rule 1.6

Rule 1.6(c), which was amended effective January 1, 2017, provides as follows:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

The purpose of the 2017 amendments to Rule 1.6(c) was to increase the security of confidential information in the digital age. The amendments to the black letter text of Rule 1.6(c) were accompanied by significant amendments to Comment [17] to Rule 1.6. But even in a little over three years since the 2017 amendments took effect, cybersecurity threats have steadily grown more frequent, more ingenious, more widespread, and more damaging.

The New York State Legislature responded to increasing cybersecurity dangers by enacting a law named the “Stop Hacks and Improve Electronic Data Security” Act (the “SHIELD Act”). The SHIELD Act was signed into law by Governor Cuomo in July 2019 and took effect on March 21, 2020. It amends New York’s data breach notification law, expands the definitions of “breach” and “personal information,” and updates notification requirements when a breach occurs. The legislative justification for the SHIELD Act was that it “creates reasonable data security requirements tailored to the size of a business.” For the full text of the bill as signed, see <https://legislation.nysenate.gov/pdf/bills/2019/S5575B>.

The NYSBA Committee on Technology and the Legal Profession and its Cybersecurity Subcommittee reacted to the passage of the SHIELD Act by urging COSAC to amend Comment [17] to Rule 1.6 and add a new Comment [17A] to help lawyers develop and carry out “reasonable efforts” to comply with Rule 1.6(c). COSAC is grateful to the Committee on Technology and the Legal Profession for drafting proposed Comments, and COSAC has used those proposals as a basis for the amendments to the Comments that COSAC now proposes.

Public comments on Comments to Rule 1.6 and COSAC’s response

United States Department of Justice and United States Attorney Offices in New York

The United States Department of Justice and the United States Attorney Offices in New York submitted the following comment on proposed new and amended Comments to Rule 1.6:

The Department has conducted a number of investigations into cyberattacks on confidential law firm information. We share COSAC’s concerns in this area and believe that the proposed amendments will serve a useful function in reminding the bar of the need to maintain reasonably adequate cyber defenses. To emphasize that cyber defenses must be continuously re-evaluated, we might suggest the following addition to the last sentence of proposed Comment [17A]: “To protect such information, lawyers and law firms should use reasonable **and appropriately up-to-date** administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains.”

COSAC’s response to DOJ

COSAC agrees that lawyers and law firms should use administrative, technical, and physical safeguards that are “appropriately up-to-date,” but COSAC believes that safeguards are “reasonable” only if they are kept up to date. COSAC thus believes that the phrase “lawyers and law firms should use *reasonable* administrative, technical and physical safeguards” provides sufficient guidance without adding any specific reference to keeping these safeguards current.

NYSBA Committee on Technology and the Legal Profession

The NYSBA Committee on Technology and the Legal Profession, which originally suggested that COSAC amend the Comments to Rule 1.6 to provide more guidance to lawyers regarding cybersecurity, wrote to express “support” for COSAC’s proposals, and explained its support as follows:

We commend COSAC for taking the lead in incorporating the concept of lawyers’ cybersecurity hygiene into the Rules. “[H]acking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communication and data storage used by lawyers” is virtually an everyday occurrence and it is important that the Rules of affirmatively acknowledge these problems, which will only increase over time. Lawyers are even more susceptible to these intrusions while working remotely during the current pandemic. It is such important for the Rules to clarify that lawyers need to ethically address these risks by “us[ing] reasonable and proportionate technology to safeguard information protected” by the Rules. To that end, COSAC’s proposed addition to Comment [16] to Rule 1.6 which now would explicitly state that Rule 1.6(c) requires “a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties,” is critical.

COSAC appropriately seeks to include terminology from New York’s recently enacted “Stop Hacks and Improve Electronic Data Security” Act (“SHIELD Act”). The SHIELD Act calls for persons and businesses, which includes lawyers and law firms, to protect the security, confidentiality and integrity of certain sensitive data through the use of “reasonable administrative, technical and physical safeguards.” while the SHIELD Act utilizes the term “appropriate” to describe how such safeguards should be implemented depending on the “(a) size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains,” COSAC instead uses the term “proportionate” to describe how such factors should be weighed by a lawyer. This subtle change provides the Bar with additional guidance to evaluate such factors.

The Committee endorses COSAC’s proposed changes and additions to the Comments to Rule 1.6. Indeed, it is for the above reasons that the Committee is now proposing that New York be the first bar in the nation to include in its attorney continuing legal education requirement a credit on the topic of cyber security.

COSAC’s response to the Committee on Technology and the Legal Profession

The Committee on Technology and the Legal Profession has great expertise in cybersecurity and related technology, so COSAC is pleased that the Committee supports and endorses COSAC’s proposed changes in the Comments to Rule 1.6.

NYSBA Trusts and Estates Law Section

The NYSBA Trusts and Estates Law Section’s Practice and Ethics Committee submitted the following comments on the proposed amendments to the Comments to Rule 1.6:

We are overall in agreement with the proposed (i) changes to Comment [16] and (ii) new Comment [17A]. For new Comment [17A], we would suggest adding something similar to the following language from the comments to the ABA Model Rules of Professional Conduct to make clear that other rules or laws (separate from the New York Rules of Professional Conduct) may have more elaborate requirements on data privacy.

“Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.”

COSAC’s response to Trusts and Estates Law Section

COSAC is aware that other rules or laws (separate from the New York Rules of Professional Conduct) may have more elaborate requirements on data privacy. Existing Comment [17] (which COSAC proposes to renumber as Comment [Rule 1.7(b)]) contains the following language:

[17B] ... [A] lawyer may also be required to take specific steps to safeguard a client’s information to comply with a court order (such as a protective order) or to comply with other law (such as *state and federal laws or court rules that govern data privacy* or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked “Confidential” or “Confidential – Attorneys’ Eyes Only”; the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) may require a lawyer to take specific precautions with respect to a client’s or adversary’s medical records; and court rules may require a lawyer to block out a client’s Social Security number or a minor’s name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules. [Emphasis added by COSAC.]

Thus, the Rules of Professional Conduct already address the important issue flagged by the Trusts and Estates Law Section.

NYSBA Local and State Government Law Section

The Ethics Committee of the NYSBA Local and State Government Law Section submitted a detailed memorandum supporting COSAC’s proposed new Comment [17A] to Rule 1.6, with one modification. The memorandum says, in pertinent part:

Rule 1.6 protects the confidential information of a client; Rule 1.9 protects the confidential information of a former client; and Rule 1.18 protects the confidential information of a prospective client.

Local and state government lawyers are bound by an additional duty of confidentiality owed to persons who are neither clients, former clients, nor prospective clients. Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) provides, in pertinent part, that:

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about *a person*, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(Emphasis added).

Rule 1.11(c) is a rule of disqualification. It does not explicitly prohibit disclosure of confidential government information, but Comment 4A to the Rule states, in pertinent part, that

[T]he purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the private client of a law firm with which the former public officer or official is associated from obtaining an unfair advantage by using the lawyer’s confidential information about the private client’s adversary.

Because the purpose and effect of Rule 1.11(c) is to protect confidential information from a source other than those contemplated by Rules 1.6, 1.9 and 1.18, it is recommended that the proposed Comment 17A to Rule 1.6 be modified to include a reference to Rule 1.11, as follows:

[17A] The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communications and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, 1.11 or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains. [Underscoring is in place of red font in original.]

Representatives of the Local and State Government Law Section will be prepared to move for such an amendment during the House of Delegates meeting. However, This will be unnecessary if this amendment is accepted by COSAC.

COSAC's response to the Local and State Government Law Section

COSAC agrees with the importance of safeguarding confidential government information as defined in Rule 1.11(c), but COSAC believes that confidential *government* information is not in the same category as the information of a current, former, or prospective *client* that is protected by Rules 1.6, 1.9, and 1.18. The information protected by Rule 1.11(c) is not in the physical or digital files of the law firm at which a former government lawyer is working. It is only in that lawyer's head, and therefore does not present a cybersecurity issue (which is the primary subject of proposed Comment [17A]).

Moreover, because the black letter text of Rule 1.11(c) provides that a firm with which the former government lawyer is associated “may undertake or continue representation in the matter *only if the disqualified lawyer is timely and effectively screened from any participation in the matter* in accordance with the provisions of paragraph (b),” Rule 1.11(b) and (c) themselves already obligate a law firm to “implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm.” In addition, the first sentence of Comment [4A] to Rule 1.11 says: “By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client.”

In sum, COSAC agrees that a former government lawyer must personally protect any confidential government information in that lawyer's possession, but the screening provisions of Rule 1.11(b)(1)(ii) and (c) already keep that information out of the hands of the law firm, so confidential government information does not fit in the same category as information protected by Rules 1.6, 1.9, and 1.18.

Bar Association of Erie County

The Bar Association of Erie County (“BAEC”) notified COSAC that the BAEC Ethics committee “previously reviewed the COSAC revised proposal and had no objections to the amendments to Rules 1.6, 3.4, 4.2, 8.3.”

COSAC's response to BAEC

COSAC is pleased that the BAEC Ethics Committee has no objections to the proposed Comments to Rule 1.6.

New York City Bar

The New York City Bar Committee on Professional Ethics “generally supports” COSAC's proposed amendments to the Comments to Rule 1.6 and did not suggest any changes.

Another committee within the City Bar said: “The technical protections need to be kept up to date.”

COSAC's response to City Bar

COSAC agrees that the administrative, technical, and physical safeguards should be kept appropriately up to date, but COSAC believes that these safeguards are not “reasonable” if they are not kept up to date. COSAC thus believes that the phrase “lawyers and law firms should use reasonable administrative, technical and physical safeguards” is sufficient without any specific reference to keeping these safeguards current.

Rule 4.2 **Communication with** **Person Represented by Counsel**

Proposed new Comment [4A] to Rule 4.2

COSAC is not proposing any amendments to the black letter text of Rule 4.2, but COSAC is proposing to add a new Comment [4A] to Rule 4.2 to provide better guidance to lawyers regarding limitations on accessing a social media account of a person known to be represented by counsel. The new Comment would provide as follows:

[4A] Rule 4.2 does not prohibit a lawyer from accessing (including reading, watching, listening, or otherwise receiving) the public online information of a represented person, even where accessing that information generates a notice to the represented person that the information has been or may be accessed. The term “public online information” refers to information available to anyone accessing a social media network or other online presence without the need for express permission from the person whose information is being accessed. Communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule.

COSAC Discussion of Proposed New Comment [4A] to Rule 4.2

COSAC's current proposal is a shorter and simpler version of the proposal COSAC circulated for public comment on April 14, 2020. That proposal said:

[4A] Rule 4.2 does not prohibit a lawyer from accessing or following the public online information of a represented person, even where accessing or following that information generates a notice to that person that the information has been accessed or followed. See Rule 4.3, Comment [2A]. The term “following” refers to accounts that a particular user has subscribed to in order to view and/or receive updates about the contents of those accounts. The term “public online information” refers to information available to anyone viewing a social media network without the need for express permission from the person whose account is being viewed. Public online information includes content available to all members of a social media network and content that is accessible to non-members. However, communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of

“communication” under Rule 3.5.

COSAC revised the April 14 version of proposed new Comment [4A] in light of public comments (discussed below).

The current proposal makes clear that mere notice that a lawyer is accessing the social media account or other internet presence (such as a website) of a represented person is not, without more, a “communication” about the subject of the representation within the meaning of Rule 4.2.

The proposed final sentence to Comment [4A] is intended to avoid the implication that guidelines for accessing a social media account or other online presence of a represented person under Rule 4.2 also apply to efforts to access the same online information with respect to a juror or prospective juror. Whether accessing social media accounts and online information constitutes an improper “communication” with a juror or prospective juror is to be determined by Rule 3.5, not by Rule 4.2. Differing treatment under Rule 4.2 and 3.5 may make sense because the policies underlying restrictions on communications with jurors and prospective jurors under Rule 3.5 are different from the policies underlying restrictions on communications with represented persons under Rule 4.2. As a consequence of these differences, Rule 3.5 may prohibit lawyers from (for example) reviewing public social media content of jurors or prospective jurors if the social media platform automatically notifies (“pings”) a juror or prospective juror, even though Rule 4.2 would permit lawyers to review the public social media content of a person represented by counsel under those circumstances. *See, e.g.,* N.Y. City Ethics Op. 2012-2 (2012) (“Attorneys may use social media websites for juror research as long as

no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication.”); New York County Lawyers’ Ass’n Ethics Op. 743 (2011) (concluding that “sending a ‘friend request,’ attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog or ‘following’ a juror’s Twitter account” are prohibited by Rule 3.5). COSAC is not taking any position on the proper interpretation of Rule 3.5 at this time. It is simply alerting lawyers that Rule 3.5, not Rule 4.2, applies to communications with jurors or prospective jurors.

COSAC’s original August 13, 2019 proposal regarding Rule 4.2 was limited to adding a single sentence (with a citation) to existing Comment [4]. Some of the public comments below thus respond to the following proposal, which has now been superseded by the proposal in this memorandum:

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. A lawyer is also not prohibited from accessing the publicly available online information of a represented person or “following” that person’s publicly available Internet or social media account. See Rule 4.3, Comment [2A]. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

The public comments on COSAC’s original proposal led COSAC to alter its proposal and to circulate a revised version on April 14, 2020. The public comments on the revised proposal, taken together with some of the public comments on the 2019 proposal, caused COSAC to revise its proposal substantially again. Below we set forth public comments received on the current proposal and, where relevant, on the earlier proposal.

Public comments regarding Rule 4.2 and COSAC’s response

United States Department of Justice and United States Attorney Offices in New York

The United States Department of Justice and the United States Attorney Offices in New York submitted the following comment on currently⁹ proposed Comment [4A]:

COSAC has already taken into consideration previous comments by the Department on this proposal and we support COSAC’s proposed amendment.

COSAC’s response to DOJ/United States Attorney Offices

COSAC found the suggestions of the DOJ/United States Attorney Offices on COSAC’s August 2019 proposals very helpful and is glad to have their support.

NYSBA Commercial and Federal Litigation Section (“CFLS”)

The Commercial and Federal Litigation Section (“CFLS”) submitted extensive and perceptive comments on COSAC’s April 14, 2020 proposal to add a new Comment [4A] to Rule 4.2. CFLS “supports the proposed amendment of Rule 4.2, with certain edits to the proposed text,” as follows:

We support the portion of the proposed amendment, which clarifies that Rule 4.2 does not prohibit a lawyer from accessing the public information of a represented person, even where accessing that information generates an automated notice to that person that the information has been accessed. We would suggest though that the current proposed language for Comment [4A] is unduly complex, confusing and may be misleading. We suggest COSAC revert to its original proposed language or revise the language of the comment as suggested in these comments.

The original proposed language was:

[4A] A lawyer is also not prohibited from accessing the publicly available online information of a represented person or “following” that person’s publicly available Internet or social media account. See Rule 4.3, Comment [2A].

The revised text reads as follows:

[4A] Rule 4.2 does not prohibit a lawyer from accessing or following the public online information of a represented person, even where accessing or following that information generates a notice to that person that the information has been accessed

or followed. See Rule 4.3, Comment [2A]. The term “following” refers to accounts that a particular user has subscribed to in order to view and/or receive updates about the contents of those accounts. The term “public online information” refers to information available to anyone viewing a social media network without the need for express permission from the person whose account is being viewed. Public online information includes content available to all members of a social media network and content that is accessible to non-members. However, communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of “communication” under Rule 3.5.

To fully understand the scope of the first sentence in the revised text a reader must (1) read and cross-reference the 2 , 3 and 4 sentences, and then (2) apply all of those definitions to the multitude of social media and online data sources. Respectfully, the burden of the additional language adds confusion, not clarity.

It should be noted that some prior comments from others regarding COSAC’s initial proposal cited this Section’s *Social Media Ethics Guidelines* (hereinafter the “Guidelines”) as support for extensive revisions to COSAC’s original language. There were some oversights in those comments that may have materially affected the revised text.

1. The comments draw definitions for “following” and “public”
2. The “*Social Terminologies*” section is part of the Guideline’s “APPENDIX – Social Media Definitions.” The appendix states it “...is designed for attorneys seeking a basic understanding of the social media landscape.” The Appendix does not suggest the included terms should be used to limit or increase the boundaries of ethical obligations.
3. The “Social Terminologies” section includes three uses of the word “follow”, to wit:
 - Follow: Process of subscribing to another user in order to receive access to their content. This is a unilateral connection as it does not provide access to one’s own content.
 - Follower: Refers to a user who subscribes to another user’s account and thereby receives access to the latter’s content.
 - Following: Refers to those accounts that a particular user has subscribed to in order to view and/or receive updates about the content of those accounts.

Both in the definitions above and in common usage, “following” is generally a unilateral decision. A social media user chooses to follow a second user. The second user need not take any action for the first user to be subscribed to content created by the second user. This is also the common understanding of following someone – it is a unilateral decision by the first user. In contrast, “friending” (terminology popularized by Facebook) or “connecting” (LinkedIn’s terminology) requires the second user to approve the first user’s request for access to the second user’s content.

This distinction is important. While the automated notice generated by a social media platform after a lawyer’s unilateral decision to follow a represented party may not be “contact” under Rule 4.2, sending a friend request to a represented party, who then must approve the request to grant access, would ordinarily be impermissible. *See* NY Ethics Op. 843, fn. 1. The Section fears that this distinction is lost in the complex revised language.

A related problem is attempting to define social media activities without the context of the particular social platform. For example, Facebook users can send a friend request, follow or like a page, join a group, or check in or suggest edits. Are all or some of these activities encompassed by the reference to “follow?”

We recommend that in order to avoid confusion, COSAC should revert back to their original revised text above or simplify the current version by removing the multiple definitions and focusing on the intent of this new comment as proposed below:

[4A] ~~Rule 4.2 does not prohibit a~~ A lawyer is also not prohibited from accessing ~~or following~~ the public online information of a represented person, or unilaterally “following” that person’s public social media account even ~~where~~ if accessing or following ~~that information~~ the account generates ~~a~~ an automated notice to that person ~~from the social media platform~~ that ~~the information~~ their account has been accessed or followed. ~~See Rule 4.3, Comment [2A]. The term “following” refers to accounts that a particular user has subscribed to in order to view and/or receive updates about the contents of those accounts. The term “public online information” refers to information available to anyone viewing a social media network without the need for express permission from the person whose account is being viewed. Public online information includes content available to all members of a social media network and content that is accessible to non-members. However,~~ This rule only addresses communications with persons represented by counsel and not communications with jurors or prospective jurors ~~are, which are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of “communication” under Rule 3.5.~~

COSAC’s response to CFLS

COSAC has enormous respect for the views of CFLS, which originally published the Social Media Guidelines more than five years ago and has kept the Guidelines up to date with several subsequent editions. COSAC agrees that its April 14, 2020 proposal should be shorter and should contain fewer definitions. COSAC has decided to avoid confusion by not using the word “follow” in any form in Comment [4A]. COSAC has also simplified its proposal by eliminating some of the definitions and by shortening the final sentence regarding Rule 3.5.

NYSBA Committee on Professional Ethics

The NYSBA Committee on Professional Ethics submitted the following comment on COSAC's original August 2019 proposal, and it remained relevant to the April 2020 revised proposal:

COSAC has not yet revisited Rule 3.5, so we assume that nothing in its proposal is considered applicable to communications with jurors or venire members (though surely a Comment so clarifying would be useful).

We have no quarrel with COSAC's treatment of lawyer access to the public portions of a person's social media site as long as the lawyer (or the lawyer's agent) does not engage in deceptive practices.

We are concerned about COSAC's proposal to allow a lawyer to "follow" on social media a person known to be represented by counsel. The protocols of social media are changing so rapidly that a use of the phrase "follow" may be an anachronism in the blink of an eye. One site's "follower" could be another site's "friend" with a change in a site's policies. We agree that a mere notice that a lawyer is "following" a person on social media may not be a "communication" about the subject matter of the representation, but gaining access to the private portions of a represented person's site is, in our view, inconsistent with the purpose of Rule 4.2.

COSAC's response to the NYSBA Ethics Committee

In response to the ethics committee's concerns, COSAC added a new sentence at the end of new Comment [4A] to Rule 4.2 to make clear that the interpretation of Rule 4.2 in new Comment [4A] does not necessarily apply to similar conduct with respect to jurors and prospective jurors, because that conduct is governed by Rule 3.5, not by Rule 4.2.

COSAC also now agrees with the ethics committee (and others) that the term "follow" may become an anachronism, so COSAC has eliminated that term and its definition from Comment [4A].

NYSBA Real Property Law Section

The NYSBA Real Property Law Section found the August 2019 proposed addition of new Comment to be acceptable and did not object to COSAC's revised April 2020 proposal.

COSAC's response to the Real Property Law Section

COSAC is glad that the Real Property Law Section found COSAC's original proposal acceptable and trusts it will also find COSAC's current proposal acceptable.

NYSBA Trusts and Estates Law Section, Practice and Ethics Committee

The NYSBA Trusts and Estates Law Section's Practice and Ethics Committee said: "We are overall

in agreement with the proposed new Comment [4A].”

COSAC’s response to the Trusts and Estates Law Section

COSAC is grateful for the Trusts and Estates Law Section’s overall agreement with proposed new Comment [4A] to Rule 4.2.

New York County Lawyers’ Association

The New York County Lawyers’ Association Committee on Professional Ethics submitted the following comments on proposed Comment [4A]:

1. The NYCLA Committee on Professional Ethics considered this proposal in email correspondence between April and May 2020. Our Committee agrees with the proposal, but expresses a concern similar to that expressed by the NYSBA Committee on Professional Ethics, namely that the term “follow” on one social media platform is the same as a “friend” request on a different platform, which can have very different implications in terms of whether or not the lawyer who seeks access is communicating with social media subscriber. We note, in particular, the issue we addressed in NYCLA’s Formal Opinion 750, in which we considered whether a lawyer could add an adverse party or witness as a “friend” on Snapchat, which would permit the lawyer to access the adverse party or witness’s Snapchat posts and stories accessible only to the Snapchat user’s “friends.” We explained that upon making the “friend” request, the first subscriber will send a notification to the second subscriber and can immediately view the second subscriber’s public stories if the second subscriber has set his or her profile to make stories visible by “Everyone.” If the second subscriber only permits “friends” to view the subscriber’s posts, the first subscriber can only see the posts if the second subscriber responds to the first subscriber’s “friend” notification by adding the first subscriber as a “friend.” If the second subscriber adds the lawyer as a friend, the lawyer will have gained access to restricted postings without having revealed the purpose for seeking to be added as a friend – finding out useful information to impeach the adverse party or witness available in that person’s Snapchat posts. We concluded that the inability for the lawyer to disclose this purpose made the attempt at access impermissible.
2. We are comfortable with the proposed addition of Comment [4A] because it excludes from the definition of “public online information” information that requires express permission from the person whose account is being viewed.” We also advise caution in considering modifications to the rules or comments that expressly focus on social media. As we observed in NYCLA Formal Op. 750, “[d]etermining what is or is not permissible when lawyers wish to mine social media of an adverse party or witness has become more complicated with the increasing number of social media platforms and changes in the way that each platform is accessed by users.” It will be important to be aware of the variety of platforms and means of access when making pronouncements about whether different forms of notifications

constitute impermissible communications under the Rules of Professional Conduct.

3. We have enclosed with this comment a copy of NYCLA Opinion 750.

COSAC's response to the NYCLA Ethics Committee

COSAC agrees with the views of the NYCLA Committee on Professional Ethics and has revised its proposal accordingly. COSAC appreciates the expertise that the NYCLA Committee on Professional Ethics has developed in the technology area.

New York City Bar

The New York City Bar Committee on Professional Ethics “generally supports” COSAC’s proposed amendments to Rule 4.2, but one member urged that proposed new comment [4A] to Rule 4.2 should “be clarified to explain what it means by ‘follow’ in the social media sphere.” Specifically, the member said:

I think what it means is that you can “follow” a represented party, even if doing so generates a notice to that represented party, but you cannot send a Linked In invite or ask to be added to a group of “friends” who receive information that is restricted to that group (I don’t use Facebook so my terminology probably isn’t quite right). If my understanding above is correct, I think the comment needs to be clear that the prohibited types of contacts are indeed prohibited (i.e., sending the LinkedIn invite or “friend” request). I anticipate that COSAC may be of the view that the definition of “public online information” provides the necessary clarity, but I was still confused, and I suspect that others may be as well.

A member of a different New York City Bar committee (either Professional Responsibility or Professional Discipline) submitted the following comment:

The last sentence of the comment is not that compelling logically and could be potentially confusing: "However, communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of “communication” under Rule 3.5." One could reach the result that COSAC reaches – i.e., that it is acceptable for a social media notification to be generated when an attorney views information about a represented party (because the contact may not necessarily be about the subject of the representation/matter) but that the same is not permissible for jurors – without generating confusion about the definition of a communication. As I understood it, the distinction is that the contact with the juror is impermissible in all circumstances, whereas contact with the represented party is not impermissible unless it touches on the subject of the representation. You can either accept or reject the rationale that viewing a represented party’s profile (and generating the notification) is or is not related to the representation subject matter depending on the circumstances. But, it should not be because following or friend requesting is not a “communication” under R. 4.2 – the definition of “communication” should not be tortured under the rules to achieve that result.

COSAC's response to the New York City Bar

COSAC largely accepts the City Bar's views. COSAC has reduced possible confusion by eliminating the term "following" from proposal Comment [4A], and COSAC has shortened and simplified the cross-reference to Rule 3.5 in the closing sentence of the proposed Comment.

NEW YORKS STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION

TO: Executive Committee
FROM: Ethics Committee
RE: COSAC Proposals to Amend Rules 1.6, 3.4, 4.2 and 8.3
DATE: May 11, 2020

The Ethics Committee has reviewed the Memorandum dated April 14, 2020 setting forth COSAC's proposals to amend Rules 1.6, 3.4, 4.2 and 8.3 of the New York Rules of Professional Conduct, and to amend the Comments to those rules. It is respectfully recommended that the Local and State Government Law Section support the proposed amendments with one modification.

COSAC proposes to add Comment 17A (Duty to Preserve Confidentiality) to the Comments to Rule 1.6 (Confidentiality of Information):

[17A] The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communications and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains.

Rule 1.6 protects the confidential information of a client; Rule 1.9 protects the confidential information of a former client; and Rule 1.18 protects the confidential information of a prospective client.

Local and state government lawyers are bound by an additional duty of confidentiality owed to persons who are neither clients, former clients, nor prospective clients. Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) provides, in pertinent part, that:

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about *a person*, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental

authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(Emphasis added).

Rule 1.11(c) is a rule of disqualification. It does not explicitly prohibit disclosure of confidential government information, but Comment 4A to the Rule states, in pertinent part, that

[T]he purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the private client of a law firm with which the former public officer or official is associated from obtaining an unfair advantage by using the lawyer's confidential information about the private client's adversary.

Because the purpose and effect of Rule 1.11(c) is to protect confidential information from a source other than those contemplated by Rules 1.6, 1.9 and 1.18, it is recommended that the proposed Comment 17A to Rule 1.6 be modified to include a reference to Rule 1.11, as follows (in red):

[17A] The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communications and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, 1.11 or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains.

Representatives of the Local and State Government Law Section will be prepared to move for such an amendment during the House of Delegates meeting. However. This will be unnecessary if this amendment is accepted by COSAC.

Thank you.

PLEASE NOTE, comments must be submitted to COSAC no later than May 29, 2020 in order to be considered by that committee for incorporation in its proposal to the House of Delegates on June 14, 2020.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #11

REQUESTED ACTION: Approval of the report and recommendations of the Commercial and Federal Litigation Section.

In 2017, the Women's Initiative Task Force issued a report entitled, "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and ADR." The report found that women attorneys have low rates as lead counsel and speaking roles in the courtroom, as well as appearing in ADR proceedings or serving as neutrals. The report recommended steps that law firms, courts and clients could take to achieve equality. In November 2017 the House approved the report; in February 2018 the ABA House of Delegates passed a resolution adopting the report.

This year, the Task Force undertook a review of changes since the issuance of the 2017 report; it found that while there has been some progress, there continues to be large disparities for women, particularly women of color. The report also outlines efforts that have been undertaken since 2017 to implement recommendations that were contained in the 2017 report and efforts that should be undertaken going forward.

The Dispute Resolution Section is a co-sponsor of this report.

The report will be presented at the June 13 meeting by representatives of the Commercial and Federal Litigation and Dispute Resolution Sections.



NEW YORK STATE
BAR ASSOCIATION

THE TIME IS NOW: Achieving Equality for Women Attorneys in the Courtroom and in ADR

2020 Women's Initiative Task Force Follow-Up Study

Task Force Members

The Honorable Shira A. Scheindlin (ret.),
Stroock & Stroock & Lavan

Carrie H. Cohen, Morrison & Foerster LLP

Tracee E. Davis, Seyfarth Shaw

Laurel R. Kretzing, Nassau County Attorney's Office

Bernice K. Leber, Arent Fox LLP

Sharon M. Porcellio, Bond Schoeneck & King, PLLC

Lauren J. Wachtler, Barclay Damon

Report of the New York State Bar Association
Commercial and Federal Litigation Section

Thanks to DOAR, which provided analysis and technical support

**THE TIME IS NOW: ACHIEVING EQUALITY FOR WOMEN
ATTORNEYS IN THE COURTROOM AND IN ADR**

2020 WOMEN’S INITIATIVE TASK FORCE FOLLOW-UP STUDY

**REPORT OF THE NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION**

I. INTRODUCTION

Three years ago in 2017, the Women’s Initiative Task Force of the New York State Bar Association, Commercial and Federal Litigation Section (the “Task Force”) wrote a ground-breaking report entitled “If Not Now When? Achieving Equality for Women Attorneys in the Courtroom and in ADR” (the “2017 Report”). The 2017 Report included the results of a first-of-its-kind observational study based on questionnaires completed by state and federal judges throughout New York State that tracked the appearances of women in speaking roles in New York courts during the period September-December. The 2017 Report also compiled statistics on the percentage of women appointed as mediators and arbitrators in alternative dispute resolution (“ADR”).

The 2017 Report revealed that female attorneys comprised only about 25 percent of attorneys in lead counsel roles in courtrooms throughout New York State. This low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, *ex parte* applications and

multi-party matters. The 2017 Report found similar results in ADR regarding both the appearance of counsel in arbitration and mediation proceedings and the neutral conducting the hearing.

To help improve these percentages, the 2017 Report explored solutions that would hopefully move the needle towards full equality for women in the legal profession. Toward that end, the 2017 Report focused on efforts by law firms, clients, and courts to achieve that goal.

The 2017 Report was well received in the legal community. Initially, it was adopted by the Commercial and Federal Litigation Section (the “Section”). It was then formally adopted as a report of the New York State Bar Association (“NYSBA”) at a meeting of its House of Delegates on November 4, 2017. Finally, the American Bar Association (“ABA”) House of Delegates passed a resolution adopting the 2017 Report at its meeting on February 5, 2018 (Resolution No. 10A). The 2017 Report also received a great deal of publicity and has been the subject of innumerable articles, panels, webinars, and discussions, as well as generated substantial changes to policy and procedures within law firms, the business community, and the judiciary.

Even with the positive changes spurred by the 2017 Report, an important question remains: Have the statistics improved and what tangible changes have occurred? In order to answer that question, the Task Force decided it would repeat

the original study three years later. Most of the original Task Force members participated once again, with the addition of the current Section chair. The follow-up study included a questionnaire, annexed to this Report as Appendix A, and similar to the questionnaire used for the original study, to be completed by judges throughout New York State for the period September through December 2019 (the same months as the 2017 survey). This time, the Task Force received the professional assistance of DOAR, which graciously provided its services on a *pro bono* basis, to input and analyze the data received from the questionnaires.¹

This follow-up Report closely follows the organizational structure of the 2017 Report. It begins with an Executive Summary, which provides the most salient findings of the recent survey. The next section is a review of the recent literature regarding women in litigation and in ADR. The Report then presents the detailed results of the recent survey, followed by an update on the efforts made by

¹ The Task Force is greatly indebted to DOAR for its invaluable assistance, specifically to Paul Neale, its founder and CEO, for taking on this project and assigning two of his best researchers – Dr. Ellen Brickman and Natalie Gordon – who performed much of the survey analysis. The Task Force also acknowledges the assistance of Anuja Thatte, who spent many hours reviewing relevant studies and articles appearing during the last three years in order to provide an updated review of the literature on the issue of gender equality in the legal profession. Further, the Task Force acknowledges Lena Hughes, an associate at Morrison & Foerster LLP, and Laura M. Santana and Ashley A. Stephenson, paralegals at Morrison & Foerster LLP, for their invaluable assistance on various aspects of this Report. Finally, the Task Force gives special acknowledgement and thanks to Deborah Masucci, who although not a member of the Task Force, worked tirelessly on the ADR sections of this Report.

The Task Force notes that this Report was released in the midst of the COVID-19 pandemic. Notwithstanding the challenges facing the legal community, we remain resolute in continuing the forward momentum toward providing greater opportunities for women and minorities. The Task Force hopes that the recommendations and best practices in this Report further those efforts both during and after the current global health crisis.

law firms, in-house legal departments, and the courts to improve the presence of women in the courtroom and in ADR. It is our hope that this updated Report will provide both evidence that we are making progress but also that much work remains in order to achieve our goal of full equality.

II. EXECUTIVE SUMMARY

This comprehensive Report explores the results of our survey and also updates efforts by law firms, in-house legal departments, courts, and ADR providers to increase speaking opportunities for women attorneys. Set forth here are the key survey findings:

- The results summarized in this Report are based on more than 5,000 responses as opposed to approximately 2,800 in the 2017 Report.
- Female attorneys represented 26.7% of attorneys appearing in civil and criminal cases across New York. This represents a rise of 1.5 percentage points in the past three years.
- Female attorneys accounted for 25.3% of lead counsel roles and 36.4% of additional counsel roles. This represents a disappointingly tiny increase of only one-half of a percentage point in lead counsel roles but a healthy increase of 9 percentage points in additional counsel roles – which means

that more women attorneys are appearing in court even if they are not lead counsel.

- Once again, there was a disappointing disparity in the appearance of women attorneys based on the number of parties in the case, which often reflects the complexity of a matter. When the case involved only one party per side, women appeared as lead counsel at the encouraging rate of 43%. But, as the number of parties increased, the percentages of women appearing shrank to 26.6% (two parties on at least one side); 26% (three-five parties); and 23.5% (six or more parties). However, all of these figures reflect an increase from three years ago where the comparable numbers were: 31.6%; 26.4%; 24.8%; and 19.5%.
- Women appeared with greater frequency in trial courts than in appellate courts, although the difference was not great, approximately one percent. In the last survey, women made up 24.7% of appearances in trial courts but now the figure is 26.3% – a rise of nearly 2 percentage points. But, the appellate court appearances for women were nearly identical at 25.2% (first survey) and 24.7% (current survey).
- Federal courts appeared to be more hospitable to women attorneys than state courts. Women lead attorneys made up 27.5% of appearances in federal

court, contrasted with 23.1% of appearances in state courts – a significant gap of four percentage points. Women attorneys had the highest rate of lead roles in the Commercial Division of the Eighth Judicial District in Erie County (35.1%) and the Southern District of New York (31.8%) and the lowest rate of appearances in the Commercial Division of New York County (18.7%) – a very stark disparity. A possible explanation is that the federal courts included a large number of criminal matters often handled by public sector attorneys, but state criminal cases were not included in the survey, which only surveyed the state trial courts in the commercial divisions.

- A similar gap was noted between upstate and downstate courts, with upstate courts reflecting women in lead roles 27.9% of the time versus 24.2% of the time in downstate courts. A gap of 3.7 percentage points is not insignificant.
- A major finding in the 2017 Report was the large gap between the public and private sector. In the current study, women made up 35.1% of public sector lead attorneys but just 20.8% of private practice lead attorneys. The numbers from the previous study showed 38.2% of public sector lead attorneys but just 19.4% of private practice lead attorneys. These figures show little progress with respect to private sector attorneys, whose appearances as lead attorneys grew by just over one percentage point..

II. LITERATURE REVIEW

Since the Task Force issued its 2017 Report in July of 2017, the #MeToo movement has cast an even brighter light on discrimination, harassment, and inequality in many fields, including the law. Despite increased attention on these issues, however, there are still stark disparities in the legal profession for women and particularly women of color.² This section of the Report summarizes some of the recent literature that was reviewed by the Task Force in preparing this Report.

A. Women in Litigation: Nationwide

1. ABA Presidential Initiative on Achieving Long-Term Careers for Women in Law

The disproportionately high rate of attrition among women lawyers—and relatedly, the disproportionately low number of leadership positions held by women lawyers—is well documented. For example, a 2018 study showed that although women have comprised 45-50% of incoming law firm associates for many years, they account for just 29% of new equity partners and 20% of equity partners overall.³ Likewise, more than 75% of law firm management committee members,

² While not the focus of the survey or this Report (or the 2017 Report), women of color and diverse women are often even more disadvantaged than white women. Several participating state judges noted their desire to include race, national origin, and ethnicity in the survey and while such a survey would be extremely desirable, this Initiative was focused on women in the courtroom and in ADR. Nonetheless, the Task Force hopes that our work spurs others to take similar action to help combat the disturbing statistics that highlight the difficulties faced by diverse women in the legal profession.

³ See Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report, at 1 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

practice group leaders, and office heads were men.⁴ Indeed, *The American Lawyer* has forecast that given current trends, gender parity among equity partners will not be achieved until the year 2181.⁵

Against this backdrop, in 2017, then-ABA President Hilarie Bass launched the ABA’s Presidential Initiative on Achieving Long-Term Careers for Women in Law (the “Presidential Initiative”).⁶ The Presidential Initiative sponsored research aimed at developing “recommendations for what law firms, corporations, bar associations, and individual lawyers can do to enhance the prospects for women to reach the highest levels of practice and remain in the profession.”⁷

Among the research sponsored by the Presidential Initiative was a survey of 1,262 lawyers (men and women) at *National Law Journal* 500 firms who had been practicing law for at least 15 years.⁸ The final results of that survey were published in a November 2019 report—authored by the Co-Chairs of the Presidential

⁴ See *id.*

⁵ See *id.* at 1 (citing *The American Lawyer*, *Special Report: Big Law is Failing Women* (May 28, 2015)) <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

⁶ See ABA, Presidential Initiative on Achieving Long-Term Careers for Women in Law, <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/summer/aba-presidential-initiative-on-achieving-long-term-careers-for-w/>.

⁷ *Id.*

⁸ See Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report, at 3 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

Initiative, Roberta D. Liebenberg and Stephanie A. Scharf—titled “*Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice.*”⁹

The survey results revealed striking differences in the experiences of senior men and women in large law firms. (Because the number of participating lawyers of color was so low, the survey did not break out its findings for minority women.¹⁰) Among other things, 50% of female respondents reported having experienced unwanted sexual conduct at work, compared to only 6% of male respondents; 75% of female respondents reported having been subjected to demeaning comments, stories, or jokes, compared to only 8% of male respondents; and 82% of female respondents reported having been mistaken for a lower-level employee, compared to 0% of male respondents.¹¹

Unsurprisingly, these disparities extended to compensation and professional development experiences as well: 54% of female respondents reported having been denied a salary increase or bonus on account of their gender, whereas only 4% of male respondents said the same; and 46% of female respondents reported a lack of access to sponsors in the workplace, compared to just 3% of male

⁹ See *id.* at 1.

¹⁰ See *id.* at 3.

¹¹ See *id.* at 7-8.

respondents.¹² Nearly 70% of male respondents felt “extremely” or “somewhat” satisfied with their firm’s compensation structure, but only 46% of female respondents reported the same.¹³

The data further indicated that women lawyers have significantly higher levels of responsibility at home than their male counterparts—and that such responsibilities affected their decisions to leave law firms. For example, 54% of the women said that they were fully responsible for arranging childcare, compared to 1% of men.¹⁴ When asked why women leave law firms, nearly 60% of the senior women lawyers surveyed cited childcare commitments as an “important” influence.¹⁵ Other top responses were “emphasis on marketing or originating business,” “billable hours,” “no longer wishes to practice law,” “work life balance,” and “personal or family health concerns.”¹⁶

Reflecting on this data, the report observes:

These top reasons why experienced women leave private practice boil down to the stress and time needed to “do it all,” especially around non-substantive responsibilities at the office that do not reflect the quality of an individual’s legal work. Pressures to bill a large number of hours, and

¹² *See id.* at 8.

¹³ *Id.* at 6.

¹⁴ *See id.* at 12.

¹⁵ *See id.*

¹⁶ *Id.*

then spend more time to originate business, and then meet caretaking commitments lead to increased stress and an inability to strike an acceptable work/life balance.¹⁷

At the same time, “[c]lient demands for the breadth of talent that comes with diversity are being heard today, and will increase each year.”¹⁸ In discussing the project, Ms. Scharf noted that “[i]n looking at the parameters where women are much less satisfied than men, those factors are pretty much within the control of the law firm.”¹⁹ With respect to the types of policies that experienced women lawyers did cite as beneficial, the report states:

The policies that at least 75% of women believe are important to advancing senior women are work from home (78%); paid parental leave (76%); clear consistent criteria for promotion to equity partner (75%); and a formal part-time policy for partners (75%).²⁰

However, “when a firm does not implement these policies in a meaningful way, it is undercutting its ability to retain and advance women into senior roles.”²¹

¹⁷ *Id.*

¹⁸ *Id.* at 18.

¹⁹ Roy Strom, *Women Partners, Law Firm Leaders, Have Vastly Different Big Law Lives, Study Shows*, law.com (Aug. 3, 2018), <https://www.law.com/2018/08/03/women-partners-law-firm-leaders-have-vastly-different-big-law-lives-study-shows/>.

²⁰ Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report, at 17 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

²¹ *Id.*

As to what firm leadership might do differently, the report concludes by offering various “recommended best practices” for firms, including: (i) taking ownership over “the business case for diversity” — *i.e.*, that, as more and more clients are recognizing, “promoting greater diversity in the law firms they hire will lead to better decision-making, work product, and results”; (ii) establishing a concrete timeline for what the firm wants to achieve; (iii) using metrics to track key factors over time; (iv) training employees, including partners, on implicit bias and sexual harassment in the workplace; and (v) adopting meaningful policies to alleviate the family pressures disproportionately borne by women—including promoting, rather than penalizing, employees who utilize such options.²²

Critically, however, the report urges that male partners cannot simply put this work onto the (few) female partners within their ranks because “[o]nly the full strength and voice of a firm’s leaders can give teeth to a firm’s efforts.”²³

²² *Id.* at 18-20.

²³ *Id.* at 20.

2. Other Recent Literature Regarding Gender Disparities Within the Profession and Initiatives for Change

Other recent literature corroborates the extent to which gender disparities pervade the legal profession, particularly within law firms.

A 2018 Major, Lindsey & Africa survey found that, on average, male partners in the United States out-earn their female counterparts by 53%.²⁴ One possible explanation may be that partner compensation is driven largely by business origination, and relatedly, valuable client relationships tend to be passed down among partners who predominantly are white and male.²⁵ In other words, the lack of women and minorities currently in leadership positions may reinforce limitations for future diverse lawyers. In addition, even when women partners bring in business, research indicates that they generally receive 80% of the origination credit given to men.²⁶

Research indicates that women (and minorities) similarly have access to far fewer professional development opportunities. For example, at the trial level, an ABA study of randomly selected federal cases found that 76% of civil trial teams

²⁴ See Dan Packel, *New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay*, N.Y.L.J., at 1 (Dec. 6, 2018).

²⁵ See *id.* at 3.

²⁶ See Aviva Will, *New Solutions Are Needed to Fix a Gender Pay Gap That's Getting Bigger*, N.Y.L.J. (Dec. 13, 2018).

and 79% of criminal trial teams were led by men.²⁷ And, at the apex of the litigation process, the United States Supreme Court, a mere 12% of arguments were conducted by women during the 2017-18 term.²⁸ As Stanford Law School professor and frequent Supreme Court advocate Pam Karlan recognized, “I think it is hard to get a first argument, and without getting a first argument it is hard to get more arguments. . . .There is an aggressiveness in rainmaking that not all men have, but most of the people who have it are men.”²⁹

Positive change also is being driven by judges, clients, and other industry participants. For example, as Judge Joy Flowers Conti of the Western District of Pennsylvania explained, increasing diversity within the lawyers who appear in court is “the talk of the town” amongst judges—with many judges now adopting standing orders that encourage participation from less-experienced lawyers.³⁰ Judge Conti elaborated that, “the reason for [such standing orders] is that’s where all the minorities are that never make it up to first-chair roles. . . . You just have to

²⁷ See Lynne Herrnle, *I defended Kleiner in the Ellen Pao case—here’s why we need more women leading trials*, Bus. Insider (Sept. 12, 2017), <https://www.businessinsider.com/i-defended-kleiner-in-the-ellen-pao-case-2017-9>.

²⁸ See Mark Walsh, *Number of women arguing before the court has fallen off steeply*, ABA Journal (Aug. 1, 2018), https://www.abajournal.com/magazine/article/women_supreme_court_bar/P1.

²⁹ *Id.*

³⁰ Britain Eakin, *Judges Outline Ways Judiciary Is Pushing For Attorney Diversity*, Law360, (Sept. 27, 2019), https://www.law360.com/newyork/articles/1203640/judges-outline-ways-judiciary-is-pushing-for-atty-diversity?nl_pk=2e91411e-e487-475b-a9e0-c9728ce7cb29&utm_source=newsletter&utm_medium=email&utm_campaign=newyork&read_more=1.

give them the opportunity. . . .They can do really well, and judges like it. Men and women judges like it.”³¹

Clients also increasingly are seeking diverse representation. In January 2019, a coalition of more than 170 general counsels wrote an open letter to large law firms lamenting the fact that new partner classes “remain largely male and largely white.”³² The letter pledged, *inter alia*, that “[w]e, as a group, will direct our substantial outside counsel spend to those law firms that manifest results with respect to diversity and inclusion. . . . We expect the outside law firms we retain to reflect the diversity of the legal community and the customers we serve.”³³ Many companies also have adopted specific policies around diversity for their outside counsel.

For example, Microsoft’s Law Firm Diversity Program offers financial incentives for its outside law firms that meet certain goals with respect to the hiring and inclusion of women, minority, and LGBTQ-identifying lawyers, including at the partnership level.³⁴ As Microsoft’s General Counsel Dev Stahlkopf explains,

³¹ *Id.*

³² Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, N.Y.L.J. (Jan. 27, 2019).

³³ *Id.*

³⁴ See Caroline Spiezio, *Microsoft Seeks Diversity in its Outside Counsel*, Corporate Counsel (Oct. 1, 2018), <https://www.law.com/corpocounsel/2018/10/01/microsoft-seeks-diversity-in-its-outside-counsel/>.

such incentives are good business: “Studies show that diverse teams work more effectively and produce better results, . . . [a]nd it’s really important for us that our employees and the people who do work on our behalf reflect the full diversity of our global customer base.”³⁵

The federal government too has focused attention on these issues. For example, in April 2019, the Office of Federal Contract Compliance Programs advised that it was looking into “serious issues” with respect to the underrepresentation of women and minorities in the law firms serving the federal government.³⁶

And, as one possible solution with respect to the compensation disparity between male and female partners, litigation finance company Burford Capital has launched a \$50 million fund earmarked for financing commercial litigation and arbitrations led by women.³⁷ With this capital, women can “pitch client-friendly alternative billing arrangements to their management committees,” “pursue

³⁵ *Id.*

³⁶ MP McQueen, *Government Warns Law Firms of Consequences for Diversity Failures*, N.Y.L.J. (Apr. 11, 2019).

³⁷ *See* Aviva Will, *New Solutions Are Needed to Fix a Gender Pay Gap That’s Getting Bigger*, N.Y.L.J. (Dec. 13, 2018).

leadership positions,” and “ease pathways towards origination and client relationship credit for them and their firms.”³⁸

B. Women in ADR

1. ABA Resolution on the Selection and Use of Divers Neutrals

In 2008, the ABA adopted “Eliminate Bias and Enhance Diversity” as one of its four primary goals.³⁹ This goal recognized “that clients, the legal profession and society are best served when lawyers reflect the broader community in which they serve” and “when organizations are diverse and inclusive at every level.”⁴⁰ Yet even as more women and minorities have entered the legal profession, diversity has continued to lag—particularly at the top. As one 2017 Vault/MCCA study showed:

Even though one in four law firm associates is a person of color, more than 90 percent of equity partners are white. Among women, the figures are especially stark: women of color represent 13 percent of associates but less than 3 percent of equity partners.⁴¹

³⁸ *Id.*

³⁹ American Bar Association, “ABA Mission and Goals,” https://www.americanbar.org/about_the_aba/aba-mission-goals/; see American Bar Association Section of Dispute Resolution, Report to the House of Delegates Resolution 105 (Aug. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 2.

In August 2016, the ABA’s House of Delegates passed Resolution 113 urging, *inter alia*, that “all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys [and that] clients . . . direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”⁴²

Two years later, in August 2018, the ABA’s House of Delegates passed another resolution focused specifically on “elimination of bias and enhancing diversity in Dispute Resolution—a segment of ‘legal’ services that has been described as ‘arguably the least diverse corner of the profession’” (the “2018 Resolution”).⁴³ The 2018 Resolution urges “all users of domestic and international legal and neutral services to select and use diverse neutrals.”⁴⁴

The 2018 Resolution was accompanied by a detailed report by the ABA Section of Dispute Resolution.⁴⁵ The data compiled in that report showed, as an initial matter, that “diversity within Dispute Resolution significantly lags the legal profession as a whole.”⁴⁶ Because of the confidential nature of most dispute resolution proceedings, the report was based on limited data regarding the diversity

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.* at 2.

⁴⁶ *Id.*

of ADR professionals but included data showing a consistent underrepresentation of women and minorities on rosters of neutrals. For example, 2015 data published by the Financial Industry Regulatory Authority, Inc. (“FINRA”) showed that its roster was 75% male and 86% Caucasian.⁴⁷ Other ADR providers reported similarly low levels of diversity among their rosters (*e.g.*, JAMS (22% women; 9% persons of color); American Arbitration Association (“AAA”) (25% women and minorities); CPR Institute (15% women; 14% persons of color)).⁴⁸ Based on available statistics, the report concluded “that gender and racial/ethnic diversity of institutional providers of dispute resolution is likely to be less than one-half that of law firms.”⁴⁹

Compounding the problem, the report found that even if the roster is diverse, very few diverse neutrals are selected to preside over disputes. For example, in 2015, AAA reported that only 26% of its arbitrations had a diverse panelist.⁵⁰ The figures appear even more stark for high-value cases: “[a]s a 2017

⁴⁷ *See id.* at 4.

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *See id.* at 5.

article examining gender differences in dispute resolution practice put it, “the more high-stakes the case, the lower the odds that a woman would be involved.”⁵¹

The report identifies two main contributing factors to these figures: (i) the reality that dispute resolution is highly dependent on entrenched referral networks, and (ii) the confidential nature of most dispute resolution proceedings.⁵² With respect to the first factor, the report observes that because neutrals are generally chosen based on the parties’ consent, “many neutrals are chosen or at least vetted through the networks of equity law firm partners” and “established neutrals are often asked to make referrals to other neutrals.”⁵³ As a result, “[i]n both cases, the networks are largely white and male, and the recommendations and referrals subject to implicit bias.”⁵⁴ The report notes that “[t]his dynamic[] flows at least partly from a sense among attorneys that retired judges and veteran litigators, a largely older, white, and male cohort, are the most palatable figures to clients when

⁵¹ *Id.* Indeed, a previous 2014 study by the ABA Dispute Resolution Section found that for cases where the amount-in-controversy was between one and ten million dollars, 89% of arbitrators were men. For cases involving one billion dollars or more, one survey estimated that a woman arbitrator was involved just 4% of the time. The ABA’s research further found that parties were more likely to select a male neutral for corporate and commercial matters, and more likely to select a female neutral in cases where the dispute was primarily nonmonetary. *Id.*

⁵² *See id.* at 7.

⁵³ *Id.*

⁵⁴ *Id.*

pursuing a dispute outside the courtroom.”⁵⁵ Additionally, “this tendency is reinforced by implicit biases to which we are all subject that often lead even well-meaning individuals to pass over those who are ‘different.’”⁵⁶

As to the second factor, the report observes that “the confidentiality and privacy that are integral elements of most dispute resolution processes” also has the effect of reducing “public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change—clients.”⁵⁷ Relatedly, because clients tend to defer to outside counsel on the selection of neutrals, they “often fail to focus on enhancing opportunities for diverse neutrals” even “as part of their broader and influential efforts to enhance diversity in the legal profession.”⁵⁸ Thus, the report concludes by urging clients to take an active role in promoting the selection of women and minority neutrals: “Achieving real progress will not only require continued attention from providers in terms of recruiting and supporting women and minority mediators and

⁵⁵ *Id.* at 8.

⁵⁶ *Id.*

⁵⁷ *Id.* at 7-8.

⁵⁸ *Id.* at 9.

arbitrators, but also clients who are willing to ask questions that perhaps they haven't in the past.”⁵⁹

III. SURVEY METHODOLOGY AND FINDINGS

In this follow-up study, the Task Force prepared a questionnaire for state and federal judges, nearly identical to the questionnaire used three years ago. With appreciation to the judiciary, the response rate was more robust this time with more judges completing questionnaires. Three of the four federal district courts participated, as well as the United States Court of Appeals for the Second Circuit. The New York Court of Appeals, as well as all of the Appellate Divisions participated. Seven of the Commercial Division courts returned surveys.⁶⁰ A total of 5,429 responses were received, although 1,184 of those responses provided the data in a format different from the questionnaire. Nevertheless, data gathered from all sources were incorporated into the results of the study.

A high-level overview of the survey findings is set forth earlier in the Executive Summary. What follows is a more granular analysis of those findings. Where possible, the findings are contrasted with those obtained three years ago to highlight progress, or the lack thereof.

⁵⁹ *Id.*

⁶⁰ The following Commercial Divisions participated: Eighth Judicial District, Onondaga, New York, Queens, Suffolk, Westchester, and Nassau.

A. Women Litigators in New York State Courts

At the New York Court of Appeals, based on 33 arguments involving a total of 67 attorney appearances during the relevant time period, 18 women spoke at oral argument, for an appearance rate of 26.8%. In the 2017 Report, women attorneys comprised 39.4% of appearances in the New York Court of Appeals during the identical timeframe.

In cases in the New York Court of Appeals in which at least one party was represented by a public sector office, women attorneys comprised 41.7% of appearances (a drop from 51.3% in the 2017 Report). In civil cases overall, women attorneys appeared as lead counsel in 35.3% of the cases, an increase from 30% in the 2017 Report. The figure for women appearances in criminal cases was higher at 50%, which was a slight increase from 46.8% found in the 2017 Report. This high percentage of women as lead in criminal cases is not surprising given that prosecutors and public defenders are public employees.⁶¹

As to the Appellate Divisions, the responses from the First Department showed that women attorneys took the lead in 26% of the cases. Yet, female attorneys in the public sector appeared more frequently than their male counterparts at the astounding rate of 55.9% of appearances, although this figure

⁶¹ Because of the disparity in the amount of data collected in this survey compared to the previous survey, it is difficult to determine whether there has been a significant decline in women appearing before the State's highest court or whether the lower percentages is a result only of the smaller amount of data.

was based on very limited data (34 appearances). In the Second Department, a woman attorney took the lead in 24.3% of the arguments. Once again, female attorneys appeared in 49.4% of arguments on behalf of public entities, which was remarkably similar to the 50% appearance rate in the 2017 Report. In the Third Department, women attorneys were the lead in 28% of the cases. And, once again, they appeared with greater frequency – 34.8% – when representing a public entity. Finally, in the Fourth Department, women attorneys took the lead in 27.7% of the cases. In the public sector, women took the lead in 26.7% of cases, but in the private sector, this figure was significantly lower at 20.5%. Putting these figures together, in state court appellate arguments, a woman attorney was the lead appellate advocate 26.5% of the time.

The responses from the Commercial Divisions around the State showed vast differences in the representation of women attorneys in speaking roles in the courtroom. Despite a large response rate from the Commercial Division of New York County, the percentage of cases in which female attorneys took the lead in that court was a disappointing 18.7%. Women fared better in most of the other Commercial Divisions, with the exception of Nassau County, where women attorneys appeared in lead roles only 15% of the time. However, in Suffolk County, women attorneys took the lead 24.7% of the time, which was a significant increase from the 2017 Report when women attorneys appeared as lead in only

13.7% of the cases. In Queens County, women attorneys took the lead 21% of the time. The returns from the Commercial Division in the Eighth Judicial District in Erie County showed women in lead roles 35.1% of the time, which again was a significant increase from the 26.9% in the 2017 Report. Finally, Onondaga County had women attorneys in the lead 24.6% of the time, which was a slight decrease from 26.9% in the 2017 Report. While there is a significant variation from 18.7 to 35.1%, the average of all of the Commercial Divisions shows female attorneys in lead roles 23.2% of the time.

In total, the percentage of female attorneys in lead roles in *all* state courts surveyed (from a total of 1,766 responses), in *civil* cases was only 22.6%, a decrease from the 2017 Report statistic of 26.9%. Simply put, this finding is not encouraging and far below expectations.

B. Women Litigators in Federal Courts

Unlike the first survey, the statistics of female attorneys appearing in the Second Circuit surpassed those from the New York Court of Appeals. Of the 765 attorneys appearing before the Second Circuit during the survey period, 24.3% were female. This represents a rise of close to 4 percentage points from three years ago. While this is surely not enough progress, it does show *some* progress for female federal appellate advocates.

In the district courts, women represented 22.7% of attorneys in criminal cases and 24.3% of attorneys in civil cases. Of the 160 attorneys who were identified as either working in the public or private sectors, women represented 10.3% of public sector attorneys and 17.5% of private sector attorneys.

The Southern District of New York recorded the highest percentage of women attorneys in lead roles at 31.7% (an increase from 26.1% in the 2017 Report) and this percentage was based on responses recording appearances by 1,142 attorneys, evenly split between plaintiffs and defendants. In the Southern District, women represented a higher percentage of attorneys in criminal cases (34.3%) than civil cases (29.2%). Public sector lead attorneys were two times more likely to be women (41.4%) than private sector lead attorneys (20.4%).

The Western District of New York had women attorneys appear as lead counsel in 26.2% of appearances, an increase from 22.9% in the 2017 Report, but nearly 5 percentage points less than in the Southern District of New York despite its particularly high response rate. Its response rate also was split almost evenly between plaintiffs and defendants. Women represented a slightly higher percentage of attorneys in criminal cases (26.4%) compared to in civil cases (25.7%). And, once again, public sector lead attorneys were two times more likely to be women (26.8%) than private sector lead attorneys (13.8%).

Finally, the Northern District of New York, which had not participated in the first survey, reported women attorneys as lead counsel in 28.4% of appearances, falling between the percentages in the Southern and the Western Districts. In the Northern District, women appeared in 32% of criminal cases and 23.5% of civil cases. Women made up 43.3% of attorney appearances in cases involving public entities but only 13.2% of cases involving private parties.

In sum, when totaling all of the attorneys appearing in the three federal district courts that participated, female attorneys held lead roles 28.5% of the time (1,095 women attorneys divided by 3,837 total attorney appearances).

C. Women Litigators: General Observations

When comparing upstate to downstate courts, women fared slightly better upstate in civil cases (26.7% upstate, 23.9% downstate) but not in criminal cases (28.1% upstate, 30.6% downstate). Comparing appellate to trial level proceedings, women attorneys were better represented at the trial level in criminal cases than in civil cases. In civil cases in trial courts, women attorneys had lead roles 24.1% of the time versus 25.4% in appellate arguments. In criminal cases, by contrast, the reverse was true. Female attorneys had lead roles in 29.4% of criminal cases in the trial courts versus 22.7% in the appellate courts.

In attempting to determine whether there were disparities by subject matter in the appearances of women attorneys in lead counsel roles, the results are

interesting. The highest percentage of women in lead roles was in all aspects of family law at 40.7%. By contrast, the lowest percentage of women attorneys in lead roles was in all varieties of contract disputes at just 17.7%. In between, the following percentages were found in descending order: Criminal 28.6%; Civil Rights 28.1%; Torts 27.7%; Financial Disputes 23.4%; Intellectual Property 21.1%.

Finally, comparing federal courts to state courts in the distinctions between civil cases and criminal cases and public sector versus private sector also provided interesting data. On an aggregate basis, women attorneys represented 27.5% of attorneys at the federal level and 23.2% of attorneys at the state level. At the federal level, women comprised 28.8% of attorneys in criminal cases and 26% of attorneys in civil cases. There was virtually no data (*i.e.*, only one data point) to calculate the percentage of women attorneys appearing in criminal cases at the state level, but women appeared in 24.1% of civil cases.

At both the federal and state level, women made up a higher percentage of attorneys in the public sector than in the private sector. Specifically, at the federal level, women represented 30.9% of attorneys appearing who worked in the public sector and 17.4% of attorneys appearing who worked in the private sector; at the state level, women comprised 43.1% of attorneys appearing who worked in the public sector and 22.4% of attorneys appearing who worked in the private sector.

D. Conclusions

Unfortunately, during the three year period since the 2017 Report was issued, there has been only slight improvement in percentages of women appearing in speaking roles in courtrooms throughout New York State. Again, there was a significant gap between public sector and private sector attorneys, perhaps revealing that the private sector should try to learn from the public sector. There also was a significant disparity between trial and appellate courts, in particular, the higher the court, the less likely a woman will appear as lead counsel.

While no data was collected from the United States Supreme Court, it has been reported that the appearances of female attorneys in that court have been declining. During the Supreme Court's 2017-2018 term, for example, only 12% of appearances at oral argument were by women, which was *lower* than in the previous five years where appearances by women ranged from a low of 15% to a high of 19%.⁶²

Of additional concern is the apparent subject matter disparity that appears to show fewer appearances by female attorneys in commercial cases than in other types of cases. This is also reflected by the low rate of appearances by female attorneys in the Appellate Division First Department, which hears a greater number

⁶² See Mark Walsh, *Number of Women Arguing Before the Supreme Court Has Fallen Off Sharply*, A.B.A.J. (Aug. 1, 2018).

of commercial appeals than the other Appellate Divisions because Manhattan – the business center – is in the First Department.

On the other hand, there is an uptick in appearances of female attorneys in lead roles in trial courts – particularly in the Southern District of New York and there is also a significant rise in the appearances of female attorneys in all New York courts, in what this Report refers to as additional counsel roles (*i.e.*, not in lead counsel roles). These are encouraging developments.

In sum, there is still significant need for improvement in achieving gender equity in the courtroom. Later sections of this Report address additional actions that can be taken by law firms, clients, and courts to further improve these results.

IV. ALTERNATIVE DISPUTE RESOLUTION

None of the ADR providers used the Task Force’s suggested questionnaire with some asserting confidentiality concerns. Several ADR providers, however, maintain their own statistics with respect to the diversity of their panels, but not all track appointments to cases by race, gender or subject matter. Six providers (or entities) agreed to share their statistics for inclusion in this report and those statistics are summarized in relevant part below.

FINRA operates the largest securities dispute resolution forum in the United States,⁶³ and due to the volume of cases, is considered a gateway to allowing new neutrals to gain valuable experience. FINRA began an aggressive campaign to diversify its arbitral panels in 2015. To monitor the results of its efforts, each November it conducts a survey of its arbitrator and mediator population through an external consulting firm. The voluntary and confidential survey of the roster is conducted annually and the results are published on its website.⁶⁴ A comparison of the survey results from 2016 to 2019 for the State of New York, show that the number of female neutrals increased from 30% to 32% on the overall roster. The national results show that the number of female arbitrators increased from 24% to 29%. FINRA does not track gender or race of appointments.

Another private ADR national provider, Resolute Systems, LLC (“Resolute”),⁶⁵ reported that it had a 45% increase of women on its New York panels between December 2016 and December 2019, with a 39% increase of women nationally over the same time period. Resolute also reported an 8% increase of women selected as mediators and arbitrators in New York and a 14%

⁶³ FINRA Dispute Resolution Services, Arbitration & Mediation, <https://www.finra.org/arbitration-mediation>.

⁶⁴ FINRA, Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA, Why Diversity is Important, <https://www.finra.org/arbitration-mediation/our-commitment-achieving-arbitrator-and-mediator-diversity-finra>.

⁶⁵ Resolute Systems describes itself as one of the nation’s largest ADR Providers. *See* <https://resolutesystems.com>.

increase nationally from December 2016 through December 2019. Notably, Resolute also keeps statistics on woman participants in the ADR process, noting that overall, there were 1,062 women involved in ADR proceedings as either neutral, counsel or claims representative. Resolute noted that it had made concerted efforts to recruit female neutrals to its panels

The AAA⁶⁶ reported an increase in the number of women in its rosters from December 2016 to December 2019. In New York, the increase was 12% with a 4% increase nationally. The percentage of the number of women appointed to cases also increased between 2016 and 2019. In New York, the number of women appointed to panels increased by 25% with a national increase of 13%.

JAMS⁶⁷ reported an increase of both women on its panel and women assigned to cases between 2016 and 2019. JAMS increased the number of women on its panel from 101 in 2016 to 135 in 2019. The percentage of women assigned to both mediation and arbitration cases rose from 29% in 2016 to 35% in 2019.

JAMS separately reported statistics for its New York City location, its only office in New York State. JAMS reported 20 women neutrals in New York as of

⁶⁶ The AAA-ICDR describes itself as the largest private global provider of alternative dispute resolution services in the world. See <https://www.adr.org/mission>.

⁶⁷ JAMS describes itself on its website as the largest private ADR provider. See <https://www.jamsadr.com/about>.

2019 out of a total of 58 neutrals. The percentage of women assigned to mediation and arbitration cases rose from 44% in 2016 to 45% in 2019.

The International Institute for Conflict Prevention and Resolution⁶⁸ (“CPR”) did not provide a year-by-year comparison to measure diversity progress but did note that of all cases commenced in 2019, women served as a neutral in 39% of the cases.

In June of 2018, the International Chamber of Commerce⁶⁹ (“ICC”) International Court of Arbitration reported that for the Court’s 2018-2021 term, the ICC World Council nominated Court members with full gender parity. The percentage of female Court members rose from 23% to 50%.⁷⁰

Notably, however, except for FINRA where disputes relate to the financial services business, the subject matter of the cases in which women were chosen as neutrals is unknown. Previous data from ADR providers generally shows that women more often are chosen as neutrals in employment, domestic relations, and personal injury rather than in commercial matters.⁷¹

⁶⁸ CPR is an independent nonprofit organization that helps prevent and resolve legal conflict more effectively and efficiently. See <https://www.cpradr.org/about>.

⁶⁹ The ICC Court of Arbitration is the world’s leading arbitral institution that has been helping resolve international commercial and business disputes since 1923. See <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration>.

⁷⁰ Arbitral Women, “Gender Equality Achieved on the ICC Court – Another Year of Progress” (June 25, 2018), <https://www.arbitralwomen.org/gender-equality-achieved-on-the-icc-court-another-year-of-progress>.

⁷¹ Further disparity may occur when an organization selects the neutral versus selection by organizations.

Because of the differences in the way the statistics were reported, it is difficult to draw any detailed conclusions other than to note a general uptick in both the numbers of women neutrals on ADR provider panels and the number of women actually selected to serve on cases, representing what appears to be notable progress.

IV. Innovations and Moving Forward

A. Law Firms

1. Innovations

Law firms recognize the strategic, financial, and principled benefit of increasing diversity within their firms.⁷² During the years that followed the Section’s 2017 Report, firms have increased their efforts “to move the needle”⁷³ and have taken concrete action to advance diversity and inclusion. These efforts have and should continue to evolve.⁷⁴

a. Women’s Initiatives

⁷² See, e.g., *Strategies and Tactics For In-House Legal Departments to Improve Outside Counsel Diversity*, <https://images.law.com/contrib/content/uploads/documents/292/General-Counsel-For-Law-Firm-Diversity-Diversith-Lab-Strategy-Tactics-May-2019.pdf>; Michelle Fivel, *Millennials Are Pushing Back Against Law Firm Sexism* (May 29, 2019), <https://www.law360.com/articles/1163183/millennials-are-pushing-back-against-law-firm-sexism>.

⁷³ Lynn S. Scott, “Moving the Needle—We Can’t Give Up,” *ABA Law Practice Today*, May 14, 2019 <https://www.lawpracticetoday.org/article/moving-needle-cant-give/>.

⁷⁴ See, e.g., Hannah Roberts, “What Law Firms (And Men) Can Do to Improve Gender Diversity, According to Top Female Lawyers” (Mar. 6, 2020), <https://www.law.com/international-edition/2020/03/06/what-law-firms-and-men-can-do-to-improve-gender-diversity-according-to-top-female-lawyers/>.

Most major law firms have women's initiatives that have grown in importance and increasingly are embraced by firm leadership. Firms report that advocacy by their women's groups has resulted in positive changes during the past several years, including: (1) the adoption of alternative work arrangements for associates; (2) holding conferences for women attorneys that feature speakers from both inside and outside the legal community who share their experiences and the ways they have addressed gender discrimination in the workplace and also how they have worked to advance women in the legal profession; and (3) dissemination of marketing materials to clients that highlight their women attorneys and recent professional achievements of those women.⁷⁵

Women's initiatives, in concert with firm management, have moved past merely identifying the difficult issues facing women attorneys and the barriers to their success within and outside the firm, to implementing specific policies and programs to help women succeed within the firm and prevent the exodus of women from firms and even from the legal profession.⁷⁶ In seeking solutions, women's initiatives within firms have identified some of the factors that have prevented

⁷⁵ See, e.g., Arent Fox's AFWomen; Barclay Damon's Women's Forum; Bond Schoeneck & King's Women's Initiative; Morrison & Foerster's MoFo Women and Women's Strategy Committee; Seyfarth Shaw's Women's Network Affinity Group; and Stroock's Women's Initiative.

⁷⁶ Yuliva Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them* Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>, (recognizing that the focus must be on business development programming, engaging lawyers as mentors and sponsors and helping women lawyers become more visible).

women from achieving success and satisfaction in their firms. These include significant compensation disparities between male and female partners, an emphasis on billable hours as a key factor in achieving advancement, a failure to provide sufficient opportunities for women attorneys to develop business, a failure to share credit for or an overemphasis on originations, a lack of credit or appreciation for managing client relationships, and insufficient credit for non-billable, but essential work for the firm.⁷⁷

The women's initiatives that have been successful in effectuating change have reported success working with firm management to set goals and targets for increasing diversity and have tracked the data to measure the success of those efforts. These efforts have led to an increase in the number of women participating in compensation decisions and on firm compensation committees, an expansion of resources available to relieve pressures from family obligations, and the provision of meaningful business opportunities for women attorneys.⁷⁸ These ramped up efforts also have led to an increase in women in firm management positions,

⁷⁷ Data reveals that women partners often do double or triple the amount of non-billable firm work, including recruiting, mentoring and performing other “firm citizenship” tasks, but are not given any credit for those endeavors, contributing to the compensation gap. Dylan Jackson, *Women, Minority and LGBTQ+ Attorneys Still Struggle to Rise Within Law Firms*, *The American Lawyer* (Jan. 28, 2020).

⁷⁸ See Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out The Door: The Facts, Figures and Future of Experienced Women Lawyers in Private Practice*, ABA and ALM Intelligence Report (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>, which identified nine factors firms should consider and address in order to retain senior women attorneys.

including on compensation and executive committees and as practice group leaders.⁷⁹

With the growing recognition that corporations are becoming increasingly insistent that at least one woman be an integral part of a litigation or other legal team,⁸⁰ firms have begun to promote women attorneys to the business community and to their clients. Firms also have become increasingly aware that it no longer is acceptable to send a woman attorney to court as “window dressing,” because courts are aware of and taking note of what responsibilities are given to the women who appear in their courtrooms. Further, firms are well aware that clients are paying increased attention to women’s advancement.

For example, many firms have made a concerted effort to make the annual *Working Mother Magazine* “Best Law Firms for Women” list (which has recently increased from fifty to sixty law firms). This increased effort may be because the magazine is disseminated to corporations and their in-house counsel -- many of whom now insist on at least one woman taking a lead role on their matters.⁸¹

b. Sponsorship

⁷⁹ Nicholas Gaffney, *Women in Law Firm Leadership Positions, Part 1*, Law Practice Today (Mar. 14, 2018).

⁸⁰ Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, N.Y.L.J. (Jan. 27, 2019) (requesting firms to increase diversity of representation).

⁸¹ While not specifically addressed in this Report, policies and programs geared to work/life balance and child care are essential to a woman’s success as an attorney and the Task Force urges readers of this Report to seek out

Despite all these efforts, many women still feel that a good number of firms are “talking the talk,” boasting of diversity efforts and initiatives, but not “walking the walk.”⁸² Accordingly, firms should implement concrete programs to support the advancement of women in law firms and commit to training their women attorneys, promoting women attorneys to the business community, and including women and minorities in management and strategic planning.

In order to address these issues with concrete plans and strategies to correct them, there has been a new focus on sponsorship. Sponsorship is different from mentorship and goes beyond providing advice and counsel on the “how to’s” of promoting oneself or getting “good assignments,” or providing a role model as a second seat at a deposition or oral argument. A sponsor is someone who uses his or her political influence within a firm to advocate for the attorney being sponsored, by, for example, ensuring that the sponsored attorney receives the opportunities she needs to succeed at the firm and that the sponsored attorney’s work is known by the partners in the relevant practice group.

and implement innovations in this area, such as reduced work schedules, remote work from home policies, and parental leaves.

⁸² Joe Drayton, *It’s Time For Big Steps Toward Law Firm Diversity*, N.Y.L.J. (Apr. 11, 2019); Xiumei Dong, *For Female Attorneys, Law Firm Diversity Initiatives Aren’t Enough*, Law360 (Apr. 9, 2020), noting that many of the firms promulgating diversity initiatives are not taking the next step to implement programs for diversity and inclusion or elimination of bias. Interestingly, these articles, written a year apart, identify the same problems that continue for women in law firms. <https://www.law360.com/articles/1262114/for-female-attys-law-firm-diversity-initiatives-aren-t-enough>.

As early as 2011, Catalyst, a recognized leader in the field of research on promoting gender equality in the workplace, issued a report entitled “Sponsoring Women To Success” in which it noted that in “openly recommending high-performing employees for assignments, opportunities, or promotions, sponsors leverage their own power and reputational capital.”⁸³ Sponsorship, Catalyst noted, is therefore high stakes for the sponsor yet also carries enormous promise for both sponsor and sponsored attorney.

For the sponsor, the relationship builds trust, communication, and commitment to the firm as well as honest reviews of the associate.⁸⁴ Sponsorship also ensures the future of the firm generationally by encouraging partners to seek out a high-quality talent pool. The sponsor not only assists the sponsored attorney, but also learns from her as well. Essential information about how the firm is doing from her perspective (such as technological issues, client feedback on a given matter, or how other junior attorneys are faring), all redound to the benefit of the sponsor and the firm. Such information is helpful to the sponsor as the one in charge of ensuring the flow of business at the firm and the sponsor’s personal productivity.

⁸³ Catalyst, *Sponsoring Women To Success*, at 1 (July 17, 2001), https://www.catalyst.org/wp-content/uploads/2019/01/sponsoring_women_to_success.pdf.

⁸⁴ *Id.*

For the sponsored attorney, the sponsor relationship similarly is life-changing and career building. As one woman critically defined it, “If [you’re with] the right people, they can give you that different look. They will listen to you more. It’s ... like the sun goes up a few wattage points.”⁸⁵ Notably, the “value added” of a sponsor exposes the junior attorney to senior management; broadens a woman lawyer’s visibility, provides career development and enhanced leadership skills, and gains support in firm-wide efforts that focus on her talent and mobility.⁸⁶ The networking opportunities and the ability to work on career-enhancing assignments that a sponsor provides to the sponsored attorney also are key elements to advancing her to partnership. A sponsor identifies high potential diverse talent for the firm generationally, as well as high-visibility opportunities for the sponsored attorney, imparts to that attorney the importance of new opportunities, paves the way by introducing her to important people in the industry, including clients, and gives candid performance-based feedback.⁸⁷

As the data presented in this Report bears out, this key sponsorship element may be lacking for female talent in law firms (as well as in business generally).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Joan C. Williams and Veta Richardson, *The Impact of Law Firm Compensation Systems on Women*. 62 *Hastings L.J.* 597, 627 (2011), *citing*, Ronit Dinovitzer, Nancy Richman, Joyce Sterling, *The Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyers' Incomes*, 88 *Soc. Forces* 819, 843, 847-48 (2009). This study surveyed more than four hundred equity and non-equity partners in law firms (hereinafter, the “Dinovitzer Report”).

The recent survey published by the ABA Commission on Women found that 46% of women who responded stated that they had no access to a sponsor in the workplace.⁸⁸ Similarly, a recent Harvard Business Review survey of respondents in business found that only 39% of women reported having a career discussion with either a mentor or a sponsor in the past 24 months while 54% of men stated that they had such a discussion.⁸⁹ Significantly, 71% of executives reported having protégés who look like them (by sex and race).⁹⁰ Because less than 1% of the top rainmakers in the AmLaw 200 law firms are women, and almost one-half of those firms (46%) have no women among their top ten rainmakers, men appear to control the vast majority of the business in law firms and thus it is crucial that they conscientiously include women in their business opportunities.⁹¹

With the increasing number of women attaining leadership positions within firms, it is incumbent on more senior women to act as sponsors and allies for the next generation of women attorneys. Experience and recent data have shown,

⁸⁸ See Roberta D. Liebenberg and Stephanie A. Scharf, “Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice” ABA and ALM Intelligence Report, at 8 (Nov. 2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

⁸⁹ Rania H. Anderson and David G. Smith, *What Men Can Do to Be Better Mentors and Sponsors to Women*, Harvard Business Review (Aug.7, 2019).

⁹⁰ Joan C. Williams and Veta T. Richardson, *New Millenium Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, at 15 (July 2010), <https://worklifelaw.org/publications/SameGlassCeiling.pdf>.

⁹¹ Ida Abbott, *How Political Dynamics Undermine Gender Balance in Law Firm Leadership and What Your Firm Must Do About It*, at 6, <https://idaabbott.com/articles/how-political-dynamics-undermine-gender-balance-in-law-firm-leadership-and-what-your-firm-must-do-about-it/>.

however, that sponsorship efforts will be successful only if both male and female partners provide this support. Many women attorneys, particularly more senior women, have acknowledged that their sponsors, as well as their mentors and allies have been male. Data also have shown that male partners have traditionally transitioned their books of business to male associates, which has contributed to gender disparity in compensation.⁹² Firms now are encouraging male partners to transition books of business to female associates (and partners) as well.

c. Men as Allies

Firms also have recognized that if gender parity is to be achieved, men need to be active participants in closing the gender gap and should serve as allies to women. Being an ally means creating opportunities for women and speaking up for women attorneys, by, for example, crediting their suggestions during a large meeting or participating in women's initiatives. Women's initiatives that typically included only women now are introducing men as members and working with men to address the challenges and obstacles facing women's advancement. Making men part of the solution by raising their awareness of the challenges women face

⁹² Dan Packel, *New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay*, *The American Lawyer* (Dec. 6, 2018).

and focusing them on the importance of advancing and retaining women attorneys will advance the success of the firm as a whole.⁹³

d. Professional Development

Many firms have become increasingly aware that female attorneys are a powerful and critical resource for their firms in both the courtroom⁹⁴ and in obtaining business. Firms should ensure that women have equal opportunities to take lead roles on cases—whether arguing a motion, taking a deposition, or examining a witness at trial. While skill courses are valuable, targeted coaching, perhaps spanning several months, often is a more effective way to help attorneys develop courtroom and business skills.⁹⁵ Some firms also provide coaching and professional development programs on how to develop business and leadership skills. These types of targeted and professional development programs are critical to help attorneys succeed in the private practice of law.

e. Leadership Opportunities Within the Firm

⁹³ Amanda Zablocki and Joanna Beckett, *How Do Titans of Industry Plan to Achieve Gender Parity? Include Men in the Conversation*, N.Y.L.J. (May 20, 2019); Yuliva Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them*, Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>.

⁹⁴ Rebecca Beyer, *Judges push for diverse voices in court*, ABA Journal (Jan. 1, 2018), https://www.abajournal.com/magazine/article/judge_standing_rule_court_diversity.

⁹⁵ Yuliva Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them*, Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>.

In 2017, the Diversity Lab pioneered the Mansfield project under which signatory law firms pledged to increase women in leadership roles within the firm by a certain percentage. Those firms that achieved the goals became Mansfield Certified and had the opportunity to participate in a client forum at which the firm's women and diverse attorneys were paired with in-house clients. The Mansfield project was inspired by the National Football League's Rooney Rule (named after the late Pittsburgh Steelers owner Dan Rooney), which requires that at least one person of color be interviewed for head coaching jobs.⁹⁶

The Mansfield Certification program was such a success that it has been expanded each year to include more law firms and certification now requires a higher percentage of women and diverse attorneys in leadership roles within the firm.⁹⁷ The Diversity Lab's efforts, especially through its Mansfield Certification program, have led to an increase in women in management positions in participating firms, including on compensation and executive committees and as practice group leaders, and hopefully also have had a widespread effect even at non-participating firms.

2. Recommendations for Moving Forward

⁹⁶ Stephanie Francis Ward, *Mandating Diversity: Law firms borrow from the NFL to address the makeup of their leadership ranks*, ABA Journal (Oct. 1, 2017).

⁹⁷ See diversitylab.com.

Recent data are somewhat encouraging. A New York Law Journal sample in 2019 showed promotions of women to partnership ranks increased from 34.5% in 2018 to 37.5%.⁹⁸ This increase in promotions of women to partnership is consistent with data from the Diversity and Flexibility Alliance showing that women accounted for 41.3% of new partners in 2019, an increase of about 2 percentage points from the prior year. The Alliance has attributed this increase to a growing recognition by law firms that attention must be paid to areas in which unconscious bias can affect management decisions, such as work allocation, origination credit, and leadership roles within the firm.⁹⁹

The results of the New York Law Journal study may not be surprising as the report tracked promotions at New York's twenty-five largest firms. It is unclear whether the same improvements also are true for the profession as a whole, including at the large number of smaller firms in New York. Moreover, the overall share of *all* law firm partners who are women (as opposed to the data on promotions) still showed a disappointing increase of less than one percentage point, from 23.4% to 24.2%.

⁹⁸ The New York Law Journal surveys and tracks partner promotion classes both firmwide and in New York, of the twenty-five firms employing the most lawyers in the State as ranked by the NYLJ 100. Six law firms surveyed reported at least half of their promotions to partnership were women, and others, including Weil Gotshal & Manges, Sullivan & Cromwell, Ropes & Gray, Kramer Levin, and Barclay Damon, more than two-thirds. Jack Newsham, *NY Firms' Promotions Rose Over Last Year, As Did Share of Female New Partners*, N.Y.L.J. (Apr. 20, 2020).

⁹⁹ *Id.*

Similarly, women's initiatives and affinity groups must take a hard look at their overall firm strategies, assess the data, and implement plans and programs that will increase the number of women at the firm as a whole and in firm leadership.

a. Sponsorship

Sponsorship as well as targeted professional development programs should continue and be expanded depending on the needs of the law firm. Achieving a successful sponsor relationship requires a firm to recognize, and perhaps include in the firm's compensation calculation, all diversity and inclusion efforts.

To attract partners to help associates, sponsorship should be considered as part of partner compensation. The existing partner compensation models do not necessarily incentivize behavior that is in the best long-term interest of the firm. When partners are encouraged to perform consequential non-billable work to promote the firm (*e.g.*, marketing, enhancing the firm's image, training, management of associates), the tangible rewards for those efforts must be increased.

b. Provide Outside Opportunities

Numerous articles on advancing women for partnership in the private sector of the legal profession have posited that a lawyer whose excellence is recognized

both within and outside her firm materially advances her partnership chances.¹⁰⁰ A law firm's executive committee, managing partner(s), and practice group heads should recognize that a woman associate who gains recognition outside the firm substantially benefits the firm, not only in client retention but also in expanding the work, attracting new clients and business opportunities, and recruiting other top-notch talent. Outside speaking and related writing opportunities thus have intrinsic firm value.

A reliable, cost-effective and valuable means for a young woman lawyer to develop a reputation for excellence, as well as sound leadership and advocacy skills, is membership in bar associations. Just as firms have developed a panoply of niche practices, so too has the Section. For example, the Section currently has 29 subcommittees in various discrete areas of practice. Subcommittees provide members with speaking opportunities through panels, webinars, and conferences with lawyers and in-house counsel, both sources for referrals of business. Indeed, the policy of the NYSBA and the Section is a commitment to include women and people of color as speakers and leaders. It is noteworthy that the women authors of this Report have Chaired this Section of more than 2,000 lawyers and are recognized as national leaders and spokespersons of the bar and the profession.

¹⁰⁰ See, e.g., Yuliya Laroe, *Law Firm Women's Initiatives: Why Most Are Ineffective and What Firms Can Do to Fix Them*, Law Practice Today (Jan. 13, 2017), <https://www.lawpracticetoday.org/article/law-firm-womens-initiatives-ineffective-firms-can-fix/>. (noting that women's initiatives should include engaging in efforts inside and outside the firm to gain visibility for ascending women associates).

As another example, for the past four years, the Section has coordinated and sponsored a program entitled “Taking The Lead: Winning Strategies and Techniques for Commercial Cases.” The program was designed to showcase effective opening and closing statements and direct and cross-examinations of witnesses through a re-enactment of a civil trial. Former Chairs of the Section have represented one side of the case, while four less senior women attorneys, selected from firms throughout the State, have represented the other side—preparing the case from start to finish—giving opening and closing arguments and examining and cross-examining witnesses. The presentations, with the presiding judge ruling on objections during the trial, are critiqued by sitting state and federal judges. The junior women attorneys who have participated in this program have been uniform in their praise for the experience it has provided and have reported that the program has given them more confidence to perform in a courtroom.

Notably, the junior attorneys who took advantage of this opportunity either volunteered or responded enthusiastically when asked to participate in this program. They willingly took the risk of public “peer review” to advance their skills, credentials and contacts. That is a lesson to all attorneys – take advantage of the opportunities offered and seek out ones you find of interest.

In addition, NYSBA President Henry Greenberg announced, at the commencement of his tenure, that all 59 NYSBA committees, task forces and

working groups would be chaired, co-chaired or vice-chaired by women or other diverse individuals.¹⁰¹ This initiative provides another great opportunity for women to have leadership roles and public speaking experience as well as outside recognition that often is quite important to succeed within a firm.

c. Crediting Traditional Non-Billable Work as Billable

Firms that encourage women associates and show support for their futures also give creditable hours towards the billable hours requirement for undertaking bar activities. Firms that do so recognize not only the value of such participation to the associate, her skills and development, and helping to establish her network and provide business opportunities, but also bar association activity garners significant media attention that highlights the lawyer's firm as well as the lawyer herself. An aspiring associate who receives such media coverage often is then viewed as an expert and a spokesperson in her field of concentration thereby creating additional press as well as potential new business.¹⁰²

Studies that reflect on the gender gap in partnership diversity focus, as they must, on the compensation system by which partners are measured.¹⁰³ To date,

¹⁰¹ Brendan Kennedy, *Being An Ally For Diversity & Inclusion*, NYSBA, State Bar News (Spring 2020).

¹⁰² The disparity shown in the data earlier in this Report is reflective of the members of the NYSBA. As of April 11, 2020, 36.1% of the members are women (as compared to 63.9 men), but the percentages for the Sections on Commercial & Federal Litigation drops (23.8% women v. 76.2% men) and the Trial Lawyers even greater disparity (20.5% women v. 79.5% men).

¹⁰³ *See, e.g.*, Dinovitzer Report.

most law firms adhere to a model for compensation that largely measures three factors: hours billed, fees generated, and originations. In those firms where partners must meet an hours threshold, partners have reported, anecdotally, that a partner's diversity efforts were given little weight in determining compensation, and his or her efforts for long-term human capital development while given slightly more weight, still was did not factor strongly in partner compensation.¹⁰⁴

Beyond the leadership, networking and exposure that bar associations provide, some firms give creditable hours' recognition to a female associate for undertaking a leadership role in the legal aspects of affinity groups, charitable or civic organizations, trade associations, or other *pro bono* activities (*e.g.*, trying a case for a legal services entity). *First*, the time spent on these activities helps satisfy the *pro bono* biennial attorney registration requirement in New York. *Second*, some firms have recognized the benefit of such activities and have established policies acknowledging the many different ways a young attorney can develop the skills essential to being a successful partner.

d. Metrics and Tracking Work Assignments

As an important part of a firm's diversity efforts, firms should attempt to monitor and review certain metrics, including measuring by gender the activities of

¹⁰⁴ *Id.* at 627.

their attorneys (both in practice and in other related activities). Tracking who gets various types of work assignments, for instance, will enable firm management to correlate and provide equal career building opportunities for all attorneys. These metrics then can and should be employed when considering a woman for partnership and for building the firm's human capital fairly.¹⁰⁵ Of course, firms come in all sizes – from solo, to small, medium, or large. Different approaches may be warranted depending on the size of the firm as well as the assigning practices and procedures at the firm.

In sum, when considering an attorney for promotion, firms should take account of all of an attorney's activities, both within the firm and outside the firm, in the legal community and in the public sphere as well.

e. Partnership Compensation

Compensation theory generally says that people should be rewarded for the behavior the organization seeks to promote.¹⁰⁶ Law firms should consider how to best reward all of the contributions partners are asked to make to the firm, both

¹⁰⁵ Dylan Jackson, *Women, Minority and LGBTQ+ Attorneys Still Struggle to Rise Within Law Firms*, *The American Lawyer* (Jan. 28, 2020) (showing that firms still do not account for hours spent developing their talents and skills on non-billable matters), <https://www.law.com/americanlawyer/2020/01/28/women-minority-and-lgbtq-attorneys-still-struggle-to-rise-within-law-firms/>.

¹⁰⁶ *Id.* at 670.

through mentoring and sponsoring programs, as well as for bar committee work.¹⁰⁷

While the specific way to achieve this goal will necessarily differ by firm, law firms should evaluate the following in determining partner compensation: (i) time spent on diversity efforts in general, but in particular, on sponsorship; (ii) work on client and prospective pitches (whether or not successful); (iii) recruiting; and (iv) bar association and speaking engagements. Ernst & Young, for example, has been compensating partners using four criteria: quality of work, people (which includes sponsoring and developing talent and skills), marketing (which includes revenue generation), and operational excellence.¹⁰⁸

By scaling partner compensation to include sponsorship, for example, in addition to receipts and client hours billed, there would be a measurable, concrete incentive for a sponsor to expend the time and reputational capital required to support and nurture the partnership of an aspiring woman associate. Developing such a model for the firm's compensation system and tracking the time spent on traditionally non-billable work is vital both to ensure diversity in partnership ranks and the firm as a whole.

¹⁰⁷ Complete Guide to Law Firm Compensation Models and Formulas, <https://lawyerist.com/hiring-staffing/compensation/>.

¹⁰⁸ Dinovitzer Report at 671.

It is equally important to implement clear benchmarks and guidance for associates who are on the partnership track taking into consideration attributes and contributions that include both traditionally billable and non-billable hours. It is important that a woman being groomed for partnership receives business development and personal development opportunities and inherits firm clients from retiring partners.

f. Client Transition/Succession Planning

Part of the success of women attorneys in law firms is based on the attribution of clients to that attorney, which is described differently at different firms, *e.g.*, being the relationship partner or the billing partner. Increased attention needs to be given by firms regarding how and when a woman becomes the relationship partner or billing partner for a particular client. Often, firms permit attorneys to retain “ownership” of a client even though that partner no longer actively is engaged in the day-to-day work for that client, or the work for the client is performed by a different practice group.

Given that the Baby Boomer generation is nearing retirement, the lack of succession planning is critical to the future of the firm. Nonetheless, such planning, if it exists, appears to be mostly subjective and lacking in transparency.

The long-term investment in the law firm’s future is often overlooked in favor of an attorney’s revenue production.¹⁰⁹

B. Efforts By In-House Corporate Clients

These past three years have seen a significant increase in the demand by clients for diversity in their legal teams and firms with which they work. As client demand often can drive concrete action in law firms, in-house legal departments are a critical part of the dialogue on how to best advance women in the legal profession.

1. Innovations

Global corporate recognition of multiple studies that show increased diversity often leads to increased corporate profitability has demonstrably impacted how in-house counsel approach retaining outside counsel.¹¹⁰ Demand for diversity is partly driven by vast empirical evidence that now exists showing that diversity improves a case team’s results.¹¹¹ For instance, according to one report released by marketing research firm Acritas based on interviews with nearly one thousand

¹⁰⁹ *Id.* at 625.

¹¹⁰ Kellie Lerner and Chelsea Walcker, *Judges Can Demand Diversity In Rule 23(g) Applications*, Law 360 (Aug. 15, 2018), https://www.law360.com/articles/1073189?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared (citing McKinsey & Co. studies demonstrating that “greater gender, racial and ethnic diversity is closely correlated with increased profitability. For example, in a report titled “Delivering Through Diversity,” companies in the top 25th percentile for gender diversity on their executive teams were 21 percent more likely to experience above average profits).

¹¹¹ Aebra Coe, *Why Diverse Legal Teams Perform Better*, Law360 (Jan. 30, 2018), https://www.law360.com/articles/1004773?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

corporate clients, mixed-gender legal teams “significantly” outperform those made up of only one gender.¹¹² Similarly, studies of ethnic diversity showed comparable results, establishing that “greater gender, racial and ethnic diversity is closely correlated with increased profitability,”¹¹³ a result that likely “stems from the diversity of thought needed to deliver top-notch legal results.”¹¹⁴ Another study of the two hundred highest-grossing law firms has also shown that “the most diverse law firms reported, on average, the highest profits per partner and revenue per lawyer.”¹¹⁵

Despite all of the empirical evidence showing a strong economic case for both clients and law firms to encourage diversity, the “leaky pipeline” problem¹¹⁶ – where women associates end up leaving their law firms at disproportionately higher rates than men – continues to persist. Why? In a report co-authored by the ABA and ALM Intelligence, “Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice,” the issue of attrition

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*, citing David Rock and Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016), stating that diverse teams produce better results because they “draw upon a wider collective pool of life experience when working together to solve a problem.”

¹¹⁵ *Id.*, citing Douglas E. Brayley and Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. Legal Prof. 1 (2009-10).

¹¹⁶ Roberta D. Liebenburg and Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers In Private Practice*, ABA and ALM Intelligence Report (Nov. 2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf

of senior women lawyers is examined. Research reportedly showed that while male and female lawyers expressed “similar levels of job satisfaction regarding the intellectual challenge of their practice areas,” they reported dissimilar levels of satisfaction regarding the “recognition received for their work;” the “compensation” structure; their “opportunities for advancement;” the “commitment to workplace gender diversity;” and the “leadership diversity of their firm.” While various women’s initiatives and diversity and inclusion programs have been implemented by most law firms, general counsels are increasingly exerting greater demands on their outside firms to diversify litigation teams.

Retention and advancement of women and diverse attorneys are among the main goals in one of the more innovative and collaborative initiatives underway through Diversity Lab, an incubator for ideas on building diversity in the law.¹¹⁷ Building on its Mansfield Certification program, *supra* at p.44, n.97, Diversity Lab now has launched its Move The Needle Fund. Under this project, more than twenty-five general counsels from such corporations as Bloomberg, Ford Motor Co., Starbucks, and 3M have committed to collaborate with five law firms to develop “researched-based and data-driven ways” for each firm to achieve their own set of “aggressive and measurable” diversity goals by 2025. For example, one

¹¹⁷ Move the Needle Fund, <https://www.mtnfund2025.com/>.

firm has committed to improve its attrition rate of women and diverse attorneys “to be equal to the retention rate of its non-diverse attorneys by 2025,” reflecting a 40% reduction of the diverse attorney attrition rate. These firms also have committed to financing a combined \$5 million fund to be leveraged by Diversity Lab to, among other things, experiment with new approaches to issues that include hiring, work allocation, sponsorship, feedback and compensation systems and evidence-based research on bias interrupters.¹¹⁸

As another approach, some general counsels have adopted benchmarking to increase diversity. For example, in 2019, Intel Corporation said that although it had spent years adopting “nearly every available tool to increase the diversity of our legal teams, including mentoring programs and clerkships,” it announced that beginning January 1, 2021, it would only retain law firms where at least 21% of its equity partners are women and at least 10% of the firm’s U.S. equity partners are underrepresented minorities.¹¹⁹

Similarly, PayPal has declared diversity a “core value” of the company and begun tracking diversity of its outside firms using metrics that collect data beyond

¹¹⁸ See diversitylab.com.

¹¹⁹ Steve Rodgers, *The Intel Rule: Action to Improve Diversity in the Legal Profession*, (Nov. 21, 2019), <https://newsroom.intel.com/editorials/intel-rule-action-improve-diversity-legal-profession/>.

just the diversity of the lawyers working on their matters.¹²⁰ Under PayPal’s policy, it considers data on law firm diversity practices, the diversity of the executive committees, the allocation of origination credit, the promotion pipeline and programs offered to diverse attorneys.

In November 2017, in response to our 2017 Report, JP Morgan Chase & Co. outlined its new “Leading With Diversity” initiative pressing for at least 50% women and diverse attorneys in leadership positions on teams handling its litigation and serving as mediators and arbitrators for its matters.¹²¹ These types of initiatives, especially by major clients who often engage outside counsel for multiple matters, are key toward achieving progress.

Most recently and as previously mentioned, in January 2019 in response to new partner classes that “remain largely male and largely white,” more than 170 general counsel and corporate legal officers signed an open letter to major law firms pledging that their companies would prioritize their legal spend to those firms that commit to diversity and inclusion.¹²² Like the JP Morgan initiative,

¹²⁰ <https://www.legal500.com/gc-magazine/interview/louise-pentland-chief-legal-officer-paypal/>.

¹²¹ Miriam Rozen, *JPMorgan Initiative Aims to Boost Women's Roles on Litigation Teams*, *The American Lawyer*, (Nov. 28, 2017), <https://www.law.com/americanlawyer/sites/americanlawyer/2017/11/28/jpmorgan-initiative-aims-to-boost-womens-roles-on-litigation-teams/>.

¹²² Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, *N.Y.L.J.* Jan. 27, 2019.

these types of statements by clients make a real impact within law firms and hopefully will lead to positive change.

2. Recommendations for Moving Forward

Corporate clients should continue to infuse accountability through use of metrics and data-driven approaches to provide women with equal opportunities to participate in all aspects of litigation. Corporate clients can review bills to determine what types of work the women and diverse attorneys on their matters are performing and then engage in discussions with the partner managing the engagement to encourage equal allocation of work within a team. Corporate clients also can encourage associates to participate on team calls and attend important meetings as well as, with appropriate supervision, take and defend depositions and speak in court.

Corporate clients should continue to have open dialogue with the firms with which they work about diversity and inclusion initiatives and ways to work together to advance women and diverse attorneys in the profession. In addition, corporate clients can award work to diverse teams and discuss how billing credit is allocated with the engagement partner. In addition, corporate clients can and should continue to pledge to give their work to firms that provide them with diverse teams at all levels.

Lastly, it is critically important that clients and law firms work together to help move the needle. In-house attorneys should alert the firms to their expectations and the investments that their outside providers need to make, while being open to partnering and providing information as needed to make that happen. In-house attorneys collaborating with law firms on advancing women and diverse attorneys will help ensure that more women succeed in the legal profession, including by increasing the percentage of women taking lead roles in the courtroom.

C. The Judiciary

Members of the judiciary are increasingly playing an active role in helping women and diverse attorneys have greater access to opportunities to take on lead roles in the courtroom. Mindful of the importance of diversity in the profession and the small number of cases that are tried combined with the low rate of appearances in court by women attorneys, many judges have been seeking ways to increase the number and substance of speaking opportunities.¹²³

1. Innovations

As a result of the Section's 2017 Report, a number of federal judges, including the legendary federal judge Jack B. Weinstein in the Eastern District of New York, amended their practice rules by inviting "junior members of legal teams" to argue "motions they have helped prepare and to question witnesses with whom they have worked."¹²⁴ Designed to increase opportunities for junior attorneys, such rules also removed limits on the number of lawyers appearing per party to permit more than one lawyer "to argue for one party if this creates an

¹²³ Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule*, N.Y. Times (Aug. 23, 2017).

¹²⁴ *Id.*

opportunity for a junior lawyer to participate.”¹²⁵ Since 2017, more than 150 state and federal judges have adopted some variations of the rule, where “less experienced lawyers, lawyers from diverse backgrounds and lawyers who are women” or historically underrepresented attorneys are encouraged to participate in courtroom proceedings.

Further, judges have demonstrated their commitment to increasing opportunities for women by inquiring directly from the bench about women who they see as part of a litigation team and knowledgeable of the case, yet not otherwise afforded a speaking role. In fact, some judges have specifically asked to hear from the woman attorney, rather than (or in addition to) hearing from lead counsel, recognizing that they may be offering a career-enhancing opportunity.

For example, upon receiving our 2017 Report, the Honorable Elizabeth Wolford of the Western District of New York had a conference with attorneys in a breach of contract case. Both sides had male partners and female associates at the meeting. Knowing that the associates had likely done the research, she

¹²⁵ Hon. Jack B. Weinstein, U.S. Dist. Judge, Individual Motion Practice, <https://img.nyed.uscourts.gov/rules/JBW-MLR.pdf>; Hon. Mary Kay Vyskocil, U.S. Dist. Judge, Individual Rules of Practice in Civil Cases, (Rev. Feb. 27, 2020), https://nysd.uscourts.gov/sites/default/files/practice_documents/MKV%20Vyskocil%20Civil%20Practice%20Rules%20-%20February%2027%202020.pdf.

recommended that the associates argue at the hearing. They did. And, she said, “It was one of the best arguments I have had the privilege of presiding over.”¹²⁶

At the State court level, the Seventh Judicial District has adopted a “Courtroom Equality Statement” which is posted on its website¹²⁷ to create opportunities for junior attorneys. The website contains the names and links to all participating judges.

Female and male judges have also begun to publicly encourage consideration of women and diverse lawyers in exercising their discretionary authority to appoint lawyers to various positions. For example, the National Association of Women Judges adopted a formal resolution acknowledging that increased diversity in court appointments of lawyers to serve in roles such as lead counsel in multi-district and class action litigations, as special masters, receivers and mediators, would benefit not only women and diverse attorneys, but also the judicial system as a whole.¹²⁸ Similarly, a male federal judge, who was appointed to preside over a multi-district litigation, gained public attention¹²⁹ and support¹³⁰

¹²⁶ Rebecca Beyer, *Judges push for diverse voices in court*, ABA Journal (Jan. 1, 2018).

¹²⁷ <http://ww2.nycourts.gov/courtroom-equality-statement-26536>.

¹²⁸ National Association of Women Judges, *Resolution on Diversity in Trial Court Appointments*, (Oct. 8, 2016), https://www.nawj.org/uploads/files/resolutions/resolution-diversity_in_trial_court_appointments_2016.pdf.

¹²⁹ Lauraann Wood, *VIX MDL Lead Should Have Young, Diverse Attys, Judge Says*, Law360 (July 11, 2018), https://www.law360.com/articles/1062197?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

when he requested details on the diversity of the litigation team when considering its application to serve as plaintiff’s lead counsel.

A number of district court judges have encouraged or considered diversity when appointing lead counsel in multi-district litigation (“MDL”) or class litigation. In *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, Judge Stanwood R. Duval, Jr. (ret.), from the Eastern District of Louisiana, compiled a “list of factors that [he and his colleagues] often consider when undertaking the difficult task of choosing counsel” for multidistrict litigation.¹³¹ Those factors include “diversity in gender, racial, and geographic terms.”¹³²

In *In re Generic Digoxin and Doxycycline Antitrust Litigation*, Judge Cynthia Rufe of the Eastern District of Pennsylvania appointed two female attorneys to serve as co-lead counsel of the plaintiffs’ steering committee.¹³³ Judge Rufe advised in her appointment order that “[t]he Court expects that the leadership will provide opportunities for attorneys not named to the PSC, particularly less-

¹³⁰ Kellie Lerner and Chelsea Walcker, *Judges Can Demand Diversity In Rule 23(g) Applications*, Law360 (Aug. 15, 2018), https://www.law360.com/articles/1073189?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

¹³¹ Stanwood R. Duval Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 392 (2014).

¹³² *Id.* at 393.

¹³³ *See* Pretrial Order 1, No. 16-md-2724 (E.D. Pa. Nov. 28, 2016), ECF No. 84.

senior attorneys, to participate meaningfully and efficiently in the MDL including through participation in any committees within the PSC and in determining which counsel will argue any motions before the Court.”¹³⁴

As another example, in *In re Gildan Activewear Inc. Securities Litigation*, the late Judge Harold Baer, of the Southern District of New York, ordered co-lead counsel to “make every effort to assign to this matter at least one minority lawyer and one woman lawyer with requisite experience.” Judge Baer explained that the “proposed class includes thousands of participants, both male and female, arguably from diverse backgrounds, and it is therefore important to all concerned that there is evidence of diversity, in terms of race and gender, in the class counsel I appoint.”¹³⁵

Most recently, Judge Robin L. Rosenberg in the United States District Court for the Southern District of Florida, created a novel leadership structure for plaintiffs in an MDL related to Zantac, a heartburn medication, in order to provide less experienced attorneys with a meaningful role in the MDL. Judge Rosenberg created a “leadership development committee,” comprised of five attorneys who did not have sufficient experience to serve as co-lead counsel but who were seen as future leaders of the MDL bar. The Judge explained that she expected the

¹³⁴ *Id.* at 3.

¹³⁵ Order 1, No. 08-cv-5048 (S.D.N.Y. Sept 20, 2010), ECF No. 59.

attorneys on the leadership development committee (the committee is co-chaired by two women) to be mentored by the co-lead counsel and be provided with meaningful opportunities in managing and participating in the MDL.¹³⁶

Bringing more attention and critical thought-leadership to the issue, members of the judiciary also have begun to discuss publicly gender disparities and greater access for women to leadership opportunities by participating in panels and roundtables that tackle some of the barriers to those opportunities. For instance, unconscious gender and ethnic bias in the courtroom and its harmful impact on career advancement have been the subject of discussions by judges who have become more cognizant and vocal about techniques that can be employed to interrupt subtler forms of implicit bias observed in the courtroom.

In addition to leading the way toward increasing diversity by creating opportunities for junior lawyers to learn and hone their courtroom skills and by encouraging diverse teams and appointees reflecting the population they represent, judges have been generous in speaking at bar associations and other programs to educate not only the public but the legal community about the importance of these issues.

¹³⁶ Carolina Bolado, *Younger Attorneys Get Chance at Big Role in Zantac MDL*, Law 360 (May 11, 2020), <https://www.law360.com/newyork/articles/1272037>.

2. Recommendations for Moving Forward

Judges should continue to amend their rules of practice to encourage women and diverse attorneys to have a lead role at court appearances. As judges in state and federal courts throughout New York State already have adopted such a rule, there are many examples to use as models. The more successful rules include the following components: (1) encouraging parties to permit attorneys who have been practicing seven years or less to speak in court; (2) holding oral argument if the court is informed that junior attorneys will argue at least part of the motion/issue before the court; and (3) increasing the permitted speaking time limits to speak if junior attorneys will argue at least part of the motion/issue before the court. Courts might consider encouraging such changes to individual rules of practice, perhaps by a notice from the Chief Judge or Administrative Judge, or by a pledge for all judges to consider joining, as was done by the Seventh Judicial District.

Judges also can, where appropriate, call on a junior attorney to present when a judge observes that a junior attorney appears prepared and able to respond to the court's questions but is not being given the opportunity to speak. Judges also can address the junior attorney specifically, perhaps praising that attorney's oral presentation and/or written briefs. In addition, judges, again if appropriate, can

contact a partner the judge knows at the law firm that appeared before the judge to praise a junior attorney who performed particularly well in the courtroom.

Judges should consider the gender and diversity of all court appointments, such as leadership roles in class actions and in multi-district litigation, and in other court appointments, such as special masters, referees, guardians ad litem, and monitors.

In sum, the judiciary plays a vital role in improving the diversity of litigants in the courtroom. The efforts by the judiciary to date have been extraordinary and continuation and expansion of those efforts surely will lead to an increase in women and diverse attorneys taking the lead in the courtroom.

D. ADR Context

1. ADR Provider and Professional Organization Initiatives

New York is an international and national market and its courts and ADR providers attract matters from all over the world and often matters of broad significance, complexity, and financial importance. As a result, it is critical that ADR professionals in New York be diverse and representative of the clients whose disputes they decide. Nearly all arbitral organizations have recognized the need to offer a diverse panel of arbitrators, including gender diversity, and have engaged in outreach efforts in order to increase gender diversity.

The natural starting point for a discussion of initiatives to advance the cause of women in ADR is ArbitralWomen (“AW”), which was founded in Paris in 1993 to promote women and diversity in international dispute resolution at a time when international arbitration was overwhelmingly dominated by white males. Over the years, AW has been a pioneer in the drive for gender equality in dispute resolution and its influence is evident in the initiatives of other organizations and ADR providers.

In addition to traditional mentoring and networking opportunities, AW has developed a number of innovative techniques for advancing the interests of women in all aspects of dispute resolution including maintaining a searchable database of female practitioners from more than 40 countries and issuing publications showcasing females in dispute resolution. Most recently, AW developed the Arbitral Women Diversity Toolkit training program. This program is offered to ADR organizations, law firms, corporations, and others interested in implicit bias training, as a full day seminar designed to recognize and explore ways to address and overcome ingrained bias that inhibit the selection of women in ADR.¹³⁷

AW is also a major proponent and partner in the promotion of pledges developed by other programs and organizations, in particular the Equal

¹³⁷ <https://www.arbitralwomen.org/diversity-toolkit/>.

Representation in Arbitration (“ERA”) Pledge, which has been embraced by major ADR providers, law firms and clients.¹³⁸ The ERA Pledge was developed in 2015 by members of the arbitration community with the purpose of increasing “the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.”¹³⁹

Since its launch in March of 2016, more than 4,135 organizations and individuals have signed the ERA Pledge, including arbitration providers,

¹³⁸ The ERA Pledge states:

As a group of counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration, we are committed to improving the profile and representation of women in arbitration. In particular, we consider that women should be appointed as arbitrators on an equal opportunity basis. To achieve this, we will take the steps reasonably available to us – and we will encourage other participants in the arbitral process to do likewise – to ensure that, wherever possible:

- committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;
- lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
- gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and
- senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.

¹³⁹ Equal Representation in Arbitration, About the Pledge, <http://www.arbitrationpledge.com/about-the-pledge>.

professional arbitration organizations, law firms and individuals in the arbitration community.¹⁴⁰

Pledges have also spawned concrete initiatives. In 2018, JAMS, a signatory to the ERA Pledge, included the following model clause, inspired by the ERA Pledge:

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.¹⁴¹

This clause, like the ERA Pledge, stops short of mandating a specific percentage of female participation¹⁴² but does encourage action rather than being solely aspirational.

CPR, also a signatory to the ERA Pledge, has taken the Pledge one step further in its new Diversity & Inclusion Model Clause, released on April 1, 2020. The new model clause contains a specific minimum goal and is available to parties who wish to pre-commit to a diverse panel of neutrals in a future dispute to be resolved by arbitration and provides, in pertinent part:

¹⁴⁰ As of April 14, 2020. Equal Representation in Arbitration, Time for Change, <http://www.arbitrationpledge.com>.

¹⁴¹ JAMS, Alternative Dispute Resolution (ADR) Clauses, JAMS Mediation, Arbitration and ADR Services, <https://www.jamsadr.com/clauses/#Diversity>.

¹⁴² Equal Representation in Arbitration, About the Pledge, <http://www.arbitrationpledge.com/about-the-pledge>.

The parties agree that however the arbitrators are designated or selected, at least one member of any tribunal of three arbitrators shall be a member of a diverse group, such as women, persons of color, members of the LGBTQ community, disabled persons, or as otherwise agreed to by the parties to this Agreement at any time prior to appointment of the tribunal.

The clause was developed by CPR with the help of its Diversity in ADR Task Force, co-chaired by Hon. Timothy K. Lewis (“Ret.”) and Judge Scheindlin. The model clause was drafted by a subcommittee chaired by Laura Kaster and Ben Picker.¹⁴³

CPR also joined many courts that have sought to expand opportunities for diverse lawyers as advocates by encouraging the participation of less-experienced lawyers through the adoption of a “Young Lawyer” Rule into its domestic and international arbitration rules. The Rule aims to increase the number of “stand-up” opportunities for junior attorneys -- who are often women and people of color -- to examine witnesses and present argument at arbitral hearings.¹⁴⁴

¹⁴³ International Institute for Conflict Resolution, *CPR Continues to Pioneer in Diversity Space, with Launch of Diversity & Inclusion Model Clause*, (Apr. 1, 2020), <https://www.cpradr.org/news-publications/press-releases/2020-04-01-cpr-continues-to-pioneer-in-diversity-space-with-launch-of-diversity-inclusion-model-clause>. CPR has developed other initiatives to improve the selection of diverse neutrals to panels. A diversity statement is included in all CPR nomination letters and neutrals have the option to self-identify as diverse on slates of candidates that CPR submits to parties. In 2018, CPR also produced and disseminated a brochure showcasing the female neutrals who have been admitted to its Panel of Distinguished Neutrals.

¹⁴⁴ The Rule was incorporated into the 2019 CPR Rules for Administered Arbitration of International Disputes, the 2019 CPR Administered Arbitration Rules, the 2018 CPR Non-Administered Rules for International Disputes and the 2018 CPR Non-Administered Arbitration Rules. *Id.*

The AAA has taken a technological approach to increasing diversity in selected panels, having developed algorithms to provide arbitrator lists to parties that comprise at least 20% diverse panelists where party qualifications are met.¹⁴⁵ This effort is coupled with the AAA’s efforts to diversify its roster of neutrals, which currently stands at 24% female and minorities according to its website. The AAA also recruits and trains diverse neutrals through its Higginbotham Fellowship Program.¹⁴⁶ The AAA has also sponsored AW Diversity Toolkit workshops in both New York and Miami.¹⁴⁷

The New York International Arbitration Center¹⁴⁸ (“NYIAC”) was founded in 2013. In November 2018, NYIAC joined with AW to celebrate AW’s 25th Anniversary using the event to launch the AW Diversity Toolkit. The full-day conference entitled “The Diversity Dividend: Moving From Bias to Inclusiveness

¹⁴⁵ American Arbitration Association, Arbitrators & Mediators, <https://www.adr.org/RosterDiversity>.

¹⁴⁶ American Arbitration Association, Diversity and Inclusion Initiatives, <https://www.adr.org/DiversityInitiatives>.

¹⁴⁷ In addition to AW there are efforts by other professional membership organizations representing the interests of ADR practitioners. The Chartered Institute of Arbitrators (CI Arb) is a leading professional membership organization with worldwide representation. In 2019, CI Arb’s New York Branch launched initiatives designed to promote diversity in international arbitration including granting full scholarships to three AAA Higginbotham Fellows for the Branch’s annual 5-day Columbia – CI Arb Comprehensive Course on International Arbitration and extending a registration discount to AW members. It is also the CI Arb NY Branch’s practice to include diverse speakers in its programs, including younger female practitioners.

¹⁴⁸ See New York International Arbitration Center, <https://nyiac.org>. NYIAC also maintains a Diversity Corner¹⁴⁸ on its site cataloguing resources and achievements. NYIAC will soon add a database of female, international arbitrators in New York, providing easy access to their bios. Women serve a prominent role within NYIAC’s leadership. The past and current Executive Directors are women as is the current Chair of the Board. Women serve on NYIAC’s Executive Committee and women represent founding firms as Directors of NYIAC.

in International Arbitration,” brought together seventy-five stakeholders in international arbitration with discussions and break-out sessions designed to move the needle on gender parity. Following the Conference, NYIAC joined the AAA-ICDR to host the first U.S. Toolkit Training with thirty delegates, running several modules to better understand unconscious bias and build individual diversity strategy plans.

In 2019, with CIArb New York Branch, NYIAC launched a diversity challenge. Titled “Reinventing the Landscape for Young IA Practitioners,” officers from eight groups collaborated on strategies to build the talent pipeline and to offer suggestions on tips and tricks for a successful career in international arbitration.

Women in Dispute Resolution (“WIDR”), a committee of the ABA’s Dispute Resolution Section, has also been active in promoting the visibility of female neutrals. Among WIDR’s 2019 -2020 most notable initiatives was to update and promote its directory of WIDR members as of January 1, 2020.¹⁴⁹ The directory is well recognized by ADR institutional providers as a source of information about neutrals. The directory has not only been promoted at ABA and other legal conferences by WIDR members, it has also been promoted digitally.

¹⁴⁹ https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/widr-directory-2020.pdf.

WIDR also has created a new flyer promoting the selection of diverse neutrals making it easily downloadable by members and linking it to various ABA online publications. WIDR further provided a toolkit to members with a sample LinkedIn post encouraging them to post links to the directory and flyer on their own LinkedIn page.

The Committee on Diversity (the “Committee”) of NYSBA’s Dispute Resolution Section (“DRS”) has intensified its focus on addressing the long-standing challenge to creating an inclusive environment in the dispute resolution community. The Committee has concentrated its efforts on practical steps such as training, mentorship programs and speaking opportunities as well as tackling broader issues such as exploring the reasons for the lack of diversity, such as implicit bias.¹⁵⁰

The ADR Inclusion Network¹⁵¹ (“Network”) is yet another example and is comprised of representatives from all stakeholders in the ADR field who are committed to increasing the awareness of, use, visibility, availability, and selection

¹⁵⁰ For example, in order to overcome financial barriers to ADR training, DRS offers its signature “Diversity Mediation Scholarship” and “Diversity Arbitration Scholarship” selecting applicants and offering financial assistance related to DRS commercial mediation and commercial arbitration training programs. As another example, DRS has a “Diversity Mentorship Program” that is two years in duration and provides opportunities for mentees to observe arbitrations and/or mediations with experienced practitioners

¹⁵¹ See <https://www.adrdiversity.org/>.

of diverse neutrals within New York State in all aspects of the ADR field.¹⁵²

Founded in 2017, the organization has published a best practices tip sheet for making events more inclusive and developed a one-page sheet discussing the benefits of having a diverse panel of arbitrators.

When litigants in both domestic and international arbitration are asked what criteria are used to select a neutral they often cite the expertise of the candidate in the subject matter of the dispute¹⁵³ and the candidate's ADR experience. To obtain this information, litigants increasingly seek prior awards as indicators of the candidate's performance.

FINRA was the first organization to fill this information gap. All arbitration awards issued under FINRA rules are publicly available. FINRA offers the awards on its website¹⁵⁴ and the Securities Arbitration Reporter offers several services to research and analyze awards issued by FINRA arbitrators.¹⁵⁵ Similarly, the AAA makes its employment arbitration awards publicly available.¹⁵⁶ The purpose is to provide transparency to employees about how cases similar to theirs

¹⁵² See *id.*

¹⁵³ See <https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%2017/How-to-Select-an-Arbitrator.aspx>.

¹⁵⁴ <https://www.finra.org/arbitration-mediation/arbitration-awards>.

¹⁵⁵ <http://www.sacarbitration.com/research-home.htm>.

¹⁵⁶ See Rule 39 (b) of the AAA Employment Arbitration Rules. The names of parties and witnesses are not publicly disclosed unless the parties expressly agree.

were decided in arbitration. Employment arbitration awards have been publicly available since 1994. A similar rule was adopted under the AAA Consumer Arbitration Rules¹⁵⁷ in 2014. This Rule also was adopted to provide transparency about how consumer cases are decided.

There are several ways to obtain information from past international arbitration awards. In 2014, Arbitrator Intelligence¹⁵⁸ (“AI”) began providing data about arbitrator decision-making. AI collects information from counsel and parties to create data analytics about how arbitrators make decisions. AI has cooperative agreements with ADR providers to collect their awards. AI collaborates with AW to promote greater selection of women as arbitrators.

In 2016, the ICC Court of Arbitration introduced a policy to publish¹⁵⁹ limited information about arbitrators in order to demonstrate their expertise and competency. The goal was to promote gender, as well as regional and generational diversity of its arbitrators.

Efforts should be taken by ADR providers to broaden the information about women and minority arbitrator decisions so it is publicly available and prospective litigants can assess the competency of the candidates offered. The

¹⁵⁷ See Rule 43 (c) of the AAA Consumer Arbitration Rules.

¹⁵⁸ <https://arbitratorintelligence.com/about-1>.

¹⁵⁹ <https://iccwbo.org/global-issues-trends/diversity/diversity-in-arbitration/>.

work of AI and public availability of arbitration awards fills a gap that is currently only filled by underground networks or word of mouth. As is evident from the above, the ADR space has greatly increased its focus on the importance of diversity in ADR and there are many innovative programs and policies in this field.

2. Next Steps

The initiatives discussed above for all ADR provider and professional organizations are focused on education, pledges, recommendations, and other activities intended to promote women as neutrals and gain commitments to their appointment to cases. While it is important that providers encourage diversity, by, for example, recommending incorporation of diversity selection criteria into pre dispute clauses and suggesting specific language for that purpose, in order to be effective, such clauses need to be adopted by lawyers. Professional organizations should play a role in educating lawyers and clients regarding the clauses and the importance of diversity in decision making in general. Companies with strong diversity and inclusion programs should be targeted to receive educational material on how to add the clause to their agreements.

Aggressive promotion of the clauses should raise awareness, but a monitoring mechanism should also be established to determine whether the clause is being adopted and improving the diversity of appointments. Notably, although one of the recommendations of the ERA Pledge is to maintain and publish statistics

with respect to the gender of appointments, most providers do not make those statistics available on their websites or otherwise make them public. Metrics on gender appointments should not be limited to ADR Providers. Law firms and corporations that adopt diversity programs should create and monitor metrics to demonstrate improvement on their diversity initiatives. These statistics and metrics are key to determining whether the measures that have been adopted have proven to be effective.

All members of the bar should be responsible for developing the next generation of neutrals. Women and minorities should take a more prominent role in representing parties in ADR proceedings. The NYS Presumptive ADR initiative affords a perfect opportunity for women and minorities to gain experience as lead advocates with demonstrated competency and success. In addition, law firms should encourage women and minority associates and partners to volunteer as part of court-annexed mediation and arbitration panels.

The courts have adopted Diversity Statements recognizing the importance of their programs to attract and retain neutrals with broad professional, gender, racial and socioeconomic backgrounds to complement the diversity of its litigants.¹⁶⁰

¹⁶⁰ Southern District of New York ADR Diversity Statement: <https://nysd.uscourts.gov/sites/default/files/pdf/Mediation/Diversity%20Statement.pdf>; New York County Commercial Division ADR Diversity Statement: <http://ww2.nycourts.gov/courts/comdiv/ny/ADR-Applications-Ns-Page.shtml>.

Without law firm management support, women and minorities will be reluctant to fill these pro bono opportunities especially with the emphasis on billing. There is an added benefit to serving on these panels. A recent study¹⁶¹ concluded that cases in which the parties were represented by attorney-mediators had a reduced decision error rate suggesting that advocates' decision-making skills are improved by dispute resolution training.

Law firms increasingly are establishing Arbitration or ADR practice areas as specialties within the firm. Women and minority partners and associates can and should take a more visible role in these practices. Their publications and involvement in policymaking through ADR institutions should be highlighted on a local, national, and international level. Whether or not a firm has an Arbitration or ADR practice area, firms should provide professional development opportunities for women to develop and sharpen their skills. Women and minorities should take a leading role in delivering these programs, both internally to lawyers and clients, and externally through bar and business associations. In this way, women and minorities can more easily transition from the role of practicing lawyer to neutral because of their recognized expertise in the area, as many men do today.

¹⁶¹ See Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1740-1461.2008.00133.x>.

VI. CONCLUSION

While there is still a significant gender gap in courtroom and ADR participation by women attorneys, there has been some improvement in both during the three years since the 2017 Report was released. That improvement deserves recognition. The Task Force believes that the 2017 Report was instrumental in causing this improvement and helped broaden the focus on the issues raised in that Report by all sectors of the legal profession – including law firms, corporate legal departments, government entities, and the judiciary as well as private and public sector individual attorneys.

The progress noted in this Report, however, is incremental and certainly not sufficient to end the campaign to achieve full equality for women and all diverse attorneys in the courtroom and in ADR. Much more needs to be done before that goal is achieved. The Task Force remains committed to that endeavor and encourages all sectors of the legal profession, including individual attorneys, to continue to focus on all of the issues raised in this Report. Once again, this Report makes many recommendations that should lead to more opportunities and greater success for women in the legal profession. The Task Force is proud to have made a contribution to advancing this important cause.

**NYSBA Commercial & Federal Litigation Section
Women's Initiatives Task Force**

The Honorable Shira A. Scheindlin (ret.), Stroock & Stroock & Lavan

Carrie H. Cohen, Morrison & Foerster LLP

Tracee E. Davis, Seyfarth Shaw

Laurel R. Kretzing, Nassau County Attorney's Office

Bernice K. Leber, Arent Fox LLP

Sharon M. Porcellio, Bond Schoeneck & King, PLLC

Lauren J. Wachtler, Barclay Damon

APPENDIX A

Judicial Form for Tracking Court Appearances.

I. Identify your court: _____

(e.g., SDNY, NDNY, 1st Dep't; 3d Dept; 2d Cir, Commercial Div NY Co):

II. Type of Case: Criminal ___ (Federal only) Civil ___

Subject Matter: _____
(e.g., contract, negligence, employment, securities):

III. Is this a class action? Yes ___ No ___

IV. Is that an MDL (Federal only)? Yes ___ No ___

V. Is this an appeal? Yes, criminal (Fed. only) ___ Yes, civil ___ No ___

VI. Type of Proceeding (Please circle your answer)

- A. Pre-trial Conference
- B. Arraignment (Federal only)
- C. Bail Hearing (Federal only)
- D. Sentencing (Federal only)
- E. Oral Argument on Motion ___

Type of motion: _____
(e.g., discovery, motion to dismiss, summary judgment, TRO,
class certification, in limine)

- F. Evidentiary Hearing
- G. Trial
- H. Appellate Argument
- I. Other

III. Number of Parties (total for all sides)

A. Two ___

- B. Two to Five___
- C. More than Five___

IV. Lead Counsel for Plaintiff(s) (the lawyer who primarily spoke in court)

- Male___
- Female___
- Public___
- Private___

V. Lead Counsel for Defendant(s) (the lawyer who primarily spoke in court)

- Male___
- Female___
- Public___
- Private___

VI. Additional Counsel (if any) for Plaintiff(s) (other lawyer(s) at counsel table/who did not speak – please indicate number of each if more than one)

- Male___
- Female___
- Public___
- Private___

VII. Additional Counsel (if any) for Defendant(s) (other lawyer(s) at counsel table who did not speak – please indicate number of each if more than one)

- Male___
- Female___
- Public___
- Private___

APPENDIX B

TABLES PREPARED BY DOAR

Table I

Female Attorneys Appearing In Appellate Courts	
State Appellate Courts	
First Dept, Overall	26.0%
First Dept, Public	55.9%
First Dept, Private	24.7%
Second Dept, Overall	24.3%
Second Dept, Public	49.4%
Second Dept, Private	21.6%
Third Dept, Overall	28.0%
Third Dept, Public	34.8%
Third Dept, Private	25.5%
Fourth Dept, Overall	27.7%
Fourth Dept, Public	26.7%
Fourth Dept, Private	20.5%
Appellate Divisions, Overall	26.5%
NY State Ct, Public	41.7%
NY State Ct, Private	16.7%
NY State Ct, Civil	35.3%
NY State Court, Criminal	50.0%

NY State Court, Overall	26.8%
Federal Appellate Courts	
Second Circuit, Overall	24.3%

Table II

	Female Attorneys Appearing In Civil and Criminal Cases
Overall	26.7%
Lead Counsel	25.3%
Additional Counsel	36.4%
Federal Courts	27.5%
State Courts	23.1%
Trial Courts	26.3%
Appellate Courts	24.7%
Upstate Courts	27.9%
Downstate Courts	24.2%
Public Sector	35.1%
Private Sector	20.8%

Parties Per Side	Female Attorneys Appearing As Lead Counsel
1	43%
2	26.6%
3-5	26.0%
6+	23.5%

Table III

Female Attorneys Appearing As Lead Counsel By Geography	
Upstate, Civil	26.7%
Downstate, Civil	23.9%
Upstate, Criminal	28.1%
Downstate, Criminal	30.6%

Female Attorneys Appearing As Lead Counsel By Court	
Trial, Civil	24.1%
Appellate, Civil	25.4%
Trial, Criminal	29.4%
Appellate, Criminal	22.7%

Female Attorneys Appearing As Lead Counsel By Practice Area	
Family Law	40.7%
Contract Disputes	17.7%
Criminal	28.6%
Civil Rights	28.1%
Torts	27.7%
Financial Disputes	23.4%
Intellectual Property	21.1%

Female Attorneys Appearing As Lead Counsel By Jurisdiction	
Federal	27.5%
State	23.2%
Federal, Criminal	28.8%
Federal, Civil	26.0%
State, Civil	24.1%
Federal, Public	30.9%
Federal, Private	17.4%
State, Public	43.1%
State, Private	22.4%

APPENDIX C

SUMMARY OF RECOMMENDATIONS

1. Law Firms

- Sponsorship by partners of women and other diverse attorneys should be encouraged and tracked to ensure that mid-senior level associates have sponsors.
- Provide speaking and writing opportunities outside the firm, in particular through bar association activity. Examples include leadership roles on committees and sections, mock trial exercises, and authoring of reports, blog posts, and articles.
- Credit work as billable that traditionally has been treated as non-billable. Examples include bar association work, mentoring, sponsorship, committee work within the firm focusing on diversity and inclusion, and affinity group leadership roles. Consider crediting time spent on leadership roles for charitable and other civic organizations.
- Ensure that assignments are made equally to men and to women by tracking work assignments and reviewing metrics.

- Partnership compensation should be based on more than just billable hours. It should include work on client and prospective pitches, sponsorship, recruitment, bar association work, speaking and writing, and diversity and inclusion efforts.
- Ensure that both men and women transition to the role of relationship or billing partner and that transition planning is transparent.

2. In-house Corporate Legal Departments

- Demand accountability from outside counsel by requesting metrics that track lead counsel assignments, diverse teams, and roles within teams.
- Encourage associates at firms to participate in team calls and attend important meetings.
- Communicate expectations regarding diversity and inclusion to outside counsel.
- Discuss allocation of billing credit within the firm with the relationship partner to help ensure that the women and other diverse attorneys who perform the work receive appropriate billing credit.

3. The Judiciary

- Continue to expand the adoption of individual rules that encourage junior attorneys to speak in court.
- Ask junior attorneys to participate in an argument where it is apparent that the junior attorney worked on the brief and is knowledgeable on the issues.
- Consider diversity in all court appointments, such as leadership roles in class actions and in multi-district litigation.
- Consider diversity when appointing court adjuncts, such as special masters, receivers, referees, guardians ad litem, and monitors.
- Continue public speaking and participation on bar association panels about the importance of diversity in the courtroom.

4. ADR

- Encourage the selection of diverse neutrals, by, for example, using model clauses in arbitration agreements in which the parties agree, in advance of any dispute, to the appointment of at least one diverse neutral on every arbitral panel.

- Increase transparency in awards so that parties can select neutrals based on objective criteria in addition to the traditional reliance on word of mouth.
- Increase diversity of panels.
- Highlight the proven benefits of diverse panels in the quality of the decisions rendered.
- Publish metrics showing the appointments of women and minorities as arbitrators and mediators.
- Encourage junior women and other diverse attorneys to join court-annexed panels to gain experience in mediation and other dispute resolution techniques.



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

COMMERCIAL AND FEDERAL LITIGATION SECTION

June 4, 2020

2019-2020 Officers

JONATHAN B. FELLOWS
Chair
Bond, Schoeneck & King, PLLC
One Lincoln Centre
Syracuse, NY 13202-1324
315/218-8120
fellowj@bsk.com

DANIEL K. WIIG
Chair-Elect
Corporate Affairs, New York City
Housing Authority
250 Broadway
New York, NY 10013
212/776-5015
danielkwiig@gmail.com

IGNATIUS A. GRANDE
Vice-Chair
Berkeley Research Group
810 7th Ave Ste 4100
New York, NY 10019
646/809-8066
igrande@thinkbrg.com

ANNE B. SEKEL
Treasurer
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016-1301
212/682-7474
asekel@foley.com

JESSICA C. MOLLER
Secretary
Bond, Schoeneck & King, PLLC
1010 Franklin Ave Rm 200
Garden City, NY 11530
516/267-6332
jmoller@bsk.com

Delegates to the House of Delegates

James M. Wicks
Robert N. Holtzman
Laurel R. Kretzing
Jonathan B. Fellows, Alternate

FORMER CHAIRS:

Robert L. Haig
Michael A. Cooper
Shira A. Scheindlin
Harry P. Trueheart, III
P. Kevin Castel
Mark H. Alcott
Gerald G. Paul
Mark C. Zauderer
Bernice K. Leber
John M. Nonna
Jack C. Auspitz
Sharon M. Porcellio
Jay G. Safer
Cathi A. Baglin
Lewis M. Smoley
Lauren J. Wachtler
Stephen P. Younger
Lesley F. Rosenthal
Carrie H. Cohen
Peter Brown
Vincent J. Syracuse
Jonathan D. Lupkin
David H. Tennant
Tracee E. Davis
Gregory K. Arenson
Paul D. Sarkozi
James M. Wicks
Mark A. Berman
Mitchell J. Katz
Robert N. Holtzman
Laurel R. Kretzing

VIA ELECTRONIC & FIRST CLASS MAIL

Scott M. Karson, President
T. Andrew Brown, President Elect
New York State Bar Association
One Elk Street
Albany, New York 12207
smk@lambbarnosky.com
abrown@brownhutchinson.com

Re: THE TIME IS NOW: Achieving Equality for Women Attorneys in the Courtroom and in ADR

Dear President Karson and President-Elect Brown:

The signatories of this letter are the current Chair of the Commercial and Federal Litigation Section, and 18 former Chairs of the Section.

We are writing to express our endorsement of the recommendations in the 2020 Report of the Section's Women's Initiative Task Force, "The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR." The report followed up on the 2017 report "If Not Now When? Achieving Equality for Women Attorneys in the Courtroom and in ADR."

The Section's Women's Initiative Task Force is comprised of seven highly distinguished trial lawyers and former female Chairs of the Section: The Honorable Shira A. Scheindlin (ret.), Carrie H. Cohen, Tracee E. Davis, Laurel R. Kretzing, Bernice K. Leber, Sharon M. Porcellio and Lauren J. Wachtler.

Both reports were based on data collected by the Task Force regarding appearances of women in New York courts. The 2017 Report revealed that female attorneys comprised only about 25 percent of attorneys in lead counsel roles in the courtrooms throughout New York State. Unfortunately, the 2020 Report showed only a tiny increase in the number of female attorneys appearing as lead counsel in New York courts.

Both reports also presented data from other sources that document the disappointingly slow progress women have made in the large law firms.

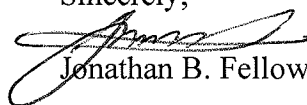
The 2020 Report contained recommendations for law firms, in-house corporate legal departments, the judiciary and ADR panels.

The 2020 Report was unanimously adopted and approved by the Executive Committee of the Section at its meeting on May 21, 2020.

The current chair and former chairs of the Section are leaders of law firms, in-house legal departments, and the judiciary. We plan to circulate the recommendations of the Women's Initiative Task Force and to urge implementation of those recommendations across the legal community. We agree wholeheartedly with the statements in the report that male attorneys must take action to address gender inequity by acting as mentors, sponsors and allies.

We are proud of and thankful for the work of the Section's former Chairs on the Women's Initiative Task Force, and look forward to working to implement its recommendations.

Sincerely,



Jonathan B. Fellows, Chair

Former Chairs:

Mark Alcott
Gregory Arenson
Mark Berman
Peter Brown
Robert Haig
Robert Holtzman

Mitchell Katz
Jonathan Lupkin
John Nonna
Gerald Paul
Jay Safer
Paul Sarkozi

Vincent Syracuse
David Tennant
Harry Trueheart
James Wicks
Stephen Younger
Mark Zauderer

cc: Pamela McDevitt, Esq., Executive Director NYSBA; pmcdevitt@nysba.org
Kathleen Baxter, Esq., General Counsel NYSBA; kbaxter@nysba.org
Hon. Shira Scheindlin; sscheidlin@stroock.com
Carrie Cohen, Esq.; ccohen@mofo.com
Tracee Davis, Esq.; tdavis@seyfarth.com
Laurel Kretzing, Esq.; laurelkretzing@gmail.com
Bernice Leber, Esq.; bernice.leber@arentfox.com
Sharon Porcellio, Esq.; porcels@bsk.com
Lauren Wachtler, Esq.; lwachtler@barclaydamon.com

MEMORANDUM

To: Kathy Baxter
CC: Commercial and Federal Litigation Section
From: Terri A. Mazur, Chair, Women in Law Section
Date: June 9, 2020
Re: Commercial and Federal Litigation Section Women's Initiatives Task Force Report: "The Time is Now: Achieving Equality for Women in the Courtroom and in ADR"

The Women in Law Section has reviewed the Commercial and Federal Litigation Section Women's Initiatives Task Force Report: "The Time is Now: Achieving Equality for Women in the Courtroom and in ADR" ("2020 Report") which updates the Women's Initiatives Task Force's groundbreaking 2017 Report "If Not Now, When? Achieving Equality for Women in the Courtroom and in ADR." This well-researched and well-written 2020 Report reveals that there has been some progress made in the number of women attorneys appearing in lead roles in court, in support roles and in ADR, but it clearly reveals that there remains significant, ongoing inequality between women and men attorneys in the courtroom and in ADR. The 2020 Report demonstrates that much more has to be done for women attorneys to achieve full equality with men in the legal profession. This Report also includes excellent recommendations for moving forward beginning on page 44, with suggestions ranging from more equitable succession planning to more inclusive shared origination credit systems.

We have identified a few minor edits to be made in the Report:

1. Page 6: Remove the second period on the last line of the page.
2. Page 14: In the last line, typo -- "al" should be "all".
3. Typo on page 17: B (1) Diverse (missing the e).
4. There are all different formats of hyphens in the Report, from long dashes to short dashes to double dashes ("—")

The Women in Law Section commends the Task Force and the Commercial Federal Litigation Section for this important work and the 2020 Report.

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
VIRTUAL MEETING
April 3, 2020**

Present: Karina E. Alomar, Jonathan B. Behrins, Mark A. Berman, Earamichica Brown, Norman P. Effman, Donna England, Margaret J. Finerty, Evan M. Goldberg, Henry M. Greenberg, Andre R. Jaglom, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Michael Miller, Domenick Napoletano, Marne L. Onderdonk, Aimee L. Richter, William T. Russell, Jr., Diana S. Sen, Rona G. Shamoon, Carol A. Sigmond, Mark T. Starkman, David H. Tennant.

Guests: Dean Aviva Abramovsky, Cynthia Arato, T. Andrew Brown, Hyun Suk Choi, Jean F. Gerbini, Mitchell J. Katz, David E. McCraw, Ronald C. Minkoff, Mark A. Moretti, Joseph E. Neuhaus, Taier Perlman, Hon. Stan L. Pritzker, Christopher R. Riano, Mirna M. Santiago, Hon. Alan D. Scheinkman, Adam Seidel, Roy D. Simon.

Mr. Greenberg presided over the meeting as President of the Association.

1. Approval of minutes of meeting. The minutes of the January 30, 2020 meeting were approved as distributed.
2. Consent calendar:
 - a. Approval of stipend increase for President and President-Elect.
 - b. Approval of investment bank resolutions.
 - c. Approval of amendments to bylaws of Senior Lawyers Section.
 - d. Approval of amendments to bylaws of Corporate Counsel Section.
 - e. Approval of presidential appointees to House of Delegates.

Items b-e of the consent calendar, consisting of the above items, were approved by voice vote.
3. Report of President. Mr. Greenberg highlighted the items contained in his written report, a copy of which is appended to these minutes. He also thanked the departing members of the Executive Committee for their service.
4. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported on the impact of Covid-19 on the Association's projected revenue and expenses through June 2020. In addition, he reported on the impact of the financial crisis on Association investments. The report was received with thanks.
5. Report and recommendations of Committee on Membership. Mitchell J. Katz and Hyun Suk Choi, co-chairs of the committee, presented a proposal to restructure the Association's dues structure. After discussion, a motion was adopted to approve the proposal.

6. Report and recommendations of Committee on LGBTQ People and the Law. Christopher R. Riano, chair of the committee, reviewed a proposed *amicus curiae* brief for submission to the U.S. Supreme Court in *Fulton v. City of Philadelphia*. After discussion, a motion was adopted to approve *amicus* participation.
7. Report and recommendations of Committee on Standards of Attorney Conduct. Prof. Roy D. Simon, co-chair of the committee, together with committee member Joseph E. Neuhaus, reviewed the committee's proposed amendments to Rule 7.5 of the Rules of Professional Conduct. After discussion, a motion was adopted to endorse the proposals for favorable action by the House.
8. Report and recommendations of Task Force on Rural Justice. Hon. Stan L. Pritzker and Taier Perlman, co-chairs of the Task Force, presented the Task Force's recommendations to ensure access to justice for rural communities. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
9. Report and recommendations of Task Force on the New York Bar Examination. Hon. Alan D. Scheinkman, chair of the Task Force, outlined the Task Force's recommendations with respect to the administration of the bar examination in New York. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
10. Report and recommendations of Task Force on Autonomous Vehicles and the Law. Dean Aviva Abramovsky, chair of the Task Force, reviewed the Task Force's recommendations for the regulation of autonomous vehicles; testing policies for autonomous vehicles; and liability and insurance. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
11. Report and recommendations of Task Force on Free Expression in the Digital Age. Cynthia Arato and David E. McCraw, co-chairs of the Task Force, outlined the Task Force's recommendations with respect to libel reform; FOIL reform; transparency; encouragement of nonprofits; and expanded legal services. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
12. Report and recommendations of International Section. In his capacity as past section chair, Mr. Jaglom reviewed the section's request for NYSBA co-sponsorship of a resolution being presented to the ABA House of Delegates at its August 2020 meeting regarding election reform and an end to armed conflict in Cameroon. After discussion, a motion was adopted to approve the request.
13. New Business. In his capacity as co-chair of the Task Force on the Parole System, Mr. Russell updated the committee on the Task Force's work, particularly with respect to the release of inmates in response to the Covid-19 pandemic. The report was received with thanks.

14. Date and place of next meeting.
Friday, June 12, 2020
Virtual Meeting

15. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sherry', with a long horizontal flourish extending to the right.

Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
CONFERENCE CALL
June 1, 2020**

Present: Mark A. Berman, T. Andrew Brown, David Louis Cohen, Norman P. Effman, Donna England, Margaret J. Finerty, Jean F. Gerbini, Sarah E. Gold, Henry M. Greenberg, Richard M. Gutierrez, Andre R. Jaglom, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Ronald C. Minkoff, Domenick Napoletano, Marne L. Onderdonk, Aimee L. Richter, William T. Russell, Jr., Robert T. Schofield, IV, Adam Seiden, Diana S. Sen, Carol A. Sigmond, Jean Marie Westlake.

Guest: John H. Gross.

Mr. Karson presided over the meeting as President of the Association.

1. New Task Forces. Mr. Karson announced that he would appoint three new task forces: A Task Force on Nursing Homes and Long Term Care Facilities, to examine issues identified in the May 2020 report of the Health Law Section; a Task Force on Covid-19 Immunity and Liability, to address issues such as those presented under contract and tort law; and a Task Force on Virtual Discovery and Trials, to examine the extent to which virtual proceedings should be utilized. He asked members of the committee to contact him with recommendations for membership on these task forces.
2. Recommendations of Committee on Civil Practice Law and Rules for *amicus curiae* participation. In his capacity as co-chair of the Committee on Civil Practice Law and Rules, Mr. Napoletano outlined issues raised in the Appellate Division, Second Department opinion of *Aybar v. Aybar*, relating to the question of whether a foreign corporation's decision to register in New York State and appoint the Secretary of State as its agent for service of process constitutes consent to jurisdiction in New York courts. After discussion, a motion was adopted to approve *amicus* participation. Messrs. Karson, Minkoff and Russell and Ms. Richter will serve as a subcommittee to review the brief before filing. Mr. Cohen and Ms. Onderdonk abstained from participating in the discussion and vote.
3. Proposed New York Practice Program for Law School Graduates. Mr. Berman outlined a proposed free program to be offered to law school graduates during summer 2020. After discussion, it was agreed to hold consideration in abeyance in order to obtain information regarding staff allocation and resources.
4. Proposal for 2021 Gala. John H. Gross, chair of the Finance Committee, reported that consideration was being given to moving the 2021 Gala, currently scheduled for January 2021 during the Annual Meeting, to April 2021 in light of the uncertainty as to holding large events. The report was received with thanks.

5. Consideration of Civil Rights Law §50-a. Mr. Effman observed that legislation to repeal or amend the statute is under discussion and asked whether the Association should participate in the consideration. It was noted that the Task Force on Free Expression in the Digital Age is continuing its study of the topic. Mr. Karson advised that the topic can be included for further consideration at the June 12, 2020 meeting.
6. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sherry', followed by a long horizontal line extending to the right.

Sherry Levin Wallach
Secretary

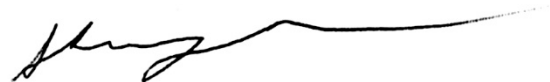
**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
CONFERENCE CALL
June 9, 2020**

Present: Mark A. Berman, T. Andrew Brown, David Louis Cohen, Norman P. Effman, Donna England, Margaret J. Finerty, Jean F. Gerbini, Henry M. Greenberg, Richard M. Gutierrez, Andre R. Jaglom, Scott M. Karson, Sherry Levin Wallach, Richard C. Lewis, Michael A. Marinaccio, Ronald C. Minkoff, Domenick Napoletano, Marne L. Onderdonk, Aimee L. Richter, William T. Russell, Jr., Mirna M. Santiago, Robert T. Schofield, IV, Adam Seiden, Diana S. Sen, Tucker C. Stanclift.

Mr. Karson presided over the meeting as President of the Association.

1. Consideration of Civil Rights Law §50-a. Mr. Karson noted that legislation to repeal the statute is under consideration and asked whether the Association should take a position in light of the fact that legislation is likely to be passed by the Legislature imminently. After discussion, including the observation that Association groups have differing views on repeal of the statute, a motion was adopted to support repeal.
2. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

