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CLE Materials
New York & New Jersey Tracks | Friday

January 14, 2022

Fordham Law School
Live Broadcast via Zoom
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Inessa Abayev
Inessa Abayev is an Assistant Deputy Public Defender at the Office of the Public Defender, Hudson Trial Region, in New Jersey where she has worked the past five years. She defends and represents indigent adults charged with felony allegations ranging from theft to homicide. Prior to joining her office she worked in civil litigation at the Port Authority, and before that, she served as a law clerk to the Hon. J. Randall Corman, J.S.C., in Middlesex County. Inessa is a native New Yorker and graduated from Fordham Law School in 2013 where she was a member of the Stein Scholars for Public Interest and a PIRC regular.

Alessandra Biaggi
Alessandra Biaggi is the Democratic New York State Senator in her home district (Bronx/Westchester), and Chair of the revived Ethics and Internal Governance Committee. The granddaughter of Italian immigrants who lived in Hunts Point, she is the fourth generation of her family to live in District 34.

Within her first two months in office, Senator Biaggi chaired the first public hearings in 27 years on sexual harassment in the workplace, and led the charge in New York to pass legislation that strengthens protections for survivors and holds employers accountable for addressing sexual misconduct. In a joint effort with her colleagues in the Democratic conference, the Senator worked to pass transformational legislation including tenant-centered housing reforms, bold climate-change initiatives, unprecedented criminal justice reform, comprehensive workplace protections, and expansive legislation making it easier to vote.

Before launching her campaign, she served in Governor Andrew Cuomo’s Counsel’s Office focusing on the New York State’s women’s policy agenda, advocating for passage of the Reproductive Health Act and the Comprehensive Contraceptive Coverage Act. During the historic 2016 election, Alessandra was the Deputy National Operations Director for Hillary Clinton’s presidential campaign, overseeing a budget of $500 million, 38 state directors and 45 associated staff.

Her run for office was preceded by a decade of advocacy and service to the people of New York. She interned for the Kings County D.A.’s Office, the U.S. Attorney’s Office for the Southern District of New York, and was a legal fellow for New York State Homes and Community Renewal, working to ensure that families across New York State had access to affordable housing. She served as Assistant General Counsel for Governor Cuomo’s Office of Storm Recovery, working with small businesses and municipalities to rebuild New York after Hurricane Sandy. She was a 2015 New Leaders Council (NLC) fellow, and sat on NLC’s Advisory Board. Alessandra attended Pelham public schools and holds degrees from New York University and Fordham Law School. She is also a graduate of the Women’s Campaign School at Yale University.
PAOLA BETTELLI
Ms. Bettelli is an attorney admitted to practice in New York, New Jersey and Colombia, South America. She has more than 20 years of experience in the fields of international law, environmental law and sustainable development. Working as a diplomat, she was the lead negotiator for the Colombian government in multilateral climate change, biodiversity and the movement of hazardous wastes negotiations. She headed the Climate Change Office of the Colombian Ministry of the Environment and was responsible for setting national policies on climate change and representing the Colombian government in climate change meetings.

She also worked for the United Nations as Senior Economic Affairs Officer in the New York Office of the UN Regional Commissions. In that capacity she actively participated in high-level UN task forces on climate change and on the implementation of the Millennium Development Goals (MDGs). More recently, she provided strategic guidance to the UN Regional Commissions on their positioning in the context of the 2030 Sustainable Development Agenda.

Ms. Bettelli also has experience working for the private sector as Environmental Markets Director for ICAP Securities in Colombia, as an analyst and consultant for the Andean Center for Environmental Economics (CAEMA), and as an ENB writer and Outreach and Fund Development Officer for the International Institute of Sustainable Development (IISD). She has published articles on sustainable development in Colombia and in publications of the New York Bar association. Ms. Bettelli also taught International Environmental Law at Universidad de los Andes’ Law School.

Ms. Bettelli currently works as an independent consultant in the fields of international law, environmental law and sustainable development. She is an attorney admitted to practice in New York, New Jersey and Colombia and currently teaches legal writing for non-J.D. students as adjunct professor at Fordham Law School.

Natacha Carbajal-Evangelista
Natacha Carbajal-Evangelista serves as Deputy Director for the NYS Workers’ Compensation Board, directly overseeing several of the Board’s program areas and advising the Chair and Executive Director on policy and operation matters.

Prior, Natacha served as the Assistant Secretary for Labor and Workforce for New York State, providing daily strategic leadership to seven dynamic labor and workforce-related agencies and boards, with budgets of more than $5 billion impacting operations and policy for over 9.6 million working New Yorkers, including more than 170,000 New York State employees. She led the Statewide implementation of groundbreaking initiatives, including New York's Paid Family Leave. Natacha started her state service as Special Counsel for Ethics, Risk and Compliance, focusing on the New York State Department of Labor.

Before joining State government, Natacha was a senior associate at Baker & Hostetler LLP., where she focused her practice on bankruptcy litigation and advised the Securities Investor Protection Act (SIPA) Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC. Natacha served as a Judicial Law Clerk serving the Hon. Elizabeth S. Stong of the U.S.
Bankruptcy Court E.D.N.Y. and the Hon. Arthur J. Gonzalez (retired), former Chief Judge of the U.S. Bankruptcy Court S.D.N.Y.

Natacha is a proud graduate of Fordham Law School and Cornell University’s School of Industrial and Labor Relations and active member of the American Bar Association (Business Law Section), Hispanic National Bar Association, Cafecito Network and Hudson Valley Hispanic Bar Association.

Rhonda J. Eiger
Rhonda J. Eiger concentrates her practice on residential real estate, municipal court, and wills, trusts and estates at Goldzweig, Green, Eiger & Biedzynski, LLC. Mrs. Eiger is a member of the Monmouth County Bar Association and the New Jersey State Bar Association. Ms. Eiger is a past president of the Marlboro Jewish Center. She received her B.A. from Brandeis University and her J.D. from The American University Washington College of Law. Mrs. Eiger served as a judicial clerk to the Honorable Samuel P. Supnick. She also has served as a mock trial judge, a New Jersey Bar Association Ethics Committee Fee Arbitration Chairperson, and NJ Bar Association faculty for ICLE, Lawline, Fordham Law School, CLE and the New York City Bar Association.

ALLAN L. GROPPER
Allan L. Gropper was appointed as a United States Bankruptcy Judge for the Southern District of New York on October 4, 2000 and retired on January 9, 2015. Prior thereto he was a member of the law firm of White & Case, active in bankruptcy and reorganization cases.

Judge Gropper presently serves as a consultant and expert witness in litigated matters and as an arbitrator and mediator. He is an adjunct professor of law at Fordham Law School, a member of the National Bankruptcy Conference and a Fellow of the American College of Bankruptcy. He is a member of the United States delegation to Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL). He is also a member of the American Arbitration Association Roster of Neutrals and the INSOL International College of Mediation. He is a graduate of Yale College and Harvard Law School.

Judge Gropper has frequently lectured on bankruptcy-related issues and has participated in educational sessions in several nations. His publications include The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases, 9 Brook. J. Corp. Fin. & Com. L. 57 (2015), and The Arbitration of Cross-Border Insolvencies, 86 Amer. Bankr. L. J. 201 (2012).

Abdul Hafiz Bio
Abdul Hafiz is a 2019 graduate of Fordham University School of Law where he was a member of the Moot Court Board, Urban Law Journal, Black Law Students Association (BLSA), and the Muslim Law Students Association (MLSA). He is currently a Law Clerk to the Honorable Katharine H. Parker, Magistrate Judge, Southern District of New York.
Prior to clerking, Abdul was a litigation associate at White & Case LLP focusing on complex commercial litigation and counseling clients in high-stake antitrust matters, including the representation of global pharmaceutical manufacturers. Abdul also counseled clients on privacy and cybersecurity issues that arose in the protection and transfer of consumer and business data, and the management of information and operational systems across various jurisdictions. Abdul is a Certified Information Privacy Professional (CIPP/US).

Jeffrey Hellman
Jeffrey Hellman is the Senior Vice President and Assistant General Counsel at PVH Corp. PVH Corp. is a global apparel company whose brand portfolio consists of nationally and internationally recognized brand names, including Tommy Hilfiger, Calvin Klein, Warner’s, Olga and True&Co.

He works on mergers and acquisition transactions (including acquisitions of The Warnaco Group, Inc. and Tommy Hilfiger B.V.), joint ventures, financings and securities offerings and handles corporate governance, securities law, creditors’ rights and commercial litigation matters. He is an adjunct professor at Fordham University Law School, where he teaches Fashion Law & Finance, and also serves as pro bono counsel to the Fashion Scholarship Fund, a non-profit organization that provides scholarships to college students planning to pursue careers in the fashion industry, a member of the Board of Directors of Comprehensive Youth Development, a non-profit organization that partners with New York City public high schools to prepare young adults for successful futures.

Mr. Hellman holds a J.D. from the University of Pennsylvania Law School and a B.S. Economics, Finance from the University of Pennsylvania.

William Jannace
William Jannace has worked nearly 35 years in the securities industry at the American and New York Stock Exchanges, FINRA and several investment banking firms. He currently serves as an expert witness for The Bates Group on securities litigation matters. He is a member of the faculty advisory group of ESG Competent Boards which provides professional development and advisory services on ESG and Sustainability to boards, investors, and executives globally. He is also an adjunct professor/lecturer at Fordham School of Law, the U.S. Army War College, the Global Financial Markets Institute, Baruch University, and Metropolitan College, where he teaches courses covering: Broker-Dealer Operations and Compliance; Investment Adviser and Investment Company Regulation; Capital Markets and Corporate Governance; Corporate Social Responsibility, ESG and Impact Investing; AML/FCPA; and Geopolitics, Climate Change, National Security, U.S. Foreign Policy, and Grand Strategy.

He is also a research affiliate with the Fletcher Network for Sovereign Wealth and Global Capital, and a member of the: Bretton Woods Committee, NGO Committee to Stop Trafficking in Persons, and International Institute for Strategic Studies. Mr. Jannace has also conducted training programs in: Russia; Uganda; Burundi; Tanzania; Kenya; Saudi Arabian; India; Ukraine; Romania; Jordan; Turkey; Albania; China; Taiwan and Spain.

Karen Leyva-Drivin
Karen Leyva-Drivin is a Senior Corporate Counsel for Bloomberg L.P., where she handles IP enforcement as well as complex transactional and legal matters. Prior to joining Bloomberg, Karen was a patent litigator with Ropes & Gray and Kenyon & Kenyon. Karen is actively involved in initiatives supporting diversity and inclusion, as well as the Hispanic community. She is a board member of the Sonia and Celina Sotomayor Judicial Internship Program, an HNBA National Past-President of the Young Lawyers Division, past Deputy Regional President for HNBA Region II, and most recently served as a Commissioner on the HNBA's Latina Commission. At Bloomberg, she served as the New York Chapter Lead of the Bloomberg Latinx Community (BLC) and Co-Chair of the Pro Bono Committee. Karen earned her J.D. from Fordham Law and a Bachelor of Engineering in Computer Engineering and Master's degree from Stevens Institute of Technology.

Kate Lang
Kate Lang joined Justice in Aging’s economic security team in December 2012. She serves as a senior staff attorney in the Washington, DC office where she works on Social Security and Supplemental Security Income-related issues. She was formerly a staff attorney at the Legal Aid Bureau in Riverdale, MD where she was an advocate for low-income older adults and persons with disabilities. In her previous positions, Kate worked as an attorney at the National Legal Aid and Defender Association and Bread for the City Legal Clinic in Washington, DC, as well as at Doherty, Cella, Keane and Associates, LLP. She also served as a staff attorney for Legal Services of Northern California. She received her B.A. from Oberlin College and her J.D. from Fordham University School of Law.

Honorable Grace E. Lee
Honorable Grace E. Lee has dedicated her career to public service and currently serves as an Administrative Law Judge for New York State. In her judicial role, Judge Lee has adjudicated over 2000 proceedings involving federal, state and local public benefits.

Prior to her appointment, Judge Lee worked as an attorney for the Division of Legal Affairs at the New York State Office of Children and Family Services where she managed a robust caseload of child care enforcement matters and facilitated laws and policies impacting the welfare of children and communities in the state. Judge Lee was also a Special Assistant for Legislative Affairs at the New York State Governor's Office, identifying pertinent legal and legislative issues impacting New York constituents.

Judge Lee is passionate about diversity on the bench and the protection of due process rights and speaks on the topics in various forums. Judge Lee received a B.A. from Boston College and J.D. from Fordham University School of Law and is an active member of several volunteer organizations and bar associations including the Asian American Bar Association of New York and Brooklyn Women's Bar Association. Judge Lee also serves as the Diversity, Equity and Inclusion Chair of the Fordham Law Alumni Association's Recent Graduates Committee and has previously served on the New York State Bar Association's President's Committee on Access to Justice.

Khasim Lockhart
Khasim Lockhart attended Fordham University School of Law from 2015-2018. He spent each of his three years fully engaged in the life of the School. As a member of the law school’s moot court team, he served as captain of the team that was victorious in the Pepperdine Law School Entertainment Law Competition. He also served as president of Fordham's Black Law Students Association and for his BLSA leadership, he won two awards: the association’s Student of the Year award and the Chapter President of the Year award from the Northeast Black Law Students Association. At graduation, he received the Eugene J. Keefe Award presented to the person who made the most important contribution to the Fordham Law community. Khasim is currently a litigation associate at Frankfurt Kurnit Klein & Selz where he represents clients in a variety of areas. His practice focuses on entertainment, intellectual property, employment, legal ethics, and professional responsibility. He is also an adjunct professor at Fordham University School of Law, teaching Peer Mentoring and Leadership.

**Wendy J. Luftig, Esq**

Wendy Luftig is a seasoned health care attorney with experience in a variety of sectors, including industry, non-profit academic medical centers, and legal entities. She is currently a Senior Manager in the Global Drug Development unit at Novartis Pharmaceuticals Corporation, where she oversees a portfolio of legal documentation related to medical research for complex, multi-site clinical trials. In this capacity, she advises on challenging negotiation impasses, intellectual property issues, and privacy law concerns, as well as implements key legal and compliance initiatives.

Prior to assuming an industry role, Ms. Luftig worked in the Office of Science and Research at NYU Langone Medical Center negotiating transactional agreements with pharmaceutical companies, private foundations, and governmental entities, such as the NIH and CDC. Earlier in her career, she practiced as a corporate litigator at several major New York firms, including Dewey Ballantine.

Ms. Luftig is a former Chair of the Bioethical issues Committee of the New York City Bar Association and a recipient of the 2012 Jeremy Epstein Award for pro bono service for her work representing cancer patients through the Cancer Advocacy Project of the City Bar Justice Center. She has published in the areas of bioethics and organ transplantation.

Since 2015, she has served as an Adjunct Law Professor at Fordham Law School, teaching seminars in Health Care Policy & the Law and Pharmaceutical Law.

Ms. Luftig received her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar, has done graduate work in bioethics at Columbia University and holds an undergraduate degree from Hamilton College.

**Deborah Mantell**

Deborah Mantell has been an attorney with the Mental Hygiene Legal Service for the Second Judicial Department for over four years, representing individuals contesting involuntary hospitalizations, guardianships, and discharges from group homes. Previously, she was an attorney in the Departmental Office of the MHLS for the First Judicial Department, where she focused primarily on appeals and strategic litigation involving post-prison civil commitments.
Deborah graduated from Fordham Law school in 2007 and completed a federal clerkship before starting her career with MHLS. Prior to law school, Deborah worked at The Legal Aid Society’s Prisoners’ Rights Project, advocating for prisoners in New York City jails and state prisons regarding conditions of confinement.

**Georgia B. McKenzie**

Georgia B. McKenzie is an Associate at Stutman Stutman & Lichtenstein, where she practices in all areas of family law, including pre- and post-nuptial agreements, custody, parenting time, spousal support, child support, equitable distribution, and post-judgment issues.

A graduate of Fordham Law School (2014), she is admitted in New York, New Jersey, and Connecticut.

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**John Owens Jr.**

John Owens Jr. serves as counsel to the Honorable Robert R. Reed, Justice of the Supreme Court, New York County, Commercial Division. Prior to this appointment, John served as Acting Deputy General Counsel at the New York City Board of Elections. John began his legal career as an Assistant District Attorney in the Bronx County District Attorney’s Office. John received his J.D. from Fordham University School of Law and earned a B.S. in criminal justice (cum laude) and an M.A. in sociology from St. John’s University.

John is the immediate past chair of the New York City Bar Association’s New York City Affairs Committee. He served as chair of the New York State Bar Association’s General Practice Section and is a member of the section’s Election Law and Government Affairs Committee. John is a member of the Board of Directors for Fordham Law Alumni Association. John serves as an Adjunct Professor of Law at Fordham University School of Law.

**Jennifer Prevete**

Jennifer Prevete is in-house counsel at Altice USA, where she handles litigation matters, including contract disputes, consumer class actions, government investigations and regulatory activity, and intellectual property matters. Prior to joining Altice, she was an associate at a boutique litigation firm, Walden Macht & Haran LLP. Jennifer was also previously a litigation associate at Davis Polk & Wardwell LLP. Her practice has focused on commercial litigation, white collar defense, government investigations, and internal investigations. Before joining Davis Polk, she clerked for the Honorable Joan M. Azrack in the Eastern District of New York. In 2015, Jennifer graduated from St. John’s University School of Law, *magna cum laude*, where she was an Associate Managing Editor of the *St. John’s Law Review*. 
Kiran Rosenkilde
Kiran Rosenkilde is a judicial law clerk to Magistrate Judge Sarah L. Cave of the Southern District of New York. He began his legal career as an Assistant District Attorney at the Bronx District Attorney’s Office, where he served from 2013-2017 in the Criminal Court, Grand Jury, and Public Integrity Bureaus. As an ADA, Kiran prosecuted a range of violent crimes and public corruption offenses.

After the District Attorney's office, Kiran served from 2017-2020 as an Assistant Corporation Counsel and then Senior Counsel in the Special Federal Litigation Division of the New York City Law Department, where he represented the City in federal civil rights litigation brought under 42 U.S.C. § 1983. Kiran defended the City and its officers in several federal trials while at the Law Department.

Kiran graduated with honors from the Benjamin N. Cardozo School of Law in 2013, and he was awarded the Jacob Burns Medal at commencement. Kiran received his undergraduate degree with honors from Tulane University in 2009.

Kiran is a member of the Federal Bar Council’s First Decade Committee and previously served on the Federal Courts Committee of the New York City Bar Association.

Diana Santos
Diana is a Senior Attorney at IBM, where she supports IBM’s Global Markets organization, which drives innovation via the adoption of hybrid cloud and artificial intelligence and guidance from IBM Consulting professionals. Prior to joining IBM, she was Assistant General Counsel at Memorial Sloan Kettering Cancer Center and Associate Counsel at the New York Genome Center. Diana has counseled senior executives and worked closely with compliance and business teams to analyze issues and mitigate risks related to hardware, software (on-premises and SaaS), cloud computing, artificial intelligence, intellectual property ("IP"), data use and collection, healthcare regulations, and collaborative works. She has also collaborated with subject matter experts to address privacy and consumer protection laws and information security teams to address cybersecurity risks. Before becoming in-house counsel, Diana spent 9 years as a Big Law associate, where I advised major software, hardware, e-commerce, technology, investment, automotive, biopharmaceutical, and consumer product companies, as well as startup companies, through transactions and litigation. She counseled on and led teams addressing a variety of IP and technology issues relating to commercial agreements, diligence for investments (M&A), invention and product development, branding, patents, trademarks, copyrights, and domain rights. Diana has been a passionate advocate for diversity, equality, and inclusion through my leadership and membership activities, currently including as a Board member of the New York Intellectual Property Association, an active member of the Hispanic National Bar Association, a member of Fordham Law's LALSA Alumni Committee, and Leadership Council on Legal Diversity Fellow.

Giancarlo Stanton, FLS '14
Giancarlo Stanton is currently the Chief Operating Officer at Cover Whale Insurance Solutions – a venture backed InsurTech company utilizing data and machine learning to transform the commercial auto space. He also advises several highly regulated tech companies in the HealthTech, PropTech, and InsurTech sectors.

He was previously the General Counsel and VP of Claims at Swyfft, a P&C InsurTech – his first in-house role after working in private practice.

Giancarlo holds a J.D. from Fordham University School of Law class of 2014, and a bachelor’s degree in Political Science from George Washington University.

ARIANA J. TADLER

- Fordham University School of Law, J.D. – 1992
- Hamilton College, B.A. – 1989

ARIANA J. TADLER is the founding partner of Tadler Law LLP, a WBENC-certified, women-owned boutique law firm handling complex litigation on behalf of businesses, consumers, and investors. Ariana has 28+ years’ experience litigating and managing securities, consumer and data breach class actions and complex litigation. She is recognized as one of the nation’s leading authorities on electronic discovery and the only plaintiffs’ lawyer to be ranked repeatedly as a Band 1 e-Discovery Practitioner by Chambers and Partners in the Global-USA and USA-Nationwide categories, an unprecedented achievement. In 2017, she was appointed by United States Supreme Court Chief Justice Roberts to serve on the Federal Civil Rules Advisory Committee; now serving in her second term, Ariana currently serves on the Social Security, multidistrict litigation (MDL), and Discovery subcommittees.

Geeta Tewari

Geeta Tewari is an Assistant Professor of Law at Widener University Delaware Law School. She received her B.A. from Cornell University, her J.D. from Fordham Law School, and her M.F.A. in Writing from Columbia University School of the Arts. She teaches and writes as an interdisciplinary legal scholar, writer, and poet in the areas of contract law, professional responsibility, gender and racial equity, and justice. Her most recent publications include Law and the New Urban Agenda (Routledge 2020) with endorsement by UN-Habitat Executive Director Maimunah Mohd Sharif, The Ethics of Gender Narratives for U.S. Corporate Boards [16 N.Y.U. J. L. & B. 221 (2019)], and Formality and Geopolitics, two sociopolitical poems in Michigan Quarterly Review. Following law school graduation, Professor Tewari clerked for New York State Supreme Court Justice Jaime A. Rios. She thereafter practiced with New York City’s Office of Corporation Counsel, the Washington D.C. Office of the Attorney General, and served as an Administrative Law Judge for the New York State Department of Labor. She is admitted to practice law in New York, New Jersey, and Washington, D.C.

She also served as the Director of the Urban Law Center at Fordham Law School, where she launched the Women in Urban Law Leadership Initiative and collaborated with UN-Habitat on projects focused on urban planning laws. In 2019, she was a Visiting Artist Scholar at the American Academy in Rome, and founded the Narrative Justice Project, with non-profit status through the New York Foundation for the Arts, to support collaboration between artists and lawyers for dialogue vital to justice and humanity. She has spoken on numerous topics,
including feminist lawyering, narrative justice, inclusivity on corporate boards, and equal pay as a human right.

Mimi Tsankov
Mimi Tsankov is an Immigration Judge at the New York Federal Plaza Immigration Court. In the past 15 years presiding at Immigration Courts in New York, Colorado, and California, she has held a variety of national leadership roles including Pro Bono Liaison Judge, contributing editor to the Immigration Judge Benchbook, Chair, Immigration Court - Board of Immigration Appeals Precedent Committee, Mentor Judge, and Juvenile Docket Best Practices Committee Chair. She is currently the elected President of the National Association of Immigration Judges (NAIJ) (2021 - 2023).

In her personal capacity, she has been elected to the Federal Bar Association (FBA) Board of Directors, and serves as Immediate Past President of the FBA Southern District of New York (SDNY) Chapter. She is a prior Chair of the FBA national International Law Section. Presently she serves on the Board of the Judicial Division and the Diversity and Inclusion Committee. In Fall 2020, she co-chaired a national law student three-part webinar program entitled, Racial Equality and the SDGs: A Certificate Training Program for Law Students. This program was accessible to all law students, nationwide. In Spring 2021, she launched an International Courts Topical Webinar Series at the FBA.

At the American Bar Association (ABA), Judge Tsankov is Secretary of the Judicial Division National Conference of Administrative Law Judges (NCALJ), serves as Liaison to the ABA Commission on Immigration, and has an ABA Presidential Appointment to the United Nations Department of Global Communications, in her capacity as President of the NAIJ.*

Judge Tsankov is co-chair of the National Association of Women Judges (NAWJ) Immigration Law Committee, and Vice President of Publications, in her capacity as President of the NAIJ.*. She serves as an adjunct faculty member at the Fordham Law School in New York. Judge Tsankov publishes regularly in peer-reviewed, and general interest journals. She speaks regularly before members of the immigration law community at international, national, and regional conferences.

Judge Tsankov completed her J.D. at the University of Virginia School of Law and was awarded an M.A. in International Relations at the University of Virginia Graduate School of Politics. She completed her undergraduate degree at James Madison University.

*DISCLAIMER: The author is the President of the National Association of Immigration Judges. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author’s personal opinions, which were formed after extensive consultation with the membership of NAIJ.
Alexander Wentworth-Ping
Alexander (Alex) Wentworth-Ping is an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office in the Northern District of New York in Albany, New York where he has served since June 2020. As an AUSA, he handles federal criminal cases and has prosecuted individuals involved in drug trafficking, possession of firearms and explosives, fraud, tax evasion, cybercrime, and domestic terrorism, among other offenses. In November 2021, Alex was awarded a certificate of recognition for his outstanding prosecutive skills and assistance provided to the FBI. Prior to joining the U.S. Attorney's Office, Alex handled criminal and civil litigation matters in private practice at Quinn Emanuel Urquhart & Sullivan, LLP and Allen & Overy LLP in New York City. He clerked for Magistrate Judge James Orenstein from 2014 to 2015 in the U.S. District Court for the Eastern District of New York. He graduated from Fordham Law School in 2013. Prior to going to law school, Alex served as a Peace Corps Volunteer in Peru from 2008 to 2010. He obtained his undergraduate degree from Williams College in 2008.

Emily Weissler, FLS '14
Emily Weissler currently works as a Litigation Counsel at Uber Technologies, Inc. At Uber, Emily focuses on managing a volume of complex litigation and advising on risk for the Company’s delivery products, which include Uber Eats, Postmates, Drizly, and Cornershop.

Prior to joining Uber in September 2021, Emily worked as a litigator at a boutique law firm, Clarick Gueron Reisbaum LLP, which focused on commercial litigation and cases in the art and intellectual property sphere. Prior to working at that boutique Emily was a litigation associate at Paul, Weiss LLP and she also clerked for Hon. Brian M. Cogan in the Eastern District of New York.

Prior to law school Emily she spent two years as a paralegal with the Department of Justice focusing on criminal international law issues, she received her undergraduate degree from Yale University.

Shlomit Yanisky-Ravid
Professor Shlomit Yanisky-Ravid, PhD is a professor of Intellectual Property (IP) Law, focusing on the challenges of advanced technology, artificial intelligence (AI), blockchain, cyberspace, privacy and competition laws, from theoretical perspective as well as on comparative and international aspects.

Prof. Yanisky-Ravid is a Visiting Professor at Fordham Law (from 2012), where she teaches the courses “IP and the Challenges of Advanced Technology: AI and Blockchain” and previously: "Beyond IP: Theoretical, Comparative and International Perspectives". Professor Shlomit Yanisky-Ravid is the Head of the “IP - AI & Blockchain Research Project" at Fordham Law CLIP working with Prof. Joel Reidenberg. Professor Shlomit Yanisky-Ravid's research focuses on Intellectual Property (IP) Law, focusing on the challenges of advanced technology, artificial intelligence (AI), blockchain, cyberspace, privacy and competition laws, from theoretical perspective as well as on comparative and international aspects. She is also a Law Professor
Research Fellow at the Yale University Law School, ISP, since 2011, when she completed postdoctoral studies at Yale Law School, and where she conducted two seminars: "Law and Society In Israel: Contemporary Issues" and "Advanced Legal Studies for the VR Graduate Program". Prof. Yanisky-Ravid is a full time Senior Law Faculty Member at the Ono Academic College, Law School, which is the largest law school in Israel, and the founder and director of the Shalom Comparative Research Institute, Eliyahu Law and Tech Center at Ono. Professor Shlomit Yanisky-Ravid has published many articles and books and has won awards and scholarships for her works. Recently, she researched the challenges of advanced technology, focusing on AI and blockchain and its impact on the legal regime. One of her studies, titled "Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—the Human-Like Workers are Already Here—A New Model", was chosen as the 2017 Visionary Article in Intellectual Property Law and in addition won an award, by Michigan State University.

She was recently identified as "the foremost thinker on AI and copyright" in the American Copyright Society Annual Event by Judge Katherine Forrest. Her article "Equality and Privacy By Design" addresses big data, that AI systems must "swallow", as the major source of biases, including at workplaces, rather than the algorithm, and suggests a new model of AI data transparency (Fordham U.L.J., special edition on AI and big data). Her article "From the Myth of Babel to Google Translate" discusses, among other topics, AI biases and discriminative results. Currently, she is writing two books, one of them discussing the interconnections between IP and AI. Some of her latest works discuss blockchain platform in regard to intellectual property regime, addressing questions of the advantages and disadvantages regarding the use of blockchain platforms for selling IP assets - is it "the Promised Land" or "the Dark Side of the Moon". Previously, her article "The Right to Privacy and the Balloon Theory" was judged by West (Thomson Reuters) Publisher as one of the best law review articles related to entertainment, publishing and/or the arts published within 2014 in the U.S. Her work on the book "Intellectual Property at Workplaces: Theoretical and Comparative Perspective" won the Van Calker Fund Award, awarded to selected scholars and was described as a profound academic work on the field. She won the Minerva Center for Human Rights award as well as the Silbert grant for other research she has done.

Professor Yanisky-Ravid is a sought after lecturer at leading universities around the world, such as: Harvard University, Berkman K. Center for Internet & Society, Columbia University, Miami University, NYU Law, Center for Labor and Employment Law American University in the U.S. as well as at Lausanne University, Switzerland, Urbino University, Italy, Oxford, UK and others. In addition, she has actively collaborated, for more than a decade, with international organizations, such as the World Intellectual Property Organization (WIPO) in Geneva and the Swiss Institute of Comparative Law, Lausanne. She is a member of many boards and forums around the world in her fields of expertise. Last year she launched the AI-IP project as part of the Fordham Law CLIP researching the challenges of advanced technology, mainly artificial intelligence and blockchain on intellectual property regime. She holds BAs in Life Science and in Psychology from Bar Ilan Univ., Israel (both Cum Laude); LLB in Law, Tel Aviv Univ., Israel (Cum Laude and 3 times dean award); PhD Law, Hebrew Univ., Direct Program for Outstanding Students; Post Doc. Graduate Program, Yale Law School.
Amanda M. Yu
Amanda M. Yu, Esq. is an associate with the law firm of Lesnevich, Marzano-Lesnevich, O’Cathain & O’Cathain, LLC, in Hackensack, New Jersey, where she practices exclusively family and matrimonial law. Ms. Yu is admitted to practice in New Jersey, the District of New Jersey, and New York, and is also a member of the Family Law Section and Young Lawyers Division of the New Jersey State Bar Association. She has served on the Young Lawyers Subcommittee of the Family Law Executive Committee since 2019. Ms. Yu also serves on the Executive Committee of the Fordham Law Alumni Attorneys of Color affinity group as the Social Media Chair and Vice Chair of the New Attorney Division.

Ms. Yu received her B.A. from Rutgers University and her J.D. from Fordham University School of Law. She served as a law clerk to the Honorable Linda E. Mallozzi, J.S.C., Union County Superior Court, Chancery Division, Family Part.

Alex Zozos, FLS ’14
Alex Zozos currently works as a Product Counsel at Coinbase Inc. a cryptocurrency company. He works collaboratively with product managers advising on how to best navigate the often unclear legal and regulatory concerns surrounding cryptocurrencies and related products. Specifically, he has advised on a number of acquisitions and various digital asset security and crypto derivative initiatives.
Prior to this in-house role, Alex was a corporate counsel at Lowenstein Sandler LLP in the Investment Management Group. His practice focused on broker-dealer regulatory issues as well as the related fin-tech space. Alex began his legal career at the U.S. Securities and Exchange Commission as a Special Counsel in the Division of Trading and Markets. While at the Commission, Alex helped oversee the secondary trading markets and assisted in reviewing the Bitcoin ETFs proposals as well as the various rulemakings.
Alex graduated from Fordham Law School in 2014. Prior to law school Alex worked at J.P. Morgan for three years in the prime brokerage division and completed his undergraduate studies in finance and accountancy at Villanova University.
FROM ALBANY, GEORGIA TO ALBANY, NEW YORK: TALKING VOTING RIGHTS AND ELECTION LAW
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§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

CREDIT(S)


Notes of Decisions (1174)

52 U.S.C.A. § 10301, 52 USCA § 10301
Current through P.L. 117-80.
§ 10302. Proceeding to enforce the right to vote, 52 USCA § 10302

(a) Authorization by court for appointment of Federal observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d of Title 42 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) Suspension of use of tests and devices which deny or abridge the right to vote

If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) Retention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different...
§ 10302. Proceeding to enforce the right to vote, 52 USCA § 10302

from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

CREDIT(S)


Notes of Decisions (32)

Footnotes

52 U.S.C.A. § 10302, 52 USCA § 10302
Current through P.L. 117-80.
§ 10303. Suspension of the use of tests or devices in determining eligibility to vote

Effective: September 1, 2014

Currentness

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement,
or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under chapters 103 to 107 of this title have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 10304 of this title, including compliance with the requirement that no change covered by section 10304 of this title has been enforced without preclearance under section 10304 of this title, and have repealed all changes covered by section 10304 of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 10304 of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 10304 of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under chapters 103 to 107 of this title; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.
(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1). Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970,
in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 10305 or 10309 of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) “Test or device” defined

The phrase “test or device” shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.
(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c), the term “test or device” shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b), the term “test or device”, as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

CREDIT(S)


VALIDITY

The United States Supreme Court has held Section 4(b) of the Voting Rights Act of 1965 unconstitutional as a violation of the fundamental principle of equal sovereignty among states. Shelby County, Ala. v. Holder, U.S.2013, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651.>
§ 10304. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

**Currentness**

**(a)** Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.
(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

CREDIT(S)


Notes of Decisions (587)

52 U.S.C.A. § 10304, 52 USCA § 10304
Current through P.L. 117-80.
§ 10305. Use of observers

(a) Assignment

Whenever--

(1) a court has authorized the appointment of observers under section 10302(a) of this title for a political subdivision; or

(2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 10303(b) of this title, unless a declaratory judgment has been rendered under section 10303(a) of this title, that--

(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title are likely to occur; or

(B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;

the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.

(b) Status

Except as provided in subsection (c), such observers shall be assigned, compensated, and separated without regard to the provisions of any statute administered by the Director of the Office of Personnel Management, and their service under chapters 103 to 107 of this title shall not be considered employment for the purposes of any statute administered by the Director of the Office of Personnel Management, except the provisions of section 7324 of Title 5 prohibiting partisan political activity.
(c) Designation

The Director of the Office of Personnel Management is authorized to, after consulting the head of the appropriate department or agency, designate suitable persons in the official service of the United States, with their consent, to serve in these positions.

(d) Authority

Observers shall be authorized to--

(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and

(2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

(e) Investigation and report

Observers shall investigate and report to the Attorney General, and if the appointment of observers has been authorized pursuant to section 10302(a) of this title, to the court.

CREDIT(S)


Notes of Decisions (7)

52 U.S.C.A. § 10305, 52 USCA § 10305
Current through P.L. 117-80.
§ 10306. Poll taxes, 52 USCA § 10306

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10306
Formerly cited as 42 USCA § 1973h

§ 10306. Poll taxes

Currentness

(a) Congressional finding and declaration of policy against enforced payment of poll taxes as a device to impair voting rights

The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) Authority of Attorney General to institute actions for relief against enforcement of poll tax requirement

In the exercise of the powers of Congress under section 5 of the fourteenth amendment, section 2 of the fifteenth amendment and section 2 of the twenty-fourth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) Jurisdiction of three-judge district courts; appeal to Supreme Court

The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

CREDIT(S)

Notes of Decisions (5)

52 U.S.C.A. § 10306, 52 USCA § 10306
Current through P.L. 117-80.
§ 10307. Prohibited acts, 52 USCA § 10307

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing
or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term “votes more than once” does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)


Notes of Decisions (63)

Footnotes

§ 10308. Civil and criminal sanctions, 52 USCA § 10308

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10308
Formerly cited as 42 USCA § 1973j

§ 10308. Civil and criminal sanctions

Currentness

(a) Depriving or attempting to deprive persons of secured rights

Whoever shall deprive or attempt to deprive any person of any right secured by section 10301, 10302, 10303, 10304, or 10306 of this title or shall violate section 10307(a) of this title, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Destroying, defacing, mutilating, or altering ballots or official voting records

Whoever, within a year following an election in a political subdivision in which an observer has been assigned (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Conspiring to violate or interfere with secured rights

Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 10301, 10302, 10303, 10304, 10306, or 10307(a) of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Civil action by Attorney General for preventive relief; injunctive and other relief

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 10301, 10302, 10303, 10304, 10306, or 10307 of this title, section 1973e of Title 42, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under chapters 103 to 107 of this title to vote and (2) to count such votes.
(e) Proceeding by Attorney General to enforce the counting of ballots of registered and eligible persons who are prevented from voting

Whenever in any political subdivision in which there are observers appointed pursuant to chapters 103 to 107 of this title any persons allege to such an observer within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under chapters 103 to 107 of this title or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the observer shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) Jurisdiction of district courts; exhaustion of administrative or other remedies unnecessary

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted any administrative or other remedies that may be provided by law.

CREDIT(S)


Notes of Decisions (9)

Footnotes


52 U.S.C.A. § 10308, 52 USCA § 10308
Current through P.L. 117-80.
§ 10309. Termination of assignment of observers, 52 USCA § 10309

52 U.S.C.A. § 10309
Formerly cited as 42 USCA § 1973k

§ 10309. Termination of assignment of observers

Currentness

(a) In general

The assignment of observers shall terminate in any political subdivision of any State--

(1) with respect to observers appointed pursuant to section 10305 of this title or with respect to examiners certified under chapters 103 to 107 of this title before July 27, 2006, whenever the Attorney General notifies the Director of the Office of Personnel Management, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision described in subsection (b), that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title in such subdivision; and

(2) with respect to observers appointed pursuant to section 10302(a) of this title, upon order of the authorizing court.

(b) Political subdivision with majority of nonwhite persons registered

A political subdivision referred to in subsection (a)(1) is one with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote.

(c) Petition for termination

A political subdivision may petition the Attorney General for a termination under subsection (a)(1).

CREDIT(S)

§ 10310. Enforcement proceedings

(a) Criminal contempt

All cases of criminal contempt arising under the provisions of chapters 103 to 107 of this title shall be governed by section 1995 of Title 42.

(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction

No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of chapters 103 to 107 of this title or any action of any Federal officer or employee pursuant hereto.

(c) Definitions

(1) The terms “vote” or “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term “political subdivision” shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) Subpoenas
In any action for a declaratory judgment brought pursuant to section 10303 or 10304 of this title, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

CREDIT(S)

Nothing in chapters 103 to 107 of this title shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

CREDIT(S)

§ 10312. Authorization of appropriations, 52 USCA § 10312

There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of chapters 103 to 107 of this title.

CREDIT(S)


52 U.S.C.A. § 10312, 52 USCA § 10312
Current through P.L. 117-80.
§ 10313. Separability, 52 USCA § 10313

If any provision of chapters 103 to 107 of this title or the application thereof to any person or circumstances is held invalid, the remainder of chapters 103 to 107 of this title and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

CREDIT(S)

§ 10314. Construction, 52 USCA § 10314

52 U.S.C.A. § 10314
Formerly cited as 42 USCA § 1973q

§ 10314. Construction

Currentness

A reference in this chapter to the effective date of the amendments made by, or the date of the enactment of, the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 shall be considered to refer to, respectively, the effective date of the amendments made by, or the date of the enactment of, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.

CREDIT(S)


52 U.S.C.A. § 10314, 52 USCA § 10314
Current through P.L. 117-80.
Figure 6: Rejected out-of-precinct ballots as a share of in-person ballots cast according to 2012 EAC Report
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The Covid-19 pandemic has rapidly transformed the legal industry. With the start of 2022 approaching, in-house legal departments can expect to see the continuation of many pandemic-era trends, including the growth of legal operations, the transition of in-house legal departments from legal advisers to strategic business partners, the accelerated use of legal technology, and the importance of managing outside counsel and legal spend.

The Growth and Strategic Importance of Legal Ops

Bloomberg Law defines “legal operations” as a multidisciplinary approach to managing a legal organization or department that aims to improve its efficiency, productivity, and profitability. In practice, this translates to managing the operations of the in-house legal department to improve workflows, automate processes, standardize interactions with outside counsel, and improve the in-house legal department overall.

Although the roles and responsibilities can vary, legal operations professionals are increasingly being integrated into an organization's strategy and business objectives. In fact, according to the Association of Corporate Counsel's 2021 survey of chief legal officers (CLO), 38% of CLOs reported that their department's most important strategic initiative fell within the area of legal operations, almost triple the percentage who selected any other area.
Beyond this strategic importance, legal department lawyers in Bloomberg Law's 2021 Legal Operations survey most often reported the ability to improve attorney efficiency, reduce costs, and improve workflows as primary considerations when deciding which legal operations practices to implement. The ability to ease implementation, reduce human error, and improve attorney health and well-being were also selected as primary considerations.

### Primary Considerations When Implementing Legal Ops Practices

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<td>Ability to improve attorney efficiency</td>
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<td>Ability to reduce costs</td>
<td>69%</td>
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<tr>
<td>Ability to improve attorney workflows</td>
<td>61%</td>
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<tr>
<td>Difficulty of implementation</td>
<td>41%</td>
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<td>Ability to reduce human error</td>
<td>27%</td>
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<tr>
<td>Ability to improve attorney health and well-being</td>
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<tr>
<td>Pressure from outside forces</td>
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<td>How widely used the practice is in the legal industry</td>
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Source: Bloomberg Law 2021 Legal Operations Survey. Law firm respondents were excluded from this graphic. Additional responses (including "Not Sure" and "Other") were surveyed but not included. Respondents were asked to select all that applied. Bloomberg Law

The 2021 ACC CLO survey results also reflect the rapid growth of legal operations. More than six out of 10 legal departments (61%) reported that they employed at least one legal operations professional in 2021—and that figure has nearly tripled since 2015. The survey further reported that 21% of legal departments employed at least four legal operations employees, and 13% of CLOs said they plan on hiring legal operations staff in the year ahead.

This increase is similarly reflected in the Corporate Legal Operations Consortium's 2021 “State of the Industry” report, which, for the second year in a row, reported that 40% of respondents have increased the number of full-time legal operations professionals.

### From Legal Adviser to Strategic Business Partner

In-house legal departments have evolved from a narrowly focused, reactive legal adviser and risk manager to a robust strategic adviser, proactively participating in overall business operations and decision-making. In-house departments are increasingly involved in advising executive and board leadership on issues such as revenue-generating initiatives, labor and employment matters, corporate social responsibility, and regulatory compliance.
Results from the 2021 ACC CLO survey confirm this evolution. CLOs reported that although they spend, on average, 28% of their time providing legal advice, they also spend a sizeable amount of time on board matters and governance issues, contributing to strategy developments, and advising other executives on non-legal issues.

Seven out of 10 CLOs also reported that they are almost always asked by executive leadership for input on business decisions.

With this transition in progress, in-house legal departments can expect to focus more of their resources on those issues—according to the survey—that are most important to the business overall (cybersecurity, regulation/compliance, and data privacy) or that are likely to cause the biggest challenges for their organizations (industry-specific regulations, data protection privacy rules, political changes, and mergers and acquisitions).

Moving forward as strategic partners, in-house legal departments will also be expected to prioritize diversity, equity, and inclusion (DEI) programs and environmental, social, and governance (ESG) initiatives, as these issues are becoming of critical importance to organizations.

The Accelerated Use of Legal Technology

The Covid-19 pandemic and associated shift to a remote or hybrid work environment greatly accelerated the need for legal technology, with video conferencing, virtual hearings, electronic document sharing, and e-filings becoming the norm. And, from the looks of it, this digital transformation is here to stay, with in-house departments planning to invest in new legal technology solutions. Indeed, according to Gartner, Inc., legal technology budgets for in-house legal departments will increase threefold, to approximately 12%, by 2025.

Legal technology that automates manual and time-consuming legal processes and facilitates remote interactions is expected to be a top priority in the coming year for in-house legal departments. Recent surveys, including the Bloomberg Law 2021 Legal Technology Survey and the 2021 ACC CLO survey report that in-house departments are planning to invest most heavily in contract management, matter management, records management, document management, e-signature, and e-billing software.

Managing Legal Spend and Outside Legal Counsel

Like other business units, in-house legal departments are often judged on their financial performance, and many are under increasing pressure to find ways to manage their spending more judiciously and use performance metrics and bill review measures to manage outside legal counsel spend.

Bloomberg Law’s 2021 Legal Operations Survey confirms the focus on metrics to better manage legal spend. Bloomberg Law surveyed more than 150 in-house lawyers, and 65% reported that their organization has implemented or is planning to implement metrics to measure vendor or outside activities, while 70% reported the same for metrics to measure efficiency. The top three metrics (selected by more than 80% of the respondents) were: spend in the aggregate (total monthly, annually, year over year), vendor/attorney billing rate (on average), and spending by project/matter/task.
The importance of metrics was echoed in the 2021 “State of the Industry” report, in which 27% of participating legal departments reported that they formally review outside counsel performance, and an additional 47% reported that they want to implement such formal review processes.

In-house legal departments are also expected to cut unnecessary costs by implementing alternative fee arrangements (AFAs). According to Bloomberg Law’s 2021 Legal Operations Survey, in-house legal department respondents reported that 21% of their legal work, on average, is performed under an AFA, and that cost savings, cost/revenue certainty, and general efficiency were the main drivers in their use of AFAs.

Outsourcing of legal work to Alternative Legal Service Providers (ALSP) and shifting more legal work in-house (to both in-house attorneys and legal operations employees) likewise are expected to continue as in-house legal departments tighten their financial belts and look for lower costs and efficiencies.

This change in the balance of work between outside counsel and in-house attorneys/ALSPs is evidenced in the 2021 “State of the Industry” report. In this report, 21% of respondents reported that they shifted more work to ALSPs (vs outside law firms) in 2020 than in 2019. Thirty-nine percent of respondents also reported that they moved more legal work in-house in 2020 than in 2019.


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Companies

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Some in-house lawyers let their guard down, ethics wise, now and again. Here is a quick reminder of some of the ethics rules that may affect you relatively often.

1. The Ethical Rules Still Apply to You

In writing and speaking on ethical issues for in-house counsel for over 15 years, I've encountered numerous in-house lawyers who believe that for some reason the ethical rules don't apply to them. To be blunt, they are wrong. In addition to the fact that the rules as written never suggest that they do not apply to in-house counsel, we now have the case of Kaye v. Rosefielde, 75 A.3d 1168, 1204 (New Jersey Super.Ct.App.Div. 2013). There, the in-house lawyer engaged in a business transaction with his client (he got an equity interest in a new company he formed) without going through the steps required by Rule 1.8.

When the lawyer was later sued by his by-then former client, one of his clients, the case was appealed to the New Jersey Supreme Court. In doing so, a bright line was drawn between in-house counsel and outside counsel. In-house counsel are covered by ethics rules by rule of law, not by rule of contract. That is, in-house counsel are covered whether or not a client agrees to it in a contract. The takeaway: The ethical rules apply to you as an in-house lawyer.
defenses was that the requirements of Rule 1.8 did not apply to him because he was in-house counsel. This was soundly rejected by the court:

Independent of the particular facts of this case, we also discern no rational basis to exempt attorneys who have been hired by corporate clients to serve as in-house counsel from the ethical requirements of Rules of Professional Conduct (RPC) 1.8. . . . We find nothing in the plain language . . . to suggest or even imply that lawyers who are retained by corporate clients as in-house counsel or general counsel are exempt from the proscriptions of RPC 1.8(a). (Emphasis added.)

2. It is Actually Pretty Easy for In-House Counsel to have Conflicts of Interest

"Directly Adverse" Conflicts under Rule 1.7(a)(1). When in-house counsel represents groups of related companies, or officers, directors, owners, or employees at the company where he is in-house, it is easy to develop a "directly adverse" conflict under Rule 1.7(a)(1). Representation of subsidiaries may occur in dealing with a third-party, and this can lead to a conflict when issues arise between the subsidiary and parent. In other cases, it may be mere inadvertence that creates the attorney-client relationship between the in-house lawyer and someone other than the company that employs him. For example, when an in-house lawyer answers legal questions from officers, employees, or owners about their legal issues (not those of the company), this can create an attorney-client relationship and thus the chance of a "directly adverse" conflict.

For example, in Yanez v. Plummer, 164 Cal. Rptr. 3d 309 (Cal Ct. App. 2013), the in-house lawyer gave advice to an employee on their way to the employee's deposition. This created an attorney-client relationship between the lawyer and the employee, which in turn led to a conflict of interest for the lawyer that the lawyer failed to recognize. It also led to a situation where the lawyer did not advise the employee of their right to an attorney.
malpractice suit against the in-house lawyer by the (by then former) employee. In *Dinger v. Allfirst Fin.*, Inc., 82 Fed. Appx. 261 (3d Cir. 2003), the in-house lawyer gave officers advice on when to cash in their stock options. This also led to a malpractice suit against the in-house lawyer, brought by the (by-then) former officers.

"Material Limitation" Conflicts under 1.7(a)(2). Conflicts under Rule 1.7(a)(2) exist for in-house counsel, as well. These "material limitations" conflicts can arise based on the lawyers' own interest in the company, the involvement of others with whom the lawyer has a personal relationship, or a myriad of other reasons. For example, if the in-house lawyer has stock in the company and thinks about what will happen to his specific stock (as opposed to the good of the company, generally) when deciding on advice to the company, then he could have a "material limitation" conflict.

Simply owning stock and wanting the company to do well, without more, does not create this conflict. But imagine if the company was considering two courses of action: one where the stock spikes in the short run, but may be riskier in the long run, and another with no spike, but more stable long-term growth. If the lawyer lets his personal retirement plans (for example) weigh into his analysis of the course to take, then he has is a conflict of interest.

3. Being Offered Stock or Stock Options in your Client is a "Business Transaction" with the Client Covered by Rule 1.8.

This was the particular rule that Kaye (as quoted above) was addressing. Analytically, there is no difference between an outside counsel going in on a business venture with a client and an in-house counsel being offered stock or stock options in the client. In both instances, the lawyer is engaging in a business transaction with the client, and so the requirements of Rule 1.8 must be followed.

4. Just because Something is Confidential to you does not Mean it is Protected by the Attorney-Client Privilege.
Mean it is Protected by the Attorney-Client Privilege

Many laymen, and a disturbing number of lawyers, believe that the attorney-client privilege attaches to all communications with a lawyer. This is not true. The attorney-client privilege only applies where the communications are between a lawyer and a client for the purpose of giving or receiving legal advice, and are expressed in confidence.

Thus, for example, when a CEO requests business advice from the in-house lawyer, neither the question nor the answer is protected by the attorney-client privilege. While the lawyer must not speak of this under Rule 1.6, that does not mean it's protected from discovery by a third party should litigation ensue. Similarly, routine human resources or employment discussions may not be protected by the attorney-client privilege, and there are multiple cases holding so.

Not everyone that works at the same company as you is the "client." This is one of the most troubling aspects of applicability of the attorney-client privilege. Many people who work at the same company as you are not the "client" for attorney-client privilege analysis. Generally, a person would have to be one who regularly consults with the lawyer regarding a particular matter or has the authority to bind the company regarding the matter to be the "client" for purposes of the attorney-client privilege. If your communications are with others at the company, they may well not be covered by the attorney-client privilege. (Of course, under Rule 1.6 you generally cannot voluntarily disclose any information about a representation without client consent, regardless of whether it is privileged.)

5. Just Because a Company has a Lawyer, Does Not Mean it is Represented for Purposes of the Rules

Just because another company with whom you are dealing has a lawyer,
matter-by-matter basis. Thus you may be dealing with a layman in the procurement department and that is perfectly acceptable under the Rules until you “know” the client is represented on that particular matter.

6. The Imputed Disqualification Rule can Disqualify an Entire In-House Legal Department

The only substantive Rule in the Model Rules of Professional Conduct that directly addresses in-house counsel is Rule 1.10, Imputed Disqualification. It reminds all lawyers that the definition of “Firm” in Rule 1.0 includes "the legal department of a corporation or other organization." As such, when one in-house lawyer is disqualified, the disqualification can be imputed to the entire in-house department.

7. Confidentiality Walls Don't Always Work

Rule 1.11 allows a confidentiality wall to segregate an attorney who previously "personally and substantially" worked on a matter for an adverse government agency. If the lawyer that previously "personally and substantially" worked on a matter came from another in-house job or private practice, however, then a confidentiality wall is ineffective and the entire in-house department may be disqualified.

8. Your Client is the Organization Itself

Rule 1.13 provides that the client is the organization itself—not the officers, management, or even the board of directors. Many times executives or owners at companies treat in-house counsel as their own personal counsel, and this can lead to the conflicts described above (among other bad things).
Many in-house counsel also have another job (Vice-President, Secretary, etc.). Most courts addressing these "dual capacities" have held the legal ethical rules still apply even when the lawyer is acting in his "other" capacity. This was another argument made by the lawyer but rejected in Kaye.

10. In-House Lawyers Should be Licensed in the State(s) Where They Regularly Office

Many in-house lawyers allow their licenses to lapse, thinking they are unnecessary. This is dangerous. Practicing law without a license is a crime, an ethical violation where you are licensed, can get your colleagues in ethical trouble (as they are prohibited from assisting in the unauthorized practice of law by the Rules), and may impact your client’s attorney-client privilege. The good news is many states have "single-client" rules that allow in-house counsel to register in the state where they office but keep up their licenses in another state.

Conclusion

You are not off the hook, ethically speaking, by going in house. Failure to be aware of the ethical rules can have negative consequences for both you and your client.

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Working Well and Happily from Home Requires Boundaries, Planning, and PSAs

To operate at your best, set boundaries for your time, physical space, and self-care.

By Ariana J. Tadler

As much as we might wish it otherwise, COVID has made working from home no longer an aberration but a reality that will continue for some time. Perhaps, like me, when we made that remote pivot in March 2020, you thought no commute and less business travel could be a nice change of pace for a month or two. So you set up your home office, a nook somewhere in your home or even a seat at the kitchen counter, and said, “I got this! I can do my job and have time to do all the things I have been wanting to do—exercise more, eat better, read more, meditate, learn a new language or how to play an instrument, create photo books (or at least print some of the thousands of photos I have taken over the last decade, with my kids now 23 and 21!).”

Perhaps you have done all that you set out to do. If so, bravo! If not—if that “extra time” that you intended to grab hold of for yourself evaporated as the demands of “home” seized it—then, as we say in the tech world, “You may need a ‘reset.’”
COVID has had a particularly harsh impact on women. Nobody anticipated that by transitioning to a work-from-home environment, all sorts of other jobs would be on you. Some of my not so favorites are team laundress, short-order cook, and quicker picker upper.

In my case, we went from being an empty nest to having responsibilities up and down the generational pike. Our quiet abode of two suddenly had a returning grown child (who is now the size of, and eats like, Paul Bunyan). We delivered groceries to high-risk family members outside our home. (I now keep collapsible crates in my car to keep things sorted.) But my personal load, while feeling heavier for me, was and is substantially less than the load carried by those of you who have cared for an aging or ill loved one during this time. And it was and is most certainly less than the load carried by those of you who have had to facilitate learning and fill new time gaps during which children were once in school—leaving children to their own devices (computer devices, among other things) has proven to be unsustainable. I am in awe of the phenomenal teachers who have worked tirelessly to teach and keep children’s attention in the Zoom environment. They are superheroes—my sister is one of them—as are the parents, all of whom are trying to teach (which is more work) from home and manage these stresses.

Maybe, Like Me, You Need a Reset

If you really want to be productive working from home and maintain some sense of sanity and control over your time and your life, you may need a “reset.” Map out a schedule—one that is realistic—that incorporates not only your job but also that day-to-day home stuff and self-care. The only person who can take care of your personal well-being is, well, you. If you don’t schedule time for exercise, meditation (or just time to breathe), and activities
that bring you joy, nobody is going to schedule them for you. And as life
teaches, business strategists, and even evangelists tell us, to make it a reality
you must not only visualize it, plan it, and take action; you must say it out
loud. You need to vocalize it for yourself and, just as importantly, let others
know so that all can manage expectations.

So what are some of the actions that you might take to better manage the
stresses of working from home? Set boundaries for your time, your physical
space, and your self-care.

Boundaries: Time, Space, and Matter

Between work and home life, you may well feel like a pinball in an arcade
game. In pinball, there are targets and bumpers. The targets are just that—
you want to hit them with the ball. We do that by planning ahead. The
bumpers are the boundaries—if you let the ball get past too many bumpers,
you will ultimately lose control of the ball, which will disappear down the
hole. If ever there was a time to draw some boundaries, it’s now so that you
don’t lose control of the ball or yourself, for that matter.

**Time.** When do you need to do your job successfully—during which
hours and for how many hours?

Plan out your week ahead of time; and, if need be, plan out each day
separately. Whether you use an old-school planner (those of us who are
super geeks used to use a Filofax) or an app, there are tools galore to
help you map out how you intend to use your time. That’s right. If you
want to reduce stress working from home, be *intentional* by writing
down or typing out what you will do when. Many people are turning to
their phones and choosing apps or even just the “reminders,” “notes,” “tasks,” or “calendar” features to plan out their time and stay on task.

As much as I love technology, after trying numerous apps, last year I reverted to an old-school planner with a variety of planning tool inserts that help you organize monthly, weekly, and daily schedules as well as projects. I use the Levenger Circa series, but I just read about women-owned Inkwell Press’s customizable planner. Unlike a traditional book planner, the pages of which are bound, these disc style planners enable you to add and remove pages and reorder them as needed. And there are even inserts that can be used to make lists for others, say, for example, your housemates—lists that might be left on a counter or a chair, perhaps, as gentle to-do or not-to-do reminders. The hard-copy choice works for me because I like to plan at the end of the day after I have had my fill of my phone and tablet. I relish using a real pen or even a mechanical pencil when things are really chaotic! When I write things down, I am intentional about my morning workouts and Monday meditations, just as when I schedule a specific time for business development or firm management tasks.

Thanks to some collaborative thinking at my firm, our team came up with MC (Management Committee) Wednesdays. Absent something pressing, my co-managing partner and I reserve Wednesdays to focus on firm management, finance, and business development. We found that we are far more creative and productive and much more likely to tick those items off our respective lists if we allot a time undisturbed by Zoom/phone calls, emails, and even text messages.
Not all jobs are alike. If we are honest, we will admit that we are not seated at our desks working straight for eight hours. By now, you know yourself well enough to identify when you are most productive. Schedule specific work tasks during these times. If your job is such that you can set your own hours, consider whether adjusting your start time earlier or later might give you some time slots when your home is quiet—perhaps earlier in the morning or later in the evening. You might also want to split your day into two shifts, with some work tasks early in the morning and others later in the day.

What is it that you need to do in that time? When it comes to work, there are no doubt specific tasks that you need to complete, such as communications with clients and service providers, research, brief writing, and hearing prep. And how about some time for creative thinking to build your client base or case inventory? Some tasks require more focus than others. For the items that do require clear focus, be sure to schedule these at a time when there are the fewest distractions (when you know others in your home won’t be there or will be busy doing something without the need for your attention). And if you are not in control of the schedule (for example, a court hearing or deposition), you will need to alert others (for me, that’s my husband and sons) in advance that you will need *Quiet, Please!*

And, lest we forget, we all need a break at some point, both mentally and physically. Nobody should be seated at a desk for eight or more straight hours. When you were in a traditional office, you likely picked yourself up at some point to chat with a colleague, grab something to eat, take a bio break, or just stretch your legs. If you are not doing that now, you
should be. (And if you don’t think you ever did that when you were in a traditional office, you are kidding yourself—even the strongest of warriors need some relief.) Using those breaks productively can be a win-win. You can give your brain a break and do a quick house-related task that perhaps under what were once normal circumstances had to wait until after you got home or the weekend.

But beware of the vacuum suck: Just because you are working from home does not mean that you now should do your job and all house- and family-related tasks too. If you don’t live alone, others should be expected to pitch in. We’re all living in a pandemic, for goodness sake. It should be all for one and one for all.

And be careful not to get distracted during that break such that you delay returning to the tasks you must complete. Working from home has highlighted just how easy it is to get distracted—seeing the kitchen is messy and cleaning it; hearing the call from a pile of laundry sitting on the floor (even though it has had your grown-up son’s name on it for days); passing by the TV and becoming engrossed in the latest breaking story (or, on a lighter note, HGTV for just a minute). So, when you take that break, be intentional as to what you are going to do with that time and for how long. If you are easily distracted, set a timer. You already have one—it’s the alarm clock on your cell phone! Set as many “alerts” as you like. You can even name them and give them different tones.

Space. If you really want to get your job done efficiently, you need a space where you can do your work when you need to work without disruption or distraction. Where and how you set yourself up to work play a critical role as to how productive you can be. You need a good
work surface, a comfortable chair (or, if you are my law partner, a ball—she has a strong core and awesome posture), good lighting, and, when necessary, *Quiet, Please!*

If you live in a house, sitting at the kitchen table when others in the house are coming and going (or attending school remotely) is not optimal. But you may not have a choice. If you live in an apartment or small space, securing a spot to avoid all distraction may be impossible, so be creative: Locate a corner, drop the pin, and make it your own as best you can. Designating a space where you will work will facilitate getting things done without (well, with *less*) distraction and keeping the things you need handy in one place.

Wherever you may be, personalize that space and organize it with the items you need. If there is no table or desk, consider investing in an old-school folding card table for as little as $35. Another option is a collapsible desk on wheels. Some include standing functionality and even have shelves for storage. These can be found for as little as $50. Social media networks and forums may also offer quick options.

You may want to also invest in a good pair of headphones so that you can work without the disruption of every noise in your home. There are many listening *options*, such as instrumental music or soothing nature sounds that some say help them to stay focused.

Wherever you choose to set your work space, be sure to set it up so that it is *free of clutter*. You want anybody looking at your space to know that it is obviously where you work.
Matter. You matter! Your work matters! It matters to you and it most certainly should matter to those with whom you live—regardless of whether you are the primary earner, your contribution should be valued and respected. You must perform at your best to be effective. To perform at your best, you must set expectations for yourself and those around you.

You are at your best when you are strong mentally, physically, and emotionally. To fulfill the expectations you set for yourself, you must engage in healthy self-care. It is incumbent upon you to make the time to eat well, exercise, and rest your brain and your body. There are many free apps out there to help with self-care, such as exercise and even breathing. By scheduling these things in your weekly plan, you are investing in and equipping yourself with the strength and endurance that you need for this marathon that we find ourselves on. (You might try a walk and talk with those headphones.)

And if you want your plan to work, you need to let others know what’s on deck for you and what you need from them. Make public service announcements to those with whom you live! Yes, you really should say out loud for all in your work-from-home environment to hear that your upcoming week looks like [this] and tomorrow you have [that], and if they want to have a dinner to eat or clean clothes, you need them to please do [XYZ]. Really communicate with them as to what you need to do your job from home and what you need from them. (I cook two dinners during the week, aim to keep things tidy, and do my laundry; my husband and son cook or sometimes order in for us, feed and walk our beloved dog, and do their laundry.)
Be sure to reciprocally listen and take note of the needs of others too. Being empathetic and receptive to others’ needs will encourage them to reciprocate. (Just ask phenoms Alex Carter, author of Ask for More, and Kwame Christian of the American Negotiation Institute (you can also subscribe to his Negotiate Anything podcast)).

Rather than dwelling on the negatives of working from home, use this time as an opportunity to teach and share skills that will serve everyone well in the long run. By managing expectations, we all can be productive, individually and collectively, and, of course, “live happily ever after.”

**ENTITY:**

**SECTION OF LITIGATION**

**TOPIC:**

[LITIGATION & TRIALS, HEALTH, GENERAL PRACTICE]

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Master Service Agreement: Everything You Must Know

A master service agreement is a contract entered into by two parties during a service transaction. This agreement details the expectations of both parties.9 min read

1. Master Service Agreement: What Is It?
2. What Is the Purpose of a Master Service Agreement?
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6. What Are the Most Common Disputes and Risks With a Master Service Agreement?
7. How Would You Add Additional Language to a Master Service Agreement?
8. Where Can You Use a Master Service Agreement?
9. What is the Difference Between a Contract, an Agreement, and a Master Service Agreement?

Updated June 24, 2020:

A master service agreement is defined as a contract two parties enter into during a service transaction. This agreement details the expectations of both parties.

Master Service Agreement: What Is It?

A master service agreement is when two parties agree to a contract that will settle most details and expectations for both parties. It'll state what each group has to do to honor its end of the bargain. It'll also show which services apply in the master service agreement.

The goal of a master service agreement is to make the contract process faster. It also should make future contract agreements simpler. A master service agreement (MSA) is also called a service level agreement (SLA). It spells out:

- **Confidentiality:** The parties both agree they won't share any secrets of the company with outside parties.
- **Delivery requirements:** The businesses decide who will deliver what and when.
- **Dispute resolution:** Should issues come up, the MSA outlines how the parties will resolve their conflict.
- **Geographic locations:** Both groups agree on where the employees will do the job.
- **Intellectual property rights:** The parties decide how to handle ownership and regulation of all patents and other IPs. The client will get all the IP in some instances. In others, the vendor provides perpetual rights while keeping his or her IP and patents.
- **Limitations of liability:** The MSA lists who is the responsible party in the event of a lawsuit.
- **Payment terms:** These terms show what the estimated cost is as well as the schedule for payment.
- **Venue of law:** The MSA identifies the place where a legal resolution will occur. This could include arbitration or a specific state or federal court.
- **Warranties:** The groups agree on the scope and the coverage of the warranty.
- **Work standards:** This section of the MSA defines what each party regards as acceptable work. Not living up to the work standards often causes disputes.
An MSA may also cover a few other areas, such as business ethics, network and property access, and social responsibilities. The goal is to hammer out as many details as possible in broad strokes. That way, corporations don't waste too much time and money in negotiations.

Similar but less important agreements to MSAs are:

- Purchase orders
- Purchasing agreements
- Service level agreements
- Statements of work
- Indemnification
- Risk allocation.

**What Is the Purpose of a Master Service Agreement?**

Businesses often use MSAs to help make contract negotiations simpler. This agreement lets both companies spend their time discussing the terms of the deal. Then, they can proceed with the work outlined in the agreement. If you don't have an MSA, the customers and the company can still work through issues, but there are big concerns that might derail the contract. Having an MSA before having a specific contract lets companies focus on what their particular contractual issues are, such as the time frame and the price, for when the contract actually arises.

Master service agreements are intricate agreements most of the time. When there isn't a particular contract that's being discussed, companies won't have to deal with the pressure of time. This way, they can figure out and tackle any possible issues.

Once a company goes through the MSA negotiation process one time, it'll understand what kind of concerns or issues may come up. This is a benefit, as the company will know what the problems are for the future and be able to address them when it drafts the next MSA.

An MSA can also be used when there's an arrangement that's long term, such as two parties needing to avoid negotiating rates every time a new work order is generated. The companies can quickly move forward and complete the job instead of having to halt and slow their progress to negotiate the new terms. This will save both time and money for the parties.

**Why Is a Master Service Agreement Necessary?**

Many small businesses use cut-and-paste provisions, or contractual templates, when they need to move quickly from one contract to the next. There may be an opportunity for a partnership that suddenly occurs, or a potential customer wants to see a nonstandard service right away. When implementing an MSA, companies don't have to deal with any problems coming from contracts that aren't well-constructed. This means MSAs assist companies in decreasing their chance of litigation and avoiding any contractual disputes. Since technology, operating environments, and markets constantly change, companies need to monitor their MSAs and make amendments when necessary.

When businesses make a deal, one party doesn't want to take responsibility for mistakes the other party makes. The MSA will guarantee that if one party screws up, it'll handle all the financial losses the mistake may cause. The other party is free of financial obligations, since it will not be held at fault. The legal term for this is indemnification.

In some instances, one party will take all on all responsibilities. It'll sign an MSA that gives the party full financial responsibility for any mistakes, even if the other party makes them. This party will even pay the legal fees for its partner in the MSA. It also agrees not to sue its partner.
Risk allocation is the other factor. When businesses agree to an MSA, the new deal can impact existing contracts. Insurance agreements are especially important. An MSA will protect the parties by outlining the risks each company takes. It'll also decide responsibility for each group during the project's lifetime. With an MSA, resolving disputes is easier. The parties already know the terms and can determine fault quickly.

**What Are the Advantages of a Master Service Agreement?**

Completing a contract between two businesses is a long and expensive process. A business pays money on hours spent and legal fees. A faster deal is in everyone's best interest. With an MSA, two parties agree to the main points. That speeds up the negotiating process. A motivated company can write an MSA in weeks or possibly days. That's much faster than a standard contract negotiation.

Since an agreement is in place, an MSA still protects both parties. When a dispute arises, the MSA decides who is at fault. Since checking the document is easy, the two businesses are less likely to sue. This again saves time and money.

The other [advantage of the MSA](https://www.upcounsel.com/master-service-agreement) is that it's a good blueprint. When a company drafts an MSA it likes, it's simple to copy. Each deal will have its own specifics, but a good MSA works as a template for future negotiations. The parties have more time to focus on the important parts of the discussion, the cost, and time required to complete the project.

**What Should the Master Service Agreement Cover?**

When building an MSA, focus on including four things in the agreement:

- Every responsible issue either party might face.
- What both companies will do together.
- What the other company must do.
- What your company must do.

Listing details will help both parties honor their side of the MSA. Deciding potential issues in advance is important, since the business world has many possible problems. Something as simple as a third-party vendor going bankrupt could derail an MSA. The two companies in the agreement must plan for such potential pitfalls. These areas of conflict include:

- **Delivery and installation**: The MSA should say when a product ships and who is responsible for setting it up the first time.
- **Background checks**: The MSA will list any requirements for potential employees who want to work on the project.
- **Project management**: Things could go wrong if neither side decides who is in charge. Spelling out who's the boss is important.
- **Expected charges**: The parties should agree on the projected cost to participate in making the product.
- **Terms of payment**: One party should tell the other when it will pay, how often it will pay, and how long it will continue the payments.
- **Insurance**: The parties will agree on how to handle all insurance coverage and expenses. Should they fail to do so in the MSA, any setback will lead to problems and possibly even litigation.
- **Escrow**: The groups will decide whether either one places money in a trust and, if so, what the circumstances are that will allow the other party to earn it.
- **Security**: Both companies must agree on who will handle and pay for the protection of their project or product.
- **Government requirements**: The parties will decide where to work on their project. Settling this has city, state, and federal tax implications.
• **Liabilities:** Should an incident occur, the MSA must spell out which business will assume the risk. Otherwise, they'll fight over who is responsible.

• **Taxes and tax responsibilities:** Once taxes are known, the two businesses must choose how they will split the tax expenses.

• **Third-party coverage and concerns:** Many projects require the involvement of more than two parties. When this happens, an MSA has to say how all the above applies to a third party.

• **Out clauses and causes for agreement termination:** Businesses split up all the time. The MSA shows how the parties should handle a corporate divorce.

### What Are the Most Common Disputes and Risks With a Master Service Agreement?

While an MSA works as a way to lessen legal concerns during negotiations, issues occur. The most common MSA disputes involve:

• **Employee injury or death:** The parties in an MSA are likely to debate blame for such incidents unless they're specifically listed in the agreement.

• **Property damage:** This should be clearly addressed in the MSA.

• **Failure to communicate:** This problem happens when one business requests updates, but the other doesn't respond in a timely manner.

• **Failure to meet deadlines:** Like anything else in the business world, a failure to meet deadlines is cause for disagreement.

• **Failure to pay as agreed:** The only thing worse than missing deadlines is missing payments. This sort of conflict is the quickest way to lead to a dispute.

• **Performance or service issues:** When a product fails to meet expected goals, the parties will blame each other for the failure.

• **Product defects:** A product that breaks down after usage will set back expected revenue.

• **Unauthorized charges:** Similar to payment issues, a slew of surprise charges will cause one party to believe the other is cheating the agreement.

### How Would You Add Additional Language to a Master Service Agreement?

A recent court case, Duval v. Northern Assur. Co. of Am., 2013 US App. LEXIS 13680, showed that additional language isn't always OK. A third-party insurer asked for the court to honor insurance requirements in the MSA that didn't apply to one of the companies, BHP. The court ruled in favor of BHP, citing no earlier cases.

Adding more language to an existing MSA will require both parties to proceed. Each will have to agree to alter the terms and then update them with the new language. The companies need to have a strong working relationship for such a thing to happen.

### Where Can You Use a Master Service Agreement?

These types of agreements are very common in government and commercial work. They're also often seen on the consumer side of things. An example of a master service agreement is what you have with your telephone company. You enter into a continuous agreement where service rates are charged each month, and the company states the conditions for its maintenance tasks.

### What is the Difference Between a Contract, an Agreement, and a Master Service Agreement?

[https://www.upcounsel.com/master-service-agreement](https://www.upcounsel.com/master-service-agreement)
The words "agreement" and "contract" are often used as if they're the same, but they are not. Black's Law Dictionary defines an agreement as "a mutual understanding between…parties about their relative rights and responsibilities." It also states this is an agreement that creates obligations between parties that the law can enforce. An MSA is also defined as a legal document that puts together separate but similar agreements between the two signing parties.

There isn't one clear answer as to which agreement or contract is best for your company. You should keep a few items in mind, however. Agreements aren't seen as formal as contracts and won't be as enforceable as a contract. On the other hand, contracts are legally enforceable and binding, but they must meet certain requirements. You can quickly draw up an agreement, while contracts can take as long as months to finish negotiating.

Some companies like MSAs, since the parties can negotiate any future terms and agreements at a quicker rate on a basis that's per deal. An MSA often outlines what the business relationship is in casual terms and focuses on:

- Product warranties
- Processes for dispute resolutions
- Liability
- Payment terms
- Intellectual property.

Some might include terms by geographic locations as well, especially if one of the parties is located in a differing state or country.

The most common areas you'll see MSAs are in marketing and finance or human resources, as one party or company is provided support that's open-ended to another one. Once an MSA is put in place, and deals are negotiated or services are added, the companies often write up agreements such as a contract or a statement of work to define what the particular service area is according to the MSA.

If you need help with your master service agreement, you can post your legal need on UpCounsel's marketplace. UpCounsel accepts only the top 5 percent of lawyers to its site. Lawyers on UpCounsel come from law schools such as Harvard Law and Yale Law and average 14 years of legal experience, including work with or on behalf of companies like Google, Menlo Ventures, and Airbnb.

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Master Services Agreement

What Is a Master Services Agreement?

A master services agreement, or MSA, is a contract that two parties enter into during a service transaction. The agreement explains the expectations for both parties. A master services agreement is a broad contract that allows the parties involved to understand:

- Major points of the deal
- Expectations
- How conflicts and other issues should be handled

What Are the Goals of a Master Services Agreement?

The MSA simplifies the negotiation process when drafting new agreements between the parties, allowing everyone to proceed with an overall understanding of how they should work together. It should state what each party must do to honor their side of the agreement. The overall goal of a master services agreement is to make the contract process faster and simplify future contract processes.

What Should a Master Services Agreement Include?
When you are drafting an MSA, you will want to focus on a few main points:

- What will your company do?
- What will the other company do?
- What will both parties do together?
- What are the responsible issues either party might face?

By listing these details, you will help both parties honor their side of the agreement. It is essential to decide potential issues in advance as there are many possible problems that could arise. For example, a third-party vendor could go bankrupt and derail your agreement. That’s why it is so important that both companies in the MSA account for any potential pitfalls.

The MSA should include several key components depending on the details of your project, including:

- **Background checks**: If you have any requirements for employees, the MSA should list this.
- **Confidentiality**: The parties to the agreement can agree they will not share any company secrets with outside parties. Here is an article about confidentiality agreements between businesses.
- **Delivery/installation**: State when a product will ship and who will be responsible for setting up the first shipment.
- **Dispute resolution**: A master services agreement should outline how the parties will resolve a conflict should issues arise.
- **Escrow**: If either party is placing money in a trust, you should use the MSA to explain the circumstances that will allow the other party to earn that money. Here is an article about escrow.
- **Geographic location and government requirement**: Parties should agree upon where employees will do the job. Deciding where to work on a project has implications for city, state, and federal taxes.
- **Insurance**: Agree ahead of time on how you will handle insurance expenses and coverage.
- **Intellectual property**: The MSA can cover intellectual property rights. The parties can decide how they will handle regulation and ownership of things such as patents and other intellectual property. In some cases, the client will get all intellectual property, while in other cases, the vendor provides perpetual rights but keeps their own intellectual property and patents. Here is an article about intellectual property.
- **Liability**: This contract should list which party is responsible in the event of a lawsuit should an incident occur. The master services agreement should state the party that will assume the risk.
- **Out clauses/causes for termination of the agreement**: Businesses do split up, so the MSA should detail how the parties would handle this.
- **Project management**: State who is in charge. Your project could easily go wrong if neither side decides who should be managing different aspects of the project.

- **Requirements for delivery**: Detail who will deliver what and when these deliverables are due.

- **Security**: Parties should agree on who will handle and pay for security to protect the product or project.

- **Standards for work**: Define what each party considers acceptable work. When one party does not live up to work standards, it creates a common source of conflict, so clear expectations included in the MSA can help avoid future disputes.

- **Tax responsibilities**: The business must decide how they will divide tax expenses and responsibilities.

- **Terms of payment**: The MSA should state the estimated cost of a project along with the payment schedule. Include the projected cost as well as who is paying, when they will pay, how often they will pay, and how long payments will continue.

- **Third parties**: If your project requires the involvement of more than the two parties that are creating the MSA, you should state in the MSA how the rest of the agreement applies to any third party.

- **Venue of law**: A master services agreement should identify the location where a legal resolution will occur, for example, arbitration, a specific state, or federal court.

- **Warranties**: Parties can use the MSA to agree upon scope and coverage of warranty.

Depending on your project, you can also use a master services agreement to cover some other areas, including:

- Business ethics
- Property and network access
- Social responsibilities

Again, the goal of your MSA is to broadly explain as many details as possible. That helps your business to avoid wasting money and time in negotiations.

### Advantages of Creating a Master Services Agreement

A master services agreement offers a few key advantages:

- **Faster process than standard contract negotiations**: When businesses spend time creating a contract, it is often a lengthy and expensive process. Coming to a quicker deal is in both parties’ best interests. A master services agreement allows you to agree to the main points, thus speeding up the
process of negotiating. It’s possible to write a thorough master services agreement in a few weeks or even days, which is significantly faster than most contract negotiations.

- **Protection for both parties:** Even though you are not going through a typical contract negotiation, the MSA still puts an agreement in place. If a dispute happens, the agreement will decide who is at fault. It’s easy to check a master services agreement, which makes the two parties less likely to take a dispute to court, again saving money and time.

- **Blueprint for future agreement:** If you like the master services agreement you create, it is very easy to use as a template for negotiations in the future. Of course, each deal necessitates its own specifics, but you will have a blueprint that allows both parties to focus on important details of the discussion.

![Image via Unsplash by cytonn_photography](https://www.contractscounsel.com/t/us/master-services-agreement)

### Common Master Services Agreement Disputes

You MSA will lessen legal concerns during your negotiations, but issues can still occur between the parties. The most common disputes that happen when companies use MSAs include:

- **Failure to communicate:** If one business requests updates but the other company does not respond in a timely manner, it can lead to disputes.

- **Injury or death of an employee:** Unless this is clearly addressed in your MSA, parties are likely to debate who holds the blame for these kinds of incidents.

- **Missed deadlines:** If one party misses deadlines, it will lead to disagreements between the parties.

- **Missed payments:** This is one of the fastest ways to create conflict between parties.

- **Performance/service issues:** If a product or service does not meet expected goals, conflict will likely arise.

- **Property damage:** You will want to clearly address what happens in the case of property damages, as this is a common source of dispute between partner companies.

The more you plan for these potential conflicts in your master services agreement, the less likely conflicts will come up down the line.

That’s why it’s so important to work with an experienced lawyer when creating a master services agreement. A [contract lawyer can help](https://www.contractscounsel.com) ensure your document covers all the necessary clauses and details.
Meet some of our Master Services Agreement Lawyers

**Jeremiah C.**
- ContractsCounsel verified
- Partner / Attorney at Law
- 14 years practicing
- Free Consultation

Creative, results driven business & technology executive with 24 years of experience (13+ as a business/corporate lawyer). A problem solver with a passion for business, technology, and law. I bring a

**Adam B.**
- ContractsCounsel verified
- Managing Partner
- 24 years practicing
- Free Consultation

Seasoned technology lawyer with 22+ years of experience working with the hottest start-ups through IPO and Fortune 50. My focus is primarily technology transactions with an emphasis on SaaS and Privacy, but

**Benjamin W.**
- ContractsCounsel verified
- Founder
- 7 years practicing
- Free Consultation

I am a California-barred attorney specializing in business contracting needs. My areas of expertise include contract law, corporate formation, employment law, including independent contractor

**Ema T.**
- ContractsCounsel verified
- Contract and IP Attorney
- 4 years practicing
- Free Consultation

I am a NY licensed attorney experienced in business contracts, agreements, waivers and more, corporate law, and trademark registration. My office is a sole member Law firm therefore, I Take pride in giving every

**David B.**
- Free Consultation

Business Contract Lawyers: They Help?

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**CEO, ZivergeTech**

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**Musician, Randy Gibson**

“I would recommend Contracts Counsel if you require legal help.”

https://www.contractscounsel.com/t/us/master-services-agreement
A twenty-five year attorney and certified mediator native to the Birmingham, Alabama area.

Rebecca L.

I absolutely love helping my clients buy their first home, sell their starters, upgrade to their next big adventure, or transition to their next phase of life. The confidence my clients have going into a transaction

Samantha B.

Samantha has focused her career on developing and implementing customized compliance programs for SEC, CFTC, and FINRA regulated organizations. She has worked with over 100 investment advisers,

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Tech From the Trenches: The Customer’s Guide to Master Service Agreements

Wade K. Sims

By choice or necessity, “Covidian”-era lawyers across all industries are becoming exposed to—and begrudgingly familiar with—technology contracts. A common but unique technology contract encountered is the master services agreement, or MSA. Unlike traditional service and license agreements, which are usually single-body contracts with occasional attachments and exhibits, MSAs are “master” documents that govern multiple agreements or transactions between entities.

An MSA will usually govern or incorporate additional contract documents, such as software license agreements, policies and procedures, terms and conditions, privacy policies, data protection agreements, end-user license agreements (EULAs) and statements of work (SOWs). The MSA will usually set forth the principal legal terms that govern the relationship of parties—the technical part only transactional lawyers care about—whereas the subsidiary agreements or SOWs contain the transactional details more important to the operations team. For example, a company might engage in a single MSA with a service provider but have separate subsidiary agreements for licensing the provider’s software suite, engaging the provider’s consultant services, and utilizing the provider’s cloud storage platform, all generally governed by the MSA terms.

MSAs are usually drafted by the service provider. As such, there are plenty of provider-centric guides and templates available on the internet, often identifying what is customary in the service provider’s industry. Instead, this Trenches column is for customers and their attorneys, both in-house and outside counsel, as well as lawyers advising their own law firms on MSAs for software and services. “Customary” does not mean customer friendly, and customers can mitigate significant risk by negotiating a few key sections.
General Considerations

Contract purpose.

Let’s start with the obvious: You must understand the purpose and context behind the agreement in order to provide your client with effective legal advice. This simple rule can be challenging to put into practice—especially with MSAs that may cover unrelated, disparate or future transactions. You may need to consider potential future contract arrangements that could fall under the MSAs terms.

Moreover, clients can be laconic when they request a legal review, especially if they assume the contract must have all the legal details counsel needs. If your client’s request amounts to, “Please review. Thanks,” call them back and request a walkthrough of the services to be purchased, including what problems this engagement seeks to solve, what are the expected costs, what type of data is involved, key deadlines and any other background information that will be relevant.

Incorporated documents.

Depending on the complexity and sophistication of the MSA, other documents referenced or incorporated may not be attached to the body for review. These referenced documents can add or change customer obligations beyond what is listed in the MSA. For example, an MSA might incorporate a software EULA that states that the service provider may change the license terms at any time without notice. Or, the MSA may reference a global policy document that imposes a limitation of liability narrower than the one provided in the MSA.

Request that all referenced documents be attached as exhibits and review them for problematic terms. There should also be a “Conflict Between Documents” clause that specifies the order in which each document controls.
Key Provisions

Payment terms.

Payment terms might be specified in SOWs, may be listed in the MSA or both. Net 30 payment terms are standard and reasonable in most circumstances. Confirm whether the customer must preapprove expenses, and check that late fees comply with applicable statutory limits.

MSAs will frequently include the provider’s right to stop work and/or withhold deliverables in the event of customer nonpayment. Reciprocally, the customer should have the right to withhold prorated amounts in dispute without triggering a contract breach, stop-work order or late fees.

Term and termination.

The MSA term will usually span the term of any covered transactions thereunder. Customers should confirm that the term of the MSA makes sense and is compatible with any subsidiary agreement term.

MSAs usually won’t allow for voluntary termination, but there should be a right to terminate for cause. Take heed of any global notice-and-cure provision and how that might affect services. For example, if a provider has a standard 30 days to cure, the customer may be without software access for up to 30 days without recourse. If loss of services is a critical issue for the customer, consider demanding a service level agreement SLA that provides for refunds and/or termination right for extended downtime.

Intellectual property (IP).

IP sections are frequently treated as boilerplate, but they can represent millions of dollars in risk exposure to the customer. If the provider will be creating deliverables for the customer, the IP of those deliverables should be explicitly assigned to the customer. Specifically, this section should state that the provider and its employees or contractors “hereby assign” any and all intellectual property in and to the deliverables. “Assign” without “hereby” only conveys a promise of future assignment and is insufficient to convey IP rights to the customer. Don’t rely on a “Works Made for Hire” clause without assignment. Works Made for Hire is a statutorily defined term under the Copyright Act, 17 U.S.C. § 101 and frequently will not apply to deliverables created pursuant to a
contract. Ideally, this section should specify what happens with new materials and pre-existing materials, including third-party materials that may be licensed by the provider.

Representations and warranties.

MSAs or subsidiary agreements will usually disclaim implied warranties. Express warranties might be provided depending on the services contemplated. The customer should confirm that the MSA includes a warranty that the provider’s products and services do not infringe on any third-party intellectual property right, including patents and trade secrets. If the provider adds the limitation “to Provider’s knowledge,” consider adding, “and after Provider’s reasonable and thorough inquiry.” Most salespersons won’t know whether their company is being sued for IP infringement.

Any express warranty that deliverables and services will comport to any specification documents should extend for the length of the term. This is especially true for software agreements, where “updates” could remove critical functionality, such as interoperability. This can be a challenging issue to negotiate if the service provider wants to reserve the right to discontinue or sunset services, especially over a long contract term.

Limitation of liability.

Standard limitations of liability are frequently the most customer-hostile provision of MSAs. Provider-drafted terms usually seek to limit the provider’s liability to the preceding 12 months’ fees paid under the applicable SOW.

These default terms are highly unfavorable to the customer. A customer’s loss risk is usually much greater than the fees paid under a SOW; there may be performance interruption, downstream compliance penalties, replacement costs, staffing issues and other effects to consider if a provider breached mid-contract. A provider who only must refund a partial term may be incentivized to breach a contract if it thinks the contract is underperforming, especially if the customer is otherwise locked into other agreements under the MSA.

Customers should seek to maximize liability caps to the extent they are able. Also, confirm that gross negligence, intentional malfeasance, misuse of confidential information and indemnification obligations are exempt from the liability cap. Expect the provider to resist any changes to their
limitations of liability clauses. You may need to engage in aggressive negotiations—either with or without lightsabers.

Choice of Forum/Law

For U.S.-based services, choice of forum/law will usually be proposed as the provider’s county/state of operation, and in most cases this will be immutable. MSAs that govern international services are more complicated and may list jurisdictions using if/then matrices. Confirm that services and their listed jurisdictions reasonably match, and pay attention to any disclaimers to international treaties or laws that could apply, such as the EU General Data Protection Regulation and the U.N. Convention on Contracts for the International Sale of Goods. Finally, the customer may also want to seek adding a forum exception for obtaining an injunction in other jurisdictions, such as to prevent disclosure of the customer’s confidential information.

Authors
Contracting Out

Using AI to transform the legal industry

“A contract is the most important data source in a company,” says Memme Onwudiwe. “It governs every relation with every employee, every vendor, every supplier, every customer. And that information is not just important to the legal department—it’s valuable to everyone.”

Onwudiwe is executive vice president of legal and business intelligence at Evisort, a contract management platform that leverages artificial intelligence (AI) to provide contract life cycle management and analytics to companies, legal teams, and anyone who deals with contracts. Onwudiwe, who graduated from Harvard Law School (HLS) in 2019, opted for a nontraditional career path in legal technology believing that he and his founding team members could transform contracting from an opaque administrative burden to something that could strengthen a company’s reputation and profit margin.

Indeed, as recent research from the Center on the Legal Profession (CLP) and EY Law indicates, contracting’s complexity often has financial repercussions—more than half of the organizations CLP and EY Law surveyed said that “inefficiencies in their contracting processes have cost them business.” While 92 percent of the organizations broadly agreed that contracting needs to change, exactly how they are trying operationalize that change remains uncertain. Moreover, while there is broad agreement on the need to do something about contracting, there is little agreement as to who “owns” the process—contracts switch hands and departments frequently, with legal, procurement, marketing, and others having their own goals and processes for the paperwork. This stymies both coordination and transformation, with 59 percent of those in legal departments believing they “own” contracting, while 39 percent of business development professionals believing they lead the charge. A “lack of alignment and clarity,” the report states, can have devastating consequences on the bottom line.
According to the EY-CLP Report, “While most understand the urgent need to change contracting practices, such transformation isn't easy. Ninety-eight percent of organizations say they face critical barriers to delivering on their vision for contracting.” Above, a graphic from the report explains the top four barriers to transformation for organizations seeking to redo their contracting.

The CLP-EY Law study further highlighted the gap between technological adoption and usage. “Although most (70%) organizations have a formal contracting technology strategy in place, almost all (99%) say they do not have the data and technology needed to optimize their contracting process,” the report says. This means “many organizations face increased risk because they are unable to measure, manage and control adherence to their policy.”

Debates about contracting are often approached from the context of risk management and cost reduction. Indeed, in a separate CLP-EY Law report, risk management and cost reduction are two of the top five CEO priorities. In the first case, when it comes to contracting—and contracting technology specifically—software presents an opportunity to mitigate risk—for example, by reducing the opacity of a company’s contract portfolio. Noah Waisberg, CEO and co-founder of legal tech company Kira Systems, writes in a chapter on contract analytics in Legal Informatics:

Human-driven contract review has the conditions for a perfect storm of risk: by most accounts the work is achingly tedious, but at the same time serious consequences can result from errors. This calls for extreme attention to detail. Stories abound of missed provisions that were only found at the eleventh hour—or worse, after a deal was completed. The status quo contract review process is slow, costly, prone to human error, and can also generate initial results that are not as useful as they might appear. Contract review software can help change all that.

In the second case and with respect to cost reductions, as Onwudiwe notes, contracts are the lifeblood of an organization, being both a source of potential growth as well as a potential sinkhole. The relationship between cost reductions and contracting is clear. As CLP and EY Law reported, research from World Commerce & Contracting suggests “the average basic contract costs nearly $7,000 to create.” The report goes on:

Complex contracts, meanwhile, average $50,000. Given that large organizations, on average, manage 350 contracts per week, it's understandable that 99% of organizations are planning to reduce the cost of contracting over the next two years. The scale of cost cutting being targeted is striking. At large organizations, slightly more than a third (34%) are targeting cost savings of 30% or more. Cutting one out of every three dollars from the contracting process cannot be achieved through small, targeted adjustments. Broader transformation will be required.

What should one make of this? Simply put, how the legal profession is evolving to deal with contracts is a prime example of legal informatics: using AI to understand, organize, and manage contracts means diving into, in Ron Dolin's words, the "logic, structure, data, and measurement of law." Innovation around contracts is also, as Dolin suggests in "Legal Informatics: Taking the tediousness out of law," an important step forward for freeing up lawyers to tackle the work they enjoy, over the work they hate.

The legal tech landscape

Over the last few years, the legal tech landscape has exploded. According to September 2021 data from...
Netflix, and Brooks Brothers. It sits among other contract companies, like Kira (recently acquired by larger legal tech company Litera with law firm clients like Davis Polk and Goodwin Procter), LawGeex (with clients such as eBay and Office Depot, as well as White & Case, which plans to deploy the software on a white label basis), and Ironclad (with clients like Mastercard and DoorDash). Market Research Future released a report in June 2021 forecasting that the contract management market alone will reach 6.5 billion by 2025. As Onwudiwe will tell you, however, there is contract management—which operates more like an Excel spreadsheet—and there’s contract intelligence, like Evisort.

In a webinar showcasing the technology, founding team member Riley Hawkins explains that Evisort’s algorithm combs through any contracts a client feeds it, extracting key data points such as dates and parties, termination rules, confidentiality, or force majeure clauses. You may be already recording this type of information manually, Hawkins says, but when done manually, the accuracy hovers around 60 percent. Evisort says that it does not release an algorithm unless it’s at 90 percent accuracy, and companies can help the AI learn so that they might achieve 100.

“When you’re turning a contract into data, you’re taking something subjective—like language and law—and turning it into something objective: numbers,” says Onwudiwe. Doing this, he believes, is a critical piece of being competitive in today’s marketplace. By providing a system that can standardize contract language, remind first-year associates who have inherited accounts to renew or sever contracts, or identify potential liability or error, Evisort allows businesses to learn more about where they could move from losing business to generating additional revenue. This, in turn, will transform the role of lawyers.

Where Evisort started and where it’s going

Looking back on Evisort’s early days, Onwudiwe reflects: “We didn’t really know what we wanted to build, but we did know what we wanted lawyering to be. And it was much less manual and it didn’t require data entry. It was less hierarchical and allowed folks to focus on the reasons they went to law school—doing complex legal analysis and not copy-pasting clauses.”

Onwudiwe was one of a team of six–four Harvard Law students, an MIT data scientist, and a computer scientist from Northeastern—who believed that they could make more impact on the legal profession by exploring the promises of AI than they could by following the traditional path of an associate at a law firm. Jerry Ting, who was a year ahead of Onwudiwe at Harvard Law School, first had the idea for Evisort (which stood for “Evidence Sort”) as an undergraduate. At the time, AI had been used for other sorts of tedious, time-consuming tasks,
consulting company interviews. Both Ting and Sussman had spent their first-year summers at Boston Consulting Group, says Onwudiwe, and “not many people at Harvard Law School are looking to pursue nontraditional paths.” It was soon after that they invited Onwudiwe to join the company as head of sales, though, “At the end of the day, where there are five people at a company, everyone kind of does everything,” Onwudiwe says.

In 2016, the company took up residency in Harvard Innovation Labs, where, Onwudiwe jokes (with some seriousness), he spent more time physically than at the law school. There, over the course of three years, they built their proprietary algorithm. Onwudiwe relates those years as tedious but fruitful:

We thought it was stupid that you had to type all the stuff in the contract, and then type it all over again just to put it in a separate contract management system. It just didn’t make sense. You just typed those things in the contract, so what’s the point of a management system that’s just storing the document but not managing it? We thought it was ridiculous that we had to do all this manual entry of information and then do it again and again if you wanted any visibility into the contracts outside the data that was already tracked. Ironically that meant we had to do three years of manually tagging information people already had written. We did that to train numerous algorithms. The idea was that we’re tagging these documents so literally nobody will ever have to do this again.

Onwudiwe says that Evisort as a business has always given primacy to the accuracy of their technology. “When we started getting accurate algorithms, we were very excited, as you might imagine,” he explains. “And the lawyers said, ‘This is great. Let’s build a platform.’ Amine, our CTO, says, ‘Great, let’s find some software engineers.’ We said, ‘Wait, you’re not going to do this?’ He said, ‘I can’t do that. I can’t make a button bigger if your mouse goes over it. I can only make algorithms—I’m a data scientist.’”

“What’s the point of a management system that’s just storing the document but not managing it?” asks Memme Onwudiwe.
Disciplining Data
Speaker's Corner: A conversation with a school of information sciences dean.
Public Health Law During A Pandemic: Key Legal and Bioethical Issues

• Crisis Standards of Care: Legal Guidelines for the Allocation of Scarce Resources

• Constitutional Law – History of Vaccine Mandates

• Constitutional Law – Vaccine Mandates, Religious Liberty During a Public Health Crisis

• Constitutional Law – Reproductive Rights During a Public Health Crisis

• Right to Refuse Treatment During a Public Health Crisis

Bridge the Gap – Fordham Law
Spring, 2022
Mary Beth Morrissey, Esq.
Wendy Luftig, Esq.
Crisis Standards of Care for the Allocation of Scarce Resources

- Crisis Standards of Care: A Systems Framework for Catastrophic Disaster Response (Institute of Medicine, 2012)
- “Cross-cutting Issues”
  - Mental Health
  - Palliative Care
- Allocation of scarce resources (See also NYSBA Health Law Section Report, 2020)
Crisis Standards of Care: Legal Guidance for the Allocation of Scarce Resources

• Who gets what when not enough to go around
• Allocation of resource guidelines adopted by some states
• Issues of age, disability and other forms of discrimination
• See NYSBA Report and Resolutions (next slide)
• See example: Office of Civil Rights, State of Alabama Case Resolution
• A.1.(a) Enact a state emergency health powers act addressing gaps in existing laws in New York, drawing upon the Model State Emergency Health Powers Act (MSEHPA), developed by the Center for Law and Public Health at Georgetown and John Hopkins Universities (2001), and other sources as appropriate;

Constitutional Law: The History of Vaccine Mandates

*Jacobson v. Commonwealth of Massachusetts, 23 S.Ct. (1905)* – State Police Power through Public Health Mandates vs. Constitutional Liberties:

- Justice Harlan (1833-1911) - The Great Dissenter in *Plessy v. Ferguson (1896)*. In *Plessy*, Harlan’s dissent argued that the Equal Protection clause of the XIVth Amendment and individual liberty interests supersede the police power of the state.

- Conversely, in *Jacobson (1905)* involving a Mass. Law, Harlan finds in favor of the exercise of the state’s Police Power, during a smallpox epidemic.

- *Jacobson* defense cites the XIVth Amendment privileges & immunities clause: “...no state shall make any law abridging privileges or immunities of citizens of US...nor deprive of life, liberty & property...or equal protection” under the law.

- But the Court, through Harlan, addresses the Constitutional claims stating: “Liberty regulated by law...” social covenant, compact, community right to protect against epidemics of disease.

- “There is a sphere in which the individual may assert supremacy of will and dispute the authority of government...but reasonable regulations require for the safety of the public when disease (contagious disease) presents great dangers.” Argues for a reasonable balance between power of the state and Constitutional rights of individual.
Constitutional Law:
The History of Vaccine Mandates

• **Decision Relied on Science** – Long footnote on Vaccination Laws in England 1808, Bavaria, Denmark, Sweden, Australia, Calcutta, Bombay and survival statistics of the vaccinated vs. unvaccinated, accepted by majority in medicine for generations, particularly for smallpox. Supreme Court decision that relied on scientific & empirical evidence.

• **Balance of “Common Good” vs. “Individual Liberty”** – “We cannot have an entire population subjugated to wishes of individual;” Harlan allows for exceptions and acknowledges some dangers associated with vaccination; But cautions “liberty itself is not unrestricted license”; liberty exists within the social compact for common good.

• **Meaning of Individual Liberty** – *Jacobson* does not raise “free exercise” argument, rather it is the Police Power of state vs. XIVth Amendment. The era of expansion of “individual liberty” does not come until the second half of the 20th Century (Recall *Griswold, Roe v. Wade, Hobby Lobby*)
Constitutional Law: 
The History of Vaccine Mandates

- **Zucht v. King (1922)** – Building on the constitutional foundation of Jacobson - Public schools may constitutionally require children to be vaccinated to attend school and may exclude unvaccinated children, even when there is no prevalent epidemic.

- **Roe v. Wade** (right to privacy in reproduction) and **Cruzan** (right to bodily integrity) – both cite Jacobson, for the proposition that there is a limit to the state’s Police Power when it infringes on individual liberty, although during the Jacobson era there was no direct jurisprudence in the area of specific constitutional rights of privacy and bodily integrity.
Constitutional Law:
COVID-19 Vaccine Mandates & Religious Liberty

Vaccine mandates and Recent COVID-19 Related Opinions and Orders from U.S. Supreme Court:

- New York Mandate:
  - Dr. A., et al, Applicants v. KATHY HOCHUL
    ON APPLICATION FOR INJUNCTIVE RELIEF, Denied.
    (Dec. 13, 2021)
  See Gorsuch Dissenting Opinion.

- Maine Mandate:
  - JOHN/ DOES 1-3 ET AL. v. JANET T. MILLS, GOVERNOR OF MAINE, ET AL.
    ON APPLICATION FOR INJUNCTIVE RELIEF, Denied.
    (October 29, 2021)
  See Gorsuch Dissenting Opinion.
Eliminating Religious Exemptions and Religious Liberty: First Amendment

- Key issues: Elimination of religious exemptions and religious liberty

- *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877 (1990): a law that is “neutral” toward religion and “generally applicable” may survive First Amendment scrutiny; if not, strict scrutiny triggered and State must prove compelling interest.

- Evolving U.S. Supreme Court jurisprudence and possible directions
Constitutional Law: Reproductive Rights During Pandemic

- Unequivocal statement issued by American College of Obstetricians and Gynecologists (ACOG) and other reproductive health organizations on March 18, 2020 that they “do not support COVID-19 responses that cancel or delay abortion procedures” during the pandemic.

- Despite ACOG’s position, governors in several states – Texas, Louisiana, Mississippi, Alabama and Oklahoma issued orders that supported cessation of both medication and surgical abortion; other governors directed that surgical abortion alone must stop during the pandemic.

- Legal basis of these orders – Abortion procedures are “elective” or “nonessential”; Lawsuits challenged these orders; TROs blocked state bans while litigation proceeded in Ohio, Alabama and Oklahoma.

- Actions highlight the vulnerability of reproductive rights, particularly pregnancy termination rights despite the constitutional standard.

- *Dobbs v. Jackson Women’s Health Organization* – Mississippi law which prohibits abortions after 15 weeks of pregnancy – contrary to *Roe v. Wade* which held that states cannot prohibit abortions prior to viability, 24th week of pregnancy.
Constitutional Law: Reproductive Rights During Pandemic


- **Robinson v. Attorney General** – 937 F3d 1171 – Reproductive rights (abortion) Cites *Jacobson* for the proposition the exercise of individual liberty (abortion) is subordinated to police powers during pandemic.
Right to Refuse Treatment and Planning in Advance

- Right to refuse treatment and protected liberty interest under *Cruzan* (1990) (See Gostin & Weir, 1991.)

- Advance care planning and advance directives:
  - Legal and ethical issues
  - Trends and challenges (Morrison, 2020)
  - Advance directives for persons with dementia
  - Proposal for Supported Decision Making for persons with disabilities (See Disabilities Rights Committee Report: *Guardianship for People with Developmental Disabilities: Examination and Reform of Surrogate's Court Procedure Act Article 17-A is a Constitutional Imperative*).
Federal Conditions of Participation & NY Palliative Care Laws and Guidance

• **42 CFR Part 483**: 483.10 Resident Rights: 483.12 Freedom from abuse, neglect and exploitation: 483.20 Resident Assessment; 483. 21 Comprehensive person-centered care planning: 483.24 Quality of life; 483.25 Quality of Care; 483:30 Physician services; 483.35 Nursing services; 483. 73 Emergency preparedness; 483.75 Quality assurance/performance improvement; 483.80 Infection control


*See also additional resources: [https://www.health.ny.gov/professionals/patients/patient_rights/palliative_care/practitioners/resources.htm](https://www.health.ny.gov/professionals/patients/patient_rights/palliative_care/practitioners/resources.htm)*
Expanding Palliative Care: Future Directions

- Palliative care imperative and palliative care environments (Morrissey et al., 2015)
- Systems and levels of care (Jennings & Morrissey, 2011)
- Mental Health and Serious Illness Care Model (See Pincus et al., 2018: https://www.capc.org/documents/download/750/)
- Long Term Care Reforms (See NYSBA Nursing Homes and Long-Term Care Report, 2021)
- Workforce education and training
Public Health Law During A Pandemic: Key Legal and Bioethical Issues

• Questions:
  - Crisis Standard of Care
  - Vaccine Mandates During Pandemic
  - Religious Liberty During Pandemic
  - Reproductive Rights During Pandemic
  - Right to Refuse Treatment and Palliative Care Standards
Guardianship for People with Developmental Disabilities: Examination and Reform of Surrogate’s Court Procedure Act Article 17-A is a Constitutional Imperative.

Preamble: The Free Britney controversy has illuminated the dangers of the guardianship process, and its potential for abuse. A person’s right to determine the course of his or her life is a fundamental value in American law and firmly embodied in New York State jurisprudence. Guardianship is the legal means by which a court appoints a third party, either an individual, a not-for-profit corporation or government official, to make some or all decisions on behalf of a person determined unable to manage his or her own affairs. The civil liberties of the person subjected to guardianship yield to that decision. Because the decision exacts such a pervasive personal cost, procedural and substantive due process requirements must be observed by the court. A failure to afford due process to a respondent in a guardianship proceeding imposes burdens on the individual, but also upon societal values. This report examines article 17-A of the Surrogate’s Court Procedure Act (SCPA), a discrete guardianship statute for people with developmental disabilities. In the opinion of the Committee, article 17-A requires immediate reform by the Legislature because the statute violates procedural and substantive due process, the Americans With Disabilities Act, and other well established principles addressing the rights of people with developmental disabilities and their need for empowerment, advocacy and quality decision-making. Reform of article 17-A must also recognize various forms of decision-making alternatives to guardianship for people with disabilities that are described within this report.  

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2 This report does not address reform of SCPA 1750-b, the health care decision making statute for people with developmental disabilities. The Legislature tapped the New York State Task Force on Life and the Law with the responsibility to reconcile the Family Health Care Decisions Act (FHCDA), SCPA 1750-b and other statutes and regulations governing surrogate health care decision making for people with mental disabilities (see L. 2010, c 8, section 28 – “[T]he task force shall consider whether the FHCDA should be amended to incorporate procedures, standards and practices for decisions about the withdrawal or withholding of life-sustaining treatment from patients with mental illness or mental retardation or developmental disabilities, and from patients residing in mental health facilities...”). The Task Force issued its report entitled Recommendations for Amending the Family Health Care Decisions Act for Persons with Developmental Disabilities and Patients In or
I. Guardianship and Civil Rights - Historical Perspectives and Modern Context

Guardianship has been employed since Ancient Rome to protect people who are unable to manage their personal and financial affairs because of incapacity by removing their right to make decisions and transferring legal power to another person, the guardian. Guardianship is a matter of state law. Before a guardian may be appointed, an individual must be determined to be an incapacitated person, defined in various ways, but codified in uniform acts as:

an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

In most states, a single guardianship statute applies to all populations, regardless of the alleged cause of the person’s incapacity. New York is one of six states, the others being California, Connecticut, Idaho, Kentucky and Michigan, that have a separate statute that may be invoked for people with developmental disabilities. Guardianships may be plenary in nature, divesting all autonomy from the person subject to the regimen, or tailored to the individual needs of the person found to lack capacity.

Given its ancient origins, guardianship laws predate not only modern civil rights laws, such as the Americans with Disabilities Act, but also precede the United States Constitution and the Magna Carta. Although often examined through the lens of benevolence, the appointment of a guardian divests autonomy from another person and has severe civil rights implications. As stated in 1987 by the House of Representatives Special Committee on Aging:

Transferred from Mental Health Facilities in 2016 (see https://www.health.ny.gov/regulations/task_force/). Legislation has not yet been introduced to implement the Task Force’s recommendations.

3 The term “incapacity” is not a term of art as used in this section of the report. As described later in this report, “incapacity” is defined at Mental Hygiene Law § 81.02 (b). Article 17-A does not employ the term “incapacity,” but by its own definitional terms allows for plenary adjudications upon a finding that the respondent in the proceeding is incapable of managing his/her affairs. SCPA 1750 provides: “For the purposes of this article, a person who is intellectually disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians ... as being incapable to manage him or herself and/or his affairs by reason of intellectual disability and that such condition is permanent in nature and likely to continue indefinitely” (see also, SCPA 1750-a for the definition of “developmental disability”).


By appointing a guardian, the court entrusts to someone else the power to choose where [he/she] will live, what medical treatment [he/she] will get and, in rare cases, when [he/she] will die. It is in one short sentence, the most punitive civil penalty that can be levied against an American citizen ... 6

The “civil death” characterization of guardianship arises because a person subjected to it loses autonomy over matters related to his or her person and property. Indeed, in many jurisdictions a person with a legal guardian will be deprived of fundamental rights, such as the right to vote, marry and freely associate with others.7

Since the enactment of article 17-A in 1969, there have been several national and international calls for the fundamental guardianship reform, but not of them have touched article 17-A. It should not be lost on our society that over two generations have passed following the 1975 passage of the Developmentally Disabled Assistance and Bill of Rights Act8 when the American Bar Association (“ABA”) undertook a broad study of major areas of law affecting developmentally disabled children and adults. This study, known as the Developmental Disabilities State Legislative Project, included guardianship. The goal was to encourage “well-conceived” legislation that drew on “the best thinking, most advanced concepts, and outstanding work products from other states.”9 After a review of state guardianship statutes, the Project concluded that the standards for appointing guardians for individuals with disabilities were frequently “broad and vague” and, most importantly, “failed to recognize that individuals with disabilities are often capable of doing many things for themselves.”10 The Project proposed a Model Guardianship and Conservatorship Act, the purpose of which was to establish:

a system which permits partially disabled and disabled persons and minors to participate as fully as possible in all decisions which affect them, which assists such persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources, and developing or regaining their abilities to the maximum extent possible, and which accomplishes these objectives through the use of the least restrictive alternatives.11

8 Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486 (1975). Over the years, the Act has been reorganized and amended extensively (see Rose Mary Bailly, Charis B. Nick-Tovok, Should We Be Talking?--Beginning a Dialogue on Guardianship in New York, 75 Alb. L. Rev. 807, 813, n. 36).
9 See Bailly & Nick-Tovok, supra note 6, Should We Be Talking, pp. 813-14 and the authorities cited therein.
10 Id.
11 Id. at 814, citing ABA Commission on the Mentally Disabled, Guardianship & Conservatorship 1-2 (1979); Model Guardianship and Conservatorship Act.
Furthermore, a powerful counter voice to guardianship as civil death is the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol. 12 Adopted in 2006, the CRPD is the first international human rights treaty drafted specifically to protect the rights of people with disabilities. 13 Even though the United States Senate has not ratified the treaty, legal scholars argue that the CRPD will provide the impetus for reshaping guardianship laws in the United States as “CRPD dictates supported—as opposed to substituted - decision making.”14

Despite all of these efforts at reform and the passage of time, article 17-A remains stuck in time and a counterweight to progressive principles that typically emerge in New York State. The NYSBA Disability Rights Committee argues that there is an urgent need to reform article 17-A, particularly as the Office for People with Developmental Disabilities (OPWDD) is advancing a program bill codifying supported decision making in New York State. As a Committee, we set forth the following general principles which a guardianship statute for adults with intellectual and developmental disabilities should contain and explain in this report the underpinnings of the principles we articulate.

Principles of Guardianship

1. Neither the alleged developmental disability nor the age of the individual alleged to have a developmental disability should be the sole basis for the appointment of a guardian. Rather, the individual's ability to function in society with available supports should be the focus of the Court’s inquiry into the need for a guardian.

2. The appointment of a guardian must be designed to encourage the development of maximum self-reliance and independence in the individual. The standard for appointment should be that the person is unable to provide for personal needs and/or property management with available supports; and the person cannot adequately understand and appreciate the nature and consequences of such inability.

3. The appointment of a guardian must be necessary and the least restrictive form of intervention available to meet the personal and/or property needs of the individual as determined by a court.


4. A guardianship petition must allege the other available resources for decision-making, if any, that have been considered by the petitioner and the petitioner’s opinion as to their sufficiency and appropriateness, or lack thereof. Other resources include, but are not limited to, powers of attorney, health care proxies, trusts, representative and protective payees, and supported decision making.

5. All persons alleged to be in need of the appointment of a guardian are entitled to due process protections including, but not limited to, notice of the proceeding in plain language and right to counsel of their own choosing or the appointment of counsel guaranteed at public expense.

6. A guardian should not be appointed absent a hearing where the person alleged to be in need of a guardian is present. The person’s appearance at the hearing may be dispensed with in exceptional circumstances at the court’s discretion and in accordance with statutory standards. The person has the right to a jury trial.

7. The need for the guardianship must be established by clear and convincing evidence of the person’s functional limitations which impair the person’s ability to provide for personal needs, the person’s lack of understanding and appreciation of the nature and consequences of his or her functional limitations; the likelihood that the person will suffer harm because of the person’s functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations; and necessity of the appointment of a guardian to prevent such harm.

8. The powers of the guardian should be identified in the order/decree issued by the court and tailored to meet the needs of the individual in the least restrictive manner possible. The person subject to guardianship retains any powers not expressly conveyed to the guardian.

9. The individual must be included in all decisions to the maximum extent possible and practicable, in order to encourage autonomy. The Guardian should be encouraging the development of maximum self-reliance and independence in the individual.

10. The duties of the guardian should be specified in the order/decree. Among other things, the guardian’s duty is to make decisions that give maximum consideration to the individual’s preferences, wishes, desires, and functioning level. A guardian

15 See MHL § 81.20. Among the duties of an article 81 guardian are that the guardian shall exercise only those powers that the guardian is authorized to exercise by court order, the guardian shall exercise the utmost care and diligence when acting on behalf of the incapacitated person, and that the guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person (MHL § 81.20 [a][1-3]). A guardian of personal needs should also promote the individual’s independence and self-determination (see MHL § 81.20 [7]) and comment annually on whether facts indicate the need to terminate the guardianship or alter the powers of the guardian (see MHL §81.31 [b][10]).
should protect the individual from unreasonable risks of harm, while supporting and encouraging the individual to achieve maximum autonomy.

11. The duration of a guardianship should be determined by the court and conform to the proof adduced at the hearing. For instance, time limited guardianships may be appropriate including where a guardianship is sought for a young adult between the ages of 18-25. Where a guardianship of limited duration has been ordered by the court, any application to extend the guardianship should require proof by clear and convincing evidence by the petitioner that it is necessary to continue the guardianship.

12. A person under guardianship has a right to seek review of the guardianship and restoration of rights. There must be a clear process to initiate restoration that permits the person under guardianship to initiate and obtain access to counsel at public expense.

13. The court should retain jurisdiction over the guardianship and entertain modification and termination proceedings where the burden of proof shall be on the person objecting to discharge or seeking increased powers for the guardian rather than on the respondent.

14. The person or entity appointed guardian must be subject to monitoring and oversight by the court. For instance, Guardians should periodically file reports as to their activities.

II. Guardianship in New York

The general adult guardianship statute in New York is codified at article 81 of the Mental Hygiene Law (MHL). The purpose of article 81 is to: satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person’s life. A discrete statute exists, however, that may be invoked for people alleged to be in need of a guardian by reason of an intellectual or other developmental disability. In contrast, that statute, codified at article 17-A of the SCPA is a plenary statute the purpose of which at its inception in 1969 was largely to permit parents to exercise continued control over the affairs of their adult children with disabilities. In essence, the statute rested upon a widely

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16 MHL § 81.01.

17 SCPA 1750, 1750-a. An Article 17-A proceeding may also be commenced for a person alleged to have a traumatic brain injury (see SCPA 1750-a [I]).
embraced assumption that “mentally retarded” people were perpetual children. Under New York law, a person with developmental disabilities can be subject to either guardianship statute, despite the considerable substantive and procedural variations between article 81 and article 17-A. An injustice arises, as a result, because a petitioner for guardianship can choose between two statutes and petitioner’s choice will determine the due process protections to be afforded to a respondent with developmental disabilities.

Article 81 of the Mental Hygiene Law

Article 81 of the MHL, proceedings for appointment of a guardian for personal needs or property management, became effective on April 1, 1993. Article 81 replaced the former dual structure conservatorship and committee statutes that operated in New York. By way of history, the appointment of a committee, pursuant to former Article 78 of the MHL, was the only available legal remedy to address the affairs of a person alleged to be incompetent. However, the committee statute required a plenary adjudication of incompetence. Because of the stigma and loss of civil rights accompanying such a finding, the judiciary became reluctant to adjudicate a person in need of a committee. In 1972, the conservatorship statute (former article 77 of the MHL) was enacted into law as a less restrictive alternative to the committee procedure. Unlike the committee statute, the appointment of a conservator did not require a finding of incompetence. Rather, the former law authorized the appointment of a conservator of the property for a person who had not been:

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18 To elaborate, there is an undue emphasis under article 17-A that people with developmental disabilities are children forever. First, is the ambiguous nature of article 17A. It appears to apply to adults, yet its main provisions mirror those applicable to minors in article 17. Article 17-A also incorporates article 17 by reference (see SCPA 1761 - “To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this article with the same force and effect”). In addition, while article 17-A does not specifically state that the statute is applicable to minors as well as adults, the statute appears to contemplate such. For example, a guardian appointed pursuant to article 17-A does not terminate “at the age of majority” (see SCPA 1759). Further, article 17-A, provides that the standard for appointment of a guardian is “best interests,” the same standard applicable to minors in article 17 (see SCPA 1701 - “the court may appoint a permanent guardian of a child if the court finds that such appointment is in the best interests of the child.” (emphasis added); SCPA 1707 -“If the court be satisfied that the interests of the infant will be promoted by the appointment of a guardian or by the issuance of temporary letters of guardianship of his or her person or of his or her property, or of both, it must make a decree accordingly. If the court determines that appointment of a permanent guardian is in the best interests of the infant or child, the court shall issue a decree appointing such guardian.”) (emphasis added). Finally, there is no required hearing under article 17 or 17-A of the SCPA (see SCPA 1706, 1754).

19 See Shea and Pressman, supra note 2, Guardianship a Civil Rights Perspective, at 21.
20 The following discussion of article 81 of the Mental Hygiene Law and article 17-A of the SCPA is largely borrowed from Shea and Pressman, supra note 2, Guardianship a Civil Rights Perspective, pp 21-23.
22 Id.
23 Id.
24 In re Fisher, 147 Misc. 2d 329, 332 (Sup. Ct. N.Y. County 1989).
25 1972 N.Y. Laws, c. 251
Judicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs or other cause suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support.\textsuperscript{26}

However, by design, the statute limited the power of the conservator to property and financial matters.\textsuperscript{27} Chapter amendments to the MHL were enacted in 1974 attempting to expand the role of conservators. The first established a statutory preference for the appointment of a conservator.\textsuperscript{28} A second chapter amendment authorized conservators to assume a limited role over the personal needs of the person who was the subject of the proceeding.\textsuperscript{29} Cast as reform measures, the amendments actually contributed to the “legal blurring” between articles 77 and 78.\textsuperscript{30} In 1991, the Court of Appeals was confronted with a case requiring a construction of the statutory framework to determine the parameters of the authority of a conservator. The question presented to the tribunal was whether a conservator could authorize the placement of his ward in a nursing home. In the case of \textit{In re Grinker},\textsuperscript{31} the Court of Appeals determined that such power could be granted only pursuant to the committee statute. The \textit{Grinker} decision “settled the debate” surrounding the authority of a conservator to make personal needs decisions.\textsuperscript{32} However, the \textit{Grinker} holding also “dramatized the very difficulty the courts were trying to resolve, namely, choosing between a remedy which governs property and finances or a remedy which judges a person completely incompetent.”\textsuperscript{33}

To resolve the difficulties inherent in the conservator-committee dichotomy, the New York State Law Revision Commission proposed the enactment of Article 81 as a single remedial statute with a standard for appointment dependent upon necessity and the identification of functional limitations.\textsuperscript{34} The new statute rejected plenary adjudications of incompetence in favor of a procedure for the appointment of a guardian whose powers are specifically tailored to the needs of the individual. Going forward, the right to counsel would be guaranteed and monitoring of guardianships would be required. The objective of the proceeding as declared by the legislature was to arrive at the “least restrictive form of intervention” to meet the needs of the person while, at the same time, permitting the person to exercise the independence and self-determination of which he or she is capable.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{26} MHL § 77.01 (repealed 1992 N. Y. Laws c. 698).
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} MHL 77.04 & 70.02 (repeated 1992 N. Y. Laws c. 698).
\item \textsuperscript{29} 1974 N. Y. Laws c. 623 § 3.
\item \textsuperscript{31} 77 N.Y.2d 703 (1991).
\item \textsuperscript{32} Solinski, \textit{supra} note 27 at 450.
\item \textsuperscript{33} \textit{Id}.
\item \textsuperscript{34} Memorandum of the Law Revision Commission Relating to Article 81 of the Mental Hygiene Law Appointment of a guardian for Personal Needs and/or Property Management, Senate No. 4498, Assembly No. 7343, Leg. Doc. No. 65 [C] (1992).
\item \textsuperscript{35} MHL § 81.01.
\end{itemize}
Article 17-A of the SCPA

Under article 17-A, the basis for appointing a guardian is whether the person has a qualifying diagnosis of an intellectual or other developmental disability. Current law permits the appointment of a guardian upon proof establishing to the “satisfaction of the court” that a person is intellectually or developmentally disabled and that his or her best interests would be promoted by the appointment. As a jurisdictional prerequisite, a 17-A petition must be accompanied by certifications of two physicians or a physician or a psychologist that the respondent meets the diagnostic criteria of an intellectual or other developmental disability. On its face, article 17-A provides only for the appointment of a plenary guardian and does not expressly authorize or require the surrogate to dispose of the proceeding in a manner that is least restrictive of the individual’s rights. Indeed, article 17-A does not even require the court to find that the appointment of a guardian is necessary, does not guarantee the right to counsel and permits the proceeding to be disposed without a hearing at the discretion of the court. That said, article 17-A has been revered by families because of its relative ease in commencing the proceeding, often without the assistance of counsel. In contrast, article 81 proceedings can be very complex and expensive to prosecute. The convenience of article 17-A proceedings as compared to article 81 proceedings causes tension in New York. As aptly stated by one commentator:

If guardianship is made too expensive, incapacitated people who need the protection and assistance of a guardianship may not have those needs met. However, if guardianship fails to protect the rights of respondents, then respondents can be unjustly deprived of their right to autonomy.

Given the many substantive and procedural variations between article 17-A and article 81, the Governor’s Olmstead Cabinet and commentators have called for reform or

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36 See SCPA 1750, 1750-a. An article 17 proceeding may also be commenced for a person alleged to have a traumatic brain injury (SCPA 1750-a[1]).
37 Id.
38 See Bailly & Nick-Tovok, supra note 6, Should We Be Talking, 821-825.
39 See Karen Andreasian, Natalie Chin, Kristin Booth Glen, Beth Haroules, Katherine I. Hermann, Maria Kuns, Aditi Shah, Naomi Weinstein, A Report Of The Mental Health Law Committee And The Disability Law Committee Of The New York City Bar Association, Revisiting S.C.P.A. 17-A: Guardianship for People with Developmental Disabilities, 18 CUNY L. Rev. 287, n. 23 at 300, where the authors note that 17-A procedure is relatively simple and can be typically managed by pro se petitioners.
40 The cost of an article 81 proceeding will often encompass the fees of petitioner’s counsel, counsel for respondent and the Court Evaluator. The person alleged to be incapacitated is generally liable for fees when a petition is granted (see MHL§§ 81.09 [f], 81/10[f], 81/16[f]). Efforts have been made to reduce the expenses associated with article 81 proceedings. For example, article 81 forms are now uploaded to the New York State Office of Court Administration website for the 6th Judicial District: http://ww2.nycourts.gov/article-81-forms-31251
42 The Olmstead Cabinet derives its name from the United States Supreme Court decision in Olmstead v. L.C., 527 U.S. 581 (1999). The Cabinet’s mandate is to recommend law and policy changes to ensure that people with disabilities receive services and supports in settings that do not segregate them from the community. https://www.ny.gov/programs/olmstead-communityintegration-every-new-yorker-1ast.
“modernization” of article 17-A. In some cases, Surrogates are bringing enhanced scrutiny to article 17-A adjudications and dismissing petitions where guardianship is not the least restrictive form of intervention. Further, a lawsuit was commenced on September 26, 2016 in the U.S. District Court for the Southern District of New York by Disability Rights New York seeking to enjoin the appointment of guardians pursuant to article 17-A. While the lawsuit was subsequently dismissed on Younger abstention grounds, the complaint alleged that Article 17-A violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, the ADA and § 504 of the Rehabilitation Act. The federal court’s decision to abstain does not prejudice the right of the plaintiffs to challenge the statute in state court.

III. Article 17-A is indefensible under the lens of constitutional analysis

The Fifth Amendment to the United States Constitution provides that the federal government shall not deprive any person “of life, liberty, or property, without due process of law.” The Fourteenth Amendment makes this requirement applicable to the states, and together, the Fifth and Fourteenth Amendments forbid the government from infringing on a fundamental liberty interest where the matter is not narrowly tailored to serve a compelling governmental interest. Guardianship impacts both the fundamental liberties and property interests of individuals. An individual may be subject to guardianship indefinitely, interfering with the individual’s ability to maintain personal relationships, seek and obtain employment, marry, or vote. While the Supreme Court has not specifically defined “liberty,” the term is broadly interpreted and “extends to the full range of conduct which the individual is free to pursue,” and must not be restricted without proper governmental objective.

These fundamental liberty and property rights are at stake in a guardianship proceeding. Guardianship can infringe on a person’s fundamental right to privacy to engage in personal conduct; fundamental right to refuse unwanted medical treatment; a fundamental right to make personal decisions regarding marriage, procreation, contraception, family relationships, child rearing, and education; and a fundamental right to vote. New York

43 See Bailly & Nick-Tovok, supra note 6; Andreasian et al., supra note 36.
44 See In re D.D., 50 Misc. 3d 666 (Sur Ct., Kings Co. 2015).
47 916 F. 3d at 137. Our Committee also notes that an action in state court may implicate New York State constitutional guarantees. New York courts “have not hesitated[,] when [they] concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens[,] to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority (Cooper v. Morin, 49 N.Y.2d 69, 79 [1979]).
48 U.S. Const. amend V.
49 See U. S. Const. amend. XIV § 1; Reno v. Flores, 507 U.S. 292, 301-02 (1993).
50 See Monthie, supra note 42 at 961 and the authorities cited therein.
51 Id., at 961-962 and the authorities cited therein. The right to vote in New York State should not be impacted by the appointment of a guardian under either article 17-A or article 81 due to administrative pronouncement that the exclusions found in the New York State Election Law are obsolete and unenforceable.
courts have described guardianship as “calculated to deprive a citizen not only of the possession of his property, but also of his personal liberty.” Two New York Surrogate’s Courts (New York County and Kings County) have consistently invoked the liberty and property interests of individuals subjected to Article 17-A guardianship. The New York County Surrogate’s Court found:

The appointment of a plenary guardian of the person under article 17-A gives that guardian virtually total power over her ward’s life ... including virtually all medical decisions, where the ward shall live, with whom she may associate, when and if she may travel, whether she may work or be enrolled in habilitation programs, etc. This imposition of virtually complete power over the ward clearly and dramatically infringes on a ward's liberty interests.

Procedural Due Process

There are three factors to determine whether a taking of liberty or property violates a person’s rights to procedural due process. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

A brief review of pleading requirements of article 17-A and the procedures employed to dispose of guardianship applications reveals their patent insufficiency given the liberty interests at stake in the proceeding.

- The statute is entirely diagnosis driven and will turn upon certificates filed in conjunction with the petition alleging that the respondent has an intellectual disability or other developmental disability;
• There is no requirement that the 17-A petitioner even allege that the appointment of a guardian is necessary or that there are less restrictive alternatives to guardianship;

• There is no right to counsel for the respondent in the proceeding;

• In most cases there is no hearing and the determination of what is in the respondent’s best interests is left to the discretion of the court.

• The guardianship is plenary; that is, the person under guardianship loses to right to make any and all decisions;

• The appointment of a guardian has no time limit and continues indefinitely; indeed, guardianship does not terminate at the age of majority of upon the marriage of the person who is developmentally disabled, but shall continue during the life of such person, or until terminated by the court.

• There is no requirement that a guardian of the person ever report on the respondent’s personal circumstances and there is no review of the necessity for continuation of guardianship by the court; and

• In a guardianship modification or termination proceeding, the statute does not identify the party with the burden of proof and case law leans toward requiring the respondent to demonstrate a change in circumstances before a guardianship decree may be modified or terminated.

As this brief description of the statute demonstrates, it is entirely out of date with regard to procedural protections that are now both statutorily and constitutionally required when compared with article 81 of the MHL.56

Substantive Due Process

Under the Fourteenth Amendment to the United States Constitution, a state government may not deprive an individual “of life, liberty, or property, without due process of law.” The Supreme Court has interpreted the guarantee of “due process of law” in the Fifth and Fourteenth Amendments to include “a substantive component that bars certain...
arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.” 58 As discussed above, article 17-A has numerous procedural flaws that may lead to erroneous determinations. In addition, the statute also violates the substantive due process rights of respondents for lack of any clear criteria for the court to adjudicate when presented with a guardianship application and by not requiring that there be any inquiry into whether guardianship is the least restrictive alternative.59

For example, article 81 requires clear and convincing evidence of the necessity of guardianship before a guardian will be appointed and functional limitations must be proven before a guardianship is imposed.60 By contrast, the decision to appoint a guardian of the person or property, or both, under article 17-A is based upon the less-stringent best interest standard.61 The best interest standard has been described as “amorphous”62 and the “criteria necessary to support a finding that appointment of a guardian is appropriate in a particular case are rarely articulated but frequently assumed.”63 Given the gravity of the liberty and property interests at stake in an article 17-A guardianship proceeding, the best interest standard must be substituted with a functional test requiring the court to scrutinize a respondent’s abilities, rather than permitting the court to rest on a diagnosis when disposing of the application. Indeed, the subjective best interest standard, makes a guardianship order difficult to appeal and poses obstacles to restoration of the respondent’s rights in the future.

Equal Protection of the Law

Under the Fourteenth Amendment of the U.S. Constitution, individuals subjected to Article 17-A guardianship proceedings are also denied the equal protection of the laws. "While the end to be achieved by article 17-A and article 81 is the same, the means is not, and the inequality of treatment is not justifiable." 64

The Fourteenth Amendment requires that where a person’s fundamental rights and liberties are implicated, “classifications which might invade or restrain them must be closely

59 In the case of In re Guardianship of Dameris L., Surrogate’s Court New York County (Glen, J.) wrote that "in order to withstand constitutional challenge, including, particularly, challenge under our own state Constitution’s due process guarantees, SCPA article 17-A must be read to include the requirement that guardianship is the least restrictive alternative to achieve the state’s goal of protecting a person with intellectual disabilities from harm connected to those disabilities. Further, the court must consider the availability of “other resources,” like those in Mental Hygiene Law § 81.03(e), including the support network of family, friends and professionals before the drastic judicial intervention of guardianship can be imposed (38 Misc. 3d 570, 578-579 [2012]).
60 See Addington v. Texas, 441 U.S. 418 (1979) -- , adopting a "standard of proof is more than an empty semantic exercise." In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.”
61 SCPA 1754
64 See, Monthie, supra note 42 at 988.
scrutinized and carefully confined.” The U.S. Supreme Court requires a strict scrutiny test for state laws affecting fundamental rights, even when the class affected is not a suspect class, stating:

The guaranty of “equal protection of the laws is a pledge of the protection of equal laws.” When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

As demonstrated above, the due process protections afforded to individuals subjected to these guardianship proceedings depends on whether guardianship is being considered pursuant to article 17-A or article 81. Specifically, article 81 directs the court to limit the appointment of a guardianship even if the person is found to be incapacitated, while an article 17-A proceeding relies exclusively on the best interest standard for appointment of guardianship. There are also stark differences with the level of notice that each of the statutes requires: article 81 directs that the notice inform the alleged incapacitated person of the nature and potential consequences of the proceeding and the right to a hearing and counsel, whereas article 17-A is silent as to notice beyond providing a copy of the petition to the individual with a disability. Once the petition proceeds to a hearing, the right to counsel, the right to a mandatory evidentiary hearing, and the standard of proof applied at the hearing all differ dramatically.

Also, when the court appoints a guardian, the article 81 process directs that the guardianship be tailored and that the person’s right to participate in decision-making not be encumbered to the greatest extent possible. Article 81 specifically directs that guardianship must be administered in the least restrictive manner after consideration of all other alternatives. Article 17-A directs the appointment of only a plenary guardianship. Furthermore, article 17-A uses a lower standard of proof as compared to article 81. Article 81 expressly requires courts to apply a clear and convincing evidence standard of proof, whereas article 17-A uses a best interest standard.

Restoration of Rights

A person subjected to an article 17-A guardianship faces greater difficulty when attempting to terminate or modify the guardianship. Article 17-A is silent on the burden of proof in a termination proceeding, but the majority of written decisions place the burden on the person seeking to terminate the guardianship—the person with a disability. On the

67 See Monthie, supra note 42, 968-970.
68 See Monthie, supra note 42, 980-983.
other hand, article 81 specifically prescribes a mechanism for termination of the guardianship and places the burden on the party seeking to continue the guardianship.  

_Closing Thoughts on Constitutional Analysis_

"The line drawn between individuals subjected to article 17-A and article 81 is an artificial one, and one that should be (and is) prohibited by the due process clause." In fact, the New York judges have struggled with these divergent processes and have recognized that people with developmental disabilities can be subject to either article 17-A or article 81 guardianships and should treated equally. In _Matter of Derek_, Judge Eugene Peckham, then the Broome County Surrogate’s Court held: "There [was] no rational reason why the respondent in a contested article 81 guardianship proceeding should be [able] to assert [a] ... privilege while the respondent in a contested article [17-A] guardianship ... cannot." Judge Peckham’s pronouncement captures the disparities in the statutory schemes governing guardianship in New York State.

IV. Article 17-A is indefensible under the Americans with Disabilities Act

Article 17-A provides inferior due process protections to people with developmental disabilities and traumatic brain injuries compared to all other New Yorkers who are afforded the superior protections of article 81 of the Mental Hygiene Law. This is clearly discriminatory on the basis of type of disability, and, as such, violates Title II of the Americans with Disabilities Act. Additionally, in November 2012, New York State created the Olmstead Development and Implementation Cabinet ("Olmstead Cabinet"), “charged with developing a plan consistent with New York’s obligations under the ... _Olmstead v. L.C._” decision.

By way of background, on June 22, 1999, the U.S. Supreme Court held in _Olmstead v. L.C._ that unjustified segregation of individuals with disabilities constituted discrimination in violation of Title II of the ADA. The Court held that public entities must provide community-based services to persons with disabilities when (1) such services are appropriate; (2) the affected persons do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated, taking into account the resources available to the public entity and the needs of others who are receiving disability services from the entity. This decision placed an affirmative duty on states to ensure that the state’s services, programs, and activities for people with disabilities are administered in the most integrated setting appropriate to the person’s needs.

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70 _See_ Monthie, _supra_ note 42, 987-988.
71 _See_ Monthie, _supra_ note 42, at 990.
72 _See, In re Guardianship of B.,_ 190 Misc. 3d 581, 585 (Co. Ct. Tompkins County. Peckham, J.) - "The equal protection provisions of the federal and state Constitutions would require that mentally retarded person in a similar situation be treated the same whether they have a guardian appointed under [A]rticle 17-A or [A]rticle 81."
73 12 Misc. 3d 1132 (Sur. Ct., Broome County 2006).
74 _Id.,_ at 1134-1135
The Olmstead Cabinet examined New York’s compliance with Olmstead, and issued a thirty-one-page report with recommendations in October 2013. This report concluded that Article 17-A discriminated against people with intellectual and developmental disabilities under the ADA, because:

(i) Under Article 17-A, the basis for appointing a guardian is diagnosis driven and is not based upon the functional capacity of the person with disability. A hearing is not required, but if a hearing is held, Article 17-A does not require the presence of the person for whom the guardianship is sought.

(ii) Additionally, Article 17-A does not limit guardianship rights to the individual’s specific incapacities, which is inconsistent with the least-restrictive philosophy of Olmstead.

(iii) Once guardianship is granted, Article 17-A instructs the guardian to make decisions based upon the “best interests” of the person with a disability and does not require the guardian to examine the choice and preference of the person with a disability.

The Olmstead Cabinet recommended that article 17-A be modernized in light of the Olmstead mandate to mirror the more recent article 81 with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision-making.” In 2015, the Office for People With Developmental Disabilities proposed a (OPWDD) departmental bill to the legislature, which sought to redress the discrimination criticized in the Olmstead report. The bill was not enacted. In 2016, two new bills were introduced: Senate bill 5840 and Assembly bill 8171. Neither of these bills were enacted and legislative reform efforts since 2017 have remained elusive as priorities changed with the advent of the COVID public health crisis in 2019.

Reform of Article 17-A must also recognize that there are less restrictive decision-making alternatives to guardianship that are described below. These alternatives are identified as a continuum of options available to potentially meet the needs of individuals with developmental disabilities.

V. Alternatives to Plenary Guardianship

Health Care Proxies and other Health Care Advance Directives;

Article 29-C of the Public Health Law establishes a decision-making process that allows a competent adult (the principal) to appoint an agent to decide about health care in the event the principal becomes unable to decide for him or herself. The proxy law covers decisions to consent to or refuse any treatment, service or procedure to diagnose or treatment an individual’s physical or mental condition. Adults are presumed competent to

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76 The Cabinet’s mandate is to recommend law and policy changes to ensure that people with disabilities receive services and supports in settings that do not segregate them from the community. [https://www.ny.gov/programs/olmstead-communityintegration-every-new-yorker-last](https://www.ny.gov/programs/olmstead-communityintegration-every-new-yorker-last).
designate a health care agent unless they have a guardian appointed for them. 77 OPWDD regulations encourage the execution of health care proxies for people with developmental disabilities. 78 Pursuant to OPWDD regulations, in order for a person (the "principal") to execute a health care proxy, the person must have the requisite capacity to understand that he or she is delegating to another person the authority to make medical decisions in the event of incapacity. 79

A 2008 chapter amendment to article 33 of the MHL authorized the creation of a simplified advance directive for persons with developmental disabilities. 80 The form shall specify, at the option of the principal, what end-of-life treatment the person wishes to receive; may designate a health care agent consistent with the provisions of this article; and may, at the option of the principal, authorize the health care agent to commence making decisions immediately upon the execution of the proxy, provided that all such decisions made prior to a determination of incapacity pursuant to section twenty-nine hundred eighty-three of the public health law shall be made in direct consultation with the principal and the attending physician; and provided, further, that if, after such consultation, the principal disagrees with the agent’s proposed decision, the principal's wishes shall prevail; and provided, further, that, in the case of any decision to withhold or withdraw artificial nutrition or hydration, the principal’s wishes must have been recorded in the health care directive or stated in the presence of the agent and the attending physician; and further, provided, that the consultation among principal, agent and attending physician must be summarized and recorded in the principal's medical record. 81

The feature of the law permitting the proxy to be effective immediately upon execution, have led to the phrase "Act Now" health care proxy being ascribed to this initiative. The 2008 chapter amendment also requires that the form for the simplified advance health care directive be developed by the commissioner of OPWDD in consultation with the commissioner of health, providers of service authorized to provide services pursuant to article sixteen of this chapter, advocates, including self-advocates, and parents and family members of persons receiving services from such providers. A workgroup was formed to implement the chapter amendment shortly after its enactment. Regrettably, a form has yet

77 Public Health Law (PHL) § 2981[1][b]); but see, Matter of John T. (Hanson), 119 A.D. 3d 948 (2d Dept. 2014) where the Court reversed the presumption of competency based upon a diagnosis of moderate to severe mental retardation.
78 See 14 N.Y.C.R.R. 633.20
79 14 N.Y.C.R.R. 633.20 (a)(1)(ii). There are also special witnessing requirements when a health care proxy is executed by a person with developmental disabilities. Specifically, for persons who reside in OPWDD facilities, at least one witness shall be an individual who is not affiliated with the facility and at least one witness shall be a physician, nurse practitioner, physician assistant or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the MHL or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician, nurse practitioner, physician assistant, or clinical psychologist possess specialized training or three years experience in treating developmental disabilities (see PHL § 2981[2][c]).
80 L. 2008, c. 210; MHL 33.03[e]).
81 Id.
to be approved by OPWDD so this statutory innovation, while potentially beneficial to people with developmental disabilities, remains dormant.

**Powers of Attorney**

A Power of Attorney is a legal instrument that is used to delegate legal authority to another. The person who signs (executes) a Power of Attorney is called the Principal. The Power of Attorney gives legal authority to another person (called an Agent) to make property, financial and other legal decisions for the Principal. There is no health care decision making authority attached to a Power of Attorney.

A Principal can give an Agent broad legal authority, or very limited authority. The Power of Attorney is frequently used to help in the event of a Principal’s illness or disability, or in legal transactions where the principal cannot be present to sign necessary legal documents. A person with a developmental disability who has capacity to execute a power of attorney may do so subject to regulations of the department of mental hygiene that may apply if the person resides in an OPWDD operated or licensed facility.

**Representative payment, supplemental needs trusts, ABLE accounts**

A person with a disability who is receiving public benefits but who may be unable to manage his or her funds, may have a representative payee appointed which can negate the need for a property guardian. For example, the Social Security Administration (SSA) has a regulatory scheme implementing representative payment. As a matter of policy, SSA states that every beneficiary has the right to manage his or her own benefits. However, some beneficiaries due to a mental or physical condition or due to their youth may be unable to do so. Under these circumstances, SSA may determine that the interests of the beneficiary would be better served if SSA certified benefit payments to another person as a representative payee.

A Supplemental Needs Trust (also called a Special Needs Trust) is a trust which, under federal and State law, allows a trustee (either a corporation authorized by law or an individual) to manage funds for the benefit of a person with a disability (the “beneficiary”), while preserving that person’s eligibility for government benefits such as Supplemental Security Income or Medicaid. Such means-tested public benefits can make a significant

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82 The New York State Power of Attorney statute was recently amended, effective June 13, 2021. See, L. 2020, c. 323.
83 See, definitions at General Obligations Law (GOL) § 5-1501.
84 However, an agent may make financial decisions relative to health care (see GOL§ 5-1502k).
85 14 N.Y.C.R.R. 22.3 - when a patient may sign a legal instrument.
86 20 C.F.R. Part 404, subpart U; Part 416 (Supplemental Security Income). SSA’s policy is that every beneficiary has the right to manage his or her benefits. However, some beneficiaries due to a mental or physical condition or due to their youth may be unable to do so (see 20 C.F.R. 416.601).
87 20 C.F.R. 2010; to the extent the SSA regulations afford due process rights to beneficiaries alleged to need a representative payee those remedies are found cross-referenced to sub-part J of the regulations (20 C.F.R. 2030[b]).
positive impact on the quality of life available to the person with disabilities, permitting them to live successfully in their home communities, while the trust funds can pay for supplemental needs and wants of the beneficiary which the public funds do not provide.\textsuperscript{89}

In contrast, an ABLE account (Achieving a Better Life Experience \[ABLE\] Act)\textsuperscript{90} is a tax-advantaged savings program for individuals with disabilities enabled by federal law and modeled after the federal college savings plans. ABLE accounts enjoy tax free growth on the income within the account. Future distributions are allowed on a tax-free basis so long as they are for "qualified expenses." In addition, these distributions generally will not count as income to the beneficiary for the purposes of means tested government programs such as SSI and Medicaid. States implement the federal law and in New York, the ABLE program administered by the New York State Comptroller under authority granted in the State Finance Law and MHL. \textsuperscript{91}

\textit{Single Transaction Orders}

An underutilized provision of New York’s adult guardianship law, MHL § 81.16(b), permits a judge to “authorize a [necessary] transaction or transactions” that can solve a single problem or a series of interrelated problems that stem from a health concern. Informally known as a "one-shot" provision, section 81.16(b) can meet a health care provider’s need for informed consent to a medical procedure, or for authorization for a hospital discharge without the requirement of first establishing guardianship. Using section 81.16(b) thus avoids the imposition of guardianship, permits a person to retain all their rights, personhood, and dignity, while offering a solution to the vulnerable person’s immediate health concerns and, importantly, takes into consideration that individual’s specific, related challenges. In addition to decisions that are directly related to a person’s health and medical treatment, a “one-shot” solution can also encompass related issues that impact on a person’s health, such as preserving that person’s home from foreclosure, securing an inheritance that makes it possible to pay for necessitites. For clients served in the OPWDD system, single transaction guardianships have been used very effectively to establish SNTs in those instances where the person may have received an inheritance of a retroactive SSA benefit.

\textit{Supported Decision Making}

Whereas guardianships involve a third party making decisions for the individual subject to the regimen, supported decision-making focuses on supporting the individuals' own decisions. As stated by the American Bar Association:

\textsuperscript{90} 26 U.S.C. 529A
\textsuperscript{91} See MHL art. 84; State Finance Law 99-x.
Supported decision-making constitutes an important new resource or tool to promote and ensure the constitutional requirement of the least restrictive alternative. As a practical matter, supported decision-making builds on the understanding that no one, however abled, makes decisions in a vacuum or without the input of other persons whether the issue is what kind of car to buy, which medical treatment to select, or who to marry, a person inevitably consults friends, family, coworkers, experts, or others before making a decision. Supported decision making recognizes that older persons, persons with cognitive limitations and persons with intellectual disability will also make decisions with the assistance of others although the kinds of assistance necessary may vary or be greater than those used by persons without disabilities.92

Supported Decision-Making New York (SDMNY) is a consortium of Hunter/CUNY, The New York Alliance for Innovation and Inclusion, and Arc of Westchester with Disability Rights New York (DRNY) as its legal partner which recently concluded a five year pilot funded by the Developmental Disabilities Planning Council.93 Drawing on the expertise of its members, and on the work of advocates and pilots in other countries, SDMNY has developed a three-phase model, utilizing trained facilitators who, in turn, are supported by experienced mentors. The facilitators work with people with intellectual and developmental disabilities (who are referred to as “Decision Makers,” to emphasize their centrality to the process) and the trusted persons in their lives who they have chosen as their supporters. They assist the Decision Makers in identifying the areas in which they want support, the kinds of support they want, and the ways in which that support should be given. The “product” of the facilitation, which typically involves monthly meetings over a period of nine to twelve months, is a contract negotiated by the Decision Maker and her/his supporters, the Supported Decision-Making Agreement (the SDMA) that reflects their agreement. The SDMA is not just a piece of paper, but describes and memorializes a flexible process, which the Decision Maker can use for the rest of her/his life to make her/his own decisions, with the support s/he needs and desires.94

Presently in New York, the SDMA has no binding legal effect, and third parties--health care professionals, financial institutions, landlords, for example-- are under no legal obligation to honor it. An SDM program bill was introduced during the 2020 session, however, and if enacted, the bill would, as other states have done, require acceptance by third parties of SDMA agreements and relieve those third parties from liability for good faith reliance.95

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93 https://sdmny.hunter.cuny.edu/
95 S. 7107 (2020). If enacted, OPWDD will be charged with developing regulations to implement the statute. The regulations, among other things, will further define the rights of decision makers and the training required for supporters to ensure the law meets its intended objectives.
VI. Recommendations and Conclusions

The NYSBA Disability Rights Committee urges the reform of Article 17-A of the SCPA and recognition that people with developmental disabilities should not be deprived of their agency, autonomy, and civil rights based upon misassumptions about their abilities or the quality of their lives. The Committee offers an Appendix with legislative proposals that can be advanced and supported in the upcoming 2022 legislative session.

VII. Proposed Statutory Reform - APPENDIX
a. Law Revision Commission - proposal to reform article 17-A
b. Office of Court Administration - program bill #30
c. Document comparing the two legislative proposals
d. Supported Decision Making- 2020 OPWDD program bill (S. 7107)
e. Stakeholder Comments on OPWDD program bill

Dated: November 15, 2021

Joseph Ranni
Alison Morris
Co-Chairs
New York State Bar Association Committee on Disability Rights
NEW YORK STATE BAR ASSOCIATION COVID-19 RESOLUTIONS

Approved by House of Delegates: November 7, 2020

The following Resolutions, as clarified and revised, have been approved by the New York State Bar Association (NYSBA) House of Delegates (HOD) on November 7, 2020.

Please note that the full Health Law Section COVID-19 Report remains available at the links below:


https://nysba.org/healthlawsectioncovid19/

Resolution #1

Public Health Legal Reforms

The seriousness and magnitude of the present COVID-19 pandemic are unprecedented over the course of the last hundred years by any measure - the number of lives lost, the number of people afflicted with serious COVID-19 illness and the complications of pre-existing co-morbidities, the risks to health care workers and other frontline and essential workers, disruptions to businesses and the New York State ("the State") economy, impacts upon employment and family life, and the profound trauma, losses and bereavement persons, families, communities, especially communities of color, have suffered and continue to suffer. Public health law and preparedness play an essential role in addressing disasters and emergencies. New York, like the rest of the country, was unprepared to deal with the pandemic. The report of the Health Law Section recommends reforms to public health law addressing identified gaps in the law to strengthen the preparedness and capacities of the State both during the present and in future pandemics, and to protect the public’s health.

The New York State Bar Association recommends: State Government to:

A.1.(a) Enact a state emergency health powers act addressing gaps in existing laws in New York, drawing upon the Model State Emergency Health Powers Act (MSEHPA), developed by the Center for Law and Public Health at Georgetown and John Hopkins Universities (2001), and other sources as appropriate;

A.1.(b) Adopt crisis standards of care addressing gaps in existing laws in New York, drawing upon the Crisis Standards of Care, developed by the Institute of Medicine (2012); The Arc, Bazelon Center for Mental Health Law, Center for Public Representation and Autistic Self Advocacy Network Evaluation Framework for Crisis Standard of Care Plans (Evaluation Framework); and other sources as appropriate.
Resolution #1 (continued)

A.1.:  

A.1.(c) Provide comprehensive workforce education and training in the implementation of the above state emergency health powers act and crisis standards, including proper use and disposal of PPE and other equipment;

A.2.(a) Appoint and maintain a core team of emergency preparedness experts to review evidentiary sources and draft legislation to strengthen emergency preparedness planning; and

A.2.(b) Evaluate the public benefit and costs of laws and/or regulations waived during the COVID-19 emergency, and the Executive Orders and emergency regulations issued in response to the COVID-19 emergency and consider eliminating or amending those laws and/or regulations, as appropriate.

B.1.(a) Adopt resource allocation guidelines addressing gaps in existing laws in New York, drawing upon the New York State Task Force on Life and the Law 2015 Report, Ventilator Allocation Guidelines, the Evaluation Framework, and other sources as appropriate;

B.1.(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, persons 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 to all persons as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID-19 crisis;

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. Amend the New York State Public Health Law: Article 29-C “Health Care Proxy,” to require in the case of a State Disaster Emergency Declaration:

B.2.(a) at least one, rather than two, witnesses, or

B.2.(b) attestation by a notary public in person or remotely;
Resolution #1 (continued)

B.2:

B.2.(c) adoption of legislation or regulation as necessary to implement:

i. procedural requirements for remote witnessing and execution of a health care proxy;

ii. specific language to be included in the attestation of the notary public;

iii. that the services of a witness and a notary public be made available by the facility where the individual executing the health care proxy is being treated; and

iv. that the services of a witness and notary public be provided to institutionalized individuals without charge and regardless of their ability to pay.

B.3. Nothing contained in the Resolutions herein calls for consideration of any proposed change to New York Law as to authority to terminate treatment over the objection of a patient or the patient’s surrogate.

Resolution #2

Legal Reforms in Care Provision, Congregate and Home Care, Workforce and Schools

The New York State Bar Association recommends: State Government to:

A.1. Evaluate the public benefit and costs of continuing the following laws and/or regulations which were waived by executive orders, for possible repeal and/or amendment:

A.1.(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.

A.1.(b) 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.

A.1.(c) 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.
Resolution #2 (continued)

A.2.:

A.2. Congregate Care and Home Care: Ensure, as applicable to all congregate settings and residents thereof, and recipients of home care, including:

A.2.(a) Older Adults, Persons with disabilities, Persons with disabilities in Residential Facilities or Group Homes, Persons confined in Psychiatric Centers, Nursing Home and Adult Care Facilities Residents, and Nursing Home Providers and Adult Care Facilities Operators:

   i. 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;

   ii. Adequate provision of PPE;

   iii. Adequate levels of staffing;

   iv. Adequate funding of employee testing;

   v. Consistent and timely tracking and reporting of case and death data;

   vi. Adoption of non-discriminatory crisis standards and ethics guidelines;

   vii. Recognition and honoring of Older New Yorkers’ and New Yorkers’ with disabilities right to health and human rights, including rights to be free from abuse and neglect and to care in the most integrated setting, as protected under federal law and international conventions; and

   viii. 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.2.(b) Persons incarcerated and correctional facilities and care: Ensure:

   i. Adequate access of persons incarcerated to COVID-19 testing, medical care and mental health and supportive services;

   ii. COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;

   iii. Release to the community of older persons and persons with disabilities who are incarcerated or living with advanced illness who do not pose a danger to the community;

   iv. Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and
Resolution #2 (continued)

A.2.(b):

v. Recognition and honoring of the right to health and human rights of persons who are incarcerated, as protected under international conventions.

A.2.(c) Immigrants in detention facilities: 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:

i. Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers, and recognition and honoring of immigrants’ right to health and human rights, as protected under international conventions.

A.3. Telehealth: Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

B.1.(a) Prioritize additional childcare funding and implementing novel childcare staffing strategies, such as utilizing staffing firms dedicated to child care to supplement the childcare workforce, to ensure quality childcare services, effective and sustainable facility operations and the health and safety of our children and childcare providers, enabling businesses to effectively reopen with sufficient childcare resources and support;

B.1.(b) Prioritize education and training pertaining to crisis standards to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services; and

B.1.(c) Prioritize enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by frontline workers under crisis conditions.

B.2. Enhance regulatory oversight, to ensure:

B.2.(a) adequate and non-discriminatory allocation of resources to persons and communities of color and vulnerable populations in conformity with state and federal laws;

B.2.(b) equitable access of persons and communities of color and vulnerable populations to health and mental health services in conformity with state and federal law, including palliative care as an ethical minimum to mitigate suffering among those persons who remain in institutional, facility, residential or home care settings, or are hospitalized during the COVID-19 crisis; and
Resolution #2 (continued)

B.2.:

B.2.(c) provision of PPE and testing to essential workers at highest risk in delivering essential services to vulnerable populations.


Resolution #3

COVID-19 Vaccine and Virus Testing: Legal Reforms and Guidelines

The authority of the State to respond to a public health threat and public health crisis is well-established in constitutional law and statute. In balancing protection of the public’s health and civil liberties, the Public Health Law recognizes our interdependence, and that a person’s health, or her/his/their lack of health, can and does affect others. This is particularly true for communicable and infectious diseases. Since the discovery of the smallpox vaccine in 1796, vaccines have played a crucial role in preventing the spread of dangerous and often fatal diseases. The New York Public Health Law mandates several vaccinations for students at school-age up through post-secondary degree educational levels, and for health care workers. The Public Health Law also mandates treatment for certain communicable diseases, such as tuberculosis.

The New York State Bar Association recommends:

To protect the public’s health, it would be useful to provide guidance, consistent with existing law or a state emergency health powers act as proposed in Resolution #1, to assist state officials and state and local public health authorities should it be necessary for the state to consider the possibility of enacting a vaccine mandate. A vaccine must not only be safe and efficacious; it must be publicly perceived as safe and efficacious. Diverse populations, including people of color, older adults, women, and other marginalized groups, must be represented in clinical trials. The trials also must follow rigorous protocols that will establish a vaccine’s safety and efficacy through expert consensus of the medical and scientific communities.¹

¹ The National Academies of Sciences, Engineering and Medicine is an example of a recognized organization of medical and scientific experts that assists U.S. policymakers, such as in planning for equitable allocation of COVID-19 vaccines.

It is noted further that nothing in this Resolution or the underlying Report should be regarded as suggesting that emergency use authorization should be considered in determinations concerning any immunization requirement.
Resolution #3 (continued)

State Government to:

A.1. Ensure Access to Virus Testing: Establish a coordinated statewide plan for Virus Testing to ensure:

A.1.(a) frontline health care workers are prioritized in access to rapid diagnostic testing; and

A.1.(b) the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

A.2. Adopt Ethical Principles Guiding Equitable Allocation and Distribution: Once available, a vaccine should first be equitably allocated and distributed based upon widely accepted ethical principles including maximizing benefit to the society as a whole through reducing transmission and morbidity and mortality; recognizing the equal value, worth and dignity of all human persons and human lives; mitigating suffering, health inequities and disparities; and ensuring fairness and transparency in decision making. Health care workers and other essential workers most endangered by COVID-19 and populations at highest risk must be afforded priority access to a vaccine.

A.3. Encourage Public Acceptance and Educational Programs: Efforts must be made to encourage public acceptance. Public health authorities should build on existing systems and infrastructures including community-based organizations and networks. The campaign must acknowledge distrust in communities of color from a history of medical exploitation. Efforts should include linguistically and culturally competent educational and acceptance programs, and stakeholder community engagement strategies, to build public trust, widely encouraging vaccine uptake and addressing vaccine hesitancy.

A.4. Take Steps to Protect the Public's Health and Consider Mandate As May Be Necessary to Reduce Risks of Transmission and Morbidity and Mortality: Our state and nation have suffered terrible losses from COVID-19. As of September 3, 2020, 186,000 Americans, including 26,000 New Yorkers, have lost their lives. Unemployment has been at the highest levels since the Great Depression. Numerous businesses have closed.

Should the level of immunity be deemed insufficient by expert medical and scientific consensus to check the spread of COVID-19 and reduce morbidity and mortality, a mandate and state action should be considered, as may be warranted, only after the following conditions are met and as a less restrictive and intrusive alternative to isolation, subject to exception for personal medical reasons:

A.4.(a) evidence of properly conducted and adequate clinical trials;

A.4.(b) reasonable efforts to promote public acceptance;
Resolution #3 (continued)

A.4.:  

A.4.(c) fact-specific assessment of the threat to the public health in various populations and communities; and 

A.4.(d) expert medical and scientific consensus regarding the safety and efficacy of a vaccine and the need for immunization. 

Enforcement of any immunization requirement should be along the lines of current New York law.
WITHDRAWN from Resolutions: Resolution #2 Provisions and Resolution #4

WITHDRAWN: Resolution #2 Provisions

WITHDRAWN:
2.A.1. 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.  

WITHDRAWN:
2.B.1.(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.  

2.B.1.(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.  

WITHDRAWN: Resolution #4 in its entirety

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:

3.A.2.(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 infliction of harm).

WITHDRAWN: Resolution #4 in its entirety (continued)
3.A.2.(a): intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm); and

3.A.2.(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):

3.A.3.(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;

3.A.3.(b) a second practitioner concurs with the determination; and

3.A.3.(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:

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:**

3.C. 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).