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COLUMNS

DEPARTMENTS

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Anything Less Would Be Uncivilized

By DANIEL J. HORGAN

Daniel J. Horgan is the 99th president of the Connecticut Bar Association. Attorney Horgan is an experienced litigator with Horgan Law office in New London, representing clients in workers' compensation cases and various civil matters in both State and Federal courts as well as the Mashantucket and Mohegan Tribal Courts. He has been chosen by his peers to frequently act as an arbitrator and mediator.

Civility in the legal profession has routinely been a topic of studies and conversations among bar associations across the country for a number of years. Have you noticed recently, however, there has been an increase of calls for civility? When I was installed as CBA president last May, I felt the need to make civility a part of my bar year platform, along with collaboration and wellness. Newly installed American Bar Association president, Debra Enix-Ross (NY), has also made civility a critical piece of her national platform during this bar year as she announced to the House of Delegates in Chicago at the ABA's Annual Meeting, where she stated: "Our differences are aggravated by incivility in public discourse…."[1]

Bullying, intimidation, and nastiness in our profession all too often has replaced negotiation, discussion, and skillful advocacy. Frayed patience and frustration coupled with the wall wedged between lawyers from remote communication and lack of face-to-face meetings with our colleagues brought on by the COVID-19 pandemic has increased rude behavior in our profession. The refusal to give a reasonable extension of time in litigation is one example of rude and unnecessary behavior, while not returning phone calls and engaging in obnoxious and abrasive rhetoric with colleagues in transactional matters wastes time and invariably increases fees to clients. What can we do about it? Is discussing and writing about civility going to make a difference? Perhaps not, but it is a start. We are lawyers having earned our Juris Doctorates and who have passed the bar examination. We have ethical responsibilities preached to us since our first day of practice. Civil behavior is a core element of our profession. Moreover, incivility among lawyers extends beyond litigation interfering with transactions of every kind. Even more concerning when discussing the topic of incivility is that younger lawyers, women lawyers, and lawyers of color and other marginalized groups are disproportionately on the receiving end. Speaking of younger lawyers, the concept of civility should begin in our law schools. Former United States Supreme Court Chief Justice Burger once gave the following response to law school professors who believed they only needed to teach law students how to think: "Lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice."[2]

Not only are bar associations focused on this topic, but our judiciary is concerned as well. Recently appointed Connecticut Supreme Court Justice Joan Alexander spoke of respect, dignity, and emphasized civility during her keynote

"Zealous advocacy does not authorize lawyers to be rude or disrespectful."

— Connecticut Supreme Court Justice Joan Alexander

address to the CBA's Young lawyers Section (YLS) Leadership Retreat attendees: "Zealous advocacy does not authorize lawyers to be rude or disrespectful."[3] Justice Alexander went on to tell our YLS leaders that their reputation is their most prized professional asset and that civility and respect should not only be given to courts and colleagues but also to the people you work with, from janitors to secretaries.

We have all seen various definitions of civility and understand the word. I came across former President of Boston University, John Silber's take on civility that I find particularly enlightening: "The lawyers' contribution to the civilizing of humanity is evidenced in the capacity of lawyers to argue furiously in the courtroom, then sit down as friends over a drink or dinner. This habit is often interpreted by the layman as a mark of their ultimate corruption. In my opinion, it is their greatest achievement: It is a characteristic of humane tolerance that is most desperately needed at the present time."[4] At this present time in our profession, with all that we have been through and facing great challenges ahead, we must try to add some empathy and understanding when dealing with colleagues without forfeiting our principles of zealous advocacy. Both maxims have in the past and must in the future co-exist.

The only reference to civility in Connecticut's Rules of Professional Conduct is buried in the preamble, where it states: "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." We have plenty of rules governing our conduct as lawyers, but it seems to me and many others that we need to place a greater emphasis on civility within our profession. Therefore, I am creating a task force entitled-We can do better: Connecticut's Civility Task Force. This is an issue I am confident our profession can address and overcome. It starts with the top of our profession—our judges, bar leaders, senior partners, and our most experienced mentors. We must meet this challenge by doing everything in our power. Anything less than our maximum efforts to address rude and destructive behavior in our profession is, well, frankly, UNCIVILIZED! ■

NOTES

1. Debra Enix-Ross, Presidential Address (ABA 2022 Annual Meeting, Chicago, IL, August 10, 2022).
2. Chief Justice Warren E. Burger, "Excerpts From the Chief Justice's Speech on the Need for Civility," *The New York Time*s, May 19, 1971, pg 28.
3. Justice Joan Alexander, Keynote Address (Young lawyers Section Leadership Retreat, Mashantucket, CT, August 12, 2022).
4. John R. Silber, quoted in *The Wall Street Journal*, March 16, 1972.

CONNECTICUT BAR ASSOCIATION

News & Events

CBA Members, Family, and Friends ANNUAL SUMMER OUTING

On Sunday, June 26, over 240 CBA members, officers, and past presidents and their family and friends enjoyed a summer outing at Holiday Hill in Prospect. Those in attendance enjoyed cotton candy, ice cream truck treats, and a picnic lunch. There were pony rides, mini-golf, kayaking, canoes, basketball, softball, yard games, bingo, and a rock-climbing wall. Many families that spent the day enjoyed the pool and activities. We plan to hold the annual outing again next year in June 2023.

Upcoming Education Calendar

Register at ctbar.org/CLE

OCTOBER

13 Un-Ringing the Bell: Diagnosis and Treatment in Concussion and Brain Injury
Saint Clements Castle

14 IOLTA/Law Office Management*
Grassy Hill Country Club

19 Diversity, Equity, & Inclusion Summit: The Collaborative Blueprint*
Webinar

27 Federal Practice Bench Bar Conference
Saint Clements Castle

**Ethics credit available*

NOVEMBER

4 Raising the Bar: Bench-Bar Symposium on Professionalism*
Waterbury Courthouse

8 Education Law
Webinar

10 2022 5th Annual Connecticut Bankruptcy Conference*
Saint Clements Castle

16 Legal Entrepreneur Conference*
Grassy Hill Country Club

18 Practice, Procedures, and Protocols in Connecticut Courts
Grassy Hill Country Club

CLE Pass Eligible

OCTOBER

18 Connecting the Dots in Civ & Crim Justice: Protecting People by Focusing on Animal Abuse
Webinar

25 An Introduction to the Practice of Criminal Law in Connecticut
Webinar

NOVEMBER

28 Solo/Small Firm
Webinar

DECEMBER

6 Insurance Law and Construction Law
Webinar

13 Business Law
Webinar

CBA Hosts 2022 LAW Camp for High School Students

The CBA hosted the 2022 LAW Camp virtually over the week of July 11-15. LAW Camp exposes high school students to the legal profession and gives them instruction on critical and analytical thinking to help them succeed in their educational and professional careers. During the camp, high school students were taught about different aspects of pursuing a legal career, observed a federal court jury trial, and participated in several mock lawyer exercises. Thirteen students attended the camp and 22 attorneys and law students volunteered as presenters, panelists, and coaches throughout the week.

The students were introduced to the LAW Camp with welcoming remarks from CBA President Daniel J. Horgan, who told the students, "This week is going to be so important for you to decide what kind of path you're going to choose in college and beyond. The skills you're going to learn this week, like public speaking and thinking on your feet, will help you in life. The things I learned in law school about being proud of yourself and carrying things all the way through has helped me to this day."

Throughout the camp, the students joined Zoom sessions led by CBA members. Past President Karen DeMeola and other volunteers presented on their personal journeys through college and law school and discussed how people of diverse backgrounds and educational experiences can pursue a path to success in the field of law. The students learned about basic legal concepts; the roles that lawyers, judges, and juries play in court proceedings; and the various careers paths that are open to attorneys. Halfway through the week, the students were able to virtually observe a criminal jury trial in federal court. During the trial break, Senior United States District Judge for the District of Connecticut Janet Bond Arterton, spoke with the students to explain the trial processes that took place.

Along with hearing presentations from CBA volunteers, the students also participated in activities by role playing as lawyers and conducting mock direct and cross examinations and participating in a closing argument competition. For the competition, which closed out the week, the students each prepared a closing argument with mentoring by volunteer attorneys. During the final round of the competition, CBA President-Elect Margaret I. Castinado chose a winner from the four finalists and provided closing remarks to the students, congratulating them on their participation in the camp and efforts in the competition.

CBA Hosts July 2022 Free Legal Advice Clinic

On July 26 and 27, the Connecticut Bar Association (CBA) Pro Bono Committee and Statewide Legal Services of Connecticut held a virtual Free Legal Advice Clinic where 22 volunteer attorneys met with 41 clients over Zoom meetings. Prior to the clinic, 16 volunteer paralegal and law students completed client intake forms and asked follow-up questions to help the attorneys prepare for the meetings and provide the best possible legal advice.

On the days of the clinic, the volunteer attorneys provided free legal guidance to the clients. Most of the client meetings that took place during the clinic covered topics involving family law or landlord/tenant issues.

Thank you to all those who volunteered at this important event that supports the public's access to legal representation. The CBA's next Free Legal Advice Clinic will be held on October 25 and 26 from 10:00 a.m. – 6:00 p.m. Learn more at ctbar.org/freelegaladviceclinics.

IN MEMORIAM

Frank H. Finch, Jr., president of the CBA during the 1998-1999 bar year, passed away on July 23. Originally born in Minnesota and raised in Urbana, IL, Frank H. Finch, Jr. earned his BA from Harvard College in 1953 and his law degree from Harvard Law School in 1959. That same year, he was admitted to practice in the State of Connecticut and joined the law firm of Howd & Lavieri LLP in Winsted. He was later admitted to practice before the United States District Court for the District of Connecticut and the United States Supreme Court. From 1961-1978, he served as an assistant prosecuting attorney in Connecticut state courts on a part-time basis. Eventually, he gained partnership at the firm currently known as Howd Lavieri and Finch LLP. Attorney Finch represented a wide variety of clients with a special focus on corporate and business law cases. In total, his active tenure at Howd Lavieri and Finch LLP spanned seven decades.

Attorney Finch became active in the CBA in 1959. He represented the CBA in the American Bar Association's House of Delegates for many years prior to serving as our association's president. In addition to his positions with the CBA, he also served as president of the Litchfield County Bar Association and was a James W. Cooper Fellow of the Connecticut Bar Foundation. In 1987, he became a Connecticut trial referee. He also served as chairman of the Litchfield County Standing Committee on Recommendation for Admission to the Bar. In 2000, Attorney Finch was appointed to the chief justice's Civil Commission, and in 2001, he was appointed to the Federal Court Grievance Committee. Through his career and many professional achievements, Attorney Finch proved himself to be a successful and conscientious leader of the Connecticut legal community.

CBA DELEGATION ATTENDS AMERICAN BAR ASSOCIATION ANNUAL MEETING

A delegation from the Connecticut Bar Association (CBA) attended the American Bar Association (ABA) 2022 Annual Meeting in Chicago from August 3-9. Those attending included CBA President Daniel J. Horgan, CBA President-Elect Margaret I. Castinado, Cindy M. Cieslak, Dana M. Hrelic, and Daniel A. Schwartz. During the annual meeting they attended various events and the delegation voted on resolutions as part of the ABA's House of Delegates. During the annual meeting, where retired U.S. Supreme Court Associate Justice Stephen G. Breyer received the 2022 ABA Medal, CBA President Horgan and President-Elect Castinado were able to meet Justice Breyer in-person.

(L to R) President-Elect Margaret I. Castinado, retired US Supreme Court Associate Justice Stephen G. Breyer, and President Daniel J. Horgan.

Young Lawyers Section Leaders Attend Annual Leadership Retreat and Receive Service Awards

The Connecticut Bar Association's Young Lawyers Section (YLS) hosted its annual leadership retreat on August 12-13 at Foxwoods Casino in Ledyard. The YLS Executive Committee holds this event each summer to familiarize new members of the committee with the duties of their leadership roles and to present awards to members of the committee for their service during the previous bar year.

During the retreat, Connecticut Supreme Court Justice Joan K. Alexander presented the keynote to the YLS leadership, focusing on the importance of the rule of law and professional conduct. "I remind you that the most effective advocacy is not the result of tone and theatrics but is advanced from a solid understanding of the issues at stake," stated Justice Alexander, as she emphasized how attorneys must always remember to act with respect and civility.

After the keynote speech, 12 YLS Executive Committee members received awards for their service during the 2021-2022 bar year.

"Last year I had the pleasure of serving as chair and the year's successes could not have been had without all of the hard work and dedication that the [YLS] Executive Committee put in," stated Joshua J. Devine, 2021-2022 YLS chair. "While I am here today to present awards to a few [YLS] Executive Committee members who went above and beyond. I must say it was very difficult to select the award recipients because I truly believe all the [YLS] Executive Committee members put in 110 percent, and I want to again thank and recognize everyone who served last year."

Leadership Award

Josiah Tyler Butts, Robinson+Cole, earned a leadership award for organizing several CLE and non-CLE events, including a revamped YLS pro bono outing.

John M. Russo, Jr., State of Connecticut—Office of the Attorney General, received a leadership award for recruiting several new members to the YLS Executive Committee and organizing a successful holiday party, where the YLS made a sizeable contribution to Project ALS.

Rookie of the Year Award

Alexander R. Cox, Locke Lord LLP, received a Rookie of the Year Award for his exemplary service on the YLS Executive Committee and for organizing three CLE programs for the YLS.

Andrew J. Glass, Karsten & Tallberg LLC, earned a Rookie of the Year Award for his work on the YLS Executive Committee and as YLS committee chair of Federal Practice.

Star of the Year Award

Jermaine A. Brookshire, Jr., Wiggin and Dana LLP, and **Colleen M. Garlick**, Hassett & Donnelly PC, each earned a Star of the Year Award for their service as CLE directors for the YLS.

Vianca T. Malick, Diana Conti & Tunilla LLP, received a Star of the Year Award for her service as YLS secretary, successfully launching the YLS newsletter, as well as both participating in and tracking the YLS Executive Committee's total pro bono and volunteer hours earned throughout the 2021-2022 bar year.

Christopher R. Henderson, Berchem Moses PC, garnered a Rookie of the Year Award for his service as YLS committee chair of Labor and Employment and organizing a successful CLE program for the YLS Section.

Volunteer of the Year Award

Caroline Boisvert, Axinn Veltrop & Harkrider LLP; **Sara Dickson**, UnitedHealthcare: **Ronald J. Houde, Jr.**, Ouellette Deganis Gallagher & Grippe LLC; and **Kara Zarchin**, Day Pitney LLP, received Volunteer of the Year Awards for collectively providing over 275 hours of pro bono and public service work during the 2021-2022 bar year.

(L to R) CBA President Daniel J. Horgan, 2021-2022 YLS Chair Joshua J. Devine, Connecticut Supreme Court Justice Joan K. Alexander, 2022-2023 YLS Chair Christopher Klepps, YLS Chair-Elect Sara J. Dickson, YLS Treasurer Vianca T. Malick, and YLS Secretary Trent LaLima


David Nunner

CBA Welcomes New Director of Diversity and Human Resources

The Connecticut Bar Association is pleased to announce the addition of David Nunner as it's new Director of Diversity and Human Resources as of September 12.

David comes to us from Webster Bank, where he worked in the Human Resources Department. His experience included creating and facilitating all DE&I workshops and coaching and developing for all new hires. David also helped create and build all DE&I employee resource groups.

David sits as president on the board of directors for Connecticut Theatre Company in New Britain, where he helps educate and inspire the community. He attended Philadelphia Biblical University (Cairn University) where he studied Vocal Performance and Biblical Studies.

"I am thrilled to join the CBA team! I'm excited to be a part of such an amazing association. I look forward to working with all members and staff as a useful resource and partner. My hope is that all feel a true sense of belonging."

PEERS AND CHEERS

Littler Mendelson has added **Paula N. Anthony** as a shareholder in its New Haven office. An advisor to clients in the private and public sectors, Attorney Anthony defends employers in litigation matters, mediations, and arbitrations.

Amy E. Markim has been elected a shareholder of **O'Sullivan McCormack Jensen & Bliss PC**. She is an experienced business advisor, litigator, and trial attorney.

Melicent B. Thompson, litigation partner at **Gfeller Laurie LLP**, has been elected as the firm's managing partner. She has over 25 years of litigation experience in Connecticut and Georgia. Her insurance coverage practice encompasses all areas of coverage advice in both the first- and third- party contexts and related litigation services, including declaratory judgment actions, defense of bad faith claims and reinsurance matters.

Julie Jason, a seasoned investment counsel and award-winning author, has released a new book for lawyers and their clients, *The Discerning Investor: Personal Portfolio Management in Retirement for Lawyers (and Their Clients)*, through the American Bar Association.

Namita Shah, partner and chair of the Private Equity and Finance Group at **Day Pitney LLP**, was selected as the recipient of the Cornerstone Award in recognition of her contributions to the South Asian Bar Association (SABA) and the South Asian legal community by SABA North America for 2022. The Cornerstone Award is given to an individual who exemplifies high achievement in one of more of the following: promoting the professional development of the South Asian legal community through networking, education, advocacy, and mentoring; ensuring the civil liberties of the South Asian community; serving the legal interests of the South Asian community and the community at large; or encouraging greater participation by the South Asian community in the legal profession or the government.

Joanne Butler and **Lori E. Romano** have joined **Cummings & Lockwood** as principals in the Private Clients Group. Attorney Butler, who is based in the Stamford office, has 23 years of experience developing estate planning strategies for individuals and families, as well as representing individual and corporate fiduciaries in all aspects of estate and trust administration. Attorney Romano, who is based in the Greenwich office, has 30 years of experience practicing in the areas of estate planning and estate and trust administration.

Wesley W. Horton and **Karen L. Dowd** have joined **McElroy Deutsch Mulvaney & Carpenter LLP**'s appellate practice group. Attorney Horton will serve as Of Counsel to the firm, and Attorney Dowd has joined as a partner. Both attorneys have decades of experience in appellate law, having argued, briefed, and/or consulted on scores of cases in the Connecticut Appellate and Supreme Courts, the United States Supreme Court, and the Second Circuit Court of Appeals.

This spring, eight CBA members graduated from the 2022 Connecticut Professionals' Leadership Academy: **Jenna Cutler**, Wiggin and Dana LLP; **Theresa Rose DeGray**, Consumer Legal Services LLC; **Vianca T. Malick**, Diana Conti & Tunila LLP; **Nia Chung Srodoski**, Law Office of Nia Chung Srodoski; **Erin O'Neil-Baker**, O'Neil Baker Law LLC; **Nicholas Ouellette**, Kurien Ouellette LLC; **Robert M. Yeager**, Gorman Herrmann and Menard PC; **James B. Zimmer**, Jacobs Walker Rice & Barry LLC. The program is designed to strengthen leadership skills, develop and build relationships, and create a collaborative professional services community; it brings together professionals from various industries and backgrounds, including accounting and finance, law, insurance and architecture. ■

PEERS and CHEERS SUBMISSIONS
e-mail editor@ctbar.org

Referring Attorneys' Obligations to Prospective Clients

DECEMBER 15, 2021

The inquirers are two attorneys ("referring attorneys") who, working through a bar organization committee ("the committee"), have put together a network of pro bono attorneys willing to represent a specific category of clients in a variety of legal matters. The referring attorneys have created a form for prospective clients to complete; they expect to use the form to facilitate obtaining from the clients sufficient information to make an appropriate match with an attorney in the network. The referring attorneys will not receive a fee for this service.

The referring attorneys anticipate that their primary role will be to obtain preliminary background information from each prospective client (via the client information form); assess the prospective client's needs; and match the client with an appropriate attorney in the pro bono network. In some situations, the intake and screening process will result in a client match with an attorney employed at the non-profit organization that employs the attorneys conducting the intake. Such a match would occur when the client's legal needs fit within the parameters of the non-profit organization's funding and organizational purpose. Absent a referral to their own employer organization, the referring attorneys do not anticipate that their role will exceed the intake, screening, and matching functions. They expect to have little or no direct contact with the client after first obtaining the information necessary to assess the client's needs and match the client with an attorney in the pro bono network, and then communicating to the client the matched pro bono attorney's contact information.

The referring attorneys seek our opinion on the following questions:

1. Aside from cases where the client is matched with an associated attorney at the non-profit organization – i.e., when the referring attorneys are acting only in the intake and gatekeeper roles – would the referring attorneys be deemed to be acting as attorneys such that their interactions with the clients would be subject to the Rules of Professional Conduct?

2. If the referring attorneys are bound by the ethical rules in any communication with the clients, would the duty of confidentiality apply, even if neither they nor the non-profit organization establishes an attorney-client relationship with the client?

3. Is there any language that should be included on the client form, or any way in which the referral process should be structured, to protect the confidentiality of information provided to the attorneys in the matching process?

The short answer to the first two questions is that a lawyer who consults with

Image credits YakobchukOlena /iStock/Getty Image+

a prospective client is acting as a lawyer and owes the prospective client the duty of confidentiality as to information conveyed to the lawyer even if a formal attorney-client relationship does not ensue. The answer to the third question is that the information obtained in the intake process is confidential and thus should be handled in the same way as any other client confidential information is handled.[1]

As an initial matter, even where the attorney's role goes no further than to collect and assess information to make a determination about a match with a lawyer in the pro bono network, the conduct falls within Connecticut's definition of the practice of law. See Practice Book § 2-44A ("practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances and or objectives of that person … [and] includes … (1) Holding oneself out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents that such a person is either (a) qualified or capable of performing, or (b) is engaged in the business or activity of performing any act constituting the practice of law … [and] (2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities …").

On the facts presented, the intake and screening lawyers are engaged in the practice of law in holding themselves out as lawyers, operating through a bar organization committee, for the purpose of assisting prospective clients of the pro bono network by assessing their legal needs and identifying an appropriate attorney in the network. Given that such conduct falls within the practice of law as defined in Connecticut, the conduct is subject to the Rules of Professional Conduct.

Rule 1.18 (Duties to Prospective Client) expressly addresses attorney obligations in this situation. As a preliminary matter, the Rule defines a "prospective client" as a "person who consults with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter." Rule 1.18(a).

Subsection (b) of Rule 1.18 provides that even if "no client-lawyer relationship ensues," the lawyer remains obligated to protect from disclosure any information learned from the prospective client. More specifically, the lawyer may not "use or reveal that information, except as Rule 1.9 would permit." Rule 1.9 (Duties to Former Clients), in turn, provides that a lawyer may not: (1) use client confidential information to the disadvantage of a former client (absent certain circumstances); or (2) reveal client confidential information "except as these Rules would permit or require…" Rule 1.9(c). For example, the Rules permit disclosure of confidential information where the client consents to such disclosure, or where disclosure is necessary to prevent certain criminal or fraudulent conduct. Rule 1.6(a), (b), (c)(1). *See also* Rules of Professional Conduct, Scope ("But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established."); Mark A. Dubois and James F. Sullivan, *Connecticut Legal Ethics and Malpractice* (3rd ed 2016) at §1-1:2 ("Under Rule 1.18, a 'prospective' client obtains the rights of a 'former' client as defined under Rule 1.9 for conflicts and confidentiality purposes.").

In short, Rule 1.18 dictates that the intake lawyers are obligated to protect the confidentiality of information prospective clients provide to them even if the clients do not enter into a client-lawyer relationship with them or the non-profit where they are employed.

The Rules of Professional Conduct do not require the inclusion of specific language or notice on the intake form to establish that the information the client provides to the referring lawyers is protected as confidential: the confidentiality of the information arises out of the relationship between the prospective client and the lawyer. While the lawyers may include such language or notice on the form, the information the client provides is confidential per Rule 1.18, even without specific language. The Committee notes, however, that prospective clients may be more comfortable disclosing information if the form includes a statement that the information they provide in the intake process is confidential.

In the Committee's view, too, even where the prospective client does not give express consent to the disclosure of the intake information provided to the referring lawyers, the client's completion and submission of the intake form operates as the client's implied authorization for the disclosure of the client's information to the network lawyer accepting the client's matter as a pro bono referral. *See* Rule 1.6(a) (otherwise confidential information may be disclosed where client consents or where impliedly authorized). Even so, it may be prudent to include on the form notice (and therefore reassurance) to the prospective client that the referring lawyers will share the information the client provides only with the attorney to whom the service refers the client.

Finally, as is the case with any information learned from a client or prospective client, the referring attorneys have an obligation to ensure that the intake information *remains* confidential. Accordingly, the referring attorneys must take reasonable precautions to ensure that there is no inadvertent or unauthorized disclosure of, or unauthorized access to, information or documents the prospective clients have provided to them. *See* Rule 1.6(e). ■

NOTES

1. The inquirers also ask a fourth question, concerning attorney-client privilege. Privilege issues do not implicate the Rules of Professional Conduct. Rather, they are matters of substantive and evidentiary law, and it is not within the Standing Committee's jurisdiction to express opinions on issues of law. CBA Informal Opinion 00-20 (declining to consider question of law concerning attorney client privilege). The question of whether the privilege will attach in any specific circumstance is not a question this Committee may address. *See* CBA Informal Opinion 99-38 ("The evidentiary question of the breadth and scope of the attorney-client privilege for a subpoenaed attorney's testimony concerning a former client is for a trial judge to decide.").

Representation of Individual Following Employment by Municipality: Rule 1.11

Image credit:CHRISsadowski/iStock/Getty Image+

JANUARY 19, 2022

A Connecticut lawyer (the "Requestor") seeks guidance on whether he may serve as counsel in a motor vehicle-related personal injury matter adverse to a municipality (the "Municipality") and the Municipality's employee (the "Employee"). The Requester previously worked for the Municipality at issue for roughly five months. While the case at issue (the "Current Case") had been pending during the time he worked at the Municipality, he was personally unaware of it. He did not work on the case, nor did he do any work on any other matter involving the actions of the same Employee. The Requester did do background research on another unrelated motor vehicle personal injury matter while working at the Municipality.

The issue presented is whether the Requestor's prior work for the Municipality precludes him from representing an individual adverse to the Municipality and its Employee in the Current Case. While Rule 1.9 of the Rules of Professional Conduct (the "Rules") generally governs potential conflicts of interest involving former clients, Rule 1.11, entitled Special Conflicts of Interest for Former and Current Government Officers and Employees, applies here.

The relevant portion of Rule 1.11, which deals with former government employees, states:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
>
> **(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee**, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(Emphasis added).

Rule 1.9(c) prevents a lawyer from utilizing information gained from a former client to that client's disadvantage.[1] Thus, to the extent the Requestor learned information about the Municipality or its Employee during his prior work for the Municipality that would be utilized to the Municipality or Employee's disadvantage in the current representation, Rule 1.9(c) would prohibit the representation. Here, however, the Requestor indicated that he was unaware of the Current Case during his employment by the municipality and did no work on any matters involving the Employee. While the Requestor stated that he did some background research on an unrelated motor vehicle personal injury matter while at the municipality, it is unlikely information learned as part of that background research would trigger Rule 1.9(c).[2]

Subsection (a)(2) disqualifies a former government attorney from representing a client in connection with a matter if the lawyer participated "personally and substantially" in that matter as a public employee. "Matter" is defined to include:

> (1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
>
> (2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Here, the Requestor did not work on, or even know about, the Current Case while

Continued on page 40 →

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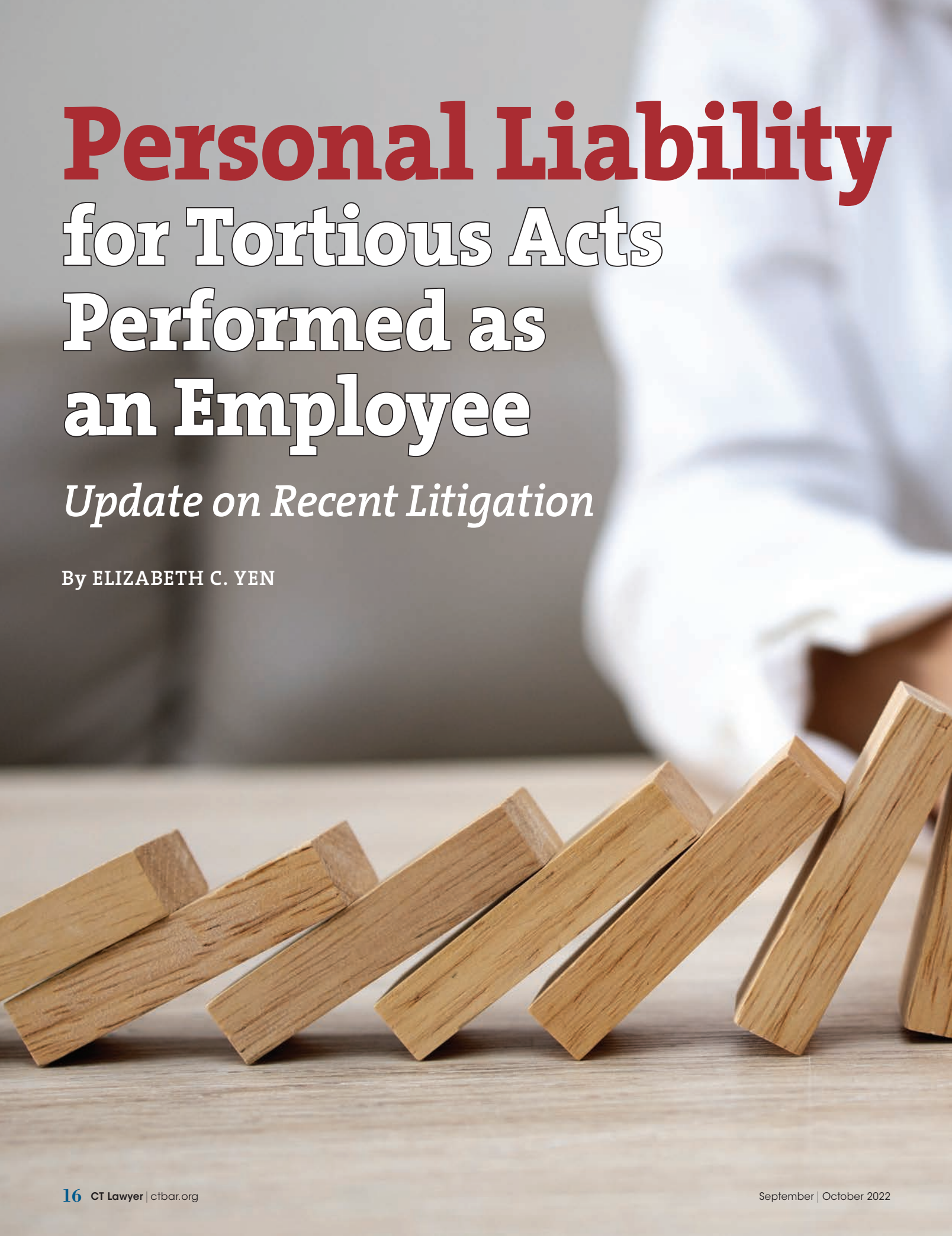
Personal Liability for Tortious Acts Performed as an Employee

Update on Recent Litigation

By ELIZABETH C. YEN



RECENT DECISIONS from Connecticut and other jurisdictions are useful reminders that employees may be held personally liable for certain violations of law while acting within the scope of their employment. Employers should consider reviewing their existing errors and omissions insurance coverages for their employees' work-related tortious acts.

In *Scott v. FedChoice Federal Credit Union*, 274 A.3d 318 (DC App. 2022), the plaintiff (a District of Columbia resident) alleged that FedChoice Federal Credit Union (FedChoice) and its then employee (Ms. Kelly) each violated Maryland consumer debt collection statutes in 2019 while attempting to collect a past due credit card debt from Mr. Scott. The relevant credit card agreement stated that it was governed by Maryland law, and the credit card issuer (FedChoice) was headquartered in Maryland. Among other things, Mr. Scott alleged that several debt collection communications were made directly to him in 2019 by Ms. Kelly on behalf of FedChoice (her then employer), in violation of Maryland law after she was advised that Mr. Scott was represented by legal counsel and also after she was advised that Mr. Scott was in the hospital. The communications at issue included both "dunning letters and phone calls after learning [Mr. Scott] had retained counsel to deal with them and after learning of his health issues." (274 A.3d at 326.) On appeal, the court held that Mr. Scott's claims against Ms. Kelly could be pursued, because violations of Maryland's consumer debt collection statutes (if proven) are torts, and "[u]nder agency principles in both Maryland and the District of Columbia, '[t]he general rule is that the corporate officers or agents are personally liable for those torts which they personally commit, or which they inspire or participate in, even though performed in the name of an artificial body.'" (274 A.3d at 327, footnote intentionally omitted.)

Image credits: krisanapong detraphiphat/Moment

Connecticut courts follow the same rule. For example, in *Coppola Construction Co. v. Hoffman Enterprises*, 309 Conn. 342, 350 (Conn. 2013), the Court agreed that "an agent of a principal is personally liable for his own torts regardless of whether...the principal itself is liable." In Connecticut, a judicial or administrative determination that an employee working for certain types of Connecticut-licensed businesses has violated a law or regulation applicable to the conduct of that licensed business may also provide a basis for the applicable state regulator to take administrative action against the licensee.[1]

The Federal Trade Commission (FTC) has similarly asserted jurisdiction under Section 5 of the FTC Act (15 USC Section 45) over individuals that cause false, misleading, or deceptive representations to be made to consumers using interstate commerce, regardless of the individuals' good or bad faith and regardless of actual deception. (*See*, e.g., *Feil v. Federal Trade Commission*, 285 F.2d 879 (9th Cir. 1960) and *Federal Trade Commission v. Cyberspace.Com*, 453 F.3d 1196, 1202 (9th Cir. 2006) ("An individual is personally liable for a corporation's FTCA § 5 violations if he 'participated directly in the acts or practices or had authority to control them' and "had actual knowledge of material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.'") (citations intentionally omitted).) An individual's actual knowledge of or reckless indifference to misleading or deceptive commercial or business practices may be established even if the individual relied on the advice of legal counsel. (*See*, e.g., *Federal Trade Commission v. Grant Connect*, 763 F.3d 1094 (9th Cir. 2014), cited with approval in *Consumer Financial Protection Bureau v. CashCall*, 35 F.4th 734 (9th Cir. 2022) (applying the same standard for individual liability for a corporation's violation of the Consumer Financial Protection Act, 12 USC Section 5536; see also 12 USC Section 5481 et seq.).)

Connecticut courts follow a similar standard for individual liability for an entity's unfair or deceptive trade practice under Connecticut's Unfair Trade Practices Act (Conn. Gen. Stat. Section 42-110a et seq. or "CUTPA"). An individual's liability for an entity's unfair or deceptive trade practice depends on the individual's participation in the unfair or deceptive practice, or authority to control the practice, and the individual's knowledge of the practice. (*See*, e.g., *Pointe Residential Builders BH v. TMP Construction Group*, 213 Conn. App. 445, 455 (June 28, 2022). See also *Joseph General Contracting v. Couto*, 317 Conn. 565, at 589-592 (Conn. 2015) (if an entity has committed an unfair or deceptive trade practice in violation of CUTPA, an individual who either "participated directly in the entity's deceptive or unfair acts or practices" or "had the authority to control them" may also be liable under CUTPA; the individual "must knowingly or recklessly engage in unfair or unscrupulous acts...in the conduct of a trade or business") (footnote intentionally omitted).)

The *Joseph General Contracting* case noted above cited with approval to *Pabon v. Recko*, 122 F.Supp.2d 311, 313 (D. Conn. 2000), which held that an employee of a creditor or collection agency that violated applicable Connecticut consumer debt collection practices laws or regulations could be liable under CUTPA if the employee participated in, controlled, or directed the unlawful collection acts or practices. Asserting such claims against both employer and employee could increase a prevailing plaintiff's entitlement to damages and costs. (For example, CUTPA authorizes a higher punitive damages award than Connecticut's creditor collection practices statute (see Conn. Gen. Stat. Sections 42-110g and 36a-648), and the defined term "creditor" in Section 36a-645 does not include a creditor's employees.) Perhaps more importantly, the risk of personal liability may encourage some employees to act with greater care and deliberation on behalf of their employers, which may help reduce the incidence of certain unfair, deceptive, or otherwise tortious practices. ■

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NOTES

1. *See*, e.g., Conn. Gen. Stat. Sections 36a-804 and 36a-852 (applicable to Connecticut-licensed consumer collection agencies and student loan servicers, respectively). Similar provisions appear in Connecticut's mortgage lender, mortgage broker, and money transmitter license statutes. (*See* Conn. Gen. Stat. Sections 36a-494 and 36a-608.)

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Connecticut's New Data Privacy Law and the Proposed Federal Law that Could Preempt It

BY DENA M. CASTRICONE

PROTECTING PERSONAL INFORMATION is important to all Americans. In the absence of a comprehensive federal privacy law (the US is one of the few remaining countries without one), states are stepping up. Five states have adopted comprehensive privacy legislation: California, Colorado, Connecticut, Virginia, and Utah. And more than half of the country's state legislatures have considered such measures over the past year.

States serving as incubators of privacy legislation certainly encourages innovation and creativity, but it also produces differing rules among the states. The resultant patchwork of laws make compliance difficult and cause confusion about applicable rights and standards. While there are similarities in the state laws, many of the rules in California are different than those in Connecticut, Virginia, or Colorado (each of which have their own nuances) and Utah is distinctly different.

The prospect of a comprehensive federal privacy law that establishes a national standard seemed a remote possibility until recently. A privacy bill with bipartisan support awaits consideration on the House floor in Congress. While the bill faces an uphill battle this year, the proposal brings the prospect of a federal privacy law much closer to reality. It also could mean the end of the newly enacted Connecticut law before it even takes effect.

I. Connecticut's Data Privacy Act (CTDPA)

After failed attempts in years past, on April 28, 2022, Connecticut became the fifth state to pass a consumer data privacy bill. The governor signed *An Act Concerning Personal Data Privacy and Online Monitoring*[1] (CTDPA)[2] on May 10, 2022. The CTDPA enjoyed bipartisan support, passing unanimously in the Senate and by a vote of 144-5 in the House.

Learning from the failed attempts, the bill's primary sponsor, Senator James Maroney, built a coalition and reworked the bill's language with input from all stakeholders. The result: a consumer protection law that balances the rights and obligations of consumers and businesses. While not perfect, the CTDPA is a good starting point for a data privacy law.

Modeled primarily after the Colorado and Virginia laws, the CTDPA also adopted some concepts from the more protective California law and from Europe's General Data Protection Regulation (GDPR). Additionally, the CTDPA contains some unique characteristics not yet seen in any of the other state laws.

A. Effective Date and Scope

The CTDPA takes effect on July 1, 2023. Similarly, the data privacy laws in Colorado, Virginia, and Utah take effect in 2023, as does the California Privacy Rights Act, which replaces California's current privacy law. In other words, all five states have effective dates for new or revised privacy laws in 2023.

Who must comply with the CTDPA? It applies to individuals or legal entities doing business in Connecticut or producing products or services targeted to Connecticut residents if they meet either of the thresholds below. In the previous calendar year, they controlled or processed the personal data of at least:

- 100,000 Connecticut residents, excluding data used solely for completing a payment transaction ***OR***
- 25,000 Connecticut residents and derived more than 25 percent of gross revenue from the sale of personal data.[3]

"Personal data," under the CTDPA means "any information that is linked or reasonably linkable to an identified or identifiable individual." It is a broad definition; however, it does not include de-identified data or publicly available information.[4]

Significantly, Connecticut is the only state to exempt data used solely for completing a payment transaction. Small retailers and

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restaurants lobbied for the addition as many of their businesses collect no other personal data.

B. Exemptions

The CTDPA has extensive exemptions at both an entity level and a data level. The following entities do not need to comply with the CTDPA: the state or its agencies, non-profits, institutions of higher education, national securities associations registered under 15 U.S.C. 78o-3 of the Securities Exchange Act, financial institutions subject to the Gramm-Leach Bliley Act, and covered entities or business associates under the Health Insurance Portability and Accountability Act (HIPAA).[5]

There are also 16 data-level exemptions, including categories of data including financial, health, and educational information protected under other laws, research information, and employment information as well as others.[6]

The laws in California, Colorado, Virginia, and Utah also offer numerous exemptions.

C. Consumer Rights

The CTDPA provides five consumer rights that are largely in line with most data privacy laws.[7] Those rights are:

1. Right to Know and Access. This allows a consumer to confirm whether or not a business is processing the consumer's personal data and to access that data;
2. Right to Correct. A consumer has the right to correct inaccuracies in the consumer's personal data;
3. Right to Delete. A consumer has a right to have personal data provided by or obtained about the consumer deleted;
4. Right to Portability. This allows a consumer to obtain a copy of their personal data and transmit it elsewhere; and
5. Right to Opt-Out. A consumer has the right to opt-out of the processing of the personal data for purposes of (A) targeted advertising, (B) selling the data, or (C) profiling that can adversely affect the consumer.

D. Business Obligations

Businesses subject to the CTDPA must take the following steps to ensure protection of consumers' personal data:[8]

- Provide consumers with "a reasonably accessible, clear and meaningful privacy notice" outlining the data that is collected, used, and shared and how consumers can exercise rights.
- Limit the collection of personal data to what is necessary and use it only for the purposes disclosed in the Privacy Notice unless the consumer consents.
- Implement reasonable data security safeguards to protect the confidentiality, integrity, and accessibility of personal data.
- Do not process sensitive data[9] without the required consent.
- Provide an effective mechanism for consumers to exercise rights.
- Do not sell or use for targeted advertising the personal data of minors ages 13 to 15 without consent. This requirement extends the existing rules under the federal law that protects children under the age of 13.
- Conspicuously disclose the sale of personal data or processing for targeted advertising and provide an opportunity to opt-out (including the acceptance of a global opt-out signal by January 1, 2025).
- Do not discriminate against consumers for exercising rights.
- Engage in contracts with contractors that will process personal data on behalf of the business.
- Perform a data protection assessment for processing activities that present a heightened risk of harm to the consumer.

E. Enforcement

The Connecticut Attorney General's office will enforce the CTDPA.[10] Unlike other states, there is no minimum or maximum penalty, but any violation will constitute a violation of the Connecticut Unfair Trade Practices Act.

For the first 18 months, if a violation of the CTDPA can be cured, the attorney general's office must provide the business 60 days to remedy the violation. After January 1, 2025, the attorney general's office may grant an opportunity to cure in its discretion and it may also engage in multijurisdictional enforcement with California and/or Colorado.

Finally, like the other state laws,[11] there is no private right of action for a violation of the CTDPA.

II. A Proposed Federal Law that Could End the CTDPA before it Starts

Less than a month after the governor signed the CTDPA, a discussion draft of the proposed federal American Data Privacy and Protection Act (ADPPA) surfaced on June 3, 2022. It took many (including me) by surprise. Lawmakers formally introduced the bill in the House of Representatives on June 21, 2022.[12]

I had not expected any push for federal privacy legislation this year and I certainly did not expect a bipartisan proposal. Not only does the ADPPA have bipartisan support, but it is vastly different than the other state laws and would preempt most of them, including the recently enacted CTDPA.

A. A Bipartisan/Bicameral Attempt

The ADPPA is the first proposed federal data privacy bill with bipartisan and bicameral support (Representatives Frank Pallone Jr. (D-NJ), Cathy McMorris Rodgers (R-WA), and Senator Roger Wicker (R-MS)). Notably absent from support is Senator Maria Cantwell (D-WA), a leader in the Senate who has previously proposed data privacy legislation and has expressed concern that the ADPPA does not provide enough protection.

Despite the lack of support from Senator Cantwell, after a markup session, the House Committee on Energy & Commerce voted 53-2 to send the bill to the House floor. All sides made concessions to create legislation that could succeed and resolved to not let perfect be the enemy of good.

Federal lawmakers found common ground on the most contentious issues: preemption and private right of action. Generally, Republican law makers want preemption and not a private right of action and the reverse is true for their Democratic counterparts. The ADPPA splits the baby. It preempts most state laws and allows for a private right of action. More on both below.

The House is not in session again until September, and given the proximity of the mid-term elections, many question whether the ADPPA will receive consideration this year. Even if it does not, we likely will see this bill again in one form or another.

B. The ADPPA Is Different and More Protective than State Privacy Laws

While the ADPPA provides consumer rights and imposes business obligations similar to those in the five states, it offers greater overall privacy protections than any of the state laws. The ADPPA is also structured differently. Transparency and consent are the focus in the state laws. On the other hand, the ADPPA recognizes that bombarding consumers with notices that most will never read does not protect information. Rather, the ADPPA does not permit the collection or processing of data except as necessary to provide a product or service or as otherwise permitted under the ADPPA.[13]

This approach is more like Europe's GDPR. It is more protective of consumers because it provides clearly defined boundaries.

Critically important is the fact that the ADPPA is broader in scope than the state laws, which all offer significant exemptions. The ADPPA recognizes only a few entity-level exemptions, including governmental entities and entities Congress designates to protect victims, families, and children.[14] The ADPPA would apply broadly to businesses, nonprofits and common carriers regardless of size or complexity of operations.[15]

While size will not exempt an entity, it certainly will impact compliance requirements. The ADPPA would hold massive data holders and social media giants to a higher standard than smaller companies.[16] It also requires data brokers to register with the Federal Trade Commission (FTC) and provide special notices to consumers.[17]

Further, the ADPPA would more aggressively protect minors.[18] The bill prohibits targeted advertising to a minor under 17 years of age. It also prohibits data transfers relating to a minor under 17 years old without affirmative express consent. While the bill requires that the covered entity have knowledge that the minor is under 17, it defines knowledge differently for large data holders and social media giants than for others.

C. The ADPPA Would Preempt Most State Privacy Laws

Generally, the ADPPA would preempt any state law that addresses issues covered by the ADPPA or its regulations.[19] The bill carves out 16 categories of exceptions to the preemption rule, including data breach notification laws, Illinois' Biometric Information Privacy Act, and California's private right of action for data breach victims. Further, the bill specifically recognizes the California Privacy Protection Agency, established under California's privacy law, and empowers it to enforce the ADPPA in the same manner it would have enforced the California law.

Preemption is a divisive issue. Those in favor of preemption generally want a single federal standard to govern privacy instead of a patchwork of state laws, which can make compliance difficult. For that reason, the business community strongly supports preemption.

Those opposed to preemption are concerned that a federal law cannot remain nimble enough to keep up with changes in technology and believe that a federal law should serve merely as a floor for protection, not a ceiling. They believe that states are in the best position to quickly pass legislation needed to address unanticipated changes and new developments in technology. Recently, 10 state attorneys general, including Connecticut's Attorney General Tong, wrote to Congressional leaders emphasizing this point.[20]

D. Enforcement of the ADPPA Would be a Team Effort

The ADPPA envisions a three-pronged enforcement strategy: (1) the Federal Trade Commission through a newly created Bureau of Privacy; (2) State Attorneys General; and (3) individuals through a private right of action, which will not be available until two years after the ADPPA's effective date.[21] Violations of the ADPPA would be deemed an unfair or deceptive act or practice under the Federal Trade Commission Act (FTCA).

A commonly cited ADPPA concern relates to resources for enforcement. Given the breadth of the bill and the lack of current structure and sufficient resources within the FTC to handle enforcement, weak enforcement could take the bite out of the ADPPA.

Additionally, many point to the ramp-up time for the FTC, the time-consuming rule making process and the two-year delay of the private right of action as creating a problematic gap in enforcement. Notably, state privacy laws would be preempted six months after the ADPPA is signed into law leaving a sizable gap in any effective privacy law enforcement efforts on the state or federal level.

E. Small Business Protections

Entities with annual gross revenues of less than $41 million in the last three years may be eligible for some exemptions to certain ADPPA requirements if they meet two additional requirements.[22] First, the entity must not collect or process the data of more than 200,000 individuals for a purpose beyond processing payment. Second, the entity cannot receive more than 50 percent of its revenue from transferring covered data.

If those criteria are met, then the qualifying entity would have more flexibility with respect to certain consumer rights and less onerous data security, privacy impact assessment, and other obligations.

Importantly, smaller entities with annual gross revenues under $25 million that collect the data of fewer than 50,000 individuals and derive less than 50 percent of revenue from transferring data would be exempt from the private right of action altogether.[23]

F. Unique or Notable Aspects of the ADPPA

Civil Rights

Unlike any state law, the ADPPA would prohibit the use of consumers' data in a way that discriminates based on race, color, religion, national origin, sex, or disability.[24] Large data holders using computerized decision making that could pose "a consequential risk of harm" would be required to perform an algorithm impact assessment annually to evaluate disparate impact. Other entities that engage in similar computerized decision-making processes would have to perform a less prescriptive algorithm design evaluation prior to deploying the algorithm.

Corporate Accountability

Similar in concept to the Sarbanes-Oxley Act and unlike the state laws, the ADPPA requires corporate accountability for compliance.[25] Large data holders would be required to submit annually a certificate of compliance, signed by an executive. Entities with more than 15 employees would have to appoint a privacy and data security officer. Further, there would be a privacy impact assessment requirement, the breadth of which depends on the size of the entity.

Transparency: China, Russia, Iran and North Korea

Privacy notice or privacy policy requirements are commonplace in privacy laws. The ADPPA is no exception. Unlike other laws, however, the ADPPA also mandates that the privacy policy to disclose whether data is transferred to, processed in, stored in, or otherwise accessible to China, Russia, Iran, or North Korea.[26]

Conclusion

The enactment of a comprehensive federal privacy law would be a game-changer in every state and, based on the current version of the federal bill, across every industry. In light of the federal bipartisan effort, we may see fewer states considering privacy measures in upcoming legislative sessions out of concern that their work may be in vain. As for the five states with laws that have not yet become effective, they are left in limbo wondering if their laws will ever take effect. ■

NOTES

1. Public Act 22-15; https://www.cga.ct.gov/2022/ACT/PA/PDF/2022PA-00015-R00SB-00006-PA.PDF.
2. Privacy professionals agreed that "CTPDPOMA" was simply not an acceptable acronym, so we use the shorter acronym of "CTDPA," which stands for the Connecticut Data Privacy Act, as we have lovingly renamed it.
3. P.A. 22-15, § 2.
4. *Id*. at § 1(25).
5. *Id*. at § 3(a).
6. *Id*. at § 3(b).
7. *Id*. at § 4.
8. *Id*. at § 6.

9. "Sensitive data" means personal data that includes (A) data revealing racial or ethnic origin, religious beliefs, mental or physical health condition or diagnosis, sex life, sexual orientation, or citizenship or immigration status; (B) the processing of genetic or biometric data for the purpose of uniquely identifying an individual; (C) personal data collected from a known child; or (D) precise geolocation data." *Id.* at § 1(27)

10. *Id.* at § 11.

11. California permits a limited private right of action for harm caused by a data breach.

12. H.R. 8152; https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf.

13. *Id.* at §§ 101 and 102.

14. *Id.* at § 2(9).

15. *Id.*

16. *Id.* at Titles II and III.

17. *Id.* at § 206.

18. *Id.* at § 205.

19. *Id.* at § 404.

20. https://oag.ca.gov/system/files/attachments/press-docs/Letter to Congress re Federal Privacy.pdf

21. Id. §§ 401-403.

22. *Id.* at § 209.

23. *Id.* at § 403(e).

24. *Id.* at § 207.

25. *Id.* at § 301 et. al.

26. *Id.* at § 201(b).

27. California's Consumer Privacy Act took effect in 2020. Substantial changes to that law, known as the California Privacy Rights Act, are scheduled to take effect on January 1, 2023.

Dena M. Castricone *CIPP/US, CIPM, managing member of DMC Law, LLC, is a privacy and healthcare attorney with substantial experience helping businesses and healthcare providers navigate privacy challenges and counseling clients on compliance with privacy laws. Attorney Castricone also advises healthcare providers on a broad range of regulatory compliance, risk management, and day-to-day operational issues.*

REMOTE NOTARIZATION
of Estate Planning Documents

By KRISTI VITELLI

The first line of the prefatory note for the draft Electronic Estate Planning Documents Act ("EEPDA") set for release by the Uniform Law Commission this fall is "Times are changing." Connecticut is the land of steady habits, and change happens slowly. However, lawyers must adapt the way they practice, or risk being left behind.

FOR 20 YEARS, Connecticut has allowed e-signatures. Connecticut adopted the Uniform Electronic Transaction Act ("UETA") in 2002. C.G.S. § 1-266 et seq. facilitates the use of electronic signatures. C.G.S. § 1-276 specifies that "If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record." This uniform law, however, applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. C.G.S. § 1-270. Thus, this statute can apply to a real estate transaction but not to an estate planning document involving only one party.

One year after UETA, Congress enacted the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"), allowing the transition from written to electronic documents for many business, commercial, and governmental transactions. These laws allow the use of electronic signatures in interstate commerce and bilateral commercial transactions, but specifically exclude estate planning documents. Connecticut's UETA conforms to the requirements of the Electronic Signatures in Global and National Commerce Act, 15 US 7002. See C.G.S. § 1-286.

When UETA was enacted, state statutory notary laws and the Uniform Law on Notarial Acts ("ULONA") still required the signer to physically appear before the notary. The Mortgage Bankers Association and the American Land Title Association realized that additional changes to notarial laws were necessary to allow remote online notarization for executing electronic documents pursuant to UETA. To remedy the problem, the associations drafted their own Remote Online Notarization ("RON") acts. Similarly, the Uniform Law Commission recognized the need to update ULONA and in 2018 released an updated uniform notary act, the Revised Uniform Law on Notarial Acts ("RULONA"). RULONA added Section 14A allowing Remote Online Notarization, or "RON." As of February 23, 2022, Connecticut was one of only nine states with no remote notarization law.

When the COVID-19 pandemic made in-person meetings difficult, if not impossible, especially with nursing home residents, states that had previously adopted some form of RON law were in a much better position to pivot and adapt to the new restrictions. A notary performing a RON must comply with the specific requirements of the state where they are authorized to perform notarial acts. Most often the notary has special training and is required to use only approved technology to perform the online notarial act.

Other states like Connecticut relied upon executive orders authorizing remote ink notarization ("RIN"). Unlike RON, which allows a notary to electronically notarize an electronic document, RIN requires an electronic document to be printed and signed with ink in the virtual presence of a notary. The paper document must then be delivered to the notary within a set time and notarized in ink.

Governor Lamont issued several executive orders during the pandemic to facilitate the execution of estate planning documents remotely via RIN, but not electronically via RON. See Governor Lamont's 2020 Executive Orders 7K, 7Q and 7ZZ. Because the orders were quickly drafted and the concept was foreign to many practitioners and their clients, many Connecticut lawyers deemed

Image credit: Sorbetto/Digital Vision Vector

the executive orders too difficult to follow. Many lawyers conducted signings by viewing the signer through windows or glass doors. Other signings occurred on trunks of vehicles and park benches. Outdoor "offices" sprung up as needed when the weather was nice.

With the difficulties of practicing law during a pandemic fresh in the minds of estate planning attorneys, many practitioners would like Connecticut to follow the lead of the Uniform Law Commission and other states to enact laws allowing more flexibility for notarizing legal documents. A bill was proposed to the Connecticut legislature the last two legislative sessions which, if passed, would allow electronic notarization of electronic signatures in Connecticut. In the most recent legislative session, the bill passed the State Senate but did not yet make it through the State House of Representatives. The Estates and Probate Section expects to join other CBA sections in the next legislative session to introduce a remote notarization law.

As mentioned previously, the Uniform Law Commission is poised to release the Electronic Estate Planning Document Act in fall 2022. The Electronic Estate Planning Document Act facilitates the creation of all estate planning documents, except wills, in electronic form. The Act does not change the state law requirements for validly signing and witnessing these documents. It simply makes it easier to execute estate planning documents. EEPDA is modeled after UETA so it will cleanly interface with existing laws. This act will apply to all estate planning documents other than wills not previously included in UETA, including durable power of attorney, health care instructions, trusts, and other documents that include notarization.

EEPDA does not intend to make the practice of law more challenging for seasoned lawyers. It is merely an *option* for signing estate planning documents. Consumers demand easier ways of signing. In our "new normal" world where you can buy a car on the Internet and have it delivered to your home, as well as conduct all your banking without ever entering a brick-and-mortar building, clients now want the convenience of signing their estate planning documents without having to go to a law office.

What became clear during the COVID-19 pandemic was that lawyers could draft and execute documents for clients without ever being in the same room with them. Valid execution of estate planning documents no longer required signing paper documents around a big conference table.

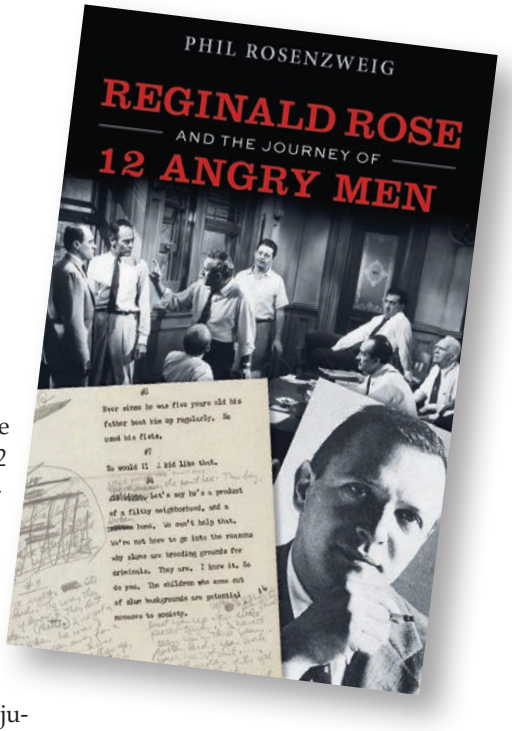
Several states allow RON where electronically created and notarized documents are valid. In our transient society these electronic documents, which were legally created elsewhere, will inevitably make their way into Connecticut. We can no longer ignore the virtual world of electronically created documents. The probate courts and financial institutions will accept them because they themselves have transitioned to electronic documents.

A lawyer cannot tell a potential client "I can't do that because I do not have the technical expertise." *See* the Commentary in the Connecticut Rules of Professional Conduct, Rule 1.1, on the duty to maintain competence. Connecticut attorneys have already replaced paper calendars with an online calendar and communicate with clients of all ages through email and text. The use of remote execution of estate planning documents is a similar transition. Even though these new methods seem difficult, once they are put into practice and Connecticut attorneys know the nuances of how they work, they will broaden the scope of an attorney's practice and ensure the attorney's competence. ■

***Kristi Vitelli**, Vitelli Law LLC, practices estate planning and probate law in Glastonbury, Connecticut. She is a member of the Legislative Committee of the CBA Estates and Probate Section.*

Reginald Rose and the Journey of 12 Angry Men

By HON. HENRY S. COHN



Author Phil Rosenzweig has released a new book, ***Reginald Rose and the Journey of 12 Angry Men***. Rosenzweig holds a Ph.D from the University of Pennsylvania's Wharton School and is currently a professor of business administration in Lausanne, Switzerland.

The book is the first complete biography of Reginald Rose (1920-2002), a scriptwriter, who lived for many years in Fairfield County. He was an army veteran, having served in World War II, worked for an advertising firm, and then began to submit scripts to television networks. His freelancing was successful and led to a fulltime position with CBS. Rose wrote during what has been called "the golden age of television," the 1950s and early 1960s. He was the father of four sons from his first marriage and two sons from his second.

Unlike his friends Rod Serling, who made his mark with *The Twilight Zone*, and Paddy Chayefsky, who wrote dramas on the family, such as the Academy Award winning *Marty*, Rose concentrated on civil and union rights. One of the most famous television series that he wrote and also produced was *The Defenders* (1961-1965). The show, winner of two Emmys, concerned tensions at a father-son law firm. It raised issues of legal ethics and controversies over mercy killings, the death penalty, mental illness and abortion. Atypcially for the times, Rose was supported by television executives as well as commercial sponsors.

Rosenzweig's biography focuses in great detail on Rose's most famous production, *12 Angry Men*. A number of people have told me over the years that viewing *12 Angry Men* led to their choosing a career in the law.

Rose wrote his script for the live television show Studio One. It aired in September 1954 and received high critical acclaim. The drama pictured only one portion of a criminal trial: 12 jurors, spending a sweltering afternoon, deliberating over a murder case where juror eight is the sole holdout for acquittal.

The movie's strength was the personal interactions between the jurors as they reach their verdict. Their discussions raise issues of racism, bias against immigrants and fair treatment of juvenile offenders.

While Robert Cummings played juror eight in the television play, Henry Fonda, who had just finished portraying the accused in Alfred Hitchcock's *The Wrong Man*, joined with Rose to bring the script to the screen. In the movie, Fonda plays juror eight. Rosenzweig spends several chapters of his book to explain how the television script was modified for the movie and how the actors were selected.

Rosenzweig provides interesting details about the filming. The movie was not filmed in an actual jury room; rather, a set was created to model a dusty, old jury room, including windows that were difficult to open and a fan that did not function. During deliberations, a rainstorm occurs, and Rosenzweig explains the technology behind what appears to be a violent storm.

When the movie premiered in the spring of 1957, it opened with much publicity at what was then one of New York City's finest theaters, the Capitol. Unfortunately, box office revenues were poor and the Capitol and other theaters only attracted small audiences. It was difficult for people to sit through a black and white movie about twelve men arguing about the outcome of a trial. Moviegoers were attracted to *The Ten Commandments*, *The Spirit of St. Louis*, and *Around the World in 80 Days*, issued at the same time.

The American public made a mistake. European audiences and critics applauded the film and it won a best picture honor in Berlin. With permission, movies were produced worldwide based on the plot of *12 Angry Men*. Gradually, it was seen by viewers in this country, as well, as a movie classic about the triumph of the American judicial system. The movie was praised by the late Chief Justice of the New York Court of Appeals, Judith Kaye, and Supreme Court Justice Sonia Sotomayor. After all, as these justices recognized, the jury system is the essence of our democracy. ■

Hon. Henry S. Cohn *is a judge trial referee in New Britain.*

Meditation—A Journey from No Way to Okay! (To Yes!)

By TANYEE CHEUNG

Image credit:Skynesher/E+

Meditation was one of those elusive skills that I never believed I could master. I heard about the great benefits of meditation: how it relieved stress, controlled anxiety, sharpened attention, increased productivity, improved sleep, managed pain, staved off illness, enhanced self-awareness, reduced memory loss, decreased inflammation, and on and on. Meditation had even been shown to decrease blood pressure and cholesterol.[1] It sounded great, but mediation always seemed pointless to me. I would sit and try to "empty my mind," but my mind was overflowing with a million thoughts—the document I needed to review, taxes to file, annual physical appointment I needed to make, dinner, and on and on. I would feel frustrated with meditation and myself. Meditation wasn't making me feel better; in fact, trying to meditate was making me feel worse! I silently cursed meditation and shoved it far out of sight.

Over time, the sting of being an abject failure at meditation wore off and my interest in well-being led me back to meditation. Older and wiser, I approached meditation with greater curiosity, less self-judgment, and zero expectations. I downloaded the Headspace app (free for 30 days and only requires three minutes). I thought to myself, how hard could three minutes of meditating be? Answer: Um, hard. A minute might as well have been a hundred.

But I vowed to stick to it—"just three little minutes," I told myself. Even if it didn't work, it was such a small amount of effort. I liked "Andy's" (my guide on Headspace) voice. I made a "game" of meditation. I started by paying attention to my breath. I noticed when I inhaled, I was sucking in my belly (contracting) and when I exhaled, I was pushing it out (expanding). This is known as paradoxical breathing. To do diaphragmatic breathing (expanding chest and belly on the inhale and contracting on the exhale), I needed to pay attention. I would count to 20, but if I caught myself paradoxically breathing or if my mind wandered and I lost count, I would start at one again. After I finished a set of 20, I would count only my in-breaths for a count of 20 and then only my outbreaths for a count of 20. The three minutes flew by and there were days I never even completed my count of 60.

Over time, my body got trained to breathe diaphragmatically and I built a foundation of mindfulness through focused breath work. Next, Andy asked me to become more aware of my body. No longer needing to focus on breathing diaphragmatically, I could shift my focus. Andy asked me to notice how my body felt and "scan" down my body, starting at the top of my head. Unsure what that meant, I de-

cided I would ask each part of my body "how it was feeling."—"Forehead, how are you today?" Forehead would reply, "Good." "Eyes, how are you today?" Eyes responded, "All good here." Down my body I would go. Every day, I would visit my body in this manner and each day, my body would respond the same. Until one day, when I asked my eyes how they were, my left eye was twitching.

I discovered that my mind had become "trained" over the last few weeks. It didn't allow me to sit and ponder this new revelation. Instead of focusing on the twitching eye, I moved on down my body as I had done each day. At the end of the body scan, I felt great—and my left eye had stopped twitching.

I hadn't notice a difference over the weeks of practice, but this encounter opened my eyes to how meditation was affecting me. I saw that when I train my mind to do something, it became habituated. When I started my body scan, my mind naturally moved through the steps, even when new revelations or a twitching eye popped up. Even though I hadn't thought meditation was doing anything, it was. I unknowingly trained my mind to focus. Little by little, day by day. I was fortunate that evidence of meditation's impact found me, for I might have been tempted to stop. Today I do a daily practice of 20 minutes (usually guided, sometimes with just music or a simple body scan). The practice continues to surprise me, and I have had several instances where I tangibly saw the power of meditation in my everyday life (more on that in a future article).

So how did I get here? Here are my tips:

1. **Understand:** Meditation is not about clearing the mind, it is about focusing the mind on what we choose to focus on. It allows us to train our wandering mind and bring our attention back to where we want it. Like a gardener tending to its flowers (meditation), when butterflies (our thoughts) come fluttering by, we allow ourselves to notice butterflies but then bring ourselves back to our flowers (our breath, joy, compassion, whatever it is we *choose* to think about). We learn not to chase the butterflies nor be annoyed by them. Butterflies will come and go; we cannot control them, but we can choose to focus on our flowers.

2. **Experiment:** There are many different types of mediation (guided, transcendental, visualization, yoga meditation, sound healing meditation, and more) and many different apps (Headspace, Insight Timer, Calm, Waking Up, and more)—take your time and find the one that works for you. Give yourself a little time with each to see if it resonates with you. Remember it is something new and may take a little bit to get used to. I recommend sticking with a particular method for at least three weeks. One word of caution: meditation is powerful and by quieting our mind, thoughts that we buried may rise to the surface. If these thoughts are causing anxiety or causing you to re-experience trauma, you may want to contact a therapist and stop meditation until you have worked through those traumas.

3. **SNAP (Start Strong, No Excuses, Always Act, Practice): Start Strong**, or as I like to say, Start Simple. Starting off telling yourself you need to do 20 minutes a day is a sure-fire way to find excuses not to meditate. Start simply with three minutes or even one minute. Build on it week after week. One minute will turn into 20 minutes in 20 weeks! **No Excuses**—who doesn't have a minute or three? You will find that meditation will give you your time back in spades. **Always Act**—Even if you have gotten up to 20 minutes and you feel that today you don't have the time, go back to your three minutes (or one minute), keep training that muscle, and keep on track! Once we stop it is easy to lose the thread and have our new habit fall by the wayside. **Practice**—Meditation is a skill, just like all other skills, you need to practice it. Like learning an instrument, riding a bike, or driving a car, we need to practice, practice, practice until it becomes part of who we are. We probably can't even explain how to ride a bike to someone, but when we get on it, we just know. And just like any other skill, once it is ingrained, it will stay with us, but it will get rusty if we don't practice. The great thing about mediation is you can practice it anywhere. Waiting for a doctor's appointment, Practice! Commuting or travelling on a train, plane, automobile? Practice! Having trouble falling asleep? Practice!

I didn't believe meditation was "right" for me or that I would ever "get" it, but I now know, I simply needed to shift my perspective. Instead of trying to "achieve" (which is totally the opposite of meditation), I let myself experience the steps of mediation in the moment. I stopped expecting and started being. Most importantly, I came up with a SNAP plan. So start. Today. Take the first step on the journey and you will find yourself on a beautiful path. Just think, in the time it took you to read this article, you could have been meditating! ■

NOTES

1. Goldstein CM, Josephson R, Xie S, Hughes JW. Current perspectives on the use of meditation to reduce blood pressure. Int J Hypertens. 2012;2012:578397. doi: 10.1155/2012/578397. Epub 2012 Mar 5. PMID: 22518287; PMCID: PMC3303565; Levine GN, Lange RA, Bairey-Merz CN, Davidson RJ, Jamerson K, Mehta PK, Michos ED, Norris K, Ray IB, Saban KL, Shah T, Stein R, Smith SC Jr; American Heart Association Council on Clinical Cardiology; Council on Cardiovascular and Stroke Nursing; and Council on Hypertension. Meditation and Cardiovascular Risk Reduction: A Scientific Statement From the American Heart Association. J Am Heart Assoc. 2017 Sep 28;6(10):e002218. doi: 10.1161/JAHA.117.002218. PMID: 28963100; PMCID: PMC5721815.

Tanyee Cheung *is a debt finance partner at Finn Dixon & Herling LLP and is chair of her firm's Wellness Committee and co-chair of the Connecticut Bar Association's Wellbeing Committee. Attorney Cheung received her Master's in applied positive psychology from the University of Pennsylvania.*

Six Ways to Provide Pro Bono Service

Right now, thousands of Connecticut families cannot afford an attorney and risk losing their home, access to their children, or other important rights without legal assistance. At any given time in Connecticut:

- 77 percent of litigants in custody cases are self-represented; many cannot afford an attorney and may risk losing regular access to their child
- Approximately 21,000 litigants in property foreclosure proceedings are self-represented each year
- There is only about one civil legal aid attorney per 5,000 residents living in poverty

The CBA offers the following six programs to help narrow the access to justice gap:

CT FREE LEGAL ANSWERS

Administered by the CBA in Connecticut, CT Free Legal Answers is an ABA-supported website where eligible Connecticut residents can post their legal questions. Volunteer attorneys provide confidential written responses to the clients on the website.

When: Anytime; answering a question typically takes only 15 to 20 minutes

Where: Volunteers post answers online

FREE LEGAL ADVICE CLINICS

For 30 minutes, volunteer attorneys provide legal advice virtually to Connecticut residents who cannot afford an attorney. Prior to the client meeting, volunteers receive information about the client's situation and a summary of an intake interview to help the attorney prepare.

When: Quarterly in January, April, July, and October

Where: Virtual

LAWYERS IN LIBRARIES

Volunteer attorneys provide legal advice to members of the public at local libraries during a two-hour block each month. Clients register in advance for a 20-minute appointment. Areas of law covered include landlord/tenant, immigration, family, employment, consumer rights, and personal injury.

When: Two-hour event held once per month

Where: Libraries in Bridgeport, Danbury, Middletown, New Britain, New London, Norwich, Simsbury, and Stamford

CBA PRO BONO CONNECT

Volunteers in the CBA Pro Bono Connect Program pledge to take at least one direct representation case each year for a client with low or no income. Volunteers receive complimentary on-demand training and are connected with a legal aid organization to be matched with a pro bono case based on the volunteer's geographic area and expressed interests.

When: Ongoing, typical commitment of five to 30 hours per year

Where: Cases are assigned to volunteers based on their locality

BANKRUPTCY PRO BONO PROGRAM

Attorneys with experience handling bankruptcy matters can volunteer to represent qualifying individuals in Chapter 7 Bankruptcy cases in the U.S. Bankruptcy Court. Volunteers can choose to help with petition filing only or with adversary proceedings and contested matters.

When: Ongoing

Where: Petition volunteers may work remotely; hearing volunteers may be required to appear in court

EMERITUS PRO BONO ATTORNEY PROGRAM

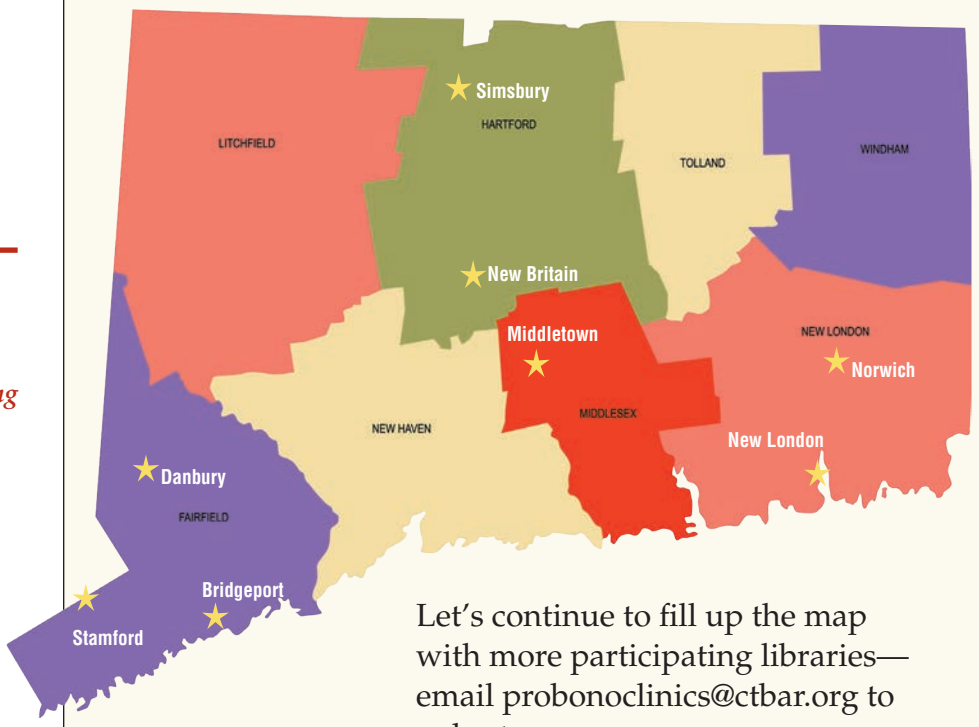
A CBA representative consults with retired, semi-retired, or non-practicing attorneys to find a pro bono opportunities that fit their interests, experience, and availability.

When: Ongoing

Where: In-person and online opportunities

To learn more or sign up for any of these pro bono opportunities, visit ctbar.org/volunteer. ■

Lawyers in Libraries Program



Let's continue to fill up the map with more participating libraries—email probonoclinics@ctbar.org to volunteer.

CBA Free Legal Advice Clinic: Volunteers Needed

Tuesday, October 25, 2022
10:00 a.m. - 6:00 p.m.

Wednesday, October 26, 2022
10:00 a.m. - 6:00 p.m.

Connecticut Bar Association

If you have 30 minutes free, you can volunteer. Volunteer attorneys will answer legal questions in their area of practice during a 30-minute remote session with a client.

Volunteers are needed in the following areas:

- Fraudulent Business/Debt Collection
- Employee Rights/Unemployment
- Immigration Law
- Landlord/Tenant
- Family Law
- Tax Law
- Bankruptcy
- Pardons
- Wills and Estates
- Torts

Volunteer opportunities are available for paralegals and law students as well. Visit ctbar.org/FreeLegalAdviceClinics to learn more and register.

The Connecticut Bar Association's 7th Annual Diversity, Equity, and Inclusion Summit

On October 19, 2022, the Connecticut Bar Association will host its Seventh Annual Diversity, Equity, and Inclusion Summit, in a virtual format, from 9:00 a.m. until 3:00 p.m. As with every Summit, the day promises to be full of opportunities for learning and inspiration, and we hope you will take the time to join us this year. This column will provide some context for the summit, and provide a preview of some of the day's offerings.

The summit has always maintained a consistent theme, drawing back to its first iteration in 2016: an emphasis on collaborative learning and work, towards strategic, accountable, and measurable diversity, equity, and inclusion progress. Each year, the summit serves as an invaluable learning and growth opportunity for representatives of the 40+ signatories to the Connecticut Legal Community's Diversity, Equity, and Inclusion Pledge and Plan ("DEI Pledge"[1]). Originally limited to 150 representatives of these organizations (because of space limitations), the shift to a virtual format has allowed the CBA to open the event broadly to anyone who is interested in participating.

Each year, the summit focuses on the themes and commitments of the DEI Pledge. The DEI Pledge, first launched in 2016, lays out a multiyear plan, with specific organizational action steps for each year, to guide signatory organizations in their diversity, equity, and inclusion efforts. This year marks the conclusion of the 5th year of the pledge, in which signatories have pledged to take the following steps:

During Year Five, the Signatories will work to ensure that formal and informal leadership opportunities within the legal organization are meaningfully and realistically accessible to diverse individuals. The goal of these efforts is to continue efforts to open up the legal organizations' leadership structures so that they are reflective of a meaningful commitment to [Diversity, Equity, and Inclusion], and that diverse individuals are able to obtain the necessary skills and tools to ascend into leadership. The Signatories will assess and modify, as necessary, their policies, procedures and practices for promotions, career advancement and formal and informal opportunities for leadership. The Signatories will focus on developing clear and objective criteria for internal advancement, and will develop practices designed to eliminate implicit and explicit bias from these processes.

This year, the summit will be broken into three primary presentations 1) diversity metrics; 2) the annual keynote workshop; and 3) six breakout panels, allowing attendees to select topics of interest in two consecutive afternoon tracks.

Diversity Metrics Presentation: Each year, the signatories to the DEI Pledge complete an annual Assessment Survey, in which they report on their DEI efforts, and provide aggregate demographic data about the attorneys working in their Connecticut legal offices. This data is then aggregated each year, and presented in an annual report, which has allowed us to track the representation of diverse attorneys across the different represented sectors of the legal profession, at every level of contribution or leadership. With six years of available data after this year's assessment, the presentation has also allowed the CBA to track and benchmark representation changes and trends over time. While Connecticut has seen measurable progress in the representation of diverse attorneys, that change has taken a significant amount of time, and the overall representation of many forms of diver-

sity, particularly in leadership, remains small. Tracking and measuring our aggregate progress, across the 40 Signatory organizations, within each represented sector (private, corporate, government, and non-profit) has provided a vital snapshot of the impact of our DEI efforts.

Keynote Workshop Presentation: We have had the privilege of drawing in inspiring speakers and keynote workshop leaders to the summit each year, and this year will be no different. Our 2022 Summit keynote workshop leader will be Ritu Bhasin, of Bhasin Consulting Inc. (bci).[2] Ritu will speak on inclusive leadership, and provide coaching to current and aspiring leaders within the Connecticut legal community on leadership that emphasizes meaningful inclusion, and not conformity. Her extensive DEI leadership and coaching experience promise an exciting and engaging presentation:

> Ritu Bhasin is an award-winning speaker, consultant, author and internationally recognized expert in diversity, equity, and inclusion (DEI); authentic leadership; anti-racism; and personal empowerment for people from equity-seeking communities. Before founding bci, Ritu spent ten years in the legal profession—first as a civil litigator and then as the director of legal talent for the preeminent Canadian law firm Stikeman Elliot LLP. Ritu also served as an instructor in the Executive Programs and the Rotman School of Management, University of Toronto for three years. She regularly appears on national television and radio in the US and Canada as an expert on leadership, inclusion, personal empowerment, authenticity and anti-racism. Her first book, *The Authenticity Principle: Resist Conformity, Embrace Differences, and Transform How Your Live, Work, and Lead*, is an Amazon bestseller.

Panel Presentation Breakouts: In the afternoon, attendees will be able to choose between six presentations, offered between two consecutive tracks at 12:30 p.m. and 1:45 p.m. These presentations will allow attendees to tailor their summit experience to their areas of interest, and are described briefly here:

Inclusive Leadership, The Foundation of Diversity, Equity, and Inclusion within Your Organization This panel will feature prominent diverse leaders within the Connecticut legal community. The panel will offer a candid insight into the challenges and opportunities of breaking through ceilings, serving in a leadership role as the first of a particular identity to hold that role, and offer strategies and advice on inclusive leadership and mentorship.

Building and Positioning Your Diversity, Equity, and Inclusion Team for Success: This panel will offer tips and strategies on how and why to invest in a dedicated DEI position(s) within your legal organization, how to expand and position your DEI team for success, and how to develop and implement your DEI personnel strategy across different professional sectors and firm sizes.

Promoting Access to Justice While Advancing Racial Justice: COVID-19 heightened and our societal awareness of both a significant access to justice gap, and issues of systemic racial injustice, and inspired renewed efforts to address these issues. This panel will explore the nexus between these two challenges, and feature private pro bono legal projects and non-profit efforts that have sought to shrink the access to justice gap while advancing racial justice.

Understanding and Addressing Discrimination, Harassment, and Sexual Harassment in the Legal Profession: Rule 8.4(7) of the Connecticut Rules of Professional Conduct became effective on January 1, 2022, and defines discrimination, harassment, and sexual harassment in professional contexts as professional misconduct. Learn about the various studies that have shed light on the prevalence of these issues within the legal profession, and how the legal profession has responded in the rules that govern the ethical practice of law.

Promoting DEI in Corporate Legal Departments and When Retaining Outside Counsel: This session will feature representatives of prominent corporate legal departments in Connecticut, discussing their own internal DEI efforts, as well as how those departments consider and assess DEI when retaining outside counsel and other external expertise.

Words Matter, Continued: This session will continue the presentation by the same name, first presented at the Connecticut Legal Conference in June of 2022. The panel will focus on the impact of certain words and phrases, how some words may convey unintentional hurtfulness, and how attendees can become more respectful of others by considering their use of those words.

The CBA extends special recognition and gratitude to the small but dedicated group of volunteers who have joined us in organizing this year's summit: Hon. Cecil J. Thomas (chair), Hon. Tejas Bhatt, Hon. Neeta Vatti, Karen DeMeola, Salihah Denman, Michelle Duprey, Ronald Houde, Steven Reynolds, Alix Simonetti, and Kean Zimmerman. Many of the organizing committee members have served on the organizing committee for the past seven years.

For seven years, the summit has served as an integral opportunity for education, planning, and reinvigoration of your personal and organizational diversity, equity, and inclusion journey. We hope you will take the time to join us this year, for what promises to be a day full of learning and inspiration. Visit ctbar.org/summit to register! ■

NOTES

1. ctbar.org/pledge
2. bhasinconsulting.com/about-bci

Emergency Searches

By CHARLES D. RAY

Police officers are called on to deal with a wide and varied array of societal issues. Two of those issues—the welfare of senior citizens and interactions with people suffering mental health issues—arose together in the Supreme Court's recent decision in *State v. Samuolis*, 344 Conn. 200 (2022). The only issue in *Samuolis* was whether the trial court properly denied the defendant's motion to suppress evidence taken from his home. Specifically, the body of his father, which police discovered inside the home the two shared. The trial court concluded that a warrantless entry into the home was justified under the emergency

exception to the fourth amendment's warrant requirement and, in addition, that any possible taint from the initial warrantless entry was erased when the defendant shot the officer who first entered his house.

To begin, searches and seizures inside a person's home, without consent and without a warrant, are presumptively unreasonable. Indeed, the Court has stated that warrantless entry into a person's home is "the chief evil" against which the fourth amendment is directed. And the fourth amendment's warrant requirement applies to both criminal investigations and the government's enforcement of administrative regulations. As with most rules, however, exceptions do exist. Indeed, the emergency exception at issue in *Samuolis* foregoes the warrant requirement where the "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable…." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

Under this exception, an officer making a warrantless entry must have an "objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." *Brigham City*, 547 U.S. at 400. And while the test is an objective one, the officer(s) making the search must have reason to believe that life or limb is in immediate jeopardy and that a warrantless entry is necessary to deal with the threat. Once entry is made, the scope and manner of a resulting search must be reasonable to meet the need of the emergency.

Against this legal background, facts become crucial. The *Samuolis* story began when two Willimantic police officers were sent to check on the well-being of John *Samuolis*, the defendant's father. Earlier in the day, one of the two officers had been told by neighbors that they were concerned because they had not seen John in a quite some time. Upon their arrival at the *Samuolis'* home, the officers knocked on the locked doors and called into open windows without any response. They concluded that no one was home. The next morning, one of the neighbors asked the police to make another check of the property because of changes made after the officers' prior visit. Namely, chicken wire covering the lower rear windows of the house and a huge number of flies massing in one of upper rear windows.

Upon arriving, two officers (one of whom had been to the property the day before) found the doors to the house all locked and the window curtains all drawn. The officers concluded that neither the chicken wire nor the flies had been present when the well-being check had been made the previous day. One of the officers used a ladder to reach the upper rear window and

Image credit: Vector Moon/iStock/Getty Image Plus SLW

discovered flies everywhere, but no odor. The window was propped open a bit by an air freshener but the officer could not see anything inside the room. The officers were, at that point, concerned not only for the welfare of John *Samuolis*, but also for the welfare of the defendant, who, they had been told, suffered from mental health issues. Having concluded that an entry into the house was called for, the officers contacted their supervisor, who also decided that entry into the house was necessary.

One of the officers used the ladder to enter the house through a better lit window at the front of the house. As he headed downstairs to open the front door for the other officers, he heard a noise coming from the basement. The officer announced his presence, but heard nothing in response. The front door was held shut by a heavy metal bar, which the officer removed and tossed toward the basement. As the officer was opening the front door, the defendant emerged from the basement, dressed in camo, wearing a ballistic vest, and carrying a rifle, which he fired at the officer, hitting him in the elbow. The officers fled the house, as did the defendant, who was later captured by a state police officer.

Once the defendant was in custody, officers entered the house and discovered that a second-floor bedroom had been sealed with plastic and a rope. Fearing a booby-trap, the officers left the house and the lead detective climbed a ladder outside and discovered the father's decomposed body, wrapped in plastic. In the meantime, the defendant gave a voluntary statement to the state police, in which admitted he had shot his father several months earlier and had sealed the room because the body began to smell.

Against this backdrop, the defendant argued that there was no reasonable basis to conclude that an emergency existed, and that, regardless, recovery of a dead body is not an emergency. The unanimous Court, per Justice Keller, held that the emergency exception justified the warrantless entry into the defendant's home. Justice Keller framed the issue as "whether there was an objectively reasonable basis for the responding officers to believe that there was a need to render emergency assistance to an injure occupant or to protect an occupant from imminent injury, either ***the defendant or [his father]***, when [the officer] made the initial entry into the home. *Samuolis*, 344 Conn. at 218 (emphasis added).

In terms of the defendant, the Court concluded that the state failed to meet its burden of establishing that "immediate entry was necessary because the defendant required *emergency aid*." *Id.* at 220. There was evidence that in the days before the warrantless entry the defendant had performed chores at the property, such as cutting a portion of the grass. Also, prior to entering the defendant's home, the officers did not seek to learn more about the defendant's mental health issues and did not make a reasonable attempt to discover a less intrusive way to make contact with the defendant. Although some of the defendant's behavior—placing chicken wire over windows, cutting a peep hole in window blinds, and cutting only a portion of the lawn—could possibly be symptomatic of a mental disorder, without more, such odd behavior "does not reasonably indicate a need for *immediate* medical assistance, physical or mental." *Id.* And while the defendant living in a house with a dead or decomposing body "could reasonably indicate that the defendant was suffering from a serious psychological impairment" the Court declined to address the "profound implications" of expanding the emergency doctrine beyond its current limitations in order to address situations similar to the defendant's. *Id.* at 219, n.11.

Instead, the Court upheld the entry and search based on its conclusion that there was "a reasonably objective basis for believing that an elderly occupant was in need of immediate medical assistance." *Id.* at 220. In so concluding, the Court avoided the issue of whether the presence of a dead body in a home could constitute an emergency. Instead, the Court based its holding on a line of previous cases in which other courts have upheld emergency entries even if the available information, such as the presence of flies and the smell of decomposing flesh, makes it more probable that a victim is dead rather than alive. "As long as there is a reasonable possibility that the person remains alive, the situation is an emergency because, in all likelihood, time is of the essence." *Id.* at 222. On top of this, the defendant's behavior, although not sufficient to justify an emergency entry as to him, was relevant in terms of the officers' assessment of whether an emergency existed in regard to his father.

All in all, a logical, careful, and well-crafted decision. ■

■ Any views expressed herein are the personal views of the author.

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Pushing the Rock

By CHRISTOPHER A. KLEPPS

Christopher A. Klepps *is the chair of the Connecticut Bar Association Young Lawyers Section for the 2022-2023 bar year. Attorney Klepps is senior counsel at The Hartford where he provides legal advice regarding coverage issues on a wide variety of claims, as well as manages litigation involving The Hartford throughout the country.*

I recently attended a golf tournament and dinner to support my friend Mitch, his wife, and their daughter. Mitch was diagnosed with cancer in January 2021. Mitch is a lawyer, and he and I went to law school together. The outpouring of support for Mitch and his family was remarkable and inspiring, including the support shown by the Connecticut legal community.

After dinner, Mitch gave a short speech. He spoke about the Greek myth of Sisyphus. Sisyphus was condemned by Zeus to push a large rock to the top of a hill for eternity. Most people, including myself, view Sisyphus' predicament as nothing short of torture. An eternity filled only with struggle, pain, and a goal that can never be accomplished. In fact, the word "Sisyphean" is defined as "a task that can never be completed."

However, Mitch had a different take on Sisyphus' eternal struggle; he found it inspiring. He stated that he used the tale as motivation even before his diagnosis, during workouts and to get through other mundane tasks. Since his diagnosis, Mitch said that Sisyphus' never-ending quest to push the rock has taken on a deeper meaning. He quoted from a speech given by retired Navy Seal, John Gretton "Jocko" Willink, who also views the legend of Sisyphus as inspirational rather than demoralizing:

> I don't want to rest, I don't want to coast, and I don't want to reach a point in my life where I say: "That's it, I've done enough. I'm not going to give anymore. I'm not going to push anymore." No, that relentless cycle of day-to-day challenges, they are not maddening to me, they don't frustrate me. They inspire me. They inspire me to drive, and to push more, and to push harder. That's what that rock does to me. So I say dig in, and get to pushing.

I've thought about Mitch's speech and the meaning of Sisyphus every day since. Three things have really stuck with me.

First, Mitch acknowledged that he was pushing the rock long before his cancer diagnosis. Sisyphus' predicament was not necessarily symbolic only of a major struggle (or even the struggle of a lifetime). Instead, Sisyphus' rock represented the oftentimes mundane daily tasks and struggles that every person endures. Getting out of bed when the alarm clock rings so that you have time to work out or exercise. Making sure you get the kids to school on time. Working on the same project or file that has consumed your work life for the past few weeks. These tasks sound simple, yet for me (and many others) they can sometimes be daunting, challenging, and frustrating. The days and weeks tend to blend together. After reflecting on Mitch's speech, I realized that daily life can often feel like a never-ending quest of pushing a rock up a hill.

Second, I was struck by Mitch's ability to draw inspiration and motivation from a story that I and most others view as dreadful. Prior to Mitch's speech, I would have said it was ludicrous to be inspired by Sisyphus. After all, he was *condemned* to push the rock. It was a punishment. How can that be inspiring? More importantly, who would want to push a rock for eternity? However, I realize now that I viewed the story through the wrong lens. I do not think anyone reading this would willingly trade places with Sisyphus, but the flaw in my thinking was assuming that the rock was avoidable in the first instance. I realize now that pushing the rock is *unavoidable*. We don't have a choice. I have not met a single person who has managed to entirely avoid mundane tasks or daily struggles, no matter how big or small. The rock is there for all

of us in some form, and we have to push it every single day.

Likewise, I now realize that the ability to draw inspiration or motivation from Sisyphus depends primarily on how one views the end goal. If the goal is to push the rock to the top of the hill and have it stay there, then Sisyphus cannot ever win. His effort is meaningless, the process is futile, and his predicament is agonizing. Conversely, if the goal is simply to push the rock, then Sisyphus has and will continue to win.

Luckily for us mere mortals, there is no curse preventing us from getting the rock to rest on the top of the hill. We've all been fortunate enough to experience the joy and satisfaction in reaching an end goal in both our personal and professional lives. End goals are important. Focusing on winning a trial will allow one to work smarter, harder, and with a purpose throughout the life of the case. Focusing on being a better parent may result in being more present in the moment and prioritizing being at your child's sporting event, play, or school graduation over a professional obligation. Still, my experience is that the monotonous days vastly outnumber the monumental days. While we cannot and should not ignore our end goals, it is a mistake to only allow ourselves to find happiness or fulfillment on those few days where end goals are fully reached. Mitch's speech was about finding purpose and joy in the *process*. I refuse to lose that message.

Image credit:erhui1979/Digital Vision Vector/Getty Images

Third, Mitch ended his speech with the following: "None of us really know what the future holds, and this may be a battle that I can't win, and I may be Sisyphus. But, if you'll all keep supporting me, I'll keep pushing the rock." I noticed immediately that Mitch's promise to keep pushing the rock was conditional. It was premised on continued support from his family and friends. Without a strong support system, pushing the rock on a daily basis is impossible. Despite our best efforts, motivation may be lacking. It helps greatly knowing we have others behind us, both personally and professionally, to help us push the rock.

Clearly, this message is not unique to lawyers or others working in the legal profession. However, lawyers do face unique challenges. The job can be stressful, the hours can be long, and the days can be repetitive. It's also clear that lawyers do not always handle those challenges well. It is well-publicized that the legal profession has a serious problem with depression,

Informal Opinion

Continued from page 14

employed by the municipality. Nor did the Requestor do any work on any matters involving the Employee. Based on this, it appears that the Current Case is not the same "matter" as previous work done for the Municipality since it does not involve the same party or parties. While the Requestor did conduct background research on a similar matter, the similarity in subject matter is not a sufficient basis for disqualification. This conclusion is supported by the Official Commentary to Rule 1.11, which explains that the Rule "represents a balancing of interests" between the government's need to protect "confidential government information" and the "legitimate need to attract qualified lawyers." The Commentary goes on to conclude:

> Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially…. The limitation of disqualification in subsections (a) (2) and (d) (2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

In conclusion, provided that the Requestor did not gain confidential information that could be used to the Municipality's disadvantage in the Current Case, it is the Committee's opinion that the Requestor would not run afoul of Rule 1.11 if he were to participate in the Current Case adverse to the Municipality because the Requestor did not personally and substantially work on the same matter as the Current Case while employed by the Municipality. ■

NOTES

1. Rule 1.9(c) states that "[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known, or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."
2. *Compare Green v. City of New York*, No. 10 Civ. 8214(PKC), 2011 WL 2419864 (S.D.N.Y. June 7, 2011) (explaining that performing legal research on a similar matter would not be disqualifying, but that lawyers were disqualified where they had obtained confidential factual information about the City's practices while representing the City in a prior class action on the same subject that was applicable to the current matter).

Young Lawyers

Continued from page39

anxiety, and substance abuse. I encourage all employers to recognize that every employee, young or old, is constantly pushing their own rock, and that many are struggling to do so. And while I think significant changes to our work model may ultimately occur, I do not think they are necessary to begin to tackle this problem. For instance, the Young Lawyers Section (thanks to Secretary Trent LaLima) has recently implemented a mentor program matching new members of the YLS Executive Committee with more experienced members. I believe this program will ease the stress that new and younger members may have when faced with the prospect of having to plan a CLE program and integrate into a group of 40+ attorneys. The YLS Executive Committee will continue to look for ways to help all of our members push the rock.

The work we do as lawyers is important, and it may often feel all-encompassing. The same can be said for parenting and maintaining relationships or friendships with loved ones. I am working, with the help of my support system, toward enjoying the journey in all aspects of my life rather than having a singular focus on getting to the top of the hill. You may reach a great result by pushing the rock, but I urge you to strive to find fulfillment in the process of pushing it.

So, take a page out of Mitch's book. Dig in and get to pushing. ■

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