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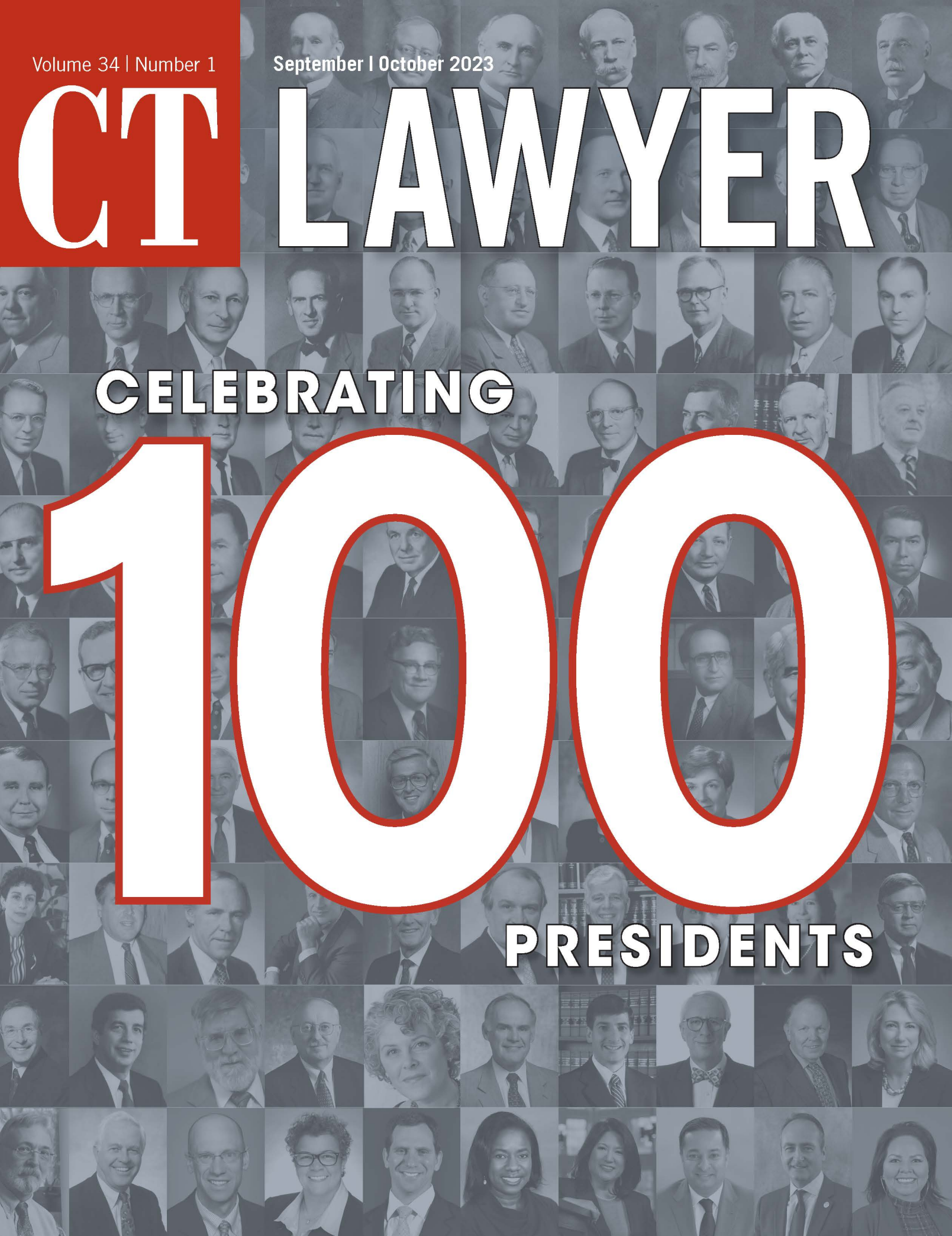
CT LAWYER



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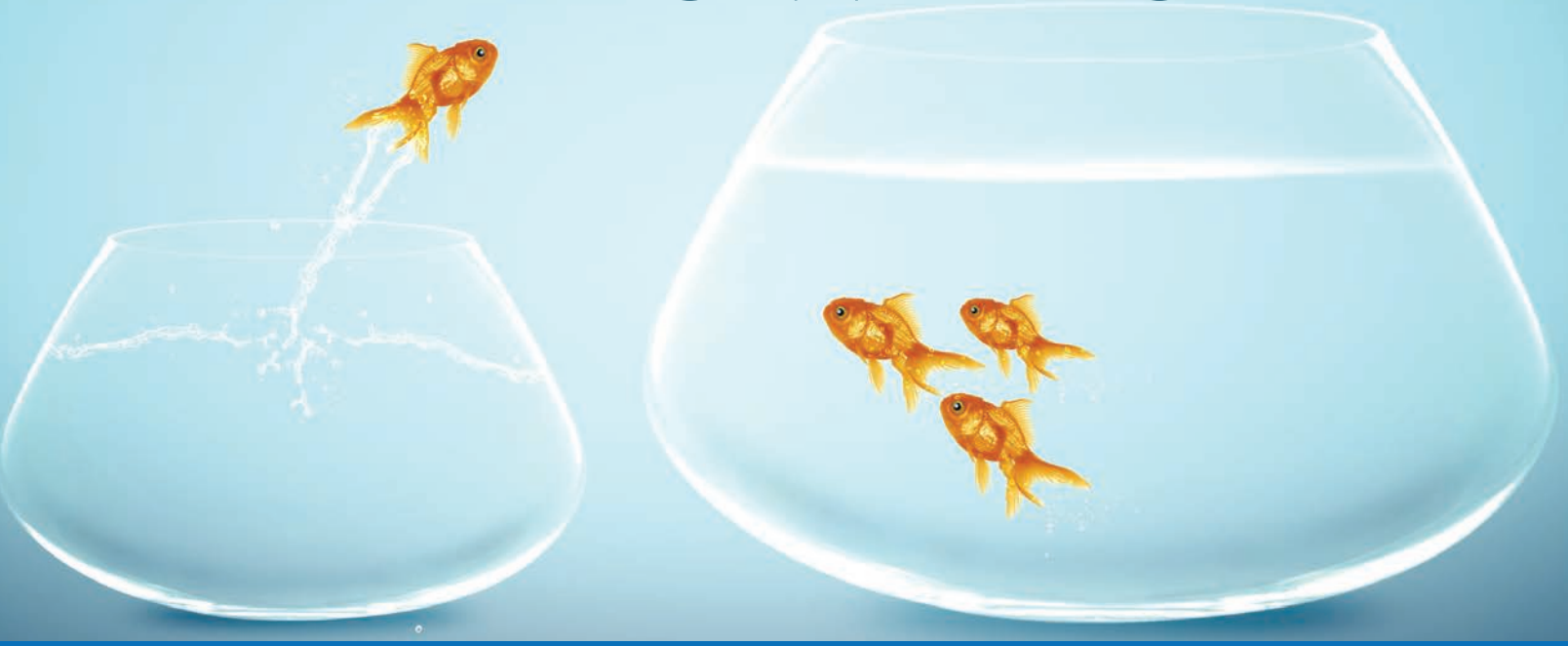

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FEATURES

COLUMNS

DEPARTMENTS

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Get to Know Your President

CT Lawyer *had the pleasure of interviewing President Maggie Castinado for her inaugural column.*

***Maggie Castinado** is the 100th president of the Connecticut Bar Association and first Hispanic leader of the association. She is a past president of the Connecticut Hispanic Bar Association and a senior assistant public defender at the Office of the Public Defender in New Haven; she has defended thousands of clients with criminal matters since 1999.*

***CT Lawyer*: Where did you grow up and how did it shape where you are today?**

Maggie Castinado: I grew up in Mitchell, NE, with a population of 1,200. I loved growing up in small town Nebraska. It was such a simple and safe life. It was a sheltered life. Very little diversity and I grew up thinking the only difference between our family and others was that they ate with Wonder Bread, and we ate with tortillas! Once I moved to Colorado and then Connecticut, reality hit.

***CL*: Tell us more about your educational background—from your time as a Colorado State University ram to Quinnipiac Law bobcat.**

MC: My father passed away in 1989. He is the reason I am where I am today. I'm reminded of a quote that says it all: "A father loves completely, gives quietly, teaches gently, and inspires deeply." He used to say to me "Mija, don't let anyone tell you you can't. You CAN do and be whatever you want to be—reach for the stars!" Now, this is important because in my culture, women were raised to be wives and mothers; not to have an education. My mother did not complete grade school, but my father wanted all his children to complete high school and be the best we could be. So, shortly after he passed away, I registered at Front Range Community College. Despite my father's belief in me, I was not at all sure that college was right for me. I had to complete an assessment exam to determine what level of classes I should start with, but it also gave the top five career paths based on the test results. I will never forget, the number one on my list was lawyer. I remember scoffing at this and thinking there is no way I could ever be a lawyer. Anyway, I did well in school and received my associate's degree and then transferred to Colorado State University where I focused on social work.

***CL*: What inspired you to become a lawyer?**

MC: My father worked for several non-profits that assisted the Hispanic community. He also volunteered for VISTA to help people fill out their tax returns and created a school during the summer for migrant children. I went into social work because I knew I wanted to help people like my father did. I just didn't know how, so I volunteered in various fields and one of them was in the Fort Collins Office of Adult Probation. What started as a volunteer position turned into an internship for credit and ultimately a paid contract position. I really enjoyed my work there. The supervisor, Les Rudner, ran his office with a focus on rehabilitation first with a social work perspective, and so probation officers could really help people change their lives! But it was my experience as the only person of color serving on a jury that I chose my path.

***CL*: You have worked at the Office of the Public Defender for over 20 years—what drew you to this work, and what about it has made you stay?**

MC: Serving on that jury was the pivotal reason. As I mentioned, I was the only person of color; the defendant was Black and represented by a public defender. During deliberations, I was the only one in favor of an acquittal, so I had to explain my position. It was a clear case of racial bias which, clearly, my Caucasian venire people had no understanding of. It was a very simple explanation to them which they grasped easily, and the client was acquitted. The moral of that story for me was, coming from very humble beginnings, how easily that could have

> *"My presidential theme is A Future Filled with Hope, centered around three tenants: Engage Our Membership, Educate Our Future Leaders, and Empower Our Community."*
>
> —MAGGIE CASTINADO
> 2023-2024 PRESIDENT

been one of my brothers on trial and because this public defender did not even consider or bring up the concept of racial bias, I thought how easily my brothers could be in jail just for the color of their skin. So, I decided to become a public defender and be the antithesis of that public defender.

***CL*: How has your time with the Office of the Public Defender shaped you as a lawyer and leader?**

MC: It was very eye-opening and incredibly frustrating. The racial profiling and systemic racism were clear from my very first year. But at that time, everybody believed law enforcement could do no wrong. So, you had people of color being arrested mostly because of the color of their skin and the fact that they lived in poor neighborhoods. That resulted in a perpetuation of progressive prosecution as soon as a person received their first conviction. Even today, though state's attorneys and courts have acknowledged that systemic racism exits, they still look back at a person's criminal history no matter how old it is or how most of it is a result of racial profiling and bias.

***CL*: What is the most important lesson you have learned as a lawyer that was not taught in law school?**

MC: So this was not taught in law school but I learned it in law school. And that's the importance of networking. I had never been to the east coast and drove up the day before orientation, not knowing a soul. I started working at the law library and quickly joined several organizations and study groups, which became my law school community. Then myself, along with the other two Hispanic students attending law school there, started the LLSA (Latino Law Students Association) organization, which ultimately led me to the CHBA (Connecticut Hispanic Bar Association) which I've been involved with ever since.

***CL*: How did your past bar leadership experience with the Connecticut Hispanic Bar Association prepare you for your term as CBA president?**

MC: It did not prepare me at all! Very different experiences leading the CHBA, where we are like a family of about 80 members, and leading an organization of 8,500 members and where the CBA's issues with lack of diversity were not that long ago and continues to be a struggle to engage many in caring about the issues. Yet, we persevere.

***CL*: What do you see as the biggest challenges facing the legal profession in Connecticut, and how do you plan to impact these challenges as president?**

MC: Right now, that remains access to justice and systemic racism and racial profiling in the criminal justice system. Our Limited Scope Representation (LSR) and Pro Bono Committees will continue to address access to justice. I'm very excited to get the LSR off the ground under the leadership of Michael Dennison who has 50+ years as a public servant and just retired as a senior states attorney. He is very excited to take this on and has great ideas! Our Criminal Justice Section will be putting on several CLEs addressing issues concerning the justice system. One in particular will speak to the current state trooper fraudulent ticket investigation. Finally, we must address the generative AI technology and how this will affect our profession. We have created the Generative AI Committee, which will be chaired by Past President Jonathan M. Shapiro and N. Kane Bennett.

***CL*: What could the CBA do to guide and prepare the next generation of lawyers?**

MC: The CBA YLS does an excellent job of taking this on and Chair Sara O'Brien has not only made YLS a welcoming section but is "Equipped to Evolve" with the times and quickly changing legal landscape.

***CL*: What initiatives do you plan to focus on throughout your year as president?**

MC: My presidential theme is **A Future Filled with Hope**, centered around three tenants: Engage Our Membership, Educate Our Future Leaders, and Empower Our Community. With the above in mind, we have already created a Generative AI Committee, a Commission on Women in the Legal Profession, and I am also establishing a Disaster Preparedness Task Force. The CBA held Helping Hands for Hawaii, a fundraising event, on September 28 in collaboration with other bar associations and affinity groups to raise funds to help those impacted by the fires in Maui. I look forward to all this bar year will bring and all that we have in store. ■

CBA Members, Family, and Friends Enjoy Third Annual Summer Outing

Boats, kayaks, and canoes were available for use by attendees on Holiday Hill's lake.

(L to R) 2022-2023 CBA President Daniel J. Horgan, Government and Public Sector Committee and Membership Committee Co-Chair Kyle LaBuff, and Attorney LaBuff's guest

On Sunday, June 25, over 290 CBA members, officers, and their families and friends gathered at Holiday Hill in Prospect for a day packed with summer recreation. Attendees enjoyed a variety of outdoor activities, including water activities, mini golf, bingo, yard games, and a rock-climbing wall as well as plentiful food options for breakfast and lunch. The day had great weather, which allowed families to take full advantage of all the outdoor activities available. We look forward to seeing everyone again at next year's annual outing in June of 2024.

2023-2024 CBA Vice President Emily A. Gianquinto with her son

Distinguish Yourself from the Crowd by Becoming a Board Certified Residential Real Estate Specialist!

Gain a certification that identifies you as a competent, experienced, and skilled attorney in the area of residential real estate law through the Connecticut Bar Association Real Property Section's Residential Real Estate Specialist Certification Program. The program has been approved by the Connecticut Superior Court's Legal Specialization Screening Committee and Rules Committee. This approval process ensures that our program has met the court's strict standards. Only attorneys who have been formally certified may use the designation "Board Certified Residential Real Estate Specialist" on business cards, letterhead, and other advertisements.

To apply for the designation "Board Certified Residential Real Estate Specialist," you must satisfy the following requirements:

- Demonstrate that no less than twenty-five percent of your total practice has been in the area of residential real estate law
- Have been engaged in the practice of law in Connecticut for at least five years and be a member in good standing of each bar in which you are admitted
- Maintain an errors and omissions policy with minimum limits of $1,000,000 per claim
- Have a satisfactory disciplinary and malpractice history
- Accumulate a minimum of thirty-six hours of continuing legal education activities in the area of residential real estate law, including at least six hours of ethics in the three years prior to filing the application
- Have a minimum of five references from other attorneys or judges knowledgeable regarding your practice and competence
- Pass a one-day written examination

To become certified as a residential real estate (RRE) specialist, you must apply for and pass the RRE specialist certification exam. The notice to apply form for the examination is available online at **ctbar.org/RRESpecialist**. You must submit your notice to apply for the RRE specialist certification exam (with an accompanying $50 fee) by **October 20**.

After submitting your notice to apply for the RRE specialist certification exam, you will then need to submit a completed application with an accompanying $250 fee (applicants who submit the notice of intent with the $50 fee will be credited $50) for the exam by **December 15, 2023**. The RRE specialist certification exam is planned to take place on **Friday, March 8, 2024**, with a snow date scheduled for **Friday, March 15, 2024**.

Image credit: Daniel Tadevosyan/Getty Image

CBA HOSTS JULY 2023 FREE LEGAL ADVICE CLINIC

On July 25 and 26, The Connecticut Bar Association (CBA) Pro Bono Committee and Statewide Legal Services of Connecticut held a Free Legal Advice Clinic, where 20 volunteer attorneys met with 41 clients over Zoom meetings. Prior to the clinic, 13 volunteer paralegal and law students completed intake forms and asked follow-up questions to help the attorneys prepare for the meetings and provide the best possible legal advice.

FREE LEGAL ADVICE CLINIC

Throughout the clinic, volunteer attorneys met with clients and provided free legal guidance on topics involving various areas of law, including family law, immigration, housing, and employment law.

"These free legal advice clinics provide vital support to individuals and families that cannot afford an attorney," stated CBA President Maggie Castinado. "I am proud to say that over 200 clients have been served by the clinics over the past year. Thank you to all the attorneys, law students, and paralegals who have dedicated time to participate in them and help close the access to justice gap. I encourage anyone who is interested in volunteering to reach out and get involved in these quarterly events."

Learn more about the CBA Free Legal Advice Clinics at ctbar.org/freelegaladviceclinics.

(L to R) CBA Immediate Past President Daniel J. Horgan, President Maggie I. Castinado, Vice President Emily A. Gianquinto, and President-Elect James T. Shearin

CBA LEADERS GATHER FOR ANNUAL RETREAT

On August 25, CBA officers, members of the Board of Governors and House of Delegates, and section and committee chairs gathered for the annual CBA Leadership Retreat at the Madison Beach Hotel, where they were trained on the CBA's various programs, initiatives, and procedures.

Save the Date

2023 Rule of Law Conference

Thursday, November 9 | 8:30 a.m.–12:30 p.m.
Quinnipiac University School of Law, North Haven

Learn more at ctbar.org/RuleOfLaw.

YLS LEADERS ATTEND 2023 ANNUAL LEADERSHIP RETREAT AND RECEIVE SERVICE AWARDS

The Connecticut Bar Association's Young Lawyers Section (YLS) hosted its annual leadership retreat on August 11-12 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, CBA President Maggie Castinado provided welcome remarks to the committee members, encouraging them to promote diversity, equity, and inclusion as young leaders. "There is still inequity in our profession and glass ceilings to break… If we are to have a diverse, tolerant, and understanding society that is celebrated and truly equal then we must have a consensus on reaching this goal," stated President Castinado. "You are the new trailblazers, you are the future, you are our hope, and this is your call to action."

Retired Connecticut Supreme Court Justice Christine Keller served as the keynote speaker for the event. She spoke about the expanding and evolving issues related to the relationship between artificial intelligence and legal practice. "AI is already out there, its inexpensively accessible… and its capable of being utilized and controlled by many who will not have the best of intentions," warned Justice Keller, as she touched upon several legal and ethical issues that have recently risen from the development and use of AI.

After the keynote speech, 12 YLS Executive Committee members received awards for their service during the 2022-2023 bar year. The 2022-2023 YLS Chair Christopher A. Klepps presented the recipients with their awards, noting each attorney's commendable achievements.

Leadership Award

Cindy M. Cieslak received a leadership award for her devoted work as an American Bar Association representative after having previously served as the chair of the YLS. During the 2022-2023 bar year, she organized a trip on behalf of the YLS for members of the CBA to be sworn-in to the US Supreme Court.

Logan A. Carducci earned a leadership award for her long-term dedication to the YLS and for serving as a role model for members of the section. She has been integral in the planning and organization of the YLS pro bono fair and other events throughout the years.

(L to R) Sara Bonaiuto, 2022-2023 YLS Chair Christopher A. Klepps, Retired Connecticut Supreme Court Justice Christine E. Keller, 2023-2024 YLS Chair Sara O'Brien, Vianca T. Malick, and Trent LaLima

Alison J. Toumekian received a leadership award for her service as an American Bar Association Young Lawyers Division representative and her involvement in planning the Northeast Regional Professional Development Conference for Young Lawyers.

Rookie of the Year Award

Virginia M. Gillette was recognized for preparing a successful CLE, attending numerous YLS social events, and showing great enthusiasm and promise as a leader throughout her first year on the executive committee.

Kevin F. Brignole, Jr. was also recognized for preparing a successful CLE as well as representing the YLS section at the June swearing-in ceremony for newly admitted attorneys at the Connecticut Supreme Court.

Star of the Year Award

Jermaine Brookshire, Jr. received a Star of the Year award for his performance as CLE director, ensuring that YLS members stayed committed to their responsibility to host programs throughout the year.

Paige M. Vaillancourt earned a Star of the Year award for preparing an engaging and well-attended CLE, planning the 2022-2023 YLS kickoff event, and serving as an asset to the section.

Hon. Shanique Fenlator and **Andrew Glass** both received their Star of the Year awards for planning and hosting student outreach events at Quinnipiac School of Law and UConn School of Law to develop a pipeline for future YLS members.

Volunteer of the Year Award

Ashley A. Cervin, **Nora Gray,** and **Caroline Boisvert** each earned Volunteer of the Year awards for collectively providing over 300 hours of pro bono and public service work, which greatly contributed to the section successfully reaching its annual goal of having its members provide over 1,000 hours of pro bono services.

(L to R) YLS Executive Committee Members Sara J. O'Brien, Kevin F. Brignole, Jr., and Vianca T. Malick greeted the new attorneys at the reception following the ceremony.

2022-2023 CBA President Daniel J. Horgan delivers remarks to the newly admitted attorneys.

New Attorneys Sworn-In to the Connecticut Bar

On the morning of June 23 at the Connecticut Supreme Court building, 29 new attorneys were sworn-in to the Connecticut Bar. Chief Justice Richard A. Robinson and Associate Justices Joan K. Alexander, Gregory T. D'Auria, Steven D. Ecker, Andrew J. McDonald, and Raheem L. Mullins presided over the ceremony, which began with welcome remarks from Chief Justice Robinson.

Justice Alexander recognized and congratulated the new admittees for their achievement and addressed the important role they will play in upholding the rule of law. "More than ever, it is imperative that our courts exemplify civility and respect, because if our justice system disintegrates because of incivility and chaos in this court, so too does our nation," stated Justice Alexander, who also identified civility as a critical element of maintaining the rule of law.

Justice McDonald administered the oath of attorney to the inductees before they each individually presented themselves as attorneys before the court. At the end of the ceremony, 2022-2023 CBA President Daniel J. Horgan welcomed the new attorneys to the profession. "From this day forward, you each have the awesome responsibility to impact the lives of your clients through your advocacy," stated President Horgan. Like Justice Alexander, he also emphasized the importance of civility and respect in the profession, warning the new attorneys that their conduct would define their reputations.

After the ceremony, the newly admitted attorneys were invited to attend a reception held in the Connecticut Supreme Court building's Museum of Connecticut History, where they were able to meet with representatives from the Connecticut Bar Association Young Lawyers Section and other bar associations from across Connecticut.

Candidates await their admission to the Connecticut Bar with family and friends seated behind them.

Upcoming Education Calendar

Register at ctbar.org/CLE.

OCTOBER

4 Navigating Vocational and Earning Capacity Evaluations

16 Current Courtroom Tactics in Civil and Criminal Cases

18 A Higher Bar: How to Exceed Client Expectations in a Virtual World

18 Special Education 101

20 2023 Diversity, Equity, & Inclusion Summit: The Collaborative Blueprint✦

25 IOLTA/Law Office Management✦

27 WC Medical Conference

NOVEMBER

2 2023 Federal Tax Institute of New England✦

6 Tribal Law

9 Rule of Law Conference

13 Appellate Advocacy

14 Hot Topics in Probate

15 Ethics✦

28 Nonprofit Law 101

30 Civic Engagement✦

DECEMBER

1 Raising the Bar: A Bench/Bar Symposium on Professionalism✦

4 Professional Ethics✦

5 Antitrust Law

13 Education Law

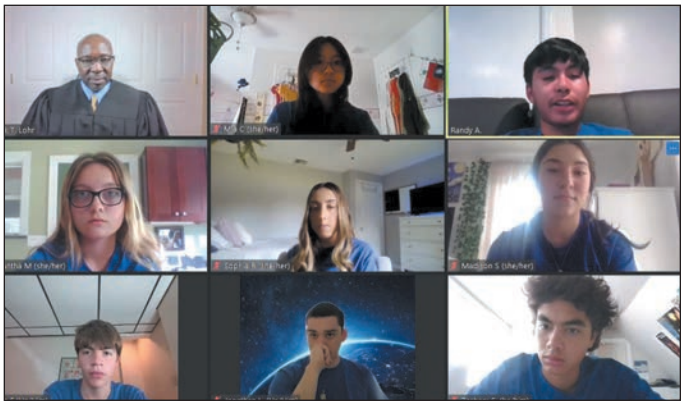
✦ *Ethics credit available* **CLE PASS ELIGIBLE:** *For more information about the CLE Pass, visit ctbar.org/CLEPass.*

CBA HOSTS 2023 LAW CAMP

On the week of July 10-14, the CBA hosted the virtual 2023 LAW camp for a group of Connecticut high school students. LAW Camp exposes high school students to the legal profession and teaches them critical and analytical thinking to help them succeed in their educational and professional careers. A total of 35 students attended this year's camp, where they learned about the legal system and what is involved in pursuing a career in law. Throughout the week, they heard presentations and engaged in activities with 40 different Connecticut Bar Association member attorneys and judges who volunteered to participate in the camp.

As a kickoff to their week, students learned about the diverse pathways to becoming an attorney through the personal stories told by CBA members, which critical educational and professional skills are necessary to succeed in law, and the different career paths available to attorneys. Over the following days, the students learned about the Connecticut court system and the mechanics of court proceedings and lawsuits. They participated in exercises demonstrating how to conduct direct and cross-examinations; heard presentations on the roles of lawyers, judges, and the jury in court; and virtually observed a court proceeding.

The week-long camp culminated with a closing argument competition between the students, who worked with volunteers to prepare. While overseeing one group's preparations, President Maggie Castinado reassured the students that "it's natural to get nervous or tongue-tied," and offered each student constructive feedback as they practiced their arguments.



Judge Erik T. Lohr oversaw the closing argument competition on the last day of LAW Camp.

The finalists presented their arguments to Judge Erik T. Lohr of the Connecticut Superior Court, who selected the winner and runner-up. After the competition, Judge Lohr explained the duties of his role as a Connecticut Superior Court judge to the students. He spoke about his path to entering the field of law and inquired with each finalist about their background and interests while providing feedback on their performances.

The week of learning ended with closing remarks from Ronald J. Houde, Jr., CBA Diversity, Equity, and Inclusion Committee co-chair and LAW Camp chair: "I hope you all had a good time, learned something new, and had a meaningful experience. I hope you had a connection or felt something with at least one speaker to give you an example of the type of law or type of career that you might want to go into, or you heard from someone who provided an example for you of what it's like to be a lawyer."

ABA Appoints Two Connecticut Lawyers to Board's Executive Committee

American Bar Association President Mary Smith appointed Amy Lin Meyerson as chair of the Board's Profession, Public Service and Diversity (PPSD) Committee and Linda Randell as chair of the Board of Governors' Finance Committee. In their leadership roles of these Standing Committees of the ABA Board, both Randell and Meyerson are serving one-year terms on the ABA Executive Committee, effective as of the end of the ABA Annual Meeting on August 8, 2023, in Denver, CO.

As Finance chair, Randell will head the committee that recommends policies to assure the prudent financial management of the Association's resources and compliance with Board-approved financial policies and oversees all financial activities of the Association, including facilities, human resources, association insurance coverage, and legal fees.

PPSD Chair Meyerson will oversee three main mission-critical areas to the ABA, its members, and the communities which they serve: the profession, public service, and diversity.[1] PPSD has oversight responsibility, including review and recommendations regarding new programming and recommendations to the Board regarding requests from ABA entities, program support funds, board nominations, and strategic planning.

"The American Bar Association will be well served during the 2023-2024 bar year from the leadership of Amy Lin Meyerson and Linda Randell as Chairs of two of the Board of Governor's Committees and as members of the Executive Committee," said Mary Smith, President of the American Bar Association. "It is historic that two female Connecticut lawyers will serve at the highest levels of the largest voluntary bar association in the world and leverage the experience they gained in the Connecticut legal community on a national scale."

Meyerson is in the third year of her board term. She is co-chair of the Connecticut Hate Crimes Advisory Council. Meyerson was the first Asian Pacific American and 97th president of the Connecticut Bar Association (2020-2021); President of the National Asian Pacific American Bar Association (2005-2006); chair of the ABA Solo, Small Firm and General Practice Division (2014-2015); president of the NAPABA Law Foundation (2016-2018); and founder/president of the Connecticut Asian Pacific American Bar Association (2000). She is a member of the ABA House of Delegates and served on its Admissions and Credentials (2018-2020) and ABA Scope and Correlation of Work (2020-2021) Committees. Meyerson chaired the ABA Solo and Small Firm Caucus (2012-2013) and served as the ABA alternate deputy representative to the United Nations and vice-chair of the ABA UN Representatives and Observers (2020-2021). She is a graduate of Duke University and the University of Connecticut School of Law. Meyerson looks forward to continuing to champion the ABA's causes, including its sustainable and inclusive initiatives while ensuring the health and vitality of ABA members.

Randell is in the first year of her current three-year term on the board, having served previously on the board and its Finance Committee from 2016-2018. She is the chair of the Long-Range

(L to R) Linda Randell, Mary Smith, and Amy Lin Meyerson

Photo Credit: Sarah Matheson

Planning Committee and a past section chair of the ABA Infrastructure and Regulated Industries Section and chaired its Long-Range Planning Committee until beginning her board service this August. As of the association's annual meeting in August, she will have completed five years of service on the ABA Committee on Scope and Correlation of Work, including one year as chair and this year as past chair; member, Standing Committee on Technology and Information Systems; and member, ABA House of Delegates. Randell also serves on the Boards of Towers at Tower Lane (HUD-funded senior congregate housing); Jewish Foundation of Greater New Haven; Gateway Community College Foundation; and University of Michigan Honors Alumni Council. She is the co-chair of the CBA Experienced Lawyers Committee. Randell was the senior VP and general counsel of UIL Holdings, a publicly held utility holding company. She was a partner and chair of Regulated Practices at Wiggin and Dana. Randell is a graduate of the University of Michigan and Yale Law School. Her favorite two-word phrases are: Play Ball, Go Blue, and Let's Eat! For people reading this article, she adds Join ABA!

NOTES

1 • The Profession, including persons and institutions involved in the legal profession, the practice of law and those things impacting the practice of law and the justice system, legal education, the public image of the legal profession, and the ABA as an indispensable force for the betterment of the profession.

• Public Service is a defining characteristic of the legal profession, and includes service to the community, pro bono service, rule of law initiatives, and other matters involving the law and its impact on the public.

• Diversity is an ABA goal and includes encouraging diversity in all things, promoting full and equal participation and inclusion of all persons in the association and the justice system, eliminating bias, and proactive efforts to achieve diversity and inclusion goals." ABA 2023-2024 Policy and Procedures Handbook at p. 12.

4 WAYS TO PROVIDE PRO BONO SERVICE

Connecticut's Rules of Professional Conduct for attorneys (Rule 6.1) defines Pro Bono Publico legal services as: "… professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means." Volunteer today through one of our pro bono programs.

CBA Pro Bono Connect
Get connected with one of Connecticut's civil legal services providers, based on your expressed pro bono interests, to provide civic legal services to Connecticut residents in need. Connections to training is also available.

CT Free Legal Answers
CT Free Legal Answers is an online civil legal service for people who cannot afford to pay for an attorney. Attorneys will answer questions through an online portal.

Lawyers in Libraries
Provides pro bono legal services to members of the public at libraries throughout the state in the areas of landlord/tenant, immigration law, family law, employment, consumer rights, and personal injury.

Bankruptcy Pro Bono Program
The Commercial Law and Bankruptcy Section has formed a panel of volunteer attorneys to represent needy and qualified individuals or married spouses pro bono in Chapter 7 bankruptcy cases, contested matters, and adversary proceedings.

Visit ctbar.org/members/volunteer to learn more about these programs and other pro bono resources.

Professional Discipline Digest

VOLUME 31 NUMBER 4 | By CONOR A. SCALISE

Reprimand issued for violation of Rules 3.3(a)(1), 8.2(a), 8.4(3), and 8.4(4) where attorney consistently and falsely characterized a hearing as a sentencing hearing in a complaint filed with the Judicial Review Council in which the attorney accused the Complainant, a superior court judge, of failing to allow victim testimony in a case involving attorney's daughter. In response to the Complainant's subsequent grievance complaint, attorney proceeded to make unsupported allegations regarding the character and integrity of the complainant. *Newson v. Christopher D. Parker*, #19-0339 (9 pages).

Reprimand issued by Stipulated Disposition for violation of Rule 8.1 and Practice Book Section 2-32(a)(1) where attorney, who was not in good standing during the pendency of the disciplinary proceeding, failed to answer the grievance complaint and failed to respond to "the overdraft." Attorney reprimanded pursuant to Practice Book Section 2-37(a). *Bowler v. Frederick A. Boland*, #20-0140 (8 pages).

Presentment for consolidation ordered by agreement where attorney had other disciplinary matters pending and probable cause was found that attorney violated Rules 1.3, 1.4, 1.5, and 8.4(3). *Flathers v. James R. Hardy II*, #20-0047 (6 pages). See *Malone v. James R. Hardy II*, #19-0668 (6 pages); *Kerr v. James R. Hardy II*, #19-0380 (6 pages); *Chambless v. James R. Hardy II*, 19-0788; *Bermudez v. James R. Hardy II*, #19-0799 (6 pages); *Hurdle v. James R. Hardy II*, #21-0033 (6 pages); *Henry v. James R. Hardy II*, #21-0275 (6 pages); *Evans v. James R. Hardy II*, #21-0052 (6 pages).

Reprimand issued by Stipulated Disposition for violation of Rules 1.5(b), 8.1(1), and 1.16(d) where attorney admitted to not having a completed written fee agreement with complainant, misstated to the court the fee agreement provided to the complainant, and failed to promptly return complainant's file and papers upon termination of representation. Attorney ordered to take three hours in-person CLE in Legal Ethics in addition to annual requirements of Practice Book 2-27A and to make restitution to complainant in the amount of $1,800. *Napolitano v. Marjorie R. Gruszkiewicz*, #20-0320 (10 pages).

Reprimand issued by Stipulated Disposition where attorney acknowledges that there is sufficient evidence to prove the facts constituting violation of Rules 1.15(b) and 1.7(a)(2). *Orlando v. Robert J. Connelly*, #18-0775 (7 pages).

Stipulated Sanctions where attorney acknowledges that there was clear and convincing evidence of violation of Rules 1.3, 1.4, 1.5(a), 1.15(d), 8.1 and Practice Book Section 2-32(a)(1). Attorney ordered to take 3 hours of in-person CLE in Legal Ethics in addition to annual requirements of Practice Book 2-27A. *Burgos v. Paul S. Taub*, #20-0232 (10 pages).

Reprimand issued by Stipulated Disposition where attorney acknowledges that there was clear and convincing evidence of violation of Rules 1.3, 1.4, 1.5(a), 1.15(d), 1.16(d), 3.3(a)(1), 8.1, 8.4(2), 8.4(3), 8.4(4) and Practice Book Section 2-32(a). *Whitley v. Paul S. Taub*, #19-0715 (8 pages).

Prepared by CBA Professional Discipline Committee members from public infor-mation records, this digest summarizes decisions by the Statewide Grievance Committee resulting in disciplinary action taken against an attorney as a result of violations of the Rules of Professional Conduct. The reported cases cite the specific rule violations to heighten the awareness of lawyers' acts or omissions that lead to disciplinary action.

Presentments to the superior court are de novo proceedings, which may result in dismissal of the presentment by the court or the imposition of discipline, including reprimand, suspension for a period of time, disbarment, or such other discipline the court deems appropriate.

A complete reprint of each decision may be obtained by visiting jud.ct.gov/sgc-decisions. Questions may be directed to editor-in-chief, Attorney John Q. Gale, at jgale@jqglaw.com.

Reprimand issued for violation of Rule 8.1(2) and Practice Book Section 2-32(a)(1) where attorney failed to establish good cause for her failure to respond to the grievance complaint. Attorney ordered to take three hours of in-person CLE in Legal Ethics in addition to annual requirements of Practice Book 2-27A. *Onofrio v. Nickola J. Cunha*, #20-0364 (7 pages).

Presentment ordered for violation of Rules 3.3(a)(1), 3.4(5), 3.4(7), 4.4(a), 8.4(1), 8.4(3), and 8.4(4) where attorney knowingly made false statements to a court and to the Committee in which she misrepresented the law and accused the

complainant of a crimes without any factual or legal basis supporting her allegations. The Committee further concluded that attorney's conduct was prejudicial to the administration of justice as the false statements made under oath designed solely to obtain an advantage in a family court matter and had no substantial purpose other than to embarrass, delay, or burden the complainant. *Cousineau v. Nickola J. Cunha*, #19-0649 (8 pages).

Reprimand issued for violation of Rules 8.1(2), 8.4(4) and Practice Book Section 2-32(a)(1) where attorney gave the complainant, a state marshal, a check for his services from an account with insufficient funds and subsequently failed to answer the grievance complaint. Attorney ordered to take three hours of in-person CLE in Law Office Management in addition to annual requirements of Practice Book 2-27*A. Lyons v. Brian A. DeSautels*, #20-0470 (6 pages).

Reprimand issued for violation of Rules 1.5(b) and 8.1(2) and Practice Book Section 2-32(a)(1) where attorney failed to provide client with a written fee agreement and failed to file an answer to the grievance complaint. Attorney ordered to take three hours of in-person CLE in Law Office Management in addition to annual requirements of Practice Book 2-27A. *Martin v. Loida Deborah John-Nicholson*, #19-0748 (5 pages).

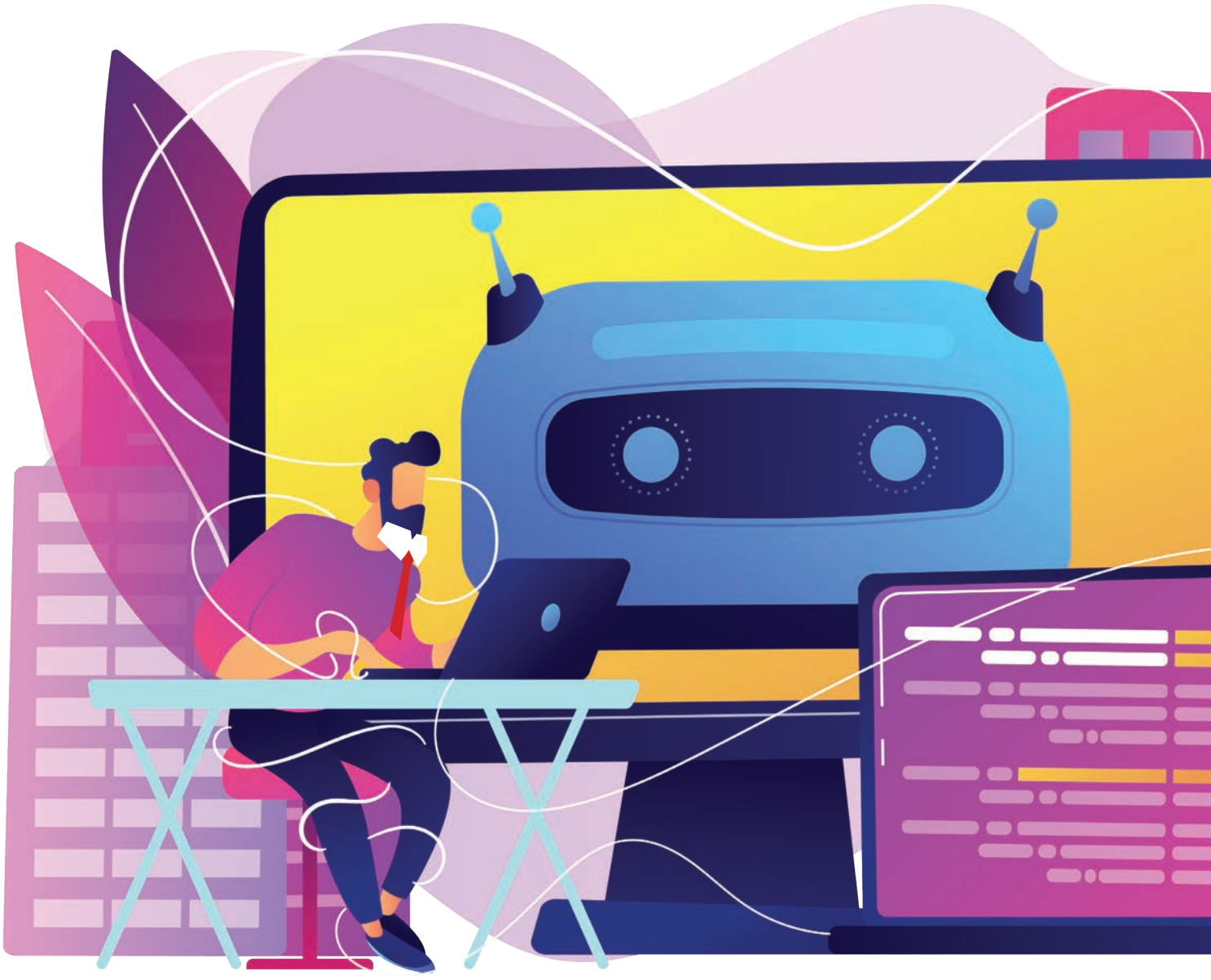
Presentment ordered for violation of Rules 1.1, 1.3, and 8.1(2) and Practice Book Section 2-32(a)(1) where attorney representing incarcerated individual in a Petition for New Trial failed to serve written discovery requests, failed to take the deposition of a key witness that potentially had information that substantiated the claims made by complainant in his Petition, and failed to file an answer to the grievance complaint. Notably, the retainer paid to attorney by complainant included $500 in costs for the deposition of said key witness. *Torres v. Thomas M. Gotimer*, #20-0435 (7 pages).

Reprimand issued for violation of Rule 8.1(2) and Practice Book Section 2-32(a)(1) where attorney failed to file an answer to the grievance complaint and failed to respond to a demand for information from the Office of Chief Disciplinary Counsel. *Brown v. Thomas M. Gotimer*, #20-0366 (7 pages).

Reprimand issued for violation of Rules 1.15(b), 1.15(d), 1.15(f), 1.16(d), and 8.4(3) where attorney failed to deposit client's funds into an IOLTA account and depositing them instead into his own personal account, failed to refund unearned fees to client, and conditioned the refund of unearned fees on the receipt of a Release from client. Attorney ordered to take three hours of in-person CLE in Legal Ethics in addition to annual requirements of Practice

Continued on page 40 →

Misadventures in ChatGPT: Lessons Learned



BY MARCY TENCH STOVALL

EARLY IN 2023, New York lawyer Steven A. Schwartz found himself in a bind when faced with a motion to dismiss an action he had commenced in state court that was subsequently removed to the District Court for the Southern District of New York. Schwartz had no experience with the issues raised in the motion to dismiss, his firm did not have a Westlaw or LexisNexis account, and his firm's Fastcase account provided only limited access to federal caselaw. So to prepare his opposition to the motion to dismiss, Schwartz opted to rely on an internet site he had heard about from press reports and family members: ChatGPT.

Images credit: Visual Generation/Getty Image

Without understanding how ChatGPT worked—he believed it functioned as a "super search engine"—Schwartz prepared an opposition pleading that relied on citations and summaries ChatGPT generated in response to a series of prompts. Schwartz did not, apparently, make any effort to obtain and analyze the decisions ChatGPT identified or even to confirm that any of the cited authority existed. Because Schwartz was not admitted in the District Court, his law firm colleague Peter LoDuca had appeared on behalf of the firm's client after the case was removed from state court. Accordingly, it was LoDuca who signed and filed the March 1 "Affirmation in Opposition" to the motion to dismiss, and he did so without any review of the cited authority or inquiry to Schwartz about his research or contrary precedent.

In its reply, the defendant pointed out that the cited cases appeared to be non-existent. After the court did its own research, and was similarly unable to locate the cited authorities, it issued two orders directing LoDuca to file an affidavit annexing copies of the cited decisions. Though alerted by both opposing counsel and the court that there was a significant problem with the opposition submission, neither lawyer took what should have been the obvious step of reconsidering the trustworthiness of the responses ChatGPT had generated. Nor did they withdraw the challenged, and critically flawed, submission. Instead, after obtaining an extension of time based on what the court subsequently deemed a misrepresentation, LoDuca filed an affidavit Schwartz prepared and which annexed only the ChatGPT summaries rather than any actual case decisions, as the court had directed.

On June 22, 2023, two weeks after the June 8 hearing at which the two lawyers had the opportunity to explain their conduct, the court issued its Opinion and Order on Sanctions ("Opinion"). *Mata v. Avianca, Inc.*, 2023 WL 4114965 (S.D.N.Y 2023). The court found that the lawyers had "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question." Noting the "[m]any harms [that] flow from the submission of fake opinions"—including that it "promotes cynicism about the legal profession and the American judicial system"—and making multiple findings of bad faith of the part of both lawyers involved, the court, pursuant to Rule 11 and its inherent power, imposed sanctions on both lawyers and their law firm.

Below are some of the lessons lawyers and law firms should take from the ChatGPT case.

First, and perhaps most basic: do not use technology without understanding its limitations. As provided in the Commentary to Rule 1.1, a lawyer's fundamental duty of competence includes the obligation to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Here, the lawyer clearly failed to meet that standard. The problem was not that he used ChatGPT: the court found that there was nothing "inherently improper" about using the technology. Rather, the real problem was the lawyer initially used ChatGPT without understanding its limitations. He then compounded that error by continuing to insist that he did not understand that ChatGPT could produce fictitious cases even though both opposing counsel and the court confronted him with the fact that he had relied on authority that simply did not exist.

Second: Don't take on a matter where you do not have the requisite experience and/or your law firm lacks the necessary resources to provide competent representation. The court found that there was no evidence that Schwartz had knowledge of or experience with the legal federal law questions at issue, and the record established that his firm lacked research

resources for a federal court matter. Presumably, if Schwartz had even some knowledge of the applicable law, he would have more readily been able to ascertain that ChatGPT had given him fictitious authority.

Third: If you make a mistake, don't try to get away with pretending that you haven't. The court pointedly noted that the situation would have been much different "if the matter had ended with Respondents coming clean about their actions shortly after they received the defendant's March 15 brief questioning the existence of the cases, or after they reviewed the Court's Orders … requiring production of the cases.… Instead, [they] doubled down and did not begin to dribble out the truth until … after the Court issued an Order to Show Cause" why they should not be sanctioned. Reading the court's Opinion, it is hard to escape the conclusion that the lawyers found themselves in a situation that they could have avoided without sanction had they offered an appropriate and timely acknowledgment of a mistake. Instead, forgetting that the first rule when you find yourself in a hole is to stop digging, they proceeded to dig themselves into a deeper and deeper hole.

Fourth: Don't sign an affidavit attesting to matters of which you have no personal knowledge. LoDuca executed and filed an affidavit purporting to annex the case decisions as ordered by the court. But it was Schwartz who authored the affidavit; LoDuca "had no role in its preparation and no knowledge of whether the statements therein were true," and there was "no evidence that Mr. LoDuca asked a single question." The bad faith findings against LoDuca included the finding that he "violated Rule 11 in swearing to the truth of the April 25 Affidavit with no basis for doing so. While an inadequate inquiry may not suggest bad faith, the absence of any inquiry supports a finding of bad faith."

Fifth, and though it should not need saying, apparently it does: Don't dissemble to the court. The court called out the ways in which the lawyers misled the court. For example, in seeking an extension of time, LoDuca represented that he was out of the office on vacation. Not only was that untrue, "[t]he lie had the intended effect of concealing Mr. Schwartz's role in preparing the March 1 Affirmation and the April 25 Affidavit and concealing Mr. LoDuca's lack of meaningful role in confirming the truth of the statements in his affidavit." In a May 25 affidavit, Schwartz represented to the court that he had relied on ChatGPT "to supplement the legal research'" (emphasis in court's Order). However, based on Schwartz's testimony at the June 8 hearing, the court concluded that the representation was "a misleading attempt to mitigate his actions by creating the false impression that he had done other, meaningful research on the issue and did not rely exclusively on an AI chatbot, when, in truth and in fact, it was the only source of his substantive arguments." And laying out the specific facts contrary to one contention Schwartz made in his June 6 Declaration, the court also rejected Schwartz's "highly dubious claim" that prior to receipt of the May 4 Order to Show Cause, he "could not fathom that ChatGPT could produce multiple fictitious cases."

Conclusion

Law firm risk managers should develop and implement protocols for their colleagues' use of generative AI tools like ChatGPT. Some steps to consider include the following:

- Determine whether the lawyer requesting approval to use the AI tool has sufficient background and knowledge of the tool's potential deficiencies to satisfy the ethical duty of competence.
- Ask the requesting lawyer to provide confirmation of the reliability of the proposed AI tool for brief writing projects, including the accuracy of case citations.
- Determine whether any outside counsel guidelines require the firm to obtain the client's written consent to the proposed use of an AI model or tool. ■

Marcy Tench Stovall *is an attorney at Pullman & Comley LLC. She practices in the area of professional liability and ethics, and regularly represents law firms and attorneys in malpractice litigation, as well as licensing, disciplinary and sanctions matters. Since 2000 she has served on the Connecticut Bar Association's Committee on Professional Ethics, which issues opinions on attorney ethics, and served as its chair from 2015-2019.*

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Connecticut Bar Association

CBA Free Legal Advice Clinic: Volunteers Needed

Tuesday, January 23, 2024
10:00 a.m. - 6:00 p.m.

Wednesday, January 24, 2024
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
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- 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.

CELEBRATING 100 PRESIDENTS

This bar year marks the installation of the 100th president to serve the Connecticut Bar Association (CBA) since its founding in 1875. The first president of the CBA was Origen S. Seymour, who served on the Connecticut House of Representatives and as a chief justice of the Connecticut Supreme Court. While it is now standard for CBA presidents to hold office for a one-year term, that was not always the tradition. Our first three presidential terms spanned 33 years. It was our fourth president, George D. Watrous, who challenged precedent with a two-year term in 1908. It wasn't until 1946 that the one-year term became standard, when William B. Gumbart, our 23rd president, served.

The term length wasn't the only change throughout the last 100 presidents—the CBA's current publications were established during two separate presidencies. The first issue of the *Connecticut Bar Journal* was published in 1927 during Terrence F. Carmody's presidency, and *CT Lawyer* was established, in its current form as a magazine, in 1990 during Carolyn P. Kelly's tenure.

Multiple presidents have had the distinction of a CBA award or fund named in their honor. The John Eldred Shields Distinguished Professional Service Award was named for our 56th president; it is presented to a member who has performed outstanding service through or on behalf of the CBA, for the benefit of the legal community and the community at large. Named for our 60th president, the Henry J. Naruk Judiciary Award is presented to members of the state and federal judiciary who have made substantial contributions to the administration of justice in Connecticut. In 2012, the CBA's pro bono award was officially renamed The Honorable Anthony V. DeMayo Pro Bono Award for the association's 46th president and his commitment to delivering legal services to the needy and a lifetime of distinguished service to the bar.

More recently, the Ralph J. Monaco Memorial Civics Education Award and Fund was established to honor the CBA's 87th president, a champion of civics education. The award is presented to Connecticut high school students who have demonstrated a significant commitment to advancing civic engagement, civics education, and/or the rule of law. The Karen Lynn DeMeola Diversity, Equity, and Inclusion Fund is named for the CBA's 94th president, a champion of DE&I within the Connecticut legal community. The fund was established by the Diversity, Equity, and Inclusion Committee to support its mission and purposes.

The CBA has a history of esteemed lawyers and judges leading the organization through innumerable changes since its founding. The milestone of the 100th presidency provides us with the opportunity to reflect on our past and to look forward to the next 100 presidents. ■

1. Origen S. Seymour 1875-1882
2. Richard D. Hubbard 1882-1885
3. Charles E. Perkins 1885-1908
4. George D. Watrous 1908-1910
5. George E. Hill 1910-1912
6. Hadlai A. Hull 1912-1914
7. Charles Phelps 1914-1916
8. William F. Henney 1916-1918
9. Charles E. Searls 1918-1920
10. A. Heaton Robertson 1920-1922
11. William B. Boardman 1922-1924
12. Lucius F. Robinson 1924-1926
13. Terrence F. Carmody 1926-1928
14. Arthur M. Brown 1928-1930
15. Harrison Hewitt 1930-1932
16. David S. Day 1932-1934
17. Hugh M. Alcorn 1934-1936
18. Warren B. Burrows 1936-1938
19. Frederick H. Wiggin 1938-1940
20. Warren F. Cressy 1940-1942


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21. Joseph F. Berry 1942-1944
22. William H. Blodgett 1944-1946
23. William B. Gumbart 1946-1947
24. Charles M. Lyman 1947-1948
25. Charles W. Pettingill 1948-1949
26. Samuel H. Platcow 1949-1950
27. H. Meade Alcorn 1950-1951
28. William W. Gager 1951-1952
29. David Goldstein 1952-1953
30. Herbert S. MacDonald 1953-1954
31. Allyn L. Brown, Jr. 1954-1955
32. David H. Jacobs 1955-1956
33. Lucius F. Robinson, Jr. 1956-1957
34. James W. Cooper 1957-1958
35. Jonathan F. Ells 1958-1959
36. J. Kenneth Bradley 1959-1960
37. J. Ronald Regnier 1960-1961
38. John Q. Tilson, Jr. 1961-1962
39. Leo V. Gaffney 1962-1963
40. Walter M. Pickett, Jr. 1963-1964
41. Bernard H. Trager 1964-1965
42. Joseph P. Cooney 1965-1966
43. Richard H. Bowerman 1966-1967
44. Arthur M. Lewis 1967-1968
45. E. Gaynor Brennan 1968-1969
46. Hon. Anthony V. DeMayo 1969-1970
47. Norman K. Parsells 1970-1971
48. Carl W. Nielsen 1971-1972
49. Harry S. Gaucher, Jr. 1972-1973
50. James R. Greenfield 1973-1974
51. William K. Cole 1974-1975
52. Carmine R. Lavieri 1975-1976
53. George F. Lowman 1976-1977
54. Hon. Peter C. Dorsey 1977-1978
55. Frederick U. Conard, Jr. 1978-1979
56. John Eldred Shields 1979-1980
57. Robert M. McAnerney 1980-1981
58. Hon. Maxwell Heiman 1981-1982
59. Jack H. Evans 1982-1983
60. Henry J. Naruk 1983-1984
61. Raymond W. Beckwith 1984-1985
62. Ralph Gregory Elliot 1985-1986
63. Paul B. Altermatt 1986-1987
64. Lawrence M. Liebman 1987-1988
65. James F. Stapleton 1988-1989
66. Marilyn P. Seichter 1989-1990
67. Carolyn P. Kelly 1990-1991
68. Susan W. Wolfson 1991-1992
69. Hon. Frank H. D'Andrea, Jr. 1992-1993
70. John M. Bailey 1993-1994
71. Rosemary E. Giuliano 1994-1995
72. Brian T. Mahon 1995-1996
73. Edward M. Sheehy 1996-1997
74. Peter L. Costas 1997-1998
75. Frank H. Finch, Jr. 1998-1999
76. William F. Gallagher 1999-2000
77. Donat C. Marchand 2000-2001
78. Barbara J. Collins 2001-2002
79. Deborah J. Tedford 2002-2003
80. John W. Hogan, Jr. 2003-2004
81. Frederic S. Ury 2004-2005
82. Louis R. Pepe 2005-2006
83. Norman K. Janes 2006-2007
84. William H. Prout, Jr. 2007-2008
85. Livia DeFilippis Barndollar 2008-2009
86. Francis J. Brady 2009-2010
87. Ralph J. Monaco 2010-2011
88. Keith Bradoc Gallant 2011-2012
89. Barry C. Hawkins 2012-2013
90. Hon. Kimberly A. Knox 2013-2014
91. Mark A. Dubois 2014-2015
92. William H. Clendenen, Jr. 2015-2016
93. Monte E. Frank 2016-2017
94. Hon. Karen DeMeola 2017-2018
95. Jonathan M. Shapiro 2018-2019
96. Hon. Ndidi N. Moses 2019-2020
97. Amy Lin Meyerson 2020-2021
98. Hon. Cecil J. Thomas 2021-2022
99. Daniel J. Horgan 2022-2023
100. Maggie Castinado 2023-2024

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The Federal Trade Commission and the U.S. DOJ Antitrust Division during the Biden Administration Have Significantly Ramped Up Antitrust Enforcement:

Non-Antitrust Lawyers Beware!

By Robert M. Langer and Michael A. Kurs

Introduction

The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice under the Biden Administration have collectively sought to move the proverbial antitrust needle into territory not heretofore a primary focus of antitrust enforcers.

While it is by no means certain that each of these initiatives will be embraced by the courts, non-antitrust lawyers should be cognizant of what the agencies are seeking to accomplish. Antitrust and non-antitrust lawyers alike should consider whether their clients' circumstances might warrant approaching one or another agency to invite their assistance on matters vexing a client, or whether their clients' conduct puts their clients at risk of unwanted antitrust scrutiny by the antitrust enforcement agencies or private antitrust litigants.

Federal Trade Commission

The genesis of the FTC's efforts to both recenter its enforcement priorities and fundamentally alter the current scope of its authority with respect to the "unfair methods of competition" component of Section 5(a)(1) of the Federal Trade Commission Act[1] is epitomized by a decision by a majority of the current FTC Commissioners in 2021 to rescind the 2015 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" [hereinafter "2015 Statement"].[2] The 2015 Statement was deemed a constraint upon the FTC's authority to investigate and halt anticompetitive business behavior under Section 5. The 2015 Statement was thus withdrawn on July 1, 2021.[3] At the time of the withdrawal of the 2015 Statement, FTC Chair, Lina Khan, commented that the withdrawal of the 2015 Statement would be the first of additional intended actions by the FTC to clarify Section 5, including steps to assist the FTC to better exercise its authority to deliver clear guidance principles consistent with both Congressional directives and case law.[4]

The FTC's 2022 "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act"

In November 2022, the FTC issued its revised "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" [hereinafter "2022 Policy Statement"].[5] The 2022 Policy Statement is far more robust than the 2015 Statement in that it seeks to expand the Commission's current unfair method of competition mission to potentially prohibit conduct that is almost certainly permissible under existing antitrust laws. The 2022 Policy Statement provides two criteria, which are weighed on a sliding scale, for evaluating whether a party's conduct constitutes an unfair method of competition. This framework evaluates whether a practice: (1) exhibits indicia of unfairness; and (2) constitutes conduct that "tends to negatively affect competitive conditions."

More specifically, the 2022 Policy Statement describes unfairness as follows:

- "The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.
- There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be

Image credit: May Lim/Getty Image

otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

- These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5. In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.
- The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused *actual* harm in the specific instance at issue. Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other

market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent. *Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions. Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act,but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."*[6] [Emphasis added].

The FTC's Proposed Non-Compete Rule

The first tangible manifestation of the FTC's 2022 Policy Statement is the FTC's proposed non-compete trade regulation rule [hereinafter "Proposed Rule"].[7] If ultimately adopted, the Proposed Rule would have the force and effect of law. The import of the Proposed Rule is that it would fundamentally upend the enforcement of employee non-compete agreements throughout the country both prospectively and retrospectively, and, as importantly, preempt inconsistent state laws.

There are several key provisions of the FTC's Proposed Rule, including:

- Sec. 910.1(b)(1): *Non-compete clause* means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.
- Sec. 910.2(a): *Unfair methods of competition.* It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.
- Sec. 910.2(b)(1): *Rescission requirement.* To comply with paragraph (a) of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a non-compete clause, an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.
- Sec. 910.4: *Relation to State laws.* This part 910 shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this part 910.[8]

Opposition to the 2022 Policy Statement and the Proposed Rule

As expected, the 2022 Policy Statement and the Proposed Rule have not been without controversy. Commissioner Christine Wilson, who has since resigned as an FTC Commissioner, authored two protracted dissents, the first to the 2022 Statement,[9] and the second,[10] to the Proposed Rule. Commissioner Wilson criticized the 2022 Policy Statement, labeling it a "dramatic expansion of the agency's purported authority,"[11] and noted in her dissent from the Proposed Rule that the Commission, in her view, lacked authority to issue trade regulation rules, *i.e.*, substantive regulations, with regard to unfair methods of competition.[12] Commissioner Wilson further condemned the 2022 Policy Statement as lacking clear or meaningful guidance for businesses aiming to comply the law, and instead sought to pinpoint "essentially any business conduct it finds distasteful."[13] Commissioner Wilson was also critical in that the 2022 Policy Statement did away with long-standing principles of antitrust such as the "rule of reason" framework, the consumer welfare standard, and the "vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct."[14]

Commissioner Wilson's dissent is an early signal that both the 2022 Statement and those initiatives by the FTC in furtherance of the 2022 Statement will be the subject of future and continuing competition discourse, and potentially protracted litigation.[15] Chair Khan's efforts also have triggered investigations of her leadership by three committees of the United States House of Representatives: its Oversight Committee, Judiciary Committee, and Energy and Commerce Committee.[16]

The use of non-competes in the employment realm faces challenges from others besides Chair Khan and the FTC. On May 30, 2023, following upon last year's interagency commitment with the FTC and DOJ to address restrictions on the exercise of employee rights, National Labor Relations Board General Counsel Jennifer Abruzzo issued a memo stating her position that "the proffer, maintenance, and enforcement [of] non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances."[17]

The Withdrawal of Several Important Guidance Documents by the Antitrust Division of the United States Department of Justice

The United States Department of Justice Antitrust Division announced on February 3, 2023, that it withdrew from three guidance documents, issued in 1993, 1996 and 2011. The reason given was that the guidance documents were deemed "obsolete."[18]

The FTC has since withdrawn the 1996 and 2011 guidance documents indicating in the future, "[i]n making its enforcement decisions, the Commission will rely on general principles of antitrust enforcement and competition policy for all markets, including markets related to the provision of health care products and services."[19] Although the FTC's July 14, 2023 announcement of its withdraw-

al from the 1996 and 2011 guidance documents is silent regarding the 1993 and the 1994 revised guidance document that it issued jointly with the Justice Department, we presume that the Commission does not intend to look to be bound by the older guidance.

The most significant aspect of the DOJ's and FTC's announced withdrawals is that each document provided certain "safety zones" for health care providers. Simply stated, if a company complied strictly with the requirements of the safety zone, one could rest assured that such conduct would not be challenged by the Antitrust Division. There were safety zones for, *e.g.*, joint purchasing, small market hospital mergers, and provider networks that involved substantial sharing of financial risk.

The greatest immediate impact, however, may be in the area of information exchanges. A widely utilized safety zone was Statement 6 of the 1996 "Statements of Antitrust Enforcement Policy in Health Care" regarding the sharing of competitively sensitive information, *e.g.*, wages and salaries. Over three decades, this safety zone in fact had become the standard methodology, not only in health care, but by businesses generally.[20]

The DOJ withdrew the safety zone over new developments in data analysis and machine learning, which the DOJ said could potentially be applied to aggregated data to harm competition in certain circumstances, even if the exchange satisfies the "safety zone" criteria.[21] It is still too early to predict where the agencies are headed, but some businesses may understandably be more reluctant to continue to participate in data gathering and data dissemination.[22]

Criminal Enforcement by the Antitrust Division of Section 2 of the Sherman Act

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, *shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court*.

(Emphasis added).

Jonathan Kanter, the current Assistant Attorney General who heads the U.S. Department of Justice Antitrust Division has stated the following:

> Congress criminalized monopolization and attempted monopolization to combat criminal conduct that subverts competition…. The Justice Department will continue to prosecute blatant and illegitimate monopoly behavior that subjects the American public to harm.[23]

In order to understand the significance of the Antitrust Division's criminal enforcement initiative in the area of single firm behavior, a leading scholar undertook an empirical study of Antitrust Division criminal monopolization cases between 1903 and 1977, since there had been no criminal Section 2 cases in almost half a century.[24] Below is a brief summary:

> [T]he Justice Department brought 175 criminal monopolization cases between 1903 and 1977, but that *only 20 of these involved unilateral exclusionary conduct* (as opposed to concerted cartel behavior), that *only 12 of these resulted in a finding of criminal liability, that only one case involving non-violent conduct resulted in a prison sentence, and that the total fines meted in these cased amounted to less than $9 million in 2022 dollars.* Thus, although there is historical precedent for bringing criminal monopolization cases, if the Justice Department carries through on its recent threats to begin bringing criminal monopolization cases again and it does so for non-violent unilateral conduct offenses and seeks significant penalties, it will be breaking new ground.[25]

(Emphasis added.)

Criminal antitrust enforcement for the past 50 years has focused exclusively on certain defined horizontal collusive competitor activities, *i.e.*, the narrow per se illegal categories — price fixing, bid rigging, and market allocation. Even though Section 2 of the Sherman Act is a criminal statute, it has been enforced civilly primarily because monopolization and attempted monopolization require a factual predicate unnecessary in per se cases, *i.e.*, defining a relevant product and geographic market. It remains to be seen how the federal courts will react to this initiative of the Antitrust Division once a criminal monopolization case actually goes to trial. If the heretofore failed attempts by the Antitrust Division to prosecute nonpoach cases criminally are any indication, the Antitrust Division may be in for some rough sledding.[26]

FTC Enforcement of the Robinson-Patman Act

The Federal Trade Commission (FTC) has announced its intention[27] to ramp up enforcement of the Robinson-Patman Act (RPA),[28] a Great Depression era anti-price discrimination law. Neither the FTC nor the DOJ has significantly enforced the RPA for several decades.

The RPA broadly forbids a seller of goods from engaging in price discrimination between two or more different purchasers. The rationale for the RPA was that preventing such price discrimination would enable smaller companies to better compete with larger businesses who often exacted substantial volume discounts when purchasing in very large quantities. Importantly, the RPA applies only in particular circumstances. First, the RPA applies only to sales of tangible commodities, not services. Second, it applies only to purchases of commodities of "like grade and quality." Third, RPA requires that at least one sale take place across state lines, and that both sales occur within the United States. Finally, the price discrimination must be such that it has the potential to substantially injure competition at the seller's level or the buyer's level. Primary-line discrimination occurs when one seller reduces its prices in a specific geo-

graphic market and causes injury to its own competitors in the same or in a different geographic market. Secondary-line violations occurs when favored customers of a seller are given a price advantage over competing purchasers. Most RPA cases are secondary-line claims.

Conduct that would otherwise fall within the scope of these RPA provisions may nevertheless be subject to certain defenses. Defenses include, for example, the following: 1) the price difference was justified by different demonstrably provable costs; and 2) the price difference was a concession to meet a competing seller's price. While not technically a defense, the U.S. Supreme Court has also recognized the existence of a "functional discount" when one competing purchaser performs functions that would otherwise be performed by the seller, *e.g.*, warehousing, etc., and as a consequence, the favored purchaser in essence is saving the seller some quantifiable amount of money it would otherwise expend itself.

The RPA also separately forbids certain discriminatory allowances (such as rebates and fees) or services furnished or paid to purchasers, requiring that a seller treat all competing purchasers in a proportionately equal manner. A seller must also allow all types of competing purchasers to receive the services and allowances or provide some other reasonable means of participation. Further, the cost justification defense does not apply in this situation.

The FTC's recent announcement follows President Biden's Executive Order "Promoting Competition in the American Economy," which, among other things, urged the FTC to enforce antitrust laws vigorously. It also comes on the heels of a bipartisan push from lawmakers urging the FTC to use the RPA against discriminatory conduct. A majority of the current FTC commissioners have voiced support for using the RPA to take action against unfair competition. Indeed, the FTC recently cited the RPA in a separate announcement urging action against certain rebating practices paid by drug manufactures to intermediaries in certain circumstances.[29] Perhaps the clearest indication of the FTC's commitment to ramp up RPA enforcement so far has been the FTC opening a preliminary investigation against Coca-Cola Co. and PepsiCo Inc. regarding potential price discrimination under the RPA.

Finally, in light of the reemergence of the FTC as an enforcer of RPA, it is possible that some state attorneys general and private litigants may attempt to enforce the state antitrust act analogues to RPA, particularly when the jurisdictional prerequisites of the RPA cannot be met. The Connecticut Antitrust Act analogue to the RPA, for example, differs in one quite significant respect from the RPA.[30] Under the RPA, the key language reads, "[W]here the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce…."[31] Unlike the RPA, the Connecticut analogue to the RPA does not contain the word "substantially."[32]

Criminal Enforcement Focused on Agreements to Limit or Fix the Terms of Employment

So far, the Justice Department's efforts to prosecute those involved in so called wage-fixing and no poach agreements criminally have broken some new legal ground. To date, however, trial results have proved uniformly unfavorable to the Justice Department, in that no jury has yet found any of the defendants criminally culpable. The groundwork for these cases dates back at least to October 2016 when the DOJ and FTC issued the "Antitrust Guidance for Human Resource Professionals." The document described its purpose as being to "alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws." According to the guidance: "An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regarding to wages, salaries, or benefits; terms of employment; or even job opportunities."[33] The 2016 guidance included the warning that "[g]oing forward, the DOJ intends to proceed criminally against naked wage fixing or no-poaching agreements."[34] A "no poaching agreement" involves an agreement with individual(s) at another company to refuse to solicit or hire that other company's employees.[35]

At the outset of 2021, the Department of Justice filed an indictment against Surgical Care Affiliates and a related entity accusing them of conspiring with other health care companies to suppress competition for senior level employees. That case has yet to go to trial. In November 2022, an individual defendant entered into a deferred prosecution agreement in an effort to avoid a criminal conviction for participating in agreements not to recruit or hire school nurses or raise their wages.[36] In a related prosecution in October 2022, VDA OC, LLC, (formerly known as Advantage On Call, LLC) pled guilty to conspiring to suppress wages of school nurses. A court sentenced the company to pay a criminal fine of $62,000 and $72,000 in restitution to victim nurses.[37]

In March 2023, a Maine jury found four home care agency managers not guilty of conspiring to refrain from hiring workers away from their competitors.[38] In April 2023, Federal District Court Judge for the District of Connecticut Victor Bolden granted a judgment for acquittal in a no-poach criminal case for each of the six defendants.[39]

With the DOJ's Assistant Attorney General Kanter having recently characterized its prosecutions as "righteous cases" of agreements that cause real harm, the risks associated with engaging in such agreements still ought not to be overlooked.[40] Even if the DOJ continues to suffer defeat in its criminal dockets, civil cases should not be as difficult to win. Also, criminal cases continue to be brought, including another indictment directed at conduct concerning fixing of nurses' wages returned in March of this year.[41]

Civil Employment Related Antitrust Enforcement Developments

The DOJ and FTC each has effectuated its current commitment to protecting workers rights through its civil enforcement activities. Most recently, on May 17, 2023, DOJ announced a consent decree against a poultry producer, the fourth in a ser-

vices of enforcement actions, targeting the sharing of compensation information about poultry processing plant workers' compensation. The consent decree calls for $5.8 million in restitution to workers harmed by the conduct.[42] In turn, the FTC has pursued covenant not to compete cases without waiting to adopt a non-compete regulation.[43] Relief obtained by the FTC has included orders to drop non-compete restrictions imposed on workers.[44]

Proposed Revisions to the DOJ/ FTC Merger Guidelines

On July 19, 2023, DOJ and the FTC released a draft of proposed revisions to their Merger Guidelines.[45] The last major revisions to the Horizontal Merger Guidelines were issued in 2010.[46] There is a 60-day public comment period regarding the 2023 draft Merger Guidelines that will conclude on September 18, 2023. In an announcement of their publication FTC Chair Lina M. Khan stated the following:

> "With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy. Informed by thousands of public comments—spanning healthcare workers, farmers, patient advocates, musicians, and entrepreneurs—these guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books."[47]

The draft Merger Guidelines set out thirteen distinct guidelines that will inform the agencies and the parties about how proposed mergers and acquisitions will be analyzed. These thirteen guidelines are as follows:[48]

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

We anticipate that there will be significant adverse public comments regarding the draft Merger Guidelines, not only because of the somewhat opaque nature of the thirteen guidelines noted above, but also because the agencies propose to fundamentally alter the current metric to determine whether a market is "highly concentrated." The metric is known as the Herfindahl-Herschman Index ("HHI").[49] In 2010, highly concentrated meant an HHI of more than 2500.[50] The 2023 draft Merger Guidelines propose to reduce the highly concentrated HHI number to more than 1800.[51] The net effect of such a change would potentially dramatically either increase the number of mergers and acquisitions challenged, and/or reduce the number of mergers and acquisitions because of the heightened risk of challenge by one of the agencies.

Conclusion

Government agencies are, of course, not the only enforcers of antitrust and unfair competition laws. Thus, as government agencies endeavor to move the proverbial antitrust and competition needle into territory that had been their principal focus, private attorneys and private parties should not overlook the role they might be able to play in these rapidly developing areas of competition law, whether in the public policy or the litigation arena. The public and private interests at stake are far too vital to ignore the competition landscape as it continues to evolve. ■

Robert M. Langer is a Senior Counsel at Wiggin and Dana LLP and current Chair of the CBA's Antitrust & Trade Regulation Section; Michael A. Kurs is a Member of Pullman & Comley LLC and immediate past Chair of the CBA's Antitrust & Trade Regulation Section.

NOTES

1 Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

2 https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (The Commission's 2015 Statement sought to evaluate potentially anticompetitive conduct utilizing a traditional "rule of reason" framework to ensure that the act/practice at issue would not be enjoined if it posed little to no harm to competition or the competitive process. The 2015 Statement also obligated the FTC to evaluate whether the act/practice was within the four corners of conduct deemed violative of either the Sherman Act or the Clayton Act.)

3 https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

4 https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf

5 https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

6 *Id.* at 8-10.

7 88 FR 3482-3546; https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

8 *Id.* at 3535-36.

9 www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf

10 www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf

11 *See* note 9, *supra*, at 4.

12 *See* note 10, *supra* at 9-13. The 2022 Policy Statement and the Proposed Rule present the question whether the FTC possesses authority to adopt trade regulation rules with respect to unfair methods of competition. In 1973, the D.C. Circuit held in *Nat'l Petroleum Ref'rs Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) that the FTC did have the authority to implement substantive rules implicating competition pursuant Section 6(g) the FTC Act, 15 U.S.C. § 46(g). Shortly after, however, the Magnuson-Moss Act was enacted and expressly authorized the FTC to adopt substantive rules regarding unfair and deceptive acts and practices. *See* Pub. L. No. 93-637, 88 Stat. 2183 (1975), codified as Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1)(B). The legislation, however, was unclear regarding the FTC's authority to adopt substantive competition rules. *See* 15 U.S.C. § 57a(a)(2). This may perhaps serve as evidence that Congress did not intend to authorize the FTC to make binding rules regarding unfair methods of competition.

13 *See* note 9, *supra*, at 2.

14 *Id.* at 3.

15 For a more extensive critique of the FTC's 2022 Policy Statement, *see* Daniel J. Gilman and Gus Hurwitz, "The FTC's UMC Policy Statement: Untethered from Consumer Welfare and the Rule of Reason," (International Center for Law & Economics, November 16, 2022); https://laweconcenter.org/resources/the-ftcs-umc-policy-statement-untethered-from-consumer-welfare-and-the-rule-of-reason/

16 https://oversight.house.gov/wp-content/uploads/2023/06/FTC-Letter-Ethics-Due-Process-Rule-of-Law-1.pdf; https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-04-12-jdj-to-khan-ftc-subpoena-cover-letter.pdf; https://energycommerce.house.gov/posts/chair-rodgers-on-ftc-chair-khan-s-abuses-of-power-leadership-matters

17 https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national

18 Justice Department Withdraws Outdated Enforcement Policy Statements | OPA | Department of Justice. The 1993 Statements were revised in 1994. The 1996 guidance describes the 1994 guidance as superseding the 1993 statements, although the 1996 guidance describes having only revised the physician network joint ventures and multiprovider networks guidance and otherwise not having revised any of the other statements. https://www.justice.gov/atr/page/file/1197731/download, p. 3.

19 https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements?utm_source=govdelivery

20 The antitrust safety zone for exchanges of price and cost information among providers requires the following: (1) the survey is managed by a third-party (*e.g.*, a purchaser, government agency, health care consultant, academic institution, or trade association); (2) the information provided by survey participants is based on data more than 3 months old; and (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

21 *See also* Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023 | OPA | Department of Justice (Feb. 2, 2023).

22 Needless to say, certain competitively sensitive information exchanges have always been deemed problematic. The recent suit against poultry processors to suppress workers' wages is just one of innumerable examples. Justice Department Files Proposed Amended Complaint and Consent Decree with Fourth Poultry Processor, Further Addressing Long-Running Conspiracy to Suppress Workers' Compensation | OPA | Department of Justice

23 *See* Executive Pleads Guilty to Criminal Attempted Monopolization | OPA | Department of Justice.

24 Daniel A. Crane, "Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136638# (University of Michigan Law & Economics Research Paper No 22-030).

25 *Id.* (Abridged abstract of article).

26 *See* discussion of no-poach and related labor restraint cases, infra, at portion of article captioned, "Criminal Enforcement Focused on Agreements to Limit or Fix the Terms of Employment."

27 https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition

28 Section 2 of the Clayton Act, 15 U.S.C. § 13(a), *et seq.*

29 FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs | Federal Trade Commission

30 Conn. Gen. Stat. § 35-45.

31 *See* note 28, *supra*.

32 The relevant portion of Conn. Gen. Stat. § 35-45 reads, "[W]here the effect of such discrimination may be to lessen competition or tend to create a monopoly in any line of commerce…" *See State v. Exxon Corp.*, 1987 WL 92054, *3 (Conn. Super. Ct. 1987).

33 https://www.justice.gov/atr/file/903511/download

34 *Id.* at 4.

35 *Id.* at 3.

36 https://www.troutman.com/images/content/3/3/331457/Hee-plea-agreement.pdf.

37 https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

38 *United States v. Manahe*, Docket No. 2:22-cr-00013 (D. Maine), Verdict, March 22, 2023.

39 *United States v. Patel*, Docket No. 3:21-cr-00220 (D. Conn.), Judgments of Acquittal, April 28, 2023.

40 https://www.forbes.com/sites/insider/2023/05/10/are-dojs-no-poach-prosecutions-getting-poached/?sh=5b5b7c811646

41 https://www.justice.gov/opa/pr/health-care-staffing-executive-indicted-fixing-wages-nurses

42 https://www.justice.gov/opa/pr/justice-department-files-proposed-amended-complaint-and-consent-decree-fourth-poultry

43 Press Release, Fed. Trade Comm'n, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), https://www.ftc.gov/news-events/news/pressreleases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers; In the Matter of Prudential Security et al., Comm'n File No. 2210026 (2023); In the Matter of O-I Glass, Inc., Comm'n File No. 2110182 (2023); In the Matter of Ardagh Group, S.A et al., Comm'n File No. 2110182 (Feb. 21, 2023). 32 Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2022), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition

44 https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions

45 FTC and DOJ Seek Comment on Draft Merger Guidelines | Federal Trade Commission.

46 https://www.justice.gov/atr/horizontal-merger-guidelines-08192010

47 *See* note 45, *supra*.

48 *Id.*

49 The HHI is calculated by summing the squares of the individual firms' market shares. As an example, pre-merger a market includes three companies with a 20% market share, and four companies with a 10% market share. Squaring the pre-merger market shares equals an HHI of 1600, *i.e.*, 1200 (20% squared x 3) plus 400 (10% squared x 4). If one 20% company and one 10% company were to merge, the post-merger HHI would be 2000, *i.e.*, 900 (30% squared) plus 800 (20% squared x 2) plus 300 (10% squared by 3). Under the 2010 Merger Guidelines, the market would be deemed moderately concentrated, while under the 2023 proposed Merger Guidelines, the market would be deemed highly concentrated, and thus more likely to be challenged.

50 *See* note 46, *supra*, at Section 5.3.

51 *See* Draft FTC-DOJ Merger Guidelines for Public Comment (2023) at p. 7.

Pro Bono Service—Why Serve?

By JAMES T. SHEARIN

Image credit: Unitone Vector/Getty Image

Pro bono service is a fixture in our profession. The Rules of Professional Conduct that we live by encourage all of us to "render public interest legal services" by, among other things, "providing professional services at no fee or a reduced fee to persons of limited means."[1] The American Bar Association says a lawyer should "aspire to render at least 50 hours of pro bono public legal services per year."[2] Many of you exceed that floor by leaps and bounds each year. Some are heralded for their service; others fly under the radar. Either way, as a profession, you give back.

But why should we undertake pro bono work?

One easy answer to the question is that the need exists, and we have the talent to satisfy it. According to the 2022 World Project Report, there are over 1.4 billion people in the world who, over the last two years, have faced a civil or administrative legal problem they were unable to address, many because they could not afford to do so.[3] Closer to home, Connecticut's poverty population (defined as a family of four earning less than $27,479) numbers approximately 3,620,000 people, which is ten percent of the population.[4] Seventy-four percent of low-income households in Connecticut experienced one or more civil legal problems in the last year.[5] As recently as August 2023, Advancing CT Together reported that Connecticut's homeless population has reached the level of 3,015 persons.[6]

For most of us, the fact that the need exists and the fact that we can address it by providing people access to justice is all the answer we need as to why we serve. We give back because we can. We help because we are able.

For some, and there are very few in our profession, that answer is not satisfactory. They ask why we should work for free when others do not. After all, helping one, two, or three people won't change the poverty statistics. That reduction will only come through the actions of society as a whole or government regulation. For those, I would submit there is another answer to the why question: Lawyers are the vanguards of the rule of law.

Many have tried to define the rule of law in a way that truly captures the breadth and depth of what it means. The American Bar Association has defined it as "a set of principles, or ideals, for ensuring an orderly and just society" which by virtue of its enforcement "everyone is treated equally" and "human rights are guaranteed to all."[7] This is not the place to decide which of the many definitions is correct, but merely to point out a common thread among all the various definitions which is—the notion that the very existence of the rule of law is to determine the standards by which we as members of society live by that protect the rights and liberties we are guaranteed from the abuses of others. The rule of law assures us of our freedom. But, as one commentator has noted, "'access to justice' is an essential element of the rule of law, and must afford persons remedies to enforce their rights, and the ability to access the courts to pursue those remedies."[8]

When that rule of law is deprived to an entire segment of society, then our entire society is weakened and the principles by which we live by are diluted. When people cannot enjoy the liberties to which they are guaranteed because they do not have the knowledge of how to protect them through our legal system, all of us suffer. When people are unfairly treated because they do not have the economic means to defend themselves, the law is what they blame. That is hardly surprising. We cannot ask people to believe in the law, promote the law, and follow the law when the law does not work for them.

Providing free legal services to those who most need and can least afford it—those whose rights will otherwise be lost as a result—furthers the rule of law. It ensures equality; it ensures that human rights are protected; it ensures an orderly society. I would submit that by helping out those one, two, or three people a year, we, as lawyers, not only make clear to them that the rule of law works, we make it clear to their family and friends. Those family

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***James T. Shearin** is the president-elect of the Connecticut Bar Association. He is a trial attorney at Pullman & Comley LLC with wide ranging experience in federal and state courts at both the trial and appellate levels, and before arbitration and mediation panels.*

Avoiding Burnout—Being PALS with Yourself

By TANYEE CHEUNG

In our last column, we discussed the phenomenon of burnout in the legal profession and the need for both organizations and individuals to find ways to mitigate the situations in our profession that can often lead to chronic stress, unreasonable workloads, capricious deadlines, challenging clients, and lack of control, resources, and appreciation. Much more than the late-night demands of a deal about to close or a case going to trial, burnout is the unsustainable constant and daily demands that legal professionals are often faced with. In this follow-up to last month's article, we examine concrete actions that we can engage in to help us avoid burnout.

The first step we must take is to take a step back, breathe, and ask ourselves if we might be on the path to burnout. For many, our work consumes us so that we do not even recognize we are headed in that direction. As you read this article, I invite you to take a pause and ask yourself the following questions:

- **How is my energy level?** On a scale of 1-10, where would I put myself?
- **How do I feel about work?** Do I have enough direction? Am I engaged? Do I find it satisfying? Do I feel appreciated?
- **How do I feel about the job I am doing?** Am I doing a good job? Do I feel I have adequate control over my work environment? When was the last time I felt overwhelmed?
- **How do I feel physically?** Am I constantly tired? Do I have constant headaches or stomach aches?
- **When was the last time I did something fun for myself?**
- **How are my relationships, both at work and outside of work?**

There is no answer key here, no score that can tell you where you are on the burnout scale.[1] The good news is that no one knows you as well as you know yourself and from your answers, you know whether you can skip the rest of this article or if you need to read on.

If you are still reading, take another breath and consider how you can be PALS with yourself. PALS is a Practice of Awareness, Love, and Self-Care. Congratulations on taking the first step and becoming more aware. This first step cannot be over-emphasized. Taking this single moment to recognize that you may need to take action to avoid burnout deserves a pat on the back. Give yourself a little love for it!

"… recognize that self-love and self-care are the foundations to a whole, healthy you and a whole healthy you is better not only for you but for your organization and your relationships."

Images credit: Olga Strelinkova/GettyImage

The next step is to recognize that self-love and self-care are the foundations to a whole, healthy you and a whole healthy you is better not only for you but for your organization and your relationships. A daily practice of affirmation —"I am worthy of self-care"— can serve as a reminder that spending the time now to avoid burnout will reap benefits for all.

Beyond self-affirmations, there are concrete actions can you engage in to move you off the burnout train. New research on burnout recovery provides insights to possible solutions. According to a study published in the *Applied Psychology Health and Well-Being* journal, activities on vacations or weekends or which provide more opportunity to get away from your work, connect with others, and experience effectiveness, can help reduce burnout and increase your energy.[2] To reignite your brain and body, take the opportunity to get away and reset. Conversely, when people did work-related activities on the weekends, they detracted from their well-being and energy levels. Taking the time to build strong relationships within and outside of work can also help prevent burnout. Below are a few ideas to help you on your way.

Vacation PALS

One of the definitions I like best for vacation is "a time of respite from something." A vacation is a time to "take a break." This allows us to re-energize and is a must for sustainability. We might feel that it's impossible to just "disappear" but often we haven't set ourselves up well for this. One of the ways we can prep for our respite is to master the "hand-off." Take the time during the week (or two) prior to vacation to start looping in others who will be taking over for you. Create a rough outline of the different aspects of the deal and the status of documents, etc. Taking the time in advance to craft a detail hand-off can give you a relatively work-free vacation. Let your team know that you won't be checking emails but that they should call you if they really need you. This allows you to turn-off emails and still be responsible to the needs of your team and client. This is great behavior to model for others and I am always happy to do this for others knowing that they will be doing the same for me when I head off.

When planning your vacation, know that there is no "perfect" respite. Often, vacations are thought of as slowing down and getting away. For some, these might be perfect ways to relax. But consider what relaxes you, uniquely. If you relax by reading a book, great. But if you relax by socializing with friends or working hard on a building project in your community, go for it. While it might seem counter-intuitive to relax by climbing a mountain, physical activity can be one of the greatest relaxation modes for people and is correlated with recovery. The key is to re-charge yourself, so consider your own energy levels and do what works best for you.

Weekend PALS

On weekends, find ways to get away and be diligent about doing things that are different than your day-to-day. Turn off your devices, silence notifications, and resist the urge to check your email or even your LinkedIn feed at least for one day. If you have anxiety that others will be upset if you don't respond within 24 hours, consider an out-of-office notification letting people know that you will respond to their email on Sunday/Monday. (Truly, has there ever been an emergency over the weekend that couldn't be solved on Monday?) I know of people who have the one day out of office on the weekends to align with religious customs, but I wonder if more of us should do this to promote mental health and productivity. For full disclosure, outside of imminent closings/signings, I often take a day off from checking emails on the weekend and I don't have an out-of-office. And, I have not had anyone question my timing of getting back to them the following day. I encourage folks to talk about the benefits to co-workers, bosses, and clients. Often, people are unaware of the real, evidenced-based benefits that can come from a re-charge and the gentle reminder through conversation can help people become more conscious. If you don't have a well-being committee in your office, consider forming one and/or ask management about bringing in someone to present on the benefits of self-care. All of this can bring greater awareness to the need and the benefits of allowing people to detach and re-energize.

Daily PALS

What if I have a deal closing or a trial coming up? I am by no means suggesting that you ignore the needs of your team or your clients, but thinking of ways to give them accessibility without tying yourself to your phone is imperative. When I have a deal that is fast-paced and someone *might* need to reach me, I still turn my phone to "Do Not Disturb." A neat trick on the iphone is that even if it is on DND, you can set it so that if someone calls you twice in a row, it will ring through (or you can have VIP numbers where it will ring through). I let my team and clients know that so they can reach me if they must. Often there is no need for an immediate response, and it was fine for me to read the email in the morning. I get my rest and time to re-energize and the next day is better for everyone. A fully rested me also allows me to tell my team to sleep in if at all possible. Divide and conquer allows us to be most efficient. Two zombies are never as good as one rested person.

The above are just a few of the ways you can build up your resistance to burnout. Remember that these are suggestions and that you are the expert in you. Practice Awareness, Love, and Self-Care and find what works best for you. ■

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.*

NOTES

1 For organizations that want better insight to the likelihood of burnout across their organization, there are resources, such as the Maslach Burnout Inventory (MBI) that can be helpful.

2 www.researchgate.net/publication/350945031_What_did_you_do_this_weekend_Relationships_between_weekend_activities_recovery_experiences_and_changes_in_work-related_well-being

The Connecticut Legal Community's Diversity, Equity, & Inclusion Pledge & Plan

The CBA Diversity, Equity, and Inclusion Committee is undertaking the revision of the Connecticut Legal Community's Diversity and Inclusion Pledge and Plan ("Pledge"). The Pledge was originally launched in 2016, at the Inaugural CBA Diversity and Inclusion Summit. Since that time, over 40 Connecticut law firms and legal organizations have signed the Pledge, and have participated in a multiyear commitment designed to implement DE&I best practices within their own organizations. The original Pledge was framed as a six-year plan, with each year focused on a different element of a successful DE&I program, such as hiring practices, training and education, mentorship programs, retention, and advancement. A draft of the revised Pledge is printed here, and the Committee welcomes your comments and suggestions. Please submit any feedback that you may wish to share to dei@ctbar.org by November 30, 2023.

The Connecticut Legal Community's Diversity, Equity, & Inclusion Pledge

Each Signatory to this Diversity, Equity, and Inclusion Pledge (the "Pledge") hereby reaffirms its ongoing commitment to advancing diversity, equity, and inclusion within our own legal organizations and within the Connecticut legal community. We hereby declare that a core value of our organizations is to promote diversity, equity, and inclusion. In making this declaration, we pledge to respect the diversity of all individuals, and to create equitable and inclusive environments within our legal organizations. Our commitment to diversity, equity, and inclusion, in its broadest sense, reflects our deep and meaningful commitment to the principles of nondiscrimination and equal opportunity for all individuals that are a part of our organizations.

Diversity, as it is used in the Pledge, refers broadly to the representation of individuals of diverse identities within our organizations, so that our organizations are reflective of the rich diversity of our society and that of the clients that we serve. Diversity is an inclusive concept, embracing the wide range of identities, seen and unseen, that may be important to the individual, including age, ancestry, color, disability, ethnicity, familial or marital status, gender identity, gender expression, language, national origin, military or veteran status, pregnancy, race, religion, sex, sexual orientation, and socioeconomic background.

Equity, as it is used in the Pledge, refers to meaningful equality, and the proportional provision of opportunity to all members of our organizations, regardless of identity. Equity, as applied within our organizations and within our work, requires the evaluation, identification, and elimination of formal and informal barriers to equal opportunity and full participation for all. Our equity efforts center on our organizational systems, policies, culture, and processes, and the elimination of improper individual and collective bias from these elements, towards the equal guarantee of fair treatment, access, opportunity, and advancement for all members of our organization.

Inclusion, as it is used in the Pledge, refers broadly to the representation of diverse identities within our organizations. Our commitment is to meaningful inclusion, meaning that individuals of diverse identities fully participate in the work and mission of our respective organizations, experience a sense of belonging, feel respected and valued, contribute to the overall strength of our organizations, and share in the benefits and rewards of those contributions.

We recognize that our legal organizations are stronger, more effective, and more capable of meeting the needs of our clients, business interests, and other external constituencies if we embrace diversity, equity, and inclusion. We also affirm that creating a more diverse, equitable, and inclusive legal community will positively impact the fair and just application of the law and strengthen the public trust in the administration of justice. We further recognize that the collaboration of the signatories to this pledge, through the identification and development of best practices, common tools, and resources, will allow us to more effectively accomplish our goals of advancing diversity and inclusion within our own legal organizations and within the Connecticut legal community as a whole.

To fully realize these goals, we therefore also pledge our commitment to fully participate in the Diversity, Equity, and Inclusion Plan (the "Plan") described herein.

The Connecticut Legal Community's Diversity, Equity, & Inclusion Plan

Revised (Draft 9.8.2023)

As a signatory to the Connecticut Legal Community Diversity, Equity, and Inclusion ("DE&I") Pledge, we are committed to the strategic implementation of effective DE&I initiatives within our organizations, coupled with appropriate accountability and the achievement of measurable outcomes. Our participation in the Connecticut Legal Community Diversity, Equity, and Inclusion Plan ("Plan"), described herein, is one way in which we will ad-

vance that commitment.

The Plan is intended to allow any Connecticut legal organization that employs attorneys to join and participate in this collaborative effort, according to that organization's ability and resources, and in a manner that suits the organization's needs. The Plan does not represent a finite initiative with a firm beginning and end, nor are the steps described below intended to be exhaustive or mandatory.

The efforts of the Signatories, and the collective implementation of the Pledge and the Plan, will continue to be supported by the Connecticut Bar Association (CBA), acting through its Diversity, Equity, and Inclusion Committee. Organizational participation in the Plan will consist of the following events, initiatives, and action steps:

Annual Assessment

Each year, in September, each Signatory organization will complete and return an Annual Assessment to the CBA, providing aggregate diversity metrics, and describing the organization's DEI efforts and initiatives in accordance with the Steps described below. The organization's annual assessment response shall be maintained confidentially by the CBA and shall only be reported out in the aggregate. Following submission of the Annual Assessment for more than two continuous years, each Signatory organization will receive an organizational benchmarking report, prepared by the CBA, describing its DE&I progress over the course of its participation in the DE&I Pledge and Plan. An organization's failure to submit an Annual Assessment response for two continuous years shall result in the removal of that organization from the published list of Signatory organizations.

Annual Diversity, Equity, and Inclusion Summit

Each year, typically in October, representatives of the Signatory organizations will gather for the Annual Diversity, Equity, and Inclusion Summit. The Summit will feature opportunities for interactive learning and training, discussion and collaboration, and aggregate reporting on the diversity metrics and collective DE&I efforts of the Signatories during the previous year.

Quarterly Meetings

In addition to the Summit, representatives of the Signatory organizations shall meet quarterly for training, discussion, updates, planning and implementation of collaborative projects such as the Future of the Legal Profession Scholars Program, and other topics relevant to the implementation of the Pledge and Plan.

Signatory Implementation of the Pledge and Plan

The original Pledge and Plan, in effect from 2016 through 2023, invited Signatory organizations to focus each year of their efforts on a different element of a successful DE&I program. By way of illustration, the first year of the original Plan focused on infrastructure building, the second year on hiring, the third on pipeline initiatives, etc. Broadly, the original Plan allowed a Signatory organization to join the Pledge and Plan, and implement, over the course of multiyear participation, a comprehensive DE&I organizational program.

In this revision, the Plan retains its focus on the implementation of DE&I best practices within each Signatory organization, tailored to that organization's size, needs, mission, and available resources. This revision of the Plan continues to anticipate and allow for Connecticut legal organizations to join at any stage of their own DE&I journey. The Plan is changed, however, to reorganize the various elements of a successful DE&I program into three "Steps," to reflect the implementation of basic, intermediate, and advanced DE&I organizational programs.

Care has been exercised so that the three levels are not merely a reflection of financial resource allocation or the size of an organization. The three Steps are rather intended to reflect an organization's intentional and comprehensive implementation of DE&I initiatives, with attention to the efficacy and impact of those efforts, over the course of years. For this reason, the specific actions within each Step are not intended as an exhaustive or mandatory list. Instead, each Step is intended to provide guidance on how an organization may implement, grow, and maintain an effective DE&I program over time. The organizational benchmarking report, provided after the submission of the Annual Assessment, will provide an opportunity for annual feedback and reflection on the organization's DE&I progress during the prior year.

Step One: Basic

An organization at Step One of its DE&I journey will demonstrate the implementation of the majority of the steps below:

- The organization has adopted a formal DE&I policy.
- The organization has formed and maintains a DE&I Committee.
- The organization's DE&I Committee meets regularly, is visible within the organization, maintains regular programming throughout the year, and is open for participation by interested attorneys and members of the organization.
- The organization promotes attorney employment opportunities broadly, including to organizations, such as affinity bar associations or affinity law student organizations, that promote DE&I within the Connecticut legal community and/or nationally.
- The organization has provided training within the past two years addressed to issues of DE&I, improper bias, or similar topics.
- The organization engages in various forms of support for or participation in external DE&I initiatives and programs within the broader Connecticut legal community.

Step Two: Intermediate

An organization at Step Two of its DE&I journey will demonstrate its implementation of the majority of the action items in Step One, as well as some of the efforts described below:

- The organization demonstrates the consistent hiring and representation of diverse attorneys within the various levels of the organization.
- The organization's DE&I efforts and commitments are visible and promoted broadly.

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Speeding to Appellate Review

By CHARLES D. RAY

Section 52-470(g) of the General Statutes brings us the following:

> No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

Although a bit of a word salad, the legislative meaning is reasonably clear—no appeal is permitted in a habeas case unless a Superior Court judge certifies that there is a question involved in the case that ought to be reviewed by a higher court. No certification, no appeal, right? You'd think and you'd be wrong.

Over the years, the Supreme Court has spilled gallons of ink explaining why and how what looks to be a jersey barrier is, in fact, only a speed hump standing between a habeas petitioner and appellate review. The latest effort at defining the height and width of that speed hump came in *Banks v. Commissioner of Correction*, 347 Conn. 345 (2023). The issue was whether Mr. Banks was entitled to appellate review on two issues that had not been raised during the habeas proceedings and had not been included in his petition for certification for appellate review. The Appellate Court said "no" and the Supreme Court said "yes," albeit in a 3-2 decision.

Some history may be helpful. In *Simms v. Warden*, 229 Conn. 178 (1994), the Court held that a writ of error could not be used as an end-around where the trial court had denied certification to appeal. Instead, the Court construed the certification requirement to permit an appeal if the petitioner could demonstrate that the "denial of certification to appeal was an abuse of discretion or that an injustice appears to have been done." Next, in *Simms v. Warden*, 230 Conn. 608 (1994), the Court determined that the statutory certification requirement was meant only to define the scope of the Court's review and not its jurisdiction. That being the case, appellate jurisdiction rested on the petitioner making a two-part showing. First, that the denial of his or her petition was an abuse of discretion and, second, that the judgment of the habeas court should be reversed on the merits. On the question of whether a habeas court abused its discretion in denying a petition to appeal, the Court held that a petitioner could prevail upon showing that the appeal is not frivolous under one or more of the criteria established by the United States Supreme Court in *Lozada v. Deeds*, 498 U.S. 430 (1991). Namely, issues are debatable among jurists of reason or a court could resolve the issues in a different way or the questions are adequate to deserve encouragement to proceed further.

On the issues of preservation and review of unpreserved claims, the Supreme Court also has a history. In *James L. v. Commissioner of Correction*, 245 Conn. 132 (1998), the trial court granted certification to appeal but the petitioner included in his appeal an issue that had been preserved in the habeas court but had not been raised in the petition. Review was granted regardless, based on the Court's conclusion that absent prejudice, "the legislature did not intend the terms of the habeas court's grant of certification to be a limitation on the specific issues subject to appellate review." Next, in *Mozell v. Commissioner of Correction*, 291 Conn. 62 (2009), the Court held that upon a grant of certification to appeal, it could consider constitutional claims that had not been presented in the habeas court. In Moye v. Commissioner of Correction, 316 Conn. 779 (2015), the Court made clear that its review of unpreserved constitutional claims was available only to address proceedings in the habeas court and not issues that arose during the petitioner's underlying criminal trial. Finally, in *Brown v. Commissioner of Correction*, 345 Conn. 1 (2022), the Court reviewed the petitioner's claim that he was entitled to notice prior to summary dismissal of his habeas case, notwithstanding that the notice issue had not been raised in the habeas court, had not been included in the petition for certification to appeal, and the petition had been denied.

With this as background, the decision in *Banks* is not all that surprising. Mr. Banks was convicted of robbery in 2012. More than five years later, he filed a habeas petition challenging his conviction. The Commissioner moved to dismiss, relying on Conn. Gen. Stat. § 52-470(c), which provides a rebuttable presumption that a habeas petition has been delayed without good cause if it is filed more than five years after the date of conviction. After a

hearing, the habeas court dismissed the petition. Mr. Banks then filed a petition for certification which was denied. In his appeal from that ruling, Mr. Banks claimed that: 1) his habeas attorney was ineffective; and 2) the habeas court failed to fulfill an alleged duty to intervene to protect Mr. Bank's rights. Neither issue had been presented to the habeas court and neither was included in the petition for certification to appeal.

The Appellate Court dismissed the appeal, taking the position that the habeas court could not have abused its discretion by denying the petition for certification on issues that it had never been asked to consider and rule on. The Appellate Court also concluded that the statutory certification requirements barred appellate review of claims that had not been preserved in cases in which the petition to appeal was denied. The Supreme Court rejected both conclusions, in an opinion penned by Justice Ecker for himself and Justices McDonald and D'Auria. Justice Ecker deemed the Appellate Court's first ruling "a matter of semantics, not substance." For the majority, the more accurate question was whether the habeas court *would have* abused its discretion by denying certification to appeal if the issue had been included in the petition.

On the second ground articulated by the Appellate Court, Justice Ecker first relied on the Court's past history to distill the following principles: 1) the certification requirement is construed narrowly to preserve the purpose of the writ; 2) the certification requirement is meant to discourage frivolous appeals, not to preclude appellate review altogether; 3) a habeas appeal is not frivolous if the issues presented are debatable among jurists of reason; and 4) if an appeal is not frivolous, the Court can review claims raised for the first time in that appeal, so long as the claims challenge the proceedings in the habeas court. Justice Ecker finds support for his ultimate conclusion in the prior case law, the legislative history of the certification statute, analogous procedures in federal court, the judicial policies animating appellate review of unpreserved claims, and the realities of habeas litigation, which appears to point to most petitions being filed *pro se* in order to meet the 10-day deadline for filing.

But notwithstanding the Court's willingness to consider unpreserved claims, the petitioner is still obligated to establish that the habeas court abused its discretion in denying the petition for permission to appeal. That burden can be met in either of two ways. First, by expressly arguing specific reasons why the habeas court abused its discretion in denying the petition. Second, by alleging that their argument on the merits of the appeal demonstrates an abuse of discretion.

For the dissent, Chief Justice Robinson writing for himself and Justice Mullins, the majority's outcome was inconsistent with the purpose of the statutory certification requirement, which was to reduce the number of repetitive and frivolous appeals in habeas cases. For the Chief Justice, the Court's recent reaffirmation of the obligation to at least allege and discuss an abuse of discretion in the denial of a petition for certification; *see Goguen v. Commission of Correction*, 341 Conn. 508 (2021); made crucial the fact that "a habeas court cannot abuse its discretion in denying a petition for certification regarding matters of which it never had notice." According to the dissent, the limited availability of appellate review in habeas cases is justified, at least in part, by the fact that neither an appeal nor a writ of error was historically available in habeas cases until the late 1800's. But the key for the dissent remained primarily the coupling of the abuse of discretion standard with review of claims the habeas court had never been asked to rule on.

Tinkering with the speed hump will no doubt continue. ■

Charles D. Ray *is a partner at McCarter & English LLP, in Hartford. He clerked for Justice David M. Shea during the Supreme Court's 1989–1990 term and appears before the Court on a regular basis.*

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

Image credit: wbritten/Getty Image

Equipped to Evolve

By SARA J. O'BRIEN

Sara J. O'Brien is chair of the Connecticut Bar Association Young Lawyers Section for the 2023-2024 bar year. She is an attorney at Stanfield Bechtel Law LLC in Middletown, where she handles civil matters, including personal injury, professional malpractice, employment, and small business law.

Over the past year, we have watched as both the federal and state legislative and judicial branches of government made changes that, while seemingly affecting a direct issue or population, undoubtedly affect us all. We have watched as landmark cases have been questioned, protested, and even overturned. Cases that we once studied in law school, that set precedent and molded the world as we have come to know it, and for many young lawyers, the world as we have only known it to be. The law offers us few certainties, but change is one of them.

As legal professionals, we are afforded a great deal of responsibility to uphold the law, fight for justice, and generate changes when that rule of law or justice is threatened. In his "Letter from Birmingham Jail," Martin Luther King, Jr. wrote, "[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[1]

My hope is that as we embark upon this new bar year, with the ideas we hope to bring to fruition and the plans we hope to successfully execute, we do so to effectuate change for the betterment of our profession and those we serve.

CBA president, Maggie Castinado, presented an appeal to hope in her speech at the Connecticut Legal Conference in July, wherein she indicated that her goals for this year included:

- A hope for greater understanding of the importance of a diverse and inclusive legal community;
- A hope for the betterment of our marginalized communities in Connecticut;
- A hope that we continue to fight disparities within our justice system;
- A hope that we support and protect the humanity of all people within our legal community; and
- A hope that we recognize the importance of wellness in our profession.

Attorney Castinado believes the best path towards achieving these goals is through engagement, education, and empowerment. The CBA Young Lawyers Section stands by this mission and hopes to support it further through our own programming this year.

The Young Lawyers Section's primary goals are the promotion of justice, the encouragement of public service, and the promotion of diversity and education of young lawyers and newly admitted practitioners. As young lawyers, we bring a new level of energy and passion to our profession and to the communities in which we live and serve. We come to the table with fresh ideas for improvement and change, and with the hope that our work will make a difference in the lives of others. We are equipped to evolve. This year, it is my hope as chair of the YLS, that through our programming we continue to generate change within our legal community that will fight disparity and inequality, protect humanity, and encourage wellness.

As I embark on my year as chair of the YLS and my sixth year on its Executive Committee (EC), I look forward to seeing what this organization will accomplish. In August 2023, we held our annual EC leadership retreat at Foxwoods with Justice Keller as our keynote speaker. The EC left the retreat energized and excited about the bar year ahead. With three overarching pillars guiding our plans, the EC has already begun taking this bar year by storm.

Pillar #1

This year we will focus on pro bono le-

gal work and community service projects. For the past two years, the EC surpassed its goal of providing at least 1,000 hours of pro bono work and/or public service each year throughout Connecticut. The EC is committed to reaching this goal once again, and I encourage any young lawyer or newly admitted practitioner to explore pro bono opportunities, many of which often offer training or education for those interested in new or different practice areas. The CBA offers a number of pro bono opportunities (*e.g.*, CT Free Legal Answers, Free Legal Advice Clinics, Lawyers in Libraries, or CBA Pro Bono Connect), and the EC will be hosting our annual pro bono fair at the Hartford Golf Club on October 19, 2023, where YLS members can register to play nine holes of golf (*optional*) followed by a cocktail reception with short presentations from various pro bono organizations throughout Connecticut.

Pillar #2

We will focus on developing and executing new social and networking opportunities for lawyers in Connecticut. As young lawyers, we are constantly encouraged to network, which does not always feel as natural as we may hope. The EC recognizes the challenges of networking, especially in a post-COVID world, and the competing priorities that impact young lawyers' "after-work" time. Our goal is to organize networking events that are fun to engage in, make networking less stressful, and are conveniently spread throughout the state. Beginning with a happy hour kick-off event at the Barrelhouse in Killingworth on September 6, 2023, we will plan several social events throughout the year, including a trivia night, our annual holiday party, and the Women in the Law Golf Outing, among many others. I hope to see you there!

Pillar #3

We will strive to provide new, relevant, and engaging CLE programs for the benefit of the bar. In September, we hosted the first-ever Northeast Regional Professional Development Conference at Mohegan Sun for young lawyers from New England, New York, and New Jersey. Seminar topics included:

- Lawyer's Guide to Social Media Success;
- AI and the Future of the Legal Profession;
- Panel Discussion on Corporate and In-House Counsel Career Paths;
- Alternative Pathways to Leadership: Government, Lawyering, and Community Engagement; and
- Balancing Wellness with the Scales of Justice: A Perspective on Attorneys and Wellness.

Additionally, the YLS EC will continue to plan many other CLE programs in a variety of practice areas, all aiming to provide pertinent material that can be used in general practice. Our programming is great for attorneys looking to learn something new and for attorneys looking to refresh their knowledge on a particular topic. I hope you will register for at least a few throughout the year.

These events are only made possible by the hard work and dedication of the YLS EC and CBA staff. To my predecessor, Christopher Klepps, thank you for making this past year a success for the YLS. Your commitment to this organization is inspiring and it has been a pleasure to work with you. For anyone interested in learning more about the YLS or the EC, I encourage you to attend some of our events this year, and to apply for a position within the EC next year. It is an experience your career should not go without.

Whether directly or indirectly, we have all been affected by the changes within our society and legal community, in the law and legal precedent, and in ourselves as we grow and develop in our careers. Together, we can make our communities stronger, encourage diversity and equality, and support access to legal services and legal rights. Together, we can evolve. ■

Image credit: dvarg/Gettylmage

NOTES

1 Martin Luther King, Jr., "Letter from Birmingham Jail"

Professional Disipline Digest

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Book 2-27A and further ordered to pay restitution to client in the amount of $244.50. *Shcheglovitov v. Walter D. Zitzkat*, #19-0575 (9 pages). ■

Time To Go Pro Bono

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and those friends may continue to feel the ill-effects of poverty, but maybe they will continue to have faith that the law protects them as it does every other member of society. And, in the end, that benefits all of us. ■

NOTES

1 Connecticut Rule of Professional Responsibilities 6.1.

2 ABA Model Rule 6.1.

3 https://justicegap.lsc.gov/the-report.

4 https://www.americanprogress.org/data-view/poverty-data/poverty-data-map-tool/; www.census.gov/quickfacts/fact/table/CT/IPE1202.

5 https://worldjusticeproject.org/world-justice-challenge-2022/access-justice.

6 www.aids-ct.org/hic-pit-2023.html.

7 www.americanbar.org/groups/public_education/resources/rule-of-law/.

8 *R. Stein*, 57 Houston Law Review, 185, 196 (2019).

DE&I

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- The organization provides work time or billable hour credit recognition for its attorneys to participate in DE&I efforts.
- The organization has provided multiple trainings within the past two years addressed to issues of DE&I, improper bias, or similar topics.
- The organization provides support to local and national affinity bar associations, through attorney participation, financial, or other in-kind support.
- The organization participates, individually and organizationally, in legal pipeline and mentorship programs designed to promote DE&I within the legal profession.
- The organization ensures diversity in any group making hiring or promotion decisions for the organization.
- The organization ensures that all attorneys are able to participate equally in formal and informal sponsorship, mentorship, and leadership development opportunities within the organization.

Step Three: Advanced

An organization at Step Three of its DE&I journey will demonstrate its implementation of a significant number of action items in Steps One and Two, as well as some of the efforts described below:

- The organization incorporates DE&I directly into its mission advancement efforts, through its work, pro bono efforts, or other organizational programs.
- The organization demonstrates the retention and advancement of diverse attorneys within the organization over time.
- The organization demonstrates the meaningful representation of diverse attorneys within the leadership structures of the organization.
- The organization participates in external DE&I certification programs, such as the Mansfield Rule.
- The organization maintains a dedicated professional position committed to the organization's diversity, equity, and inclusion efforts.
- The organization assesses its leadership for inclusive leadership traits and evaluates its leadership on the provision of mentorship and sponsorship to attorneys within the organization.
- The organization regularly conducts DE&I training and education for attorneys within the organization pursuant to a consistent education and training plan implemented over a course of years.
- The organization supports its attorneys who engage in leadership roles within affinity bar associations, external DE&I organizations, and initiatives.
- The organization organizes and sponsors its own mentorship and pipeline initiatives, designed to promote diversity, equity, and inclusion within the legal profession.
- The organization's DE&I Committee leadership or other DE&I professional is directly engaged in the executive decision-making of the organization. ■

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