NYSBA Annual Meeting

January 22-26 | New York Hilton Midtown

Constitutional Reform of N.Y.'s Court System Remains a Priority

Janet DiFiore
Chief Judge
State of New York

The Judicial Task Force on the New York State Constitution was created in July 2016 in anticipation of the following proposal on the November 2017 ballot: "Shall there be a convention to revise the constitution and amend the same." As Chief Judge, I believed it was absolutely essential to make sure the Judiciary was institutionally prepared to contribute and participate meaningfully in any and all proceedings to revise and amend Article VI, the Judiciary Article of the New York State Constitution.

As we know, the proposal for a Constitutional Convention was rejected by New York's voters. While there were many strong arguments for and against a Convention, the most compelling reason to vote yes was the need to overhaul the antiquated, overly-complex Judiciary Article of the State Constitution.

New York State Bar members are undoubtedly familiar with the Excellence Initiative, our systemwide campaign to achieve excellence in court operations and judicial decision-making. New York's judges and court staff are working hard under the banner of the Excellence Initiative to streamline court operations, promote promptness and productivity, reduce litigation cost and delay, and provide modern justice services. But we are fighting an uphill battle. The pursuit of excellence in the New York state courts is severely hampered by the very convoluted structure of our judicial system. As organizational flow charts go, ours is an absolute nightmare—16,000 words setting out the most byzantine and complex court system in the entire country, including 11 separate trial courts. By contrast, California, with about double our population, has a single trial court.

In today's fast-moving world, successful organizations must be flexible and responsive in order to meet the public's evolving needs and expectations. The New York courts, however, operate within a rigid, fragmented structure that restricts our ability to manage people and shift resources freely and rationally. In our so-called "Unified Court System," one court may be struggling with overwhelming filings and case backlogs while another court across the street may be underutilized by comparison. Yet, jurisdictional boundaries make it extremely difficult, if not impossible, to move judges and personnel from one court to another to meet caseload disparities—which is exactly what any other sane and rational organization would do, including our counterparts in the federal judiciary and every other state court system in the country.

While last year's failure to authorize a Constitutional Convention was surely a missed opportunity for the Judiciary, the stakes are too high to give up now. If a clear consensus emerged from the debates leading up to the last November's vote, it was that our court system is in desperate need of constitutional modernization. We need to move forward quickly to take advantage of the valuable studies and recommendations issued by so many bar associations, as well as the overwhelming public support for court reform expressed by numerous policy makers, good govern- » Page S6

PAVEL L PHOTO AND VIDEO

An aerial view of New York Hilton Midtown

A Technology-Focused Approach to Justice

Lawrence K. Marks
Chief Administrative Judge
New York State
Unified Court System

With the appointment of Janet DiFiore as New York's Chief Judge two years ago, the Unified Court System's top priority has been achieving excellence in every aspect of the delivery of justice in this state. One critical means of achieving the goals of the Excellence Initiative is through technology. By expanding and modernizing our technology operations, we have made justice more accessible and more efficient.

A prime example is the development of computer "dashboards," which enable judges and court administrators to review and evaluate precise details of every court's caseload in a spreadsheet format that can be filtered in any number of ways, including by judge, court part, case type, age of case, next appearance date, attorney name, and party name. The dashboards have been invaluable in comprehending and tackling backlogs and delays, better enabling judges and administrators to actively manage our considerable case inventories.

For example, we discovered that in the Bronx Supreme Court there was one court part that, through no fault of the judge, had a disproportionate number of felony drug cases. By analyzing the data in the dashboard, the judge developed » Page S5

Revisiting the Basic Values of Honor, Fairness

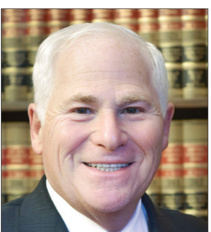
Rolando T. Acosta
Presiding Justice
Appellate Division,
First Department

It is a privilege to have been appointed Presiding Justice of the Appellate Division, First Department, and to be able to work with Chief Judge Janet DiFiore in implementing her historic Excellence Initiative. At the First Department, we have eliminated a longstanding backlog of appeals and recently began live-streaming oral arguments in response to requests from the public and the bar. From e-filing to standardizing Appellate Division practice rules to developing a uniform guide to New York evidence, our judiciary is taking needed steps to modernize and become more efficient.

Yet, while modernizing the courts and increasing access to justice are laudable goals that deserve our attention, there are many other issues that merit a full and frank discussion; nothing should be left off the table. In my view, we are only at the beginning of what must be a sustained process of consciously rethinking how law is practiced and justice administered, a process that requires all of us—the bench, the bar, and the public—to revisit basic values to safeguard the third branch of government.

For example, it is often the case in law practice that cleverness is valued at the expense of candor. Creating clever arguments to circumvent weakness in a legal position is generally accepted as » Page S6

A New World: The Role Of the Presiding Justice



Alan Scheinkman
Presiding Justice
Appellate Division,
Second Department

On January 1, Gov. Andrew M. Cuomo appointed me, not just to join the Appellate Division, Second Department, but to lead it as Presiding Justice. I am deeply honored and humbled by the confidence that the Governor has placed in me.

As the court's newest member, I am adjusting to a new way of adjudicating cases. No longer will I be alone in controlling a calendar and a courtroom and acting as sole arbiter of requests for relief. My role now will be to approach cases from the perspective of a reviewing court and to work collaboratively with my new and highly distinguished colleagues to achieve a just result in each appeal that comes before us.

I will, of course, be sitting as an appellate judge, participating as often as the associate justices do. As a former appellate law clerk, long-time member of the State Bar's Appellate Courts committee, and co-author (with the late, great David Siegel) of the State Bar's handbook on Appellate Division practice, I am looking forward to hearing the challenging and important issues that counsel will be presenting. » Page S6

Bringing Our Best Traditions Forward

Elizabeth A. Garry
Presiding Justice
Appellate Division,
Third Department

This week, as we come together for the New York State Bar Association's Annual Meeting, it is a privilege to attend for the first time as Presiding Justice of the Appellate Division, Third Department. This event provides an excellent example of what is great about our profession. Attorneys from across New York state and beyond gather as a community of colleagues from vastly different backgrounds, practice areas and professional settings, but with a shared commitment to learning from one another and upholding the highest standards of service and integrity.

As in the legal profession more broadly, the many different backgrounds and perspectives represented within the court system are a tremendous source of strength, and we remain connected through our shared values and traditions. I welcome the opportunity to bring our best traditions forward as we continue to develop strategies to make our courts ever more efficient, accessible, and prompt in rendering determinations. » Page S5

Our Oath Is an Active Duty Assignment

Gerald J. Whalen
Presiding Justice
Appellate Division,
Fourth Department

"Irish, both sides. Mother and father. I'm Irish and you're German. But what makes us both Americans? Just one thing. One. Only one. The rule book. We call it the Constitution, and we agree to the rules, and that's what makes us Americans." Bridge of Spies, Dir. Steven Spielberg, Dreamworks et al., 2015.

We are a nation that combines immigrants, the descendants of slaves and indigenous peoples. Our diverse ethnic heritages preclude national consensus on common traditions, religion, language, or food. What defines us as Americans is something different: It is our belief that certain inalienable rights exist in a just society, including the expectation of fair treatment, recognition that no individual or group is above the law, protection from unjust intrusions and takings, and, of course, the pursuit of happiness. The touchstone of this common belief is the Constitution. This rule book codifies our agreement on our fundamental principles and permeates our daily lives, whether judge or student, barber or » Page S3

Inside

Bar Week Events Underscore Core Values
by Sharon Stern Gerstman S2

An Enriching, Valuable and Meaningful Membership
by Michael Miller S2

Antitrust Is Cool Again
by Michael L. Weiner S2

Keeping Up With the Business Law World
by Kathleen A. Scott S2

Recent Bills Affecting the Entertainment And Arts Industries
by Cheryl L. Davis S2

The Practice of Matrimonial Law Continues to Evolve
by Mitchell Y. Cohen S3

Hot Topics for Food, Drug and Cosmetic Law Section
by Brian J. Malkin S3

Lawyers Should Help Lawyers
by Joel E. Abramson S3

Five Steps Governments Should Take to Address Workplace Harassment
by Richard K. Zuckerman and Sharon N. Berlin S3

Honoring Excellence and Achievement
by Conrad Singer S4

Defending Civil Claims Involving Allegations of Criminal Culpability
by Elizabeth A. Fitzpatrick S4

Maintaining Careers And Undertaking New Activities
by C. Bruce Lawrence S5

Bar Week Events Underscore Core Values

Sharon Stern Gerstman
President
New York State Bar Association

From Jan. 21 to 28, the New York State Bar Association will be convening in NYC for our annual meeting—"Bar Week," as it has been called. Our theme is Connect, Inspire, Learn. We connect with other lawyers from throughout the state (and the world); we are inspired by the passion and the commitment of the many excellent lawyers who will be receiving awards; and we will learn from experts who provide the smorgasbord of cutting-edge CLE that is NYSBA's signature.

The Annual Meeting is all that, but much more. Each day, our events underscore our core values as an association and as a profession.

We insist on the highest ethics and professionalism for all lawyers and judges. Our CLE programs are infused with presentations on issues which may create ethical dilemmas, and best practices to preventing or solving them. Our ethical rules require that we keep abreast not only of changes in the law, but changes in technology. We are helping lawyers do that in a myriad of ways, including a free CLE on using Fastcase (one of our member benefits), on understanding cloud computing, and on using social media, and a full day of Practice Management, which includes cybersecurity, encryption and ESI. We celebrate the lawyers who exhibit professionalism in the service of their clients and in promoting respect for the legal profession with the presentation of the Association's Professionalism Award at our House of Delegates dinner.

We promote access to justice for the poor and disadvantaged through our committees on Legal Aid and Access to Justice, and by encouraging pro bono. We recognize lawyers who have provided at least 50 hours of pro bono with the "Empire State Counsel" designation and awards at our Justice for All luncheon.

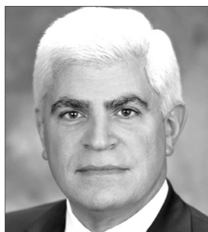
We seek to improve our state and federal laws to ensure fairness in our legal system and our society, and we see the work of our sections and committees in the presentation of their reports to our Executive Committee and to our House of Delegates. We feature a Summit, with free CLE, focusing on the problems and solutions of mass incarceration and its disparate impact on people of color.

We are committed to eliminating bias and promoting diversity and inclusion in the profession and in our justice system. We celebrate diversity with our Trailblazers awards and our free reception, hoping to introduce minority lawyers to all of the sections of the Association, and to recruit them to work with us on all of our programs. We celebrate the lawyers who have done so much to promote gender diversity with our Ruth Schapiro award, presented at our House of Delegates, and our Kay Crawford Murray award, presented by the Committee on Women in the Law. Many of our CLE programs include diversity and inclusion components, such as ways to combat implicit bias.

We hope all lawyers come connect with NYSBA, are inspired to improve our laws and justice system, and are eager to learn what we offer.

Sharon Stern Gerstman is of counsel to Magavern Magavern Grimm in Buffalo. She concentrates her practice in the areas of mediation and arbitration, and appellate practice.

An Enriching, Valuable and Meaningful Membership



Michael Miller
President-elect
New York State Bar Association

New York State Bar Association President Sharon Stern Gerstman has already provided an excellent statement about what goes on at our Annual Meeting. Rather than be repetitious, I want to share with you why I believe that attendance at the Annual Meeting and membership in NYSBA can be enriching, valuable and meaningful.

NYSBA's Annual Meeting is a special week during which thousands of lawyers gather at the Hilton Hotel in Manhattan, sharing common interests. Lawyers of social, cultural and geographic diversity gather to attend CLE programs conducted by scholars, section and committee meetings, award ceremonies and other events honoring heroes and icons of our profession.

Attending NYSBA's Annual Meeting provides a reminder that we lawyers are part of something special, with a rich tradition of scholarship, problem-solving and an abiding commitment to help the less fortunate. Sometimes in the daily pressures of life and the stresses of practice, it can be easy to forget that we lawyers play an important, indeed, a vital role in our society. We often help people and businesses resolve difficult problems in challenging situations. At the Annual Meeting there are numerous examples of selfless service and we are reminded that such service is so deeply engrained in our profession's DNA that we have a special term for it that has come down through the ages: pro bono publico.

Attendance at NYSBA's Annual Meeting helps remind us of the breadth, grandeur and importance of our profession. It also helps remind us of the importance and value of membership in this great Association. The camaraderie and the commitment to the profession's core values on display at the Annual Meeting are truly unrivaled anywhere in our profession. It is deeply inspiring and a source of pride to attend events at which lawyers are recognized for noble work, for helping those who are less fortunate.

Personally, over the years, attending the Annual Meeting has afforded me the opportunity to develop friendships with lawyers from Buffalo, Albany, Binghamton, Staten Island, Rochester, Nassau, Suffolk, Ithaca, Syracuse and elsewhere whom it is unlikely I ever would have met—people who are examples of the best qualities in our profession—scholarship, humanity and a commitment to try to make the world a little bit better.

Additionally, I believe that membership in the New York State Bar Association is important to the future of our profession and our communities. Local bars and affinity bars are important and have a meaningful role to play, but when reform is needed, when unfair regulations or inappropriate laws are proposed, when there are violations of civil liberties or there are discriminatory practices, there is no stronger, more effective, more persuasive voice in New York than that of the New York State Bar Association.

I urge you to attend the Annual Meeting, and if you are not already a NYSBA member, please join us—we want and need your support!

Michael Miller is in private practice at the Law Office of Michael Miller.

Antitrust Is Cool Again

Michael L. Weiner
Chair
Antitrust Law Section

The primary aim of antitrust enforcement in the United States since the 1980s has been the maximization of consumer welfare. In practice, the Department of Justice (DOJ) and Federal Trade Commission (FTC) have analyzed mergers, for example, with the goal of answering a relatively narrow question: How will the merger impact product prices and quality? This largely economic question has demanded a largely economic answer, and the DOJ and FTC employ teams of economists who work alongside attorneys to understand the impact of mergers on consumer welfare. Over the last two years, however, some have begun to question whether the government's focus on consumer welfare effects in antitrust enforcement is appropriate.

These questions have been raised by a steady stream of papers and reports concluding that market concentration is increasing in a variety of industries. President Obama's Council of Economic Advisors issued a 2016 report titled "Benefits of Competition and Indicators of Market Power," which reviewed a number of measures of industry concentration, and concluded that "[r]ecent indicators suggest that many industries may be becoming more concentrated, that new firm entry is declining, and that some firms are generating returns that are greatly in excess of historical standards."

The question has also reached Congress, with Sens. Warren, Booker, Klobuchar, and numerous House members advocating for strengthened antitrust enforcement. These members of Congress and other commentators want to broaden the mandate of the antitrust agencies to include considerations beyond consumer welfare, including jobs and wealth disparity. The movement even has a twitter hashtag, #HipsterAntitrust. As Professor Carl Shapiro, former chief economist for the DOJ Antitrust Division, has written, antitrust is "sexy again."

Many of these "new" considerations are in fact quite old, however. From the 1920s through the 1970s, antitrust jurisprudence focused primarily on company size. Mergers were blocked and companies broken up simply because of their size and market share. Indeed, in the 1945 Alcoa case, Judge Learned Hand came close to explaining that the mere possession of high market shares can constitute an antitrust violation because "[Congress] did not condone 'good trusts and condemn 'bad' ones; it forbad all." Antitrust was not simply an economic question; Congress may have "prefer[ed] a system of small producers" because "of its indirect social or moral effect."

The "Big is Bad" era perhaps reached its apex with the Von's Grocery case, where the Supreme Court blocked a merger between two groceries jointly controlling merely 7.5 percent of Los Angeles area grocery sales. Succinctly summing up the era, Justice Potter Stewart dissented in Von's Grocery and explained, "[t]he sole consistency that I can find is that, in litigation under [the Clayton Act], the Government always wins."

As the Trump administration enters its second year, it will bear close watching to see what its antitrust enforcement approach shapes up to be. Will it adhere to the data- and econometrics-heavy status quo, or will considerations of income inequality, employment, and other political factors become ascendant once again?

Michael L. Weiner is a partner at Dechert.

Recent Bills Affecting the Entertainment And Arts Industries

Cheryl L. Davis
Co-Chair of Diversity Committee
Entertainment, Arts & Sports Law Section

2017 was eventful on a number of fronts, not least of all in terms of legislation affecting the entertainment and arts industries. On Oct. 4, 2017, a bipartisan bill was introduced: the Copyright Alternative in Small-Claims Enforcement Act of 2017 (CASE). CASE would establish a "small" copyright claims tribunal in the U.S. Copyright Office, giving small copyright holders a much-needed tool to combat copyright infringement without having to bear the expense of going to federal court—which we know can be an extremely expensive proposition for even the most straightforward case of infringement.

If the bill passes, individual creators and other small copyright owners will not be forced to hire a lawyer (which some readers might deem a drawback) or go to federal court. Proceedings would be conducted remotely so that claimants do not have to travel. Damages in such cases would be limited to $15,000 per act of infringement with a $30,000 maximum, and injunctive relief would not be available.

Under CASE, participation in the tribunal would be on a voluntary basis and would not interfere with either party's right to a jury trial. Some of the changes made to last year's version of the bill include the addition of provisions (1) requiring the Copyright Office to expedite certificates of registration (a prerequisite to starting a copyright action) for parties with a matter before the small claims court, and (2) allowing a copyright holder to request a subpoena compelling an Internet service provider to disclose the identity of a user accused of infringement. The latter provision would be a boon to creators, among others, in their long-running fight against Internet piracy.

The Music Modernization Act (another bill introduced with bipartisan support) was introduced on Dec. 21, 2017. While it was still hot off the presses as of this writing, the stated goal of the bill is to "provide clarity and modernize the licensing system for musical works." According to Sen. Collins, the bill's lead co-sponsor, "[o]nly by ushering music licensing into the twenty-first century can we promote artistry and its appreciation long into the future, and that's exactly what we're doing with the Music Modernization Act." The bill calls for, inter alia, the creation of a "Mechanical Licensing Collective" (MLC) by copyright owners which would grant blanket mechanical licenses for interactive streaming or digital downloads, and create a database including "unmatched" works (where the copyright owner has not been identified or located), permitting copyright owners to claim their songs and collect royalties accordingly. We will review the bill in greater detail and continue to monitor its progress.

The passage of the recent new tax bill is expected to affect the incomes of many Americans—and entertainers and artists in particular. Our division (as well as all the rest) will continue to monitor the situation so we can keep our clients duly advised.

Cheryl L. Davis is the general counsel of the Authors Guild. She was previously a partner at Menaker & Herrmann, where her practice focused on intellectual property and employment issues. Diane Krausz, chair of the Entertainment, Arts & Sports Law Section, thanks the author for drafting this article.

Keeping Up With the Business Law World

Kathleen A. Scott
Chair
Business Law Section

In the past year, we have seen a new administration begin in Washington, D.C. and promise regulatory reform, particularly in the financial services area. While these promises to date have proved more aspirational then real, this year we may start to see many of the legislative and regulatory proposals moving forward. The Business Law Section of the New York State Bar Association will be reviewing any proposals to determine if there is any effect on the New York business law climate.

One of the best ways to keep up with the latest developments in the business law field is to join the Business Law Section. The Section encompasses a variety of specialties: banking, insurance, technology and venture law, nonprofit organizations, franchise, bankruptcy, public utility. Last year, we added a committee on mergers and acquisitions and this year, we are replacing the Corporations Law Committee with a Business Organizations Law Committee that will go beyond just corporations to include limited liability companies and all forms of business organizations. In other words, we have something to offer everyone and we encourage everyone to get involved.

The Business Law Section has over 3,500 members, yet only a small proportion of those members are actively involved in the committees. Each section member has something to offer and we welcome all who are interested. Committee meetings are useful for keeping up to date on the latest legislation, regulations, guidance and litigation, and offer an ability to provide input on section and association positions. Our recent Section Fall Meeting, "Financial Regulation and Deregulation: What's Next," attracted a large number of attendees, who were treated to presentations and panels involving state and federal regulators, in-house counsel, private practitioners and other experts who briefed attendees on the current business regulatory climate as well as providing their thoughts on what might be happening next. At the Annual Meeting, we are teaming up with the Corporate Counsel Section on January 24 to present a program on compliance-related issues, including whistleblowing and ethics.

The Section sponsors the well-respected NY Business Law Journal, for which proposed submissions are welcome, as well as a lively Community on which you can find out information about relevant Section and Association initiatives and members who quickly respond to requests for assistance from fellow Section members.

Finally, the Section has established a dedicated new Small Business Support Fund at the New York Bar Foundation that will provide financial support for programs that provide legal advice and assistance to military veterans, minorities and other underserved New York residents seeking to establish their own small business enterprises in the State.

My point in all this? Practitioners need to keep up with the ever-changing state of business law and the Business Law Section offers ways to keep members up-to-date on current developments, and opportunities to shape Section and Association positions on matters important to New York business lawyers. We have room and encourage you to join us!

Kathleen A. Scott is a senior counsel in the New York office of Norton Rose Fulbright.

READER'S SERVICES

For subscriptions and to purchase back issues, call 1-877-256-2472.

For questions regarding reprints and permissions, call 877-257-3382, e-mail reprints@alm.com, or visit almreprints.com.

To track calendar and motion information for individual cases, call MA 3000 at 212-457-4988.

NY Lawyers Careers Center: www.law.com/newyorklawjournal/career-center/

The Practice of Matrimonial Law Continues to Evolve

Mitchell Y. Cohen
Chair
Family Law Section

Family law practitioners are well acquainted with change, in the law, in the practice rules of the courts in which we appear, or the constantly changing facts and family dynamics relative to the people we represent. This past year has been no exception.

At the forefront of our ever-changing world, the recently enacted Tax Cuts and Jobs Act of 2017 has eliminated the deduction for alimony for all Divorce and Separation instruments executed after Dec. 31, 2018. The deductibility of alimony has a history dating back to 1942 and certainly since my admission to the bar in 1986 it has always been an important negotiating tool when trying to resolve cases. Just when I thought I understood the intricacies of the deductibility of maintenance including what recapture meant, it has now been taken off the table. Although a complicated issue, the deductibility of alimony was especially helpful in shifting taxable income in a way to increase the money available for a family to support a household that no longer had two parents living as one unit and was often a creative tool to help achieve a settlement.

When the tax reform laws were first introduced in Congress, the legislation committee of the Family Law Section immediately undertook a review of the proposal, formulated a resolution, unanimously approved by our Executive Committee, firmly against the elimination of the tax deduction for alimony. This resolution was provided to the NYSBA to take to Washington, D.C., and while the effort did not prove successful, it was gratifying that the elimination of the deduction was not immediate but delayed for one year. Our next task will be to see what changes, if any, to the recently enacted spousal maintenance guidelines might be appropriate given the significant impact on the loss of this deduction.

In July, 22 N.Y.C.R.R. 202 was amended to impose limits on the length of affidavits, attorney affirmations, and memorandums of law with respect to pendente lite motion practice both as to papers in support of the application, opposition thereto and the reply. There is, of course, an exception to permit the papers to exceed these limitations but counsel must certify a good faith need to exceed the page limitations. When first proposed, these page restrictions were met with skepticism and concern that litigant's rights were being limited, yet I am not aware of any instance where a litigant has not had a full and fair opportunity to argue either in favor or of against the relief being sought.

Domestic violence continues to be a major topic of concern, and well it should be. This tragic and destructive behavior comes in many shapes and forms and we witness this every day in the news and with our clients and their children. The NYSBA Domestic Violence Initiative was conceived by past NYSBA President Claire Gutekunst, and as the initiative has completed its mandate and issued a final report with recommendations, I am pleased to have created a special committee within the Family Law Section to take up the issue of Domestic Violence from the Initiative. This committee, co-chaired by the Hon. Debra Kaplan, Amy Schwartz-Wallace, Alton Abramowitz and Elizabeth Douglas will certainly be one of our most important and active committees and will undoubtedly be a shining example of how we as family law practitioners can have a real and significant impact.

My two-year term as chair of the Family Law Section will conclude at the end of this month. The people serving as chair before me were stars in the field, and with more than 2,500 members in the Section I felt a responsibility to serve our members diligently, to promote the practice of family law, and to provide our members with access to the resources to make the practice of family law more efficient and rewarding. Our website provides easy access to legislative updates. Monthly case updates are posted by our very own Bruce Wagner. The Section's quarterly publication, the Family Law Review, provides insightful articles and case analysis invaluable to practitioners. The community listserve provides an incredible opportunity to pose questions and receive invaluable advice from colleagues around the state, and not a day goes by without at least one post. Our legislation committee works tirelessly to analyze and comment on proposed legislation affecting our area of practice. And of course, our CLE committee is composed of the most hard-working group of individuals I have ever been associated with, devoting endless amounts of time and energy to develop and put out high quality CLE programs throughout the year, targeted to all levels of professional experience. It has been an honor and a privilege to be chair of this section and to represent this group of professionals dedicated to the practice of matrimonial and family law.

Mitchell Y. Cohen is a partner at Johnson & Cohen.

Lawyers Should Help Lawyers

Joel E. Abramson
Chair
General Practice Section

The General Practice Section is unique among NYSBA's sections in that it cuts across all lines and areas of legal practice. The Section's focus is on the common interests of every segment of the Bar. While, for example, a lawyer who handles commercial matters may have little in common with a zoning lawyer regarding substantive legal issues, they are both unified by being practicing lawyers facing the common challenges of lawyers, albeit in different settings. The General Practice Section is the section where lawyers in every practice area, regardless of firm size, can get together in order to make their lives as lawyers better and more satisfying.

The General Practice Section has taken as its mission advocacy for and on behalf of lawyers so as to improve the professional working conditions of the legal profession.

A short time ago, the NYSBA leadership asked the sections for suggested 2018 Legislative Priorities. This prompted the General Practice Section's Executive Committee to respond and to initiate the process for NYSBA's approval of an affirmative legislative proposal that is designed to significantly help lawyers by putting lawyers on an equal platform with other professionals in the area of professional malpractice liability. Presently, lawyers are subjected to a disparate, compromised and considerably less favored position than other professionals.

The General Practice Section will work to submit to NYSBA's Executive Committee a proposal to enact a new CPLR §3012-c, which would require a certificate of merit as a requirement in all legal malpractice actions. Passage of such a CPLR section will enable lawyers to be on the same footing with and have equal rights with other professionals such as doctors, dentists, and other professionals who are presently protected from sham lawsuits by CPLR §3012-a and §3012-b. Those CPLR sections require a certificate of merit for all professional malpractice suits against professionals. Lawyers are excluded from this most reasonable requirement. In contrast, lawyers are left in a defenseless wilderness. The General Practice Section wants rectification so that lawyers will be the equal of other professionals.

The General Practice Section invites and welcomes all lawyers who are not already Section members to join us and work together with us in many different ways on behalf of all lawyers. Lawyers must advocate for lawyers, and the General Practice Section intends to lead this campaign.

Joel E. Abramson, a Manhattan solo practitioner, focuses on real estate matters, business transactions and litigation.

Five Steps Governments Should Take to Address Workplace Harassment

Richard K. Zuckerman
Chair
Local and State Government Law Section

Sharon N. Berlin
First Vice-Chair
Local and State Government Law Section

Seemingly daily harassment allegations being lodged against elected officials, high-level executives and public figures require municipalities to promptly stop this abhorrent behavior and its costly impact on morale, productivity and public perception.

Step 1: Implement an Anti-Harassment Policy. Implementation of an effective policy prohibiting illegal harassment and discrimination is an essential element of a prevention strategy that can preclude municipal liability. See EEOC, Promising Practices for Preventing Harassment. The policy should prohibit unlawful behavior based upon any characteristic protected by applicable law,[1] regardless of whether by or toward an employee, applicant or constituent, and clearly explain what is prohibited and why. Victims should be encouraged to report conduct that could eventually become prohibited harassment, and be encouraged to participate in related investigations. While confidentiality cannot be guaranteed, it should be provided consistent with a thorough investigation. The policy should also prohibit retaliation against complainants and investigation participants.

Step 2: Disseminate the Policy. A policy can only be effective when communicated. New employees should receive it when hired; others should receive it annually and whenever it is updated. The policy should be posted with other policies, on the employer's website, and included in any employee handbook. A signed receipt should be required when the policy is disseminated.

Step 3: Implement an Effective Complaint System. The Equal Employment Opportunity Commission opines that an effective policy welcomes questions, concerns and complaints; encourages early reporting of problematic conduct; respectfully treats all involved; operates promptly, thoroughly and impartially; and imposes appropriate consequences for misconduct. See id. It should include multiple avenues of complaint, including about senior management.

Step 4: Train All Employees About the Policy and the Harassment Complaint System. Training should be regularly provided. See id.; see also *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998). Employees should be educated about unacceptable conduct and its potential consequences; the employer's system for addressing complaints; what to do if one becomes aware of prohibited conduct; and that retaliation is prohibited. Clear, easily understood training, conducted by interactive trainers, in all relevant languages, should be tailored to the workplace and workforce. See id.

Because an employer can be liable for conduct committed by a supervisor with authority over the employee (*Faragher* and *Ellerth*, supra), supervisors must be trained to understand that their conduct is held to even higher standards, that they have a special obligation to recognize and prevent harassment, and how to respond if they become aware of it.

Step 5: Promptly Investigate and Remedy Harassment. An impartial investigation should promptly occur when a complaint is received. Where appropriate, swift remedial action must be implemented. The investigator should be experienced and not in the chain of command with the complainant or alleged harasser. Allegations involving senior officials are often referred to an outside investigator.

The investigator should report findings, recommendations and recommend appropriate disciplinary action. The employer should document its response, including corrective or preventative action taken and anti-retaliation warnings issued. The complainant and alleged harasser should be advised about the investigation's outcome, and periodic follow-up should ensure compliance.

These steps, while not guaranteeing perfect behavior, are essential strides towards that worthy goal.

1. Race, creed, color, national origin, sex, pregnancy, gender identity, transgender status, sexual orientation, disability, age, religion, military or veteran status, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, use of a guide dog, hearing dog or service dog.

Richard K. Zuckerman and Sharon N. Berlin are partners at Lamb & Barnosky.

Hot Topics for Food, Drug and Cosmetic Law Section

Brian J. Malkin
Chair
Food, Drug and Cosmetic Law Section

The Food, Drug and Cosmetic Law Section this year has focused its program in selecting topics of a cross-functional nature, as discussed below.

Tobacco Product Law

First, a panel will address a new initiative undertaken by the U.S. Food and Drug Administration (FDA) to reduce the highly-addictive drug, nicotine, found in most tobacco products. Next, the panel will consider how the Center for Tobacco Products (CTP) utilizes a substantial equivalence process for certain tobacco products that shares many similarities with substantial equivalence used for 510(k)-type medical devices, as well as another look at tobacco flavors.

Animal Health Law

The Animal Health Law Panel then plans to discuss leveraging approved human drugs in the process to obtain animal drug approvals and features speakers from animal health companies offering their perspectives on key features in the animal drug regulatory approval process and business considerations affecting the process.

Food Law

Next, the Food Law panel features speakers discussing issues related to genetically-modified organisms (GMOs) that result in food and animal products tied to how the FDA and the U.S. Department of Agriculture (USDA) regulates those products. The science that brings us to GMOs are genes and biologic manipulation, which shares some technologic features to gene-based therapies that will be discussed in the biologics and medical device panels.

Biologics Law

The Section's Biologics panel features discussions on FDA's approval of the first gene therapies, intellectual property considerations for patenting such therapies, and an update on biosimilar market entrants, and how the Supreme Court decision on the biosimilar litigation process has raised strategy questions for prospective biosimilar applicants. This panel features speakers from both FDA's Center for Biologics Evaluation and Research and the New York Genome Center.

Ethics

An ethics panel designed for attorneys involving early access promises to provide many insights into how human subjects can be protected and potentially benefit when using unapproved medical therapies, which has been a hot topic, where increased drug access has been emphasized.

Drug Law

Following ethics, a drug law panel with the New York Attorney General's Health Care Bureau Chief will discuss how New York is addressing the opioid drug crisis, and then will include a lively debate between a distinguished academic and former Assistant Director of the U.S. Federal Trade Commission (FTC) (now litigator), considering how generic competition may be encouraged by additional FDA/FTC statutory or regulatory measures. This panel also includes a discussion of a new tactic to avoid potentially certain pharmaceutical patent challenges involving patent ownership by Indian tribes or state entities and the invocation of sovereign immunity.

Medical Device Law

The program concludes with a medical device panel focusing on device and software regulation following the 21st Century Cures Act, safety, privacy and data/cyber-security in an era of digital devices, and FDA's evolving policy on personalized medicine, featuring a discussion on gene-based tests.

Brian J. Malkin is counsel at Arent Fox.

Whalen

« Continued from page S1

banker. As Justice Robert H. Jackson once said, democracy "is not a theory of officialdom; it is a habit of the American people." Robert H. Jackson, "Is Our Constitutional Government in Danger?," Town Meeting, Vol. 5 No. 4 (Nov. 6, 1939).

Many of us entered law school inspired by the Constitution and the principles of our founders. Even those members of the Bar who pursued the law for, shall we say, more practical reasons are nonetheless taught to give reverence to those principles. We learned to value and respect the Constitution through the opinions of Justices Holmes, Cardozo, Learned Hand, Jackson, and now Justices Ginsburg and Sotomayer. We learned that dissent is healthy. We learned that passionate discussions have been and will continue to be had about the meaning to be afforded to the specific words chosen for the embodiment of our principles. But the bones of the document, the fundamental promises that are embodied in the Constitution, are not in dispute.

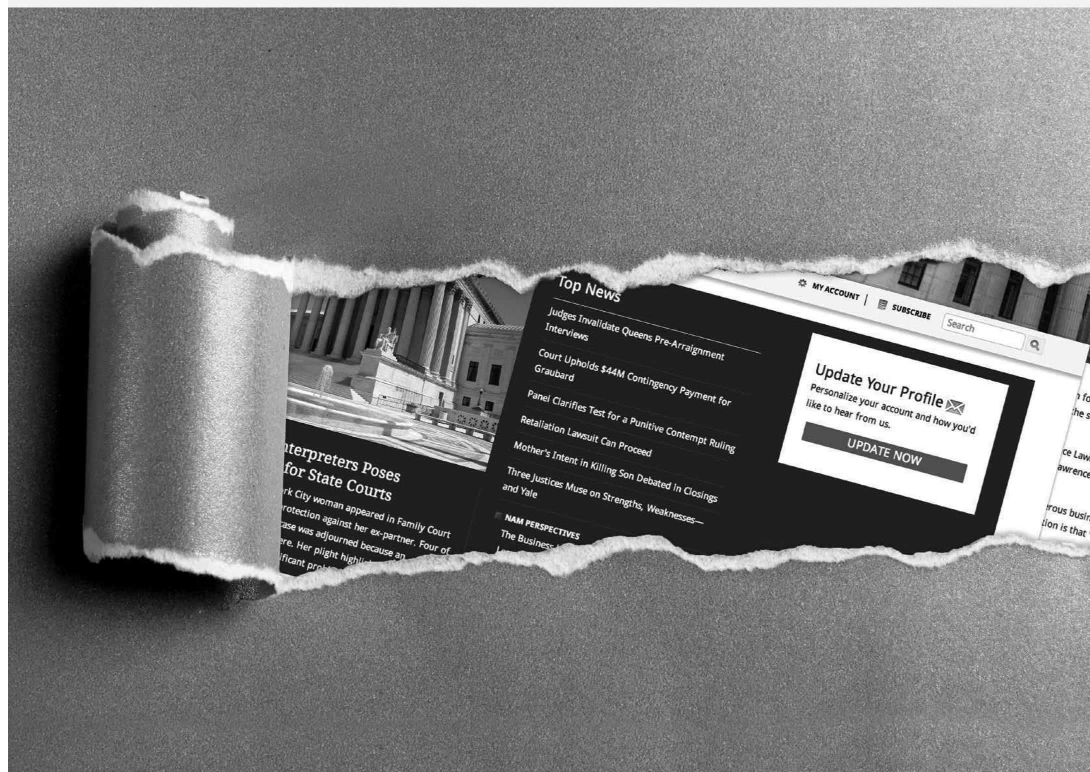
We now keep those promises. Our training culminated in a pledge, simple in its wording but heavy with responsibility: We will support the constitution of the United States, and the state of New York, and we will faithfully discharge the duties of office of attorney and counselor-at-law, according to the best of our ability (NY Const., art XIII, §1).

These words are not empty and discharging the duty is not easy. There have been times in our history when we allowed ourselves to wander away from our foundation. Lincoln suspended the writ of habeas corpus, a cardinal principle that the Constitution recognizes as "essential to the liberty of the citizen," despite his lack of constitutional authority to do so being "too plain and too well settled to be open to dispute" (*Ex parte Merryman*, 17 F. Cas. 144, 148 [CC D. Md. 1861] [Taney, C. J.]). The Supreme Court ratified the internment of American citizens because they were "born of different racial stock" (see *Korematsu v. United States*, 323 U.S. 214, 243 [1944] [Jackson, J., dissenting]). During McCarthyism, Congress "improperly s[ought] to try, convict, and punish suspects" in violation of the separation of powers and infringed First Amendment rights "through exposure, obloquy and public scorn" (*Barenblatt v. United States*, 360 U.S. 109, 136-37, 140-41 [1959] [Black, J., dissenting]).

These events remind us that, often, our failure to adhere to our core principles result not from malice or greed, but from fear and a desire to protect those we love. Justice Black, in concluding that the actions of the House Committee on Un-American Activities were in violation of the Constitution, did "not question the Committee's patriotism and sincerity in doing all this" (id. at 159). The relevant question was nonetheless "whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free." (id. at 162).

Our past failures are not a sign of a weak foundation. The Constitution, subjected as it has been to over 200 years of challenges and analysis, is structurally strong. Instead, these lapses serve as a reminder that it is not just our leaders who are tasked with responsibility; rather, our oath to uphold the Constitution is an active duty assignment. Vigilance may not require perfection; nonetheless we are expected to be perfect in our earnestness to fulfill our duty. The promises that have been made require no less.

New York Law Journal



Give Your Clients a Gift with Real Value.

Grant your clients unlimited access to award-winning legal news coverage with an ALM Gift Subscription.

Get Started
Visit at.law.com/gift

NewYorkLawJournal.com ALM

Honoring Excellence And Achievement

Conrad Singer
Presiding Member
Judicial Section

The Judicial Section of the New York State Bar Association and its affiliate, The Council of Judicial Associations, is unique. The Section's members come from every jurisdiction in the state and preside in every court—Federal, Supreme, Surrogates, Court of Claims, County, Family District, City, NYC Civil and Criminal, Housing and Town and Village. The Council is comprised of leaders from each of these courts' judicial associations and representatives from many minority Bar Associations. The Council meets four times a year to conduct business important to the judiciary, and the Section's annual meeting takes place on the Friday afternoon of State Bar Week, in conjunction with the Section's annual awards' luncheon.

The mission of the New York State Bar Association's Judicial Section is to promote dialogue, interaction, collaboration and collegiality among the judges and justices in New York state and to improve and promote the efficiency, effectiveness, diversity and standing of the judiciary. The role of the NYSBA Judicial Section is critically important in advising associations on current issues and concerns important to the judiciary and the courts. For example, the NYSBA was tireless in its support and advocacy for the pay raises finally received by the judiciary, and they are avid supporters of erasing the death gamble. The NYSBA has the ability to lobby the Legislature and Governor and each year does so for stable funding for the state court system, thereby augmenting OCA's own efforts.

This year at our luncheon we will recognize four judges who represent the exemplary judicial bench that this state has. The Honorable Paul G. Feinman will receive the Distinguished Jurist Award, which honors a jurist who embodies the highest ideals of the Judicial Section and recognizes judicial excellence and extraordinary commitment to the rule of law. The Honorable George G. Silver is the recipient of the section's fourth annual prestigious Advancement of Judicial Diversity Award. Of equal importance, the Section will be recognizing the Honorable Randall T. Eng and Honorable Karen K. Peters with lifetime achievement recognition.

This year in cooperation with the U.S. National Holocaust Museum, the Section has sponsored a program at the Southern District Courthouse. The Section is also joining forces with the Family Law Section's CLE Program during Bar Week. As a section, we continue to share ideas and collaborate to achieve our common goals and fulfill our mission. Together we can do more and will do more. The Judicial Section of NYSBA looks forward to growth in our membership and hopes that every member of the judiciary will contact the New York State Bar Association for an application.

Conrad Singer has served as Village Justice in Great Neck, Judicial Hearing Officer at the Nassau County Traffic Violation Bureau, Hearing Office for the New York State Department of Education, and as a New York State Family Court Judge in Nassau County.

Defending Civil Claims Involving Allegations of Criminal Culpability

Elizabeth A. Fitzpatrick
Chair
Torts, Insurance and Compensation Law Section

In June 2016, a New York judge found general contractor, Harco Construction, guilty of manslaughter, criminally negligent homicide, and multiple counts of reckless endangerment, in the death of a 22-year-old immigrant worker at a construction site killed when an unshored 14-foot deep trench collapsed. It was alleged the contractor had ignored prior warnings.

Defending a civil suit involving criminal claims presents unique challenges to the parties and an understanding of the effect a plea or conviction in the criminal matter may have, not only on the civil lawsuit itself, but also on the availability of insurance coverage to cover any damages, is important. Coverage for intentional acts cuts against the very heart of the insurance scheme, which requires fortuity, and violates the public policy against allowing someone to purchase an insurance policy and then to commit acts with the intent to cause injuries which are then indemnified by the policy.

In New York, while public policy does not prohibit coverage for liability arising from criminal acts, neither does it require such coverage. *Slayko v. Security Mutual Ins. Co.*, 98 N.Y.2d 289 (2002). In fact, there is support for the concept that public policy discourages insurance coverage for intentional conduct. *Massachusetts Bay Ins. Co. v. National Surety*, 215 A.D.2d 456 (2d Dept. 1995) citing *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (1992).

Beyond public policy, to address coverage under a CGL policy for intentional conduct, consideration must be given to whether the claim is outside the scope of the insuring agreement. i.e., not a covered "occurrence" in the first instance, or precluded by a policy exclusion; if a disclaimer of coverage is required and/or has been issued; and whether criminal charges were filed and if so, the status.

The policy may include a criminal act exclusion and the standard CGL policy includes an assault and battery exclusion. Other policy exclusions which may apply to a construction-related fatality claim are the expected or intended injury, contractual liability and employer's liability. The policy may also include endorsements which would preclude coverage such as the Employee Contractual Liability Exclusion Endorsement.

Absent an exclusion or an endorsement, which unequivocally precludes coverage, it is likely that the insurer will have an obligation to defend its insured in the civil litigation, even if the insured faces criminal culpability, since an insurer's duty to defend is exceedingly broad, and thus, assuming the allegations of the operative pleading include allegations of negligent conduct, the duty to defend will likely be triggered. *Automobile Insurance Company of Harford v. Cook*, 7 N.Y.3d 131, 137 (2006) quoting *Continental Casualty Company v. Rapid-American*, 80 N.Y.2d 640, 648 (1993).

If a partial denial or reservation of rights is issued, due to the inclusion of both covered and non-covered claims, the insured may be entitled to retain "independent" counsel, of the insured's own choosing, whose reasonable fees must be borne by the insurer because of the perceived conflict between the interests of the insurer and insured, in that some claims are covered claims and other claims are not. *Hartford Acc. & Ind. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 228-29 (1979); *Prashker v. United States Guar. Co.*, 1 N.Y.2d 584, 593 (1956).

Often, criminal counsel for the insured/defendant will be hesitant to allow the insured to provide a statement to the insurer or their counsel, citing Fifth Amendment rights. However, criminal defense counsel need be mindful of the cooperation clause in the CGL policy, which is a condition to coverage. Breach of the cooperation clause may result in a disclaimer of coverage and the ultimate loss of same, although demonstrating breach of the cooperation condition sufficient to allow an insurer to walk away from their coverage obligations is no easy task.

For example, in a trial court decision, a New York court, addressing an insurer's disclaimer of coverage issued as a result of the insured's refusal, on the advice of counsel, to provide a statement during the pendency of the criminal case against him held:

> While Plaintiff's refusal to provide her insurer with a statement regarding the accident was clearly a breach of the cooperation provision of the insurance policy, the court finds that her reason for refusing to provide such a statement prior to the disposition of the criminal charges pending against her in conjunction with the impact of a disclaimer upon the estate of Ronald M. excuses and absolves Plaintiff from the effect of such breach.

Wojna v. Merchants Insurance Group, 464 N.Y.S.2d 664 (Sup. Ct. 1983).[1]

Representing a party in a civil lawsuit involving criminal claims is fraught with challenges and careful consideration of the effect of the handling of the criminal matter on the civil suit must be made early. Criminal and civil counsel for the defendant/insured would be wise to coordinate their defense early and often.

1. However, New York courts have held that a neither an individual insured nor the principals of a corporate insured may invoke the Fifth Amendment privilege against self-incrimination to frustrate their carrier's efforts to investigate their claims. *Dyno-Bite, Inc. v. Travelers Cos.*, 80 A.D.2d 471, 476 (4th Dep't 1981). The U.S. Court of Appeals for the Second Circuit has affirmed an order of contempt entered against an individual who, while acting in his capacity as an agent of a corporation, claimed a Fifth Amendment privilege against producing corporate documents pursuant to a court order. *United States S.E.C. v. First Jersey Securities*, 843 F.2d 74 (2d Cir. 1988).

Elizabeth A. Fitzpatrick is general counsel for Island Companies. Corey Fitzpatrick, first-year law student at Georgetown Law, assisted in the preparation of this article.

LAW.COM
CLECenter.com
COMPLETE YOUR CLE REQUIREMENTS
Online. On time. On your schedule.
Guaranteed Accredited Continuing Legal Education at CLECenter.com

Satisfy your State-specific compliance requirements in confidence with CLECenter.com – the premiere provider of online Continuing Legal Education.

- All CLECenter.com courses are accredited by CLE Boards and State Bar Associations.
- Our Library consists of high-quality audio and video courses.
- 24/7 Access to Valuable and Diverse Content.

Take a Tour > CLECenter.com or
Call a CLE Counselor Today at (800) 348-0466 *(M-F 9:00 am - 5:00 pm EST)*

From the publishers of
THE AMERICAN LAWYER CORPORATE COUNSEL THE NATIONAL LAW JOURNAL New York Law Journal An ALM Website

Reach your peers to generate referral business
LAWYER TO LAWYER
For information
contact Sonya Nutter at (973) 854-2929
or e-mail **snutter@alm.com**

Maintaining Careers And Undertaking New Activities

C. Bruce Lawrence
Chair
Senior Lawyers Section

The Senior Lawyers Section is home to New York's experienced lawyers, age 55+. While the SLS is a relatively new section created in 2008, with some 3,000 members it is one the largest sections. The affinity of its members is age related, rather than practice area related. It provides opportunities for experienced lawyers to maintain their careers or to undertake new activities including pro bono and civic service, mentoring, lecturing and writing.

Our Annual Meeting CLE is on Thursday January 25th at 9 a.m. at the New York Hilton Midtown. This year's program concentrates on issues of transition for senior lawyers. Many seniors decide they don't want to just retire and stop working. But it can be a challenge to figure out what is next for you. At our program the first presentation will be by Melvin Simensky on "Is There a Job Coach in Your Future, Finding New Opportunities for Yourself." Coaching isn't about telling you what to do or advising you what opportunities there are, but rather helping you realize your goals and figure out what life changes you would like to make. A coach is there to help you identify solutions.

This will be followed by Andrea Tomaino of the 7th District Attorney Grievance Committee, who will talk about "Ethical Issues in Retirement." If you decide to leave your firm, but want to continue to practice on your own, what issues does this raise? If you have spent years relying on a firm to handle the administration of your practice, now you may be in an area where you are more akin to a young lawyer practicing as a solo.

Next, a panel of senior lawyers will discuss a "Second Season of Service," opportunities for volunteering. We will discuss pro bono opportunities in the City versus upstate, volunteering at Help Centers, and the Attorney Emeritus Program. The program will conclude with Sarah Diane McShea reviewing NYSBA's Planning Ahead Guide with suggestions as to how you or a successor close up a practice.

In 2017, the SLS created the Jonathan Lippman Pro Bono Award to recognize dedicated senior members of our profession who have generously provided pro bono service in New York state, and to inspire other senior attorneys to use their legal knowledge and experience to provide assistance to underserved members of the community. By naming this award in honor of former Chief Judge Lippman, the Senior Lawyers Section also seeks to honor inspiring judicial leaders who have zealously championed the cause of access to justice and have encouraged and supported the unique contributions of senior attorneys to the pro bono mission. Judge Lippman will join us at 9 a.m. to present awards to Anthony H. Szczygiel of Buffalo, Center for Elder Law & Justice, Joan Lia Levy of Tarrytown, who works with the Pro Bono Partnership, and Blaine (Fin) Fogg, President of the Legal Aid Society (NYC).

C. Bruce Lawrence is chair of the creditor's rights practice group at Boylan Code in Rochester.

Marks

« *Continued from page 1*

a plan of action to calendar the cases in chronological order. The District Attorney's Office agreed to make a final plea offer in each case and, where there was no resolution, the cases were immediately sent to trial. Through this process, the number of cases in the part was reduced from 800 to 250.

The state courts' e-filing program is another example of modernizing our court system through technology. We have introduced e-filing in 61 courts statewide, with close to 73,000 attorneys as registered users, and over 1.6 million e-filed cases across the state, in Supreme Court, Surrogate's Court, and the Court of Claims. E-filing will be launched in all four departments of the Appellate Division in early 2018. We are also now laying the groundwork for introducing e-filing in the criminal and family courts.

The benefits of e-filing are far-reaching, saving money and increasing productivity. E-filing makes the entire case file accessible online to all counsel of record at any time from any secure location. Whenever the court files a decision and order, immediate notice is provided to all counsel and participating unrepresented litigants by email, with a copy of the document attached. With e-filing, filers can embed bookmarks and hyperlinks, making it much easier for the reader to find significant portions within the text and to check citations. It also allows for the reader to search the text by keywords.

Separate from e-filing but equally helpful, the E-Track system allows attorneys to track their cases in all 62 counties, including civil cases statewide, as well as criminal cases in New York City, Nassau, and Suffolk. The system notifies the registered attorneys via email about any new developments in the case.

Our Integrated Courtroom Technology program combines a range of technology components that enhance efficiency and accessibility for all participants in the courtroom. The program includes updated sound systems, audio and video conferencing for remote appearances and remote interpreting, assistive listening devices, monitors for displaying testimony through real time reporting, a courtroom audio recording system when court reporters are unavailable, and secure Wi-Fi access for judges and open public Internet access for the public. There is also an evidence presentation system for physical and electronic evidence. We began installing this technology in 2016, and now have over 20 operational courtrooms with 20 more expected in 2018.

In 2016, the Legislature authorized a pilot program in Family Court to accept the filing of petitions for temporary orders of protection electronically, and to hold the initial ex parte hearing via video conference. The program allows approved advocacy groups to work with domestic violence victims in preparing and e-filing petitions for temporary orders of protection. Victims can also make their initial appearance via Skype conference set up by the advocating agency, and are given a secure email account from which they can communicate and receive records regarding the case. These accommodations shield victims of domestic violence from the trauma of having to appear in court in the presence of their abuser. The program is the first of its kind in the nation to be implemented on a statewide basis. Currently, it is operational in 15 counties, with additional counties to be added in the coming months and the goal of statewide deployment within two years.

Indeed, Family Court has been on the cutting edge of technology innovation. In Monroe County, the Family Court has introduced an electronic program that allows all parties to a case to sign in at a designated check-in desk, that then electronically alerts the courtroom when all parties are present and the case is ready to be called.

All Family Court files in New York City are now completely digital and no paper record is created for any new proceeding filed. The court receives most petitions from presentment agencies in digital format. The few paper petitions (and other paper documents) received are scanned and converted to digital format. Petitions involving self-represented litigants are prepared by court staff and digitally signed by the petitioners. All orders produced by the court are digital and electronically signed. Paper copies are only produced for distribution to litigants. The only hard copies of documents the court retains are evidence that is maintained in the form in which it was submitted. Jurists view documents on computer screens. Finally, copies of court files on appeal are sent digitally to the Appellate Division.

As is often the case, relatively simple steps have proved to be impactful. The summons parts in New York City are now capable of sending defendants text message reminders before their court appearance date. Even our jury management system has seen a facelift, as we have streamlined the process for issuing qualification questionnaires and summonses, and can now send communications to jurors through email and text messaging. The court system's social media presence has increased and includes a handful of accounts, each designated for a specific task or responsibility. Among them, we have Twitter accounts for announcing emergency court closures (@nycourtsnotice), that boasts more than 23,000 followers, for disseminating information about access to justice resources, news, and services (@NYCourtsA2J), and for promoting racial and ethnic fairness in the court system (@NYCourtsFHW).

These are some of the many efforts we are taking to expand the use of technology throughout the court system. Technological innovation is an integral part of the Excellence Initiative and our mission to improve the accessibility and efficiency of justice. As technology continues to transform our society, the Unified Court System is committed to doing everything it can to modernize our operations and enhance the quality of justice for all New Yorkers.

Garry

« *Continued from page S1*

My predecessor, the Honorable Karen K. Peters, emphasized the importance of ensuring that our bench, bar and legal community reflect the constituencies they serve. I share that focus and am committed to advancing the work that she and so many others have done to improve diversity and inclusion in our courts. As public servants, our institutions must represent the people we serve. Diversity is central and essential to our mission to provide full and equal access to our justice system, and we all benefit from collaborative decision-making by individuals who bring a multitude of perspectives to the challenges we face.

We must pursue this goal deliberately and sensitively. I have occasionally spoken about my own evolving attitude toward representing a historically under-represented group. Over time, I have come to better understand the meaning and importance of representation at all levels of our government. This is particularly true for young people, who have expressed that they view my advancement as further opening the door for them to achieve their own potential. I have been able to bring unique perspectives to my work as a judge and to share those perspectives with my colleagues. I have also learned a great deal from those whose experiences differ greatly from my own. We must strive for diversity while understanding that we are all much more than our race, sex, gender, ethnicity, sexual orientation, religion, physical ability, geographic background or other social identifiers. As leaders, it is critically important that we remain mindful of the cascade of benefits that accrue when we achieve meaningful diversity and inclusion at every level of our institutions.

I have been proud to serve the Third Department as an Associate Justice, and it is a remarkable honor to have been appointed Presiding Justice. I look forward to working with the Chief Judge and my colleagues across the state to uphold the principles upon which our outstanding Judiciary has been built. I also hope to connect with many of you this week and learn from your experiences as we in the court system seek new ways to provide excellent service to the people of New York state.

Point Your Career In The Right Direction.

Take the first step towards success with lawjobs.com. We provide:

- A free, fully customizable and searchable job database
- Expert resume and cover letter builder
- Confidential resume posting options and tracking of resume views
- Instant Job Alerts based on your preferences

lawjobs.com

Find the right position today.
Visit **Lawjobs.com** *Your hiring partner*

DiFiore

« Continued from page S1

ment groups and opinion leaders around the state.

That is why I have asked the members of the Judicial Task Force on the New York State Constitution to resume their work and focus on recommending discrete constitutional amendments, achievable through the legislative process, that will make our court system more efficient and better equipped to provide fair, timely and quality justice services to the public. In New York, the State Constitution may be amended by legislative action when two separately elected Legislatures vote to place an amendment on the ballot and the voters approve the proposed amendment at a general election.

The Judicial Task Force is cochaired by Judge Alan D. Scheinkman, now the Presiding Justice of the Appellate Division, Second Department, and formerly the Administrative Judge of the Ninth Judicial District, and Dennis Glazer, a retired partner from the law firm of Davis, Polk & Wardwell. The other 12 members come from broad and varied backgrounds and include current and former judges, legislators, government officials and academics recognized for their scholarship on matters of state constitutional law. The Task Force members, with their deep understanding of New York state government, are uniquely qualified to identify discrete reform measures that combine the best chance of passage with the greatest impact on our Judiciary's ability to achieve operational and decisional excellence. Obvious possibilities include:

• *Creation of a Fifth Department of the Appellate Division.* The creation of New York's four appellate departments made eminent sense when their population and workloads were roughly equal—but that was back in 1894! The explosive growth of New York City's suburbs over the last 114 years means that the Second Department today accounts for about half of the state's population and—incredibly—nearly 65 percent of the state's appellate caseload. Not surprisingly, this absurd imbalance means that it takes longer to have an appeal heard in the Second Department than elsewhere in the state.

• *Elimination or Relaxation of the Population Cap on the Number of Supreme Court Justices.* The Judiciary Article prescribes that the number of Supreme Court Justices in any judicial district shall not exceed one Justice for every 50,000 in population. This cap has gone unchanged since the Coolidge Administration (1925). As a result, the number of Supreme Court Justices has failed to keep pace with exponential caseload growth. The population cap no longer has a basis in reality given that society has grown far more litigious since 1925, and litigation itself has become vastly more complex and resource intensive. Our efforts to adopt "work arounds," such as the appointment of lower court judges to serve as Acting Supreme Court Justices, does not alleviate the harm to litigants, attorneys and the courts, because it merely deprives other courts of desperately needed judicial resources. The time has come to either remove the population cap or adopt an updated formula that reflects the greatly increased volume and complexity of litigation in our modern society.

Beyond these two "no-brainers," there are, of course, many other opportunities to update our court structure to enable us to better meet the justice needs of our citizenry in 2018 and beyond, including reorganizing and reducing the number of trial courts, and expanding Family Court jurisdiction to avoid fragmentation of family cases and promote the one-family one-judge concept.

The Task Force will consult and work closely with the New York State Bar Association's Committee on the New York State Constitution, chaired by Henry Greenberg (also a Task Force member), which issued an excellent report last year containing a thorough examination of the Judiciary Article and the many opportunities available to modernize our state courts. The Judiciary is grateful for the stout support we have received from the State Bar's leadership, including President Sharon Stern Gerstman, immediate-past President Claire P. Gutekunst, President-elect Michael Miller and the members of the House of Delegates.

Our work to modernize the structure and organization of our court system is a matter of the utmost mutual concern. It is absolutely vital that the Bench and Bar work together to recommend and follow through on practical, achievable constitutional amendments that will make our court system more efficient, affordable and accessible, and support the Empire State's ability to maintain a healthy business climate that supports economic growth and job creation.

We look forward to receiving the Task Force's recommendations and to working with the New York State Bar Association in the coming year to move forward with common sense constitutional reforms designed to ensure that the courts and the legal profession remain strong, effective and always capable of meeting the modern-day justice needs of the people we jointly serve.

Scheinkman

« Continued from page S1

Effectively and efficiently managing the operations of the court—a task of the Presiding Justice—is no small feat in a judicial department that not only has the largest population of the four departments, but is also the most diverse. The Second Department handles matters that arise in the urban environments of Kings, Queens, and Richmond Counties, the suburban areas of Nassau, Suffolk, and Westchester Counties, and the rural communities and farms of Rockland, Orange, Dutchess, and Putnam Counties. Our Department also has the largest compliment of Justices (currently 22), and unlike the Court of Appeals and other courts of last resort, our Justices do not sit as a single panel, but instead in separate and varying panels of four.

It is the responsibility of the Presiding Justice—with the assistance of the court's clerk and deputy clerks, the staff of court attorneys in the court's Law Department, and the staff of attorney editors in the court's Decision Department—to ensure that the decisions rendered by these various panels are consistent with one another, such that the court is producing a uniform body of law. To help fulfill that function, the Presiding Justice, aided by senior staff, reviews a final draft version of every decision issued by the court, prior to publication. If, during that review, a question arises as to whether a particular decision may be inconsistent with other decisions of the court, the decision is withheld until the issue is resolved.

The work of a Presiding Justice additionally includes a great many administrative duties, which involve guiding and coordinating the operations of the court's various departments and judicial chambers, not only at the Monroe Place courthouse and a nearby annex in Brooklyn Heights, but also in places throughout our geographically expansive Department.

Apart from the adjudicative work, the Presiding Justice is responsible for overseeing the operations of the court's ancillary agencies and programs, including the Committees on Character and Fitness, the Attorney Grievance Committees, the Civil Appeals Management Program (CAMP), the Office of Attorneys for Children, and Mental Hygiene Legal Services. In addition to the administrative work within the court's ambit, the Presiding Justice, together with the Chief Judge of the State and the Presiding Justices of the other three Departments, comprise the Administrative Board of the Courts, the body that establishes statewide administrative standards and policies.

Perhaps the greatest challenge that lies ahead of me in my capacity as Presiding Justice is to find ways for the Second Department to hear the cases brought before it in a timely fashion. The court is frequently referred to as the busiest intermediate appellate court in the United States. When the Appellate Division was created in 1894, it was divided into four judicial departments, with roughly equal populations. Today, however, the Second Department contains more than half of the population of the state of New York, and it is estimated that our court handles approximately 65 percent of the appeals filed at the Appellate Division level statewide. The court decides some 4,000 appeals per year, not to mention the thousands of motions made in these appeals. At present, the court hears 80 cases each week, not counting the dozen or so cases that appear each week on a submission calendar for appeals in which no oral argument is allowed.

Over time, due to factors beyond the court's control, the time between the perfecting of an appeal and the date it appears on a calendar has grown. Delays at the appellate level delay the final disposition of the case and, where interlocutory appeals are involved, can cause cascading delays in the trial courts. Justice delayed is justice denied; behind each case are real people whose lives and well-being are bound up in the litigation. The time it takes for appeals to be heard must be reduced. But this cannot be achieved through shortcuts that would negatively affect the quality and integrity of our decision-making process. We must always bear in mind that in the overwhelming majority of cases coming before us, we are, as a practical matter, the court of last resort. The Appellate Division, Second Department, has a well-deserved reputation for carefully considering every case that comes before it. This is well known to the attorneys appearing for oral argument, who must always be prepared to answer probing, detailed questions from a very well-prepared Bench. I am deeply impressed by the dedication, diligence, hard work, and collegiality exhibited by the members of the court and its non-judicial personnel.

I will strive to have a productive and collegial relationship with the Bar. We can—and should—learn from each other and work together for the betterment of our system of justice. The court should foster a positive professional environment for the attorneys who practice before it and be responsive to comments and ideas for improvements from members of the Bar. Suggestions may be sent by e-mail to ad2clerk@nycourts.gov; a link to that e-mail address appears on our court's website (http://www.courts.state.ny.us/courts/ad2/). I encourage members of the Bar to take advantage of this opportunity to have their opinions considered.

As Presiding Justice, it is my aspiration to never lose sight of the fact that our ultimate responsibility is to serve the people of the 10 counties of the Second Department. It is my goal to ensure that the court provides the public with fair and just results, and does so without undue delay. I look forward to working with my highly esteemed judicial colleagues, and the court's diligent and dedicated non-judicial staff, and with the members of the Bar, in serving the people of the Second Department.

Acosta

« Continued from page S1

a lawyer's obligation. This starts in law school, where students are often rewarded for generating almost any argument in support of a position. Later, in practice, lawyers too often give crafty excuses for refusing to disclose material, or they fail to grapple with inconvenient precedent.

Indeed, in my experience on the bench, I have read a surprisingly large number of briefs where either a case does not stand for the proposition for which it is cited, or where, instead of the traditional distinguishing phrase that advises a court of the existence of a disagreeable case on point (e.g., "While it is true that Smith … .), the case is simply ignored.

However, honor and fairness—principles at the core of our legal system—should not be sacrificed to side-step unfavorable precedent. Briefs should not distort the proposition for which a case stands. Disingenuous arguments are a source of frustration for the bench, which uniformly prefers a thoughtful and honest case analysis, with points of departure from controlling precedent candidly stated. I understand the powerful forces pushing lawyers, but we must remember that we are part of an ancient and honorable profession, which is adulterated by the abuse of cleverness.

To be sure, a call for a renewed focus on candor and fair play will strike some as weak tea or as quixotic. But I firmly believe that if our adversarial system is to deliver justice—which should be its goal—the insistence that lawyers eschew overly cunning tactics will enable our legal system to maintain a sustained focus on fairness, which is long overdue.

Of course, the judiciary is not immune to the temptation to use cunning at the expense of candor. I have often read decisions supported by a selective analysis of critical facts. With the power of the pen, judges sometimes covertly try to impose their own worldview or ideological leaning. This is, simply put, the wrong way for the judicial branch to operate. Result-oriented decisions, which disregard critical facts or twist legislative intent, impair our legal system by endangering the rule of law. I believe that judicial candor—which depends on the full disclosure and forthright analysis of relevant authority in judicial decision-making, whether involving the interpretation of statutes or case law—is vital to a productive, functional court system. I strive for this in my own work and would respectfully encourage my colleagues and future judges in the same direction.

As part of a movement toward candor, we may also want to reconsider the role of confidentiality in civil legal proceedings. There are many facets to this complicated issue and I will only attempt to explore a few in this essay. Often, businesses caught up in litigation understandably seek to keep competitive and proprietary information secret, so confidential settlements are common. Balanced against this is the view that confidentiality agreements or orders hinder public awareness of systemic, wrongful conduct in the marketplace. The interests of promoting candor make it imperative that we constantly seek to reach the correct equilibrium here.

Do judicial devices that maintain the confidentiality of parties and terms of settlement have more value to society than open judicial proceedings? This is a question that continues to confront us. On one hand, reducing confidentiality in settlement might mean fewer case resolutions and an increasingly clogged docket. Conversely, retaining the cloak of secrecy in many areas—such as cases involving sexual harassment, products liability, discrimination, and finance-related misdeeds—might allow systemic misconduct to continue unchecked. In particular, the strategic use of secrecy is illustrated most vividly in the recent "discovery" that there is an epidemic of sexual harassment. Secrecy can act not only to undermine the general public interest in open judicial proceedings, but also to undermine the interest in identifying and tackling patterns of systemic misconduct. I take seriously the arguments on both sides of these issues, and I believe this is a moment where it is important to have an honest and in-depth discussion of the competing considerations.

As I have expressed on other occasions, I expect that practitioners before our court have a great many ideas of what works and what doesn't, what ought to be preserved and what needs to change (see Rolando Acosta, "Where Judges and Lawyers Can Share Concerns and Ideas," NYLJ, Sept. 10, 2015). I look forward to continuing the conversation. And I ask the bar (and my colleagues on the bench) to consider an increased emphasis on candor, both in terms of dealing honestly with cases, facts, and arguments, and in respect to the role of transparency in the overall administration of justice. Frank discourse on all issues, no matter how challenging or controversial, is critical if we are to maintain a functioning judiciary that inspires public confidence in its legitimacy.

LAW.COM

EXPERIENCE THE NEW LAW.COM

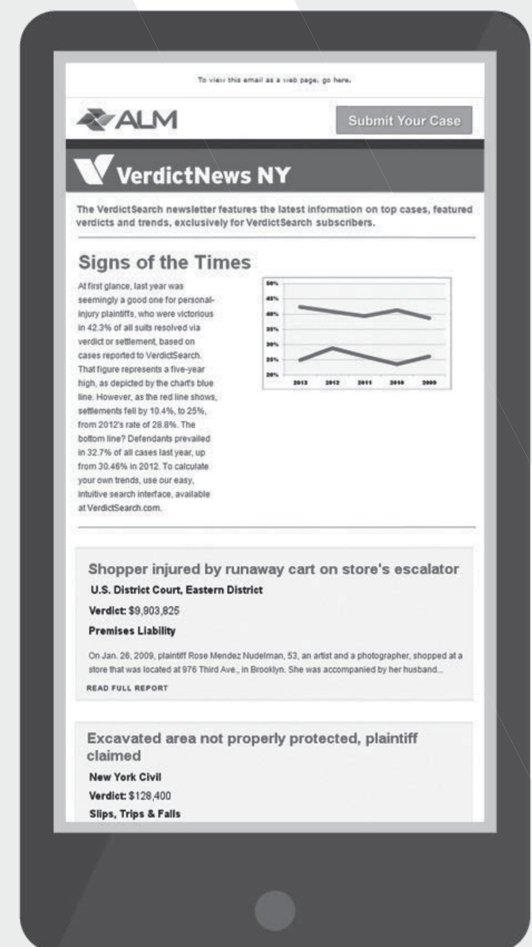
PERFECT YOUR PRACTICE

Law.com introduces national and regional news by practice area, from the ALM sources you trust. With real time news, powerful insights, and expert contributors, it's the perfect way to explore the news that matters to you.

ALM

VerdictSearch

Keep up with Verdict & Settlement Trends in Your State



Get exclusive access to news-breaking verdicts including:

- Insightful trends in your jurisdiction
- Detailed briefs
- Top weekly verdicts for your practice area

To get started, visit VerdictSearch.com/verdictnews or contact the VerdictSearch Sales Team at 1-800-445-6823

The firm isn't the only one counting on you.

Face addiction head on today.

Caron's innovative program is uniquely designed for and by legal professionals to address the specific pressures and stresses of the legal world. Our expert clinical team will treat you with privacy, discretion and personalized care as you gain the tools you need to take control of your addiction and get your life and career back on track.

You don't have to do this alone. Start now by calling **800-854-6023** or visiting **Caron.org/StartYourRecovery**